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Defiance

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DEFIANCE

LACKLAND H. BLOOM, JR.*

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INTRODUCTION

Mass public defiance of legal authority has a lengthy history in America, extending back to the nation's founding. Indeed, the very existence of the United States is the result of the ultimate act of defiance against legal authority—the revolution against Great Britain. It hardly stopped there, however. Defiance of legal authority has persisted from the outset to the present. Examples include Shays' Rebellion, defiance of the Supreme Court's decisions in *M'Culloch v. Maryland*¹ and the Cherokee territory cases;² the Nullification Crisis; slave revolts; defiance of the fugitive slave laws; resistance to the Supreme Court's decision in the *Dred Scott*³ case; the Civil War; persecution of freedmen following the Civil War and resistance to the Fourteenth and Fifteenth Amendments; the late nineteenth and early twentieth century's labor violence; the draft resistance during the First World War; the defiance that led to prohibition and then the defiance of prohibition laws; the Civil Rights Movement; the defiance of the Court's decision in *Brown v. Board of Education*;⁴ the defiance of the Court's decisions with respect to school prayer and abortion; resistance to the Vietnam War; the 1960s urban riots; the Los Angeles riots following the acquittal of police officers charged with beating Rodney King; and most recently, defiance of law was triggered by the mistreatment of African Americans by police; and the Capitol's invasion following the 2020 presidential election. These are simply a few more prominent instances of defiance of legal authority in American history. The American experiences are foreshadowed by the centuries-long history of defiance of legal authority in England, running at least from the Peasants' Revolt of 1381 through the Lord George Gordon riots of the late eighteenth century (around the time of the American Revolution), not to mention the near continuous revolt and tumult in Ireland.

Public defiance of legal authority can be a significant aspect of the legal culture. Sometimes, public defiance changes or influences the law, and sometimes, it does not. Defiance of law today may become the law

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1. *M'Culloch v. Maryland*, 17 U.S. 316 (1819).
2. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832).
3. *Scott v. Sanford*, 60 U.S. 393 (1857).
4. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Brown v. Bd. of Educ.*, 349 U.S. 294 (1955).

tomorrow. Even if defiance does not prevail and transform the future law, it may still influence its direction. Widespread public defiance may suggest that the law has taken a wrong turn or has evolved too rapidly. Even when public defiance does not become incorporated into law or influence its path, it may still impact public values or perceptions. Thus, public defiance can have a cultural, political, and legal impact.

Weighed against public defiance of legal authority is the important “rule of law” value. The law must generally be respected and obeyed for a stable democratic society to exist in which individual rights are protected. And most people do obey the law even when they disagree with it. However, if rule of law were an absolute value trumping all resistance and defiance, it would severely stunt the opportunity for legal evolution and change. If rule of law always prevailed, there would have been no Abolitionist movement, no Civil Rights movement, and no American Revolution. Therefore, it may be difficult to determine whether public defiance will be a positive or negative factor.

At the outset, the definition of terms is in order. What is meant by public defiance of legal authority? In a sense, all criminal conduct is a defiance of legal authority, especially if the lawbreaker is aware of the law and decides to violate it anyway. That is not what is meant here by public defiance. Rather, public defiance, as used herein, assumes that the individual or group violates a law in broad daylight out of disagreement with the legitimacy or equity of the law. The law violator may or may not expect to be prosecuted and accept the consequences. Defiance is a public act; secretive violations, such as failure to report taxable income, do not count. Public defiance is a political act, although an extreme one. It may be intended to provoke change in the law, or it may simply be an act of frustration. Either way, it can affect the legal culture.

It is also necessary to define “legal authority.” Legal authority includes legislative, executive, and judicial authority. Many of the examples discussed throughout involve any of the three. Defiance of judicial authority, especially of Supreme Court decisions, is perhaps unique. In our legal culture, the courts, especially the Supreme Court, have been accorded a special place in determining the law. The courts, exercising judicial review, have the warrant to reject or interpret those laws by the executive and legislative branches of government. As such, there is something nearly sacrosanct about judicial opinions. Consequently, public defiance of the courts tends to be regarded as a more serious breach. Nevertheless,

throughout American history, there have been well-known instances of public defiance of the United States Supreme Court.

Finally, there must be a distinction drawn between peaceful protest and outright defiance of law. The First Amendment protects the former and is essential to the operation of democratic government.⁵ The latter, public defiance, is by definition beyond the bounds of democratic self-government. It is an assertion that democratic government and the system of laws that it has created is in some sense flawed and may be incapable of reform through lawful action. The distinction between peaceful protest and defiance of legal authority can often be thin, especially given that the former often bleeds into the latter. This Article will focus on instances in which an individual or, much more usually, a group will publicly and deliberately defy the law based on a belief that it is unjust or simply wrong, sometimes but not always to provoke legal reform.

Just as private individuals can engage in public defiance of law, so may government officials. In our democracy, everyone is under an obligation to obey the law. Many instances of public defiance, as will be seen, involve misconduct by government officials. When that occurs, ideally, the courts will impose sanctions.

I. ENGLISH ANTECEDENTS

What took place in England before the American Revolution is significant to developing our own legal culture, though often readily distinguishable. English antecedents are significant since Britain created the American colonies and were largely settled by British citizens who brought their culture with them.⁶ As such, the American colonies, and after the Revolution, of the United States were in many respects a derivation of the British culture and legal system. The common law was largely adopted in the colonies and then in the United States. For seven centuries, from the Norman Conquest until the American Revolution, England experienced multiple incidents of public defiance of law.⁷ The English were frequently unruly, and these instances were well known to the colonists and citizens of the United States. These acts of defiance were influential but with

5. U.S. CONST. amend. I.

6. *Magna Carta: Muse and Mentor*, LIBR. OF CONG., <https://www.loc.gov/exhibits/magna-carta-muse-and-mentor/rights-of-englishmen-in-british-america.html> [https://perma.cc/4V9K-LJYW].

7. Sir Frederick Pollock, *Maitland on English Law Before the Norman Conquest*, ONLINE LIBR. LIBERTY, <https://oll.libertyfund.org/page/maitland-on-english-law-before-the-norman-conquest> [https://perma.cc/ANN7-RGUP].

limitations. Many occurred in a medieval society scarcely resembling democratic government either in the United States or current day England.⁸ Moreover, some of these incidents involved defiance of the monarch, not of an elected government.⁹ Still, most were in clear defiance of law with dreadful consequences for the rebels. As such, they are part of the tradition of public defiance of legal authority.

One of the most notable instances of public defiance in English history was the establishment of the Magna Carta in 1215, where a subset of disgruntled barons upset with arbitrary and abusive rule forced King John to sign a charter, in which he agreed to abide by several written constraints on the exercise of authority.¹⁰ The Magna Carta was set aside by the Pope as illegitimate shortly after that, but was modified and reenacted subsequently.¹¹ Though steeped in the arbitrary nature of medieval authority, the Magna Carta has come to reflect a significant step toward the exercise of legitimate legal authority and the replacement of arbitrary power with the rule of law. Even so, it must not be forgotten that it came into existence through the exercise of coercive power in defiance of recognized legal authority, however arbitrary it might have been. This is one early instance in which the march toward the rule of law and justice proceeded through the defiance of existing authority.

One of the earliest incidents of mass public defiance of legal authority in England was the celebrated Peasants' Revolt of 1381.¹² There, a mob marched on London, presumably in revolt against a recently imposed head tax.¹³ It should be noted that a frequent characteristic of public defiance of legal authority both in England and in the United States is a complaint about

8. *See generally id.* (comparing medieval society and law with the modern day); Amy Tikkanen, *Peasant's Revolt*, BRITANNICA (Dec. 12, 2023), <https://www.britannica.com/event/Peasants-Revolt> [<https://perma.cc/A9RS-PVXD>].

9. JULIET BARKER, 1381: THE YEAR OF THE PEASANT'S REVOLT 110 (2014).

10. DAVID STARKEY, MAGNA CARTA: THE TRUE STORY BEHIND THE CHARTER 122 (2015); GEOFFREY HINDLEY, A BRIEF HISTORY OF MAGNA CARTA, at xvii, 192, 196, 211–12 (2008); *see also* DAN JONES, MAGNA CARTA: THE BIRTH OF LIBERTY 134 (2015) (“There are twenty-seven names in total, most of whom were bishops and barons who had remained loyal during the standoff of the preceding weeks.”).

11. STARKEY, *supra* note 10, at 91, 92, 122.

12. *See generally*, DAN JONES, SUMMER OF BLOOD: THE PEASANT'S REVOLT OF 1381 (2009) [hereinafter JONES, SUMMER OF BLOOD] (discussing historical background of the Peasants' Revolt of 1381); BARKER, *supra* note 9 (contextualizing the Peasants' Revolt of 1381 in the age of wars and taxes).

13. BARKER, *supra* note 9, at 110; SIMON SCHAMA, A HISTORY OF BRITAIN AT THE EDGE OF THE WORLD 3000 BC-AD 1603, at 248 (2000).

abusive taxation.¹⁴ The mob turned violent, looting, burning, and murdering in a state of fury.¹⁵ It purported to be loyal to young King Richard II although fed up with his corrupt advisors—yet another frequent characteristic of public defiance of law.¹⁶ The mob purported to be loyal to the just lawgiver or ultimate legal authority but discontented with the law's administrators.¹⁷ The young King disingenuously purported to recognize the validity of the rebels' demands and promised to correct the problems in order to disperse the mob, but he failed to follow through on his commitments.¹⁸ This is frequently a common strategy of those in power to address public defiance—to show sympathy to diffuse the threat but fail to carry through with meaningful reform.

Several instances of public defiance of the law occurred in subsequent years. However, the following celebrated incident of public defiance was the Jack Cade's Rebellion¹⁹ of the mid-fifteenth century, popularized in Shakespeare's *Henry VI*, part II.²⁰ Like the Peasants' Rebellion, 170 years earlier, the rebellion arose in South-East England.²¹ As with the Peasants' Revolt, much of the grievances were laid at the hands of corrupt counselors to the King.²² As is common with public defiance, the defiance initially began with peaceful protest of arguably legitimate grievances but was soon taken over by thugs and criminals who simply wanted to loot, riot, and settle scores.²³ The rebels' demands were not met, and the rebellion turned violent with significant murder and looting.²⁴ The government responded with force and several of the rebels were executed.²⁵ As with the Peasants' Revolt, the Crown promised to meet many of the demands and pardon the rebels in order to regain control but reneged on its promises

14. BARKER, *supra* note 9, at 110.

15. SCHAMA, *supra* note 13, at 249, 252.

16. *Id.*

17. *Id.*

18. BARKER, *supra* note 9, at 393–94.

19. *See generally* DAN JONES, *THE HOLLOW CROWN: THE WARS OF THE ROSES AND THE RISE OF THE TUDOR* (2014) (providing background information about Jack Cade's Rebellion); JOHN GILLINGHAM, *THE WARS OF THE ROSES* (1981) (quoting from Jack Cade's manifesto: TREVOR ROYALE, *THE WARS OF THE ROSES: ENGLAND'S FIRST CIVIL WAR* (2009) (explaining the details of Jack Cade's Rebellion)).

20. WILLIAM SHAKESPEARE, *HENRY VI*, Part 2, act 4, sc. 2–7.

21. *See* JONES, *SUMMER OF BLOOD*, *supra* note 12, at 176 (describing the King's "show of royal magnanimity at Smithfield" and providing for the security of London).

22. ROYALE, *supra* note 19, at 197.

23. *Id.* at 196–99.

24. *Id.* at 199–200.

25. *Id.* at 200–01.

once order was restored.²⁶ This resulted in several more minor rebellions.²⁷ Although the government had been able to put down the revolt, the very fact of the revolt indicated public dissatisfaction with the status quo, eventually culminating in outright civil war, i.e., the Wars of the Roses of the mid-fifteenth century.²⁸

The English Civil War²⁹ in the mid-seventeenth century, ultimately resulting in the execution of the King and the temporary abolition of the monarchy, is the next major incident of defiance of law that should be considered.³⁰ It is arguably distinguishable from the other incidents cited in that it involved, to a large extent though not entirely, a dispute between different institutions of government (the Crown and Parliament) rather than an uprising by private citizens.³¹ The causes of the English Civil War remain a matter of continued historical dispute,³² however, the arrogance and constant misjudgments of King Charles I were certainly significant contributing factors.³³ Whatever the root causes, and assuming that at the heart it was a power struggle between competing political institutions rather than a popular uprising, a civil war resulting in the execution of the monarch³⁴ must be considered a defiance of legal authority. The revolution collapsed following the death of Oliver Cromwell in that the rebels had failed to replace the monarchy with functioning alternative governmental institutions.³⁵ Perhaps the lesson to be learned from the failure of the Protectorate is that however faulty government institutions may be, they have gathered a certain degree of cultural momentum which renders them difficult to replace, especially when there is little in the way of a functioning alternative.

26. *Id.* at 203–05.

27. *Id.* at 204–05.

28. JONES, SUMMER OF BLOOD, *supra* note 12, at 176–77.

29. CHARLES SPENCER, KILLERS OF THE KING: THE MEN WHO DARED TO EXECUTE CHARLES I 1–2 (2014); CHRISTOPHER HIBBERT, KING MOB: THE STORY OF LORD GEORGE GORDON AND THE RIOTS OF 1780, at 56–61 (1st ed. 1958); *see generally*, J.P. KENYON, THE CIVIL WARS OF ENGLAND (1988) (detailing the Civil War period of England).

30. *See generally* KENYON, *supra* note 29 (exploring the causes of the civil war period in England); SPENCER, *supra* note 29 (discussing the rule and execution of King Charles I).

31. JOHN MILLER, A BRIEF HISTORY OF THE ENGLISH CIVIL WARS 24 (2009) [hereinafter MILLER, ENGLISH CIVIL WARS].

32. *Id.* at 23; *see generally* JOHN MORRILL, A VERY SHORT INTRODUCTION TO STUART BRITAIN (1984) (contextualizing the century long period of English civil wars).

33. MILLER, ENGLISH CIVIL WARS, *supra* note 31, at 22–23.

34. *Id.* at 203.

35. KENYON, *supra* note 29, at 222–23, 228–29.

The final incident from English history of note was the 1780 Lord George Gordon Riots.³⁶ This incident is extremely significant for at least three reasons. First, it occurred while Britain was fighting the American Revolution and, as such, had an impact on American culture. Second, it was one of the most devastating riots to ever occur in England. Third, it was inspired by religious prejudice and was taken over by a criminal mob with no concern for political ends.³⁷ The riots began as a protest over a law passed by Parliament which attempted to slightly mitigate official discrimination against Roman Catholics.³⁸ Lord George Gordon, an eccentric Scot, circulated a petition protesting the recent Act.³⁹ He assembled a crowd to march with him to Parliament where the petition would be presented.⁴⁰ Along the way, the crowd swelled into a mob composed, to a large extent, of criminals and hooligans who did not care at all about the petition's substance but were primarily interested in rioting and looting.⁴¹ The mob arrived at Parliament and made an unsuccessful attempt to invade the Commons chamber.⁴² Gordon was permitted to present the petition which was overwhelmingly rejected by Parliament.⁴³ Meanwhile, outside of Parliament, the mob turned violent, attacking members of the House of Lords who were arriving.⁴⁴ The crowd continued to riot and loot for the next several nights, burning the house of Justice Mansfield and destroying the Newgate prison.⁴⁵ Eventually, troops were called in and the riot was quelled.⁴⁶

What can be learned from the Lord George Gordon Riots? First, sometimes public protest and defiance can result from ignoble ends, such as, on this occasion, religious prejudice. Second, the leaders of what starts as a peaceful protest can easily lose control. The peaceful protest can turn into a violent riot either because some politically oriented protestors conclude that continuing to proceed peacefully is ineffective, or because the protest is seized by criminals and hoodlums who use it as an excuse to loot

36. See generally HIBBERT, *supra* note 29 (chronicling the riot and its inception).

37. *Id.* at 38–39, 63.

38. *Id.* at 34.

39. *Id.* at 1, 52.

40. *Id.* at 53–54.

41. *Id.* at 60–64.

42. *Id.* at 54.

43. *Id.* at 69–72.

44. *Id.* at 64–65.

45. *Id.* at 76, 91–92, 112–20.

46. *Id.* at 129–30.

and riot. Third, once the leaders lose control of the event, it is likely impossible to regain control. Fourth, once an event turns into a full-fledged riot, it may be impossible to allow it to simply die out on its own. Rather, the application of force may be necessary. Finally, if the purpose of the protest/riot is in itself disreputable, such as continuing religious discrimination, the purpose will eventually be rejected no matter how sincere and committed the protestors might be. The colonists fighting for their independence were well aware of the Gordon Riots and filed away the lessons learned for future reference.

This is a brief introduction to the English antecedents which set the table and influenced the American experience to some extent. The American colonial experience followed the English antecedents. Especially during the first half of the eighteenth century, rioting and mass public defiance of law was quite common in the American colonies.⁴⁷ As Englishmen or descendants of Englishmen, the colonists were heavily influenced by patterns of public defiance of legal authority which had regularly occurred in England.

II. THE AMERICAN REVOLUTION

The American Revolution is the ultimate example of defiance of legal authority. The United States began with defiance of legal authority. As such, anyone who asserts that defiance of legal authority can never be justified has some explaining to do.

Relations between Great Britain and the American colonies began to deteriorate in the mid-eighteenth century, if not earlier, with the passage of the Navigation Acts which required that all trade from the colonies be conducted with the mother country.⁴⁸ The French and Indian War from 1754 until 1763 increased tensions.⁴⁹ The War and the subsequent need for British troops in the colonies lead to extreme costs on the British treasury.⁵⁰ This led to various attempts by Parliament to impose taxes on the colonies.⁵¹

47. PAUL A. GILJE, *RIOTING IN AMERICA* 37 (1996).

48. JOHN C. MILLER, *ORIGINS OF THE AMERICAN REVOLUTION* 180 (1943) [hereinafter MILLER, *AMERICAN REVOLUTION*].

49. THEODORE DRAPER, *A STRUGGLE FOR POWER* 181–82 (1996).

50. MILLER, *AMERICAN REVOLUTION*, *supra* note 48, at 44–45; DRAPER, *supra* note 49, at 181–182.

51. MILLER, *AMERICAN REVOLUTION*, *supra* note 48, at 181, 212.

John Otis's famous case against the use of Writs of Assistance by the British against colonists also added to the defiant spirit.⁵² However, the incidents directly leading to the Revolution involved a series of taxes imposed by Parliament between 1764 and 1774.⁵³ Initially, some colonists conceded that England had the right to impose taxes and regulation on external trade of the colonies, but maintained that internal taxes were forbidden.⁵⁴ The English rejected this distinction between external and internal and between taxation and regulation.⁵⁵ Rather, they asserted that concerning the colonies, Parliament had the right to impose taxation and regulation on the colonies to any extent.⁵⁶ That was the very essence of the relation between the mother country and the colonies.

There was much soul searching by the colonists. Many hoped to avoid a violent break with the mother country.⁵⁷ Still, many of the most prominent citizens of the colonies believed they were continually disrespected by the British government.⁵⁸

The incidents leading directly to the Revolution began with the passage of the Stamp Act in 1765, which required all official documents to bear an official, and arguably costly, stamp.⁵⁹ The colonists' complaint was less with the tax imposed by the Act than with the fact that it had been imposed by a legislative body, Parliament, in which the colonies had no representation.⁶⁰ The cry of protest became: "No Taxation Without Representation."⁶¹ The slogan contained a threat to the British government in England given that many regions, particularly the midlands, were heavily taxed though hardly represented in Parliament.⁶² The Stamp Act gave rise to violent riots which started in Boston with the Sons of Liberty.⁶³ As is often the case, the

52. See DRAPER, *supra* note 49, at 186 (discussing John Adams's opinion on what started the first spark of rebellion).

53. *Id.* at 218.

54. MILLER, AMERICAN REVOLUTION, *supra* note 48, at 180.

55. *Id.* at 181.

56. *Id.*

57. See *id.* (describing how colonists initially insisted American provinces were the "King's colonies").

58. *Id.*

59. EDMUND S. MORGAN, THE BIRTH OF THE REPUBLIC, 1763-89, at 20 (3d ed. 1992); DRAPER, *supra* note 49, at 218.

60. MILLER, AMERICAN REVOLUTION, *supra* note 48, at 212.

61. *Id.*

62. *Id.*

63. DRAPER, *supra* note 49, at 244-45.

protests turned violent as the mob took over.⁶⁴ General social discontent seemed to replace the Stamp Act as the motive for the riots.⁶⁵ The Stamp Act was promptly repealed, but it was replaced by the equally unpopular Townsend Acts, which placed new taxes on the imports of various necessary commodities.⁶⁶ Enforcement of the Acts led to public protest, resulting in the Boston Massacre where British troops opened fire and killed several unarmed civilians.⁶⁷ Tarring and feathering customs officials also became a prominent practice of the mob.⁶⁸ Most of the taxes were repealed however the tax on imported tea remained in place.⁶⁹ This led to the event which came to be known as the Boston Tea Party.⁷⁰ A group of colonists disguised as Native Americans boarded a British ship and tossed the tea overboard.⁷¹ This famous and celebrated incident was clearly an act in defiance of law and destruction of property.

The Boston Tea Party obviously escalated tensions with the British government, which closed Boston Harbor and essentially revoked Massachusetts Bay Colony's privileges of self-government.⁷² The other colonies fell into line behind Massachusetts and, in 1774, established the Continental Congress to determine how to proceed.⁷³

The war broke out in 1775 when British troops attempted to seize munitions stored at Lexington and Concord in Massachusetts and the colonists opened fire.⁷⁴ The Colonists formed a continental army commanded by George Washington and sent representatives to Philadelphia to decide on a course of action.⁷⁵ A committee with Thomas Jefferson as primary draftsman produced the

64. *Id.*; GILJE, *supra* note 47, at 38–40.

65. DRAPER, *supra* note 49, at 249; GILJE, *supra* note 47, at 39, 41, 44.

66. GILJE, *supra* note 47, at 38.

67. *Id.* at 47.

68. *Id.*

69. *Tea Act*, HIST. (Nov. 9, 2009), <https://www.history.com/topics/american-revolution/tea-act> [<https://perma.cc/7DTK-KK8A>].

70. GILJE, *supra* note 47, at 38.

71. *Id.*

72. *Id.*

73. *The Intolerable Acts*, AM. BATTLEFIELD TRUST (Mar. 19, 2020) <https://www.battlefields.org/learn/articles/intolerable-acts> [<https://perma.cc/E6R6-6AUR>].

74. GILJE, *supra* note 47, at 41.

75. *George Washington Assigned to Lead the Continental Army*, HIST. (Feb. 15, 2024) <https://www.history.com/this-day-in-history/george-washington-assigned-to-lead-the-continental-army> [<https://perma.cc/YS62-MY3H>].

Declaration of Independence.⁷⁶ All thirteen colonies signed it.⁷⁷ Jefferson and the Continental Congress knew that a declaration of independence was a defiance of established legal authority, so they thought carefully as to why they considered their actions justified. Sometimes “in the [c]ourse of human events” to use Jefferson’s famous phrase, it is permissible, if not obligatory, for one people to disengage from the rule of another.⁷⁸ Essentially, the Declaration argued that the purpose of government is to protect inalienable rights including “Life, Liberty and the pursuit of Happiness.”⁷⁹ To justly pursue these ends, a government must derive its power and authority from the “consent of the governed.”⁸⁰ In the event that a government fails to protect these inalienable rights and instead behaves in a tyrannical manner, the people have a right “to alter or to abolish it, and to institute [a] new Government.”⁸¹ Jefferson was explaining why at least in extreme circumstances there was a right not only to defiance but to revolution. Given that revolution should not occur “for light and transient causes,”⁸² Jefferson felt the need to detail the abuses of King George III, which led the colonists to declare independence. There followed a lengthy bill of particulars detailing the arbitrary abuse of power, the denial of self-government to the colonies, and of course, the imposition of taxes without consent.⁸³

From the colonists’ perspective, the rejection of British authority was justified. From the perspective of the British government, it was absolute defiance of the rule of law and needed to be met with maximum force. So, for the next seven years, a bitter and bloody war would take place, and with the aid of the French, the colonists would ultimately prevail.⁸⁴

What lessons can we learn from the Declaration of Independence and the American Revolution? Would the lessons be very different had the colonists not prevailed? Is the lesson that defiance can only be justified and

76. MORGAN, *supra* note 59, at 76; *see generally* WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE (1993) (explaining Thomas Jefferson’s writing process); GARRY WILLS, INVENTING AMERICA (1979) (describing Thomas Jefferson’s environment while drafting the Declaration of Independence).

77. THE DECLARATION OF INDEPENDENCE (U.S. 1776).

78. *Id.* para. 1.

79. *Id.* para. 2.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.* para. 2–29.

84. MILLER, AMERICAN REVOLUTION, *supra* note 48, at 44–45.

celebrated if the revolutionists prevail through violent action? Certainly, the Declaration and the Revolution illustrate that the rule of law has limits. The colonists were well aware that the peaceful settlement of grievances was preferable. The Declaration asserts that “We have Petitioned for Redress in the most humble terms.”⁸⁵ Perhaps there was simply too great of a gulf of understanding between the two sides. The colonists wished to be treated as equals. The Crown thought of them and could only think of them as subjects and colonial subjects. As such, there was little, if any, common ground. For peaceful resolution of differences to be a possibility, there must be a common bond or at least certain shared understandings. That was arguably lacking at the time of the American Revolution. Is a lack of shared understanding a prerequisite for defiance of legal authority that fails to reach revolutionary proportions? Or contrary to the Revolution, is most subsequent defiance simply a result of impatience with established procedures?

The American Revolution resulted from conflicting conceptions of the role and rights of the American people. Frequently, defiance of legal authority arises out of a dispute about the appropriate legal authority and what it provides. The Americans viewed themselves as Englishmen entitled to all the rights and privileges accompanying that status. The British viewed them as mere colonists completely under the thumb of the mother country. Such a conflict in visions would certainly lead to revolution as it did. But that may come with an obligation to succeed. The very point of the Revolution was to create a government far less arbitrary than that of George III, which contained safeguards to protect the rights of the people against tyranny. To the extent that this project was even partially successful, the justification for defiance of legal authority is diminished. The lessons of the American Revolution may not translate readily to current times.

III. SHAY'S REBELLION

Only four years after the Revolution ended, another popular uprising broke out, once again in Massachusetts.⁸⁶ Farmers in western Massachusetts were unable to pay taxes and frequently had their land confiscated by

85. THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

86. LEONARD L. RICHARDS, SHAY'S REBELLION: THE AMERICAN REVOLUTION'S FINAL BATTLE 4, 13 (2003).

creditors.⁸⁷ In response, Daniel Shays, a revolutionary war veteran, led a large group of over four thousand farmers.⁸⁸ They were unsuccessful in seizing an armory but managed to seize and shut down several courthouses.⁸⁹ Seizing and closing courthouses to avoid payment of debt had occurred with some frequency in colonial America.⁹⁰ The state called out the militia which was able to suppress the rebellion and disperse the rebels.⁹¹ The participants in the rebellion did not receive the acclaim of those who had fought in the American Revolution. George Washington was critical, James Madison was appalled⁹² and Samuel Adams, one of the most vigorous supporters of the American Revolution, argued that the rebels should be executed.⁹³ On the other hand, Thomas Jefferson famously wrote that “a little rebellion now and then is a good thing, and as necessary in the political world as storms in the physical.”⁹⁴ In response to Shay’s Rebellion, Jefferson also famously wrote, “The tree of liberty must be refreshed from time to time with the blood of patriots and tyrants.”⁹⁵

The rebellion took place right before the Constitutional Convention assembled in Philadelphia.⁹⁶ Arguably, it provided some support to the Federalists who campaigned for a stronger central government.⁹⁷

As with so many rebellions and acts of defiance throughout history, Shay’s Rebellion was largely ignited by protest against burdensome taxation. However, the tepid support for the rebels, at least by the elites, may suggest that rule of law ideology had largely taken hold, at least in response to violent rebellion. It is also possible that the rebellion was seen by property owners as a threat to their own interests.

87. *See id.* at 16–17 (explaining how the Massachusetts legislature sought to ease the burden on taxpayers); PAUL DE VALLE, MASSACHUSETTS TROUBLEMAKERS: REBELS, REFORMERS, AND RADICALS FROM THE BAY STATE 44 (2009) (“Many good men, neighbors of the regulators, were being jailed for nonpayment of taxes and for other debts, and farms were being foreclosed on.”).

88. RICHARDS, *supra* note 86, at 7–10, 43.

89. *Id.* at 58–59.

90. GILJE, *supra* note 47, at 44; RICHARDS, *supra* note 86, at 16–17.

91. RICHARDS, *supra* note 86, at 23, 34–35.

92. ANDREW BURSTEIN & NANCY ISENBERG, MADISON AND JEFFERSON 167 (1st ed. 2010).

93. RICHARDS, *supra* note 86, at 16.

94. Letter from Thomas Jefferson to James Madison (Jan. 30, 1787), <https://www.varsitytutors.com/earlyamerica/early-america-review/volume-1/jefferson-letter-madison> [https://perma.cc/VKE4-LMDV].

95. Letter from Thomas Jefferson to William S. Smith (Nov. 13, 1787), <https://www.monticello.org/research-education/thomas-jefferson-encyclopedia/tree-liberty-quotations/> [https://perma.cc/ZUU4-VL96].

96. RICHARDS, *supra* note 86, at 127, 132.

97. *Id.* at 132–34.

IV. DEFIANCE OF THE MARSHALL COURT

A. *M'Culloch v. Maryland*

The Marshall Court took a strong Federalist approach to the resolution of legal issues.⁹⁸ It also purported to establish the Supreme Court as the ultimate, and arguably exclusive, interpreter of the Constitution.⁹⁹ Both approaches were controversial at the time.¹⁰⁰

The important, but highly unpopular decision, in *M'Culloch v. Maryland* upheld the constitutionality of the Bank of the United States and also prohibited state taxation of the Bank's paper.¹⁰¹ There was vigorous public criticism of the decision and opinion. Ohio rejected the holding of *M'Culloch*, and the state legislature passed a "crowbar law" authorizing state law enforcement personnel to enter the bank and seize the amount of taxes imposed on the bank in clear violation of the holding in *M'Culloch v. Maryland*.¹⁰² This was explicit state defiance of a prior Supreme Court ruling. The United States challenged Ohio's defiance in *Osborne v. United States*.¹⁰³ and prevailed before the Supreme Court.¹⁰⁴ Most of the opinion dealt with the procedural issue of whether Congress could constitutionally authorize a federally chartered instrumentality to bring suit in federal court; but, on the substantive merits, the Court stood behind its opinion in *M'Culloch* and firmly rejected the Ohio defiance.¹⁰⁵

The controversy over the Bank of the United States ended with further Presidential defiance, first of the Court and later of Congress.¹⁰⁶ Initially, Congress re-chartered the second Bank of the United States.¹⁰⁷ President Andrew Jackson vetoed the re-charter, partially disagreeing with

98. *A Federalist Stronghold: John Marshall's Supreme Court*, USHISTORY <https://www.ushistory.org/us/20e.asp> [<https://perma.cc/U7YP-L5NX>].

99. Robert L. Clinton, *Judicial Supremacy and Our Two Constitutions: Reflections on the Historical Record*, THE HERITAGE FOUND. (June 19, 2020), <https://www.heritage.org/courts/report/judicial-supremacy-and-our-two-constitutions-reflections-the-historical-record> [<https://perma.cc/68FH-FPYR>].

100. *Id.*

101. *M'Culloch v. Maryland*, 17 U.S. 316, 326, 330 (1819); LACKLAND H. BLOOM, JR., DO GREAT CASES MAKE BAD LAW? 23, 28–34 (2013).

102. MARK R. KILLENBECK, MCCULLOCH V. MARYLAND: SECURING A NATION 162 (2006).

103. *Osborne v. United States*, 22 U.S. 738 (1824).

104. *Id.* at 870–71 (1824).

105. *Id.*

106. *Bank War*, HIST. (Oct. 4, 2022), <https://www.history.com/topics/19th-century/bank-war> [<https://perma.cc/JB4C-BKH3>].

107. *Id.*

Marshal's opinion in *M'Culloch*.¹⁰⁸ He wrote that the president must make his own interpretation of the Constitution and is not bound by prior Supreme Court precedent.¹⁰⁹ Only the Secretary of the Treasury was authorized to remove federal funds from the Bank.¹¹⁰ The Secretary refused Jackson's order to remove the funds from the Bank.¹¹¹ Jackson dismissed the Secretary and appointed a replacement.¹¹² Jackson made the same request of the replacement and was met with the same response.¹¹³ Once again, Jackson dismissed the Secretary and replaced him with future Chief Justice Roger Taney.¹¹⁴ Unlike his predecessors, Taney withdrew the funds, and the Bank of the United States collapsed.¹¹⁵ Because of his actions, the Senate refused to confirm Taney as permanent Secretary of the Treasury.¹¹⁶ Congress considered holding Jackson in contempt but declined when it became obvious that the public largely supported the President's action.¹¹⁷ The President clearly defied the law that Congress had passed, but he did so as part of an early separation of powers struggle over the respective roles of the branches of government. Jackson was a strong-willed individual and was not easily bullied even by Congress.

B. *Cherokee Nation Decisions*

Another example of defiance of the Marshall Court and its decisions occurred in response to the Court's decisions in the Cherokee Nation disputes with Georgia.¹¹⁸ In the first three decades of the nineteenth century, a movement gained momentum to remove Native American tribes from the southeastern United States.¹¹⁹ President Andrew Jackson, elected in 1828, supported removal. In *Cherokee Nation v. Georgia*,¹²⁰ decided in 1831,

108. RICHARD ELLIS, *AGGRESSIVE NATIONALISM: MCCULLOCH V. MARYLAND AND THE FOUNDATION OF FEDERAL AUTHORITY IN THE YOUNG REPUBLIC* 214–215 (2007).

109. *Bank War*, *supra* note 106.

110. KILLENBECK, *supra* note 102, at 173.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 174.

117. *Id.*

118. *See generally* *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (holding Native American tribes are not foreign nations subject to original jurisdiction under Article III of the Constitution).

119. HUGH BROGAN, *THE PENGUIN HISTORY OF THE UNITED STATES OF AMERICA* 67–68 (1985).

120. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831).

the Cherokee Nation sued to prevent their removal from Georgia pursuant to the federal Indian Removal Act, as well as Georgia acts endorsing and requiring such removal.¹²¹ The Supreme Court, in an opinion by Chief Justice Marshall, rejected the challenge for lack of standing on behalf of the Cherokee Nation on the ground that it was a domestic dependent nation rather than a foreign nation.¹²² Consequently, the removal of the Cherokee Nation from Oklahoma, known as the Trail of Tears occurred.¹²³

The following year, the Court decided *Worcester v. Georgia*.¹²⁴ There, a missionary invited by the Cherokee Nation onto its lands was prosecuted, convicted, and imprisoned in Georgia for entering Cherokee lands without permission of the Governor of Georgia.¹²⁵ Worcester appealed to the Supreme Court, which invalidated the conviction on the ground that the Cherokee tribe, as a quasi-sovereign nation, had treaty rights with the United States, with which the state of Georgia could not interfere.¹²⁶ However, Georgia ignored the decision and continued to imprison Worcester.¹²⁷ President Andrew Jackson declined to enforce the Court's decision.¹²⁸ Jackson was reputed to have declared, "John Marshall has his decision. Now let him enforce it."¹²⁹ Whether Jackson actually said that is disputed; however, his inaction was consistent with the statement.¹³⁰ *Worcester v. Georgia* is one of the most explicit instances of defiance of a Supreme Court mandate not only by a state but by the Chief Executive as well. It is difficult to imagine it occurring today. However, it arose at a time when the Court had yet to establish its reputation as a co-equal branch of government with the authority to ultimately settle constitutional disputes. The President and many states had a very different conception of the appropriate judicial role. John Marshall was a strong-willed individual, but

121. See generally *id.* (discussing the United States Supreme Court's 1831 opinion regarding the Cherokee Nation's lawsuit seeking an injunction against the state of Georgia from enforcing laws to remove the tribe from area lands).

122. *Id.* at 19–20.

123. BROGAN, *supra* note 119, at 68.

124. See generally *Worcester v. Georgia*, 31 U.S. 515 (1832) (discussing the United States Supreme Court's 1832 opinion invalidating Samuel A. Worcester's conviction for trespass).

125. *Id.* at 528–29.

126. *Id.* at 529–31.

127. LEONARD BAKER & JOHN MARSHALL, A LIFE IN LAW 746 (1974).

128. *Id.*

129. CHRISTOPHER L. TOMLIN, THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 63 (2005).

130. *Id.*

so was Andrew Jackson. Jackson was not afraid to battle with Marshall and defy him if necessary.

V. THE NULLIFICATION CRISIS

The Nullification Crisis of 1832 did not ultimately involve defiance of legal authority but rather raised a serious threat of such defiance and led to a public debate on the constitutional legitimacy of such defiance.¹³¹ In 1798, the Adams Administration enacted the controversial Alien and Sedition Acts, which, among other things, made it a crime to criticize certain high government officials.¹³² In response, Thomas Jefferson wrote the Kentucky Resolution and James Madison authored the Virginia Resolution.¹³³ Each suggested that if the federal government acted unconstitutionally, state governments could interpose themselves between the federal government and their own citizens to protect their citizens against constitutional harm.¹³⁴

During the first several decades of the nineteenth century, the federal government imposed substantial tariffs on imported goods.¹³⁵ These tariffs were especially unpopular in the South, especially in South Carolina.¹³⁶ There, a movement developed to declare the tariffs unconstitutional and to nullify them with respect to their operation in South Carolina.¹³⁷ Building on the theory of interposition developed in the Kentucky and Virginia Resolutions; a Nullification Convention was called which did just that.¹³⁸ President Jackson, who was generally an opponent of high tariffs, took a strong stand against nullification.¹³⁹ Vice President Calhoun, of South Carolina, resigned and ran for the Senate, where he could better support the nullification movement.¹⁴⁰ Senator Robert Hayne of South Carolina and Senator Daniel Webster of Massachusetts engaged in a

131. PAUL JOHNSON, *A HISTORY OF THE AMERICAN PEOPLE* 346 (1998); Brian Duignan, *Nullification Crisis*, BRITANNICA (Feb. 6, 2012), <https://www.britannica.com/topic/nullification-crisis> [<https://perma.cc/JD6K-NE3A>].

132. CHARLES SLACK, *LIBERTY'S FIRST CRISIS* 91, 164 (2015).

133. *Id.* at 164.

134. *Id.* at 164–66.

135. Michele Metych, *Tariff of 1828*, BRITANNICA (May 18, 2023), <https://www.britannica.com/topic/Tariff-of-1828> [<https://perma.cc/HY6M-XMTZ>].

136. JOHNSON, *supra* note 131, at 346.

137. *Id.*

138. *Id.*

139. *See id.* at 347 (noting Jackson's issuance of a Nullification Proclamation, which expressed his disagreement with the ability of a state to annul any law of the Union).

140. *Id.*

famous debate in the Senate about the nature of the Union and the legitimacy of nullification.¹⁴¹ The Nullification Crisis was defused when Congress passed a law reducing tariffs.¹⁴² South Carolina repealed its Nullification Resolution.¹⁴³

The Nullification Crisis of 1832 centered around tariffs but was, in fact, a prelude to the debate over slavery in the territories, secession, and the Civil War.¹⁴⁴ The debate over the nature of the Union, the popular sovereignty versus the compact theory, which John Marshall had attempted to judicially settle in favor of the former in *M'Culloch v Maryland*, remained very much alive in the political process.

VI. RELIGIOUS AND ETHNIC INCIDENTS PRIOR TO THE CIVIL WAR

There were numerous acts of violence that preceded the Civil War in the northeastern cities, especially in New York City.¹⁴⁵ Some were precipitated by hostility towards Catholic immigrants.¹⁴⁶ There was a significant nativist backlash against European immigrants, especially the Irish.¹⁴⁷ Some of this was attributable to the clash of different cultures with very different values.¹⁴⁸ Some was based on social class distinctions.¹⁴⁹ Some may have resulted from the exploitation of unskilled labor.¹⁵⁰ Whatever the underlying cause, it was brought to a head by the battles between rival street gangs, especially with respect to volunteer fire patrols.¹⁵¹ Whenever a crowd gathered, there was a serious potential for violence, including murder.¹⁵² This mixture of volatility led to defiance of law through the preference for rowdy behavior.

141. MERRILL D. PETERSON, *THE GREAT TRIUMVIRATE* 172–79 (1987).

142. *Id.* at 133.

143. *Id.*

144. *Id.* at 212–13.

145. GILJE, *supra* note 47, at 60, 65–67.

146. *Id.* at 65.

147. *Id.* at 66–67.

148. *Id.* at 69–70.

149. *Id.*

150. *Id.* at 71.

151. *Id.* at 73. This was dramatized in the motion picture *THE GANGS OF NEW YORK* (Miramax Films 2002).

152. *Id.* at 72.

VII. THE ABOLITIONIST MOVEMENT

The Abolitionist Movement began in the colonies prior to the revolution led primarily by the Quakers of Pennsylvania.¹⁵³ The abolitionists demanded an immediate end to slavery and must be distinguished from the Republicans like Lincoln, who supported a gradual end to slavery and the end to the spread of slavery into new states and territories.¹⁵⁴ The abolitionists were propelled by moral fervor often religiously inspired.¹⁵⁵ The Abolitionist Movement reached a fever pitch in the 1830s with the publication of *The Liberator* newspaper by William Lloyd Garrison.¹⁵⁶ For the most part, the abolitionists proceeded by legal means, including petitioning Congress and mass mailings of pamphlets.¹⁵⁷ Abolitionists were often met with violent counter-reaction as with the murder of abolitionist publisher Elijah Lovejoy by a mob in Alton, Illinois in 1837.¹⁵⁸ However, on occasion, abolitionists turned to defiance of law. Perhaps the most well-known incident is the Kansas murders by crazed abolitionist John Brown and his subsequent unsuccessful seizure of the armory in Harpers Ferry, West Virginia.¹⁵⁹

A more significant example of widespread defiance of law by the Abolitionist movement was the Underground Railroad, developed to permit runaway slaves to escape to freedom, primarily in Canada.¹⁶⁰ Participation in the underground railway was in direct conflict with the Fugitive Slave Act which prohibited persons from aiding in the escape of runaway slaves.¹⁶¹ Perhaps the most extreme example of defiance of law in this area arose with respect to the escape of fugitive slave Joshua Glover in 1852. He was

153. *Anti-Slavery in North America*, QUAKERS IN THE WORLD

<https://www.quakersintheworld.org/quakers-in-action/56/Anti-Slavery-in-North-America> [https://perma.cc/EEQ5-3YM8]; *This Day in History: First American Abolition Society Founded in Philadelphia*, HIST. (Nov. 13, 2009), <https://www.history.com/this-day-in-history/first-american-abolition-society-founded-in-philadelphia> [https://perma.cc/BHJ5-PDXL].

154. *Anti-Slavery in North America*, *supra* note 153.

155. *Id.*

156. JOHNSON, *supra* note 131, at 447.

157. *The African American Odyssey: A Quest for Full Citizenship*, LIBR. OF CONG., <https://www.loc.gov/exhibits/african-american-odyssey/abolition.html> [https://perma.cc/V6XQ-PSSY].

158. BROGAN, *supra* note 119, at 302.

159. JOHNSON, *supra* note 131, at 448–49.

160. *Id.* at 448.

161. *Ableman v. Booth*, 62 U.S. 506, 507 (1858); H. ROBERT BAKER, *THE RESCUE OF JOSHUA GLOVER: A FUGITIVE SLAVE, THE CONSTITUTION, AND THE COMING OF THE CIVIL WAR*, at xi, 48 (2006).

captured and imprisoned in Wisconsin.¹⁶² His master, Bennami Garland, attempted to retrieve him pursuant to the Fugitive Slave Act.¹⁶³ A mob led by Sherman Booth broke into the jail and set Glover free. Booth was successfully prosecuted by the United States.¹⁶⁴ However, a Wisconsin court granted a writ of habeas corpus releasing Booth.¹⁶⁵ This was yet another example of the doctrine of nullification in which the state interposed itself between a citizen and the enforcement of federal law. The United States appealed to the United States Supreme Court in *Ableman v. Booth*,¹⁶⁶ which unanimously reversed the decision of the Wisconsin court.¹⁶⁷ The Supreme Court was heavily criticized by anti-slavery advocates, however as a matter of federal law, it was clearly correct.¹⁶⁸

It is surprising, at least in retrospect, that under the circumstances, the abolitionists were not more defiant of the law given the moral cause that they so vigorously supported and the degree of violence directed at them. Many were Quakers.¹⁶⁹ They tended to be religiously motivated and committed to non-violent methods.¹⁷⁰ They also had faith that they would ultimately prevail through the legal process. Given the issue at stake, the abolition of slavery and the moral fervor which it evoked, defiance of law, for instance in the case of the Underground Railroad, is at least understandable.

A. *The Dorr Rebellion in Rhode Island*

There was a mini-rebellion in Rhode Island in the 1840s over the legitimate constitution of the state.¹⁷¹ The state was governed by the Charter of 1663, which granted the franchise only to freeholders, effectively denying the vote to most residents of the state.¹⁷² Thomas Dorr and his followers

162. BAKER, *supra* note 161, at 2.

163. *Id.* at 1–2.

164. *Id.* at 6, 8, 23, 109.

165. *Ableman*, 62 U.S. at 510–11.

166. *Ableman v. Booth*, 62 U.S. 506 (1858).

167. *Id.* at 511, 526.

168. See BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 93 (1993) (stating the Court had to reverse due to federal supremacy, otherwise they would have been authorizing state courts to suspend the operation of the federal judicial power).

169. *Quakers and the Underground Railroad*, WORLDHISTORYUS (Aug. 8, 2017), <https://worldhistory.us/american-history/quakers-and-the-underground-railroad.php> [<https://perma.cc/7XQE-5H73>].

170. *Id.*; *Anti-Slavery in North America*, *supra* note 153.

171. SCHWARTZ, *supra* note 168, at 95.

172. *Id.*

ignored the Charter, held a People's Convention, and drafted a new constitution which enfranchised a much larger constituency, held an election, and voted in the new constitution.¹⁷³ Dorr was elected governor under the new constitution and demanded that the Charter government relinquish power.¹⁷⁴ The Charter government passed a new constitution broadening the franchise, though not as much as the Dorr Constitution.¹⁷⁵ The Dorr rebels declined to recognize the reformed constitution.¹⁷⁶ Consequently, the established government declared martial law and attempted to arrest Dorr, who had fled the state.¹⁷⁷ Although the Dorr Rebellion had been peaceable, it was still an attempt to overthrow the existing government.¹⁷⁸ President Tyler recognized the Charter government as the legitimate government of Rhode Island, effectively ending the Dorr Rebellion.¹⁷⁹ The Charter government attempted to arrest Martin Luther, a supporter of the Dorr Rebellion who, like Dorr, had also fled.¹⁸⁰ The established government searched Luther's house resulting in a trespass action being filed against Luther Borden, a member of the search party.¹⁸¹ Martin Luther argued that the Charter government lacked legitimate authority to act because it did not constitute a republican government within Article IV of the Constitution.¹⁸² This resulted in the great constitutional case of *Luther v. Borden*,¹⁸³ in which the Supreme Court held that the question of who was the legitimate government of Rhode Island (at the heart of the case) and whether the Guarantee Clause of Article IV of the Constitution provided the means of providing an answer to that question was a political question beyond the competence of the federal judiciary.¹⁸⁴ The existing establishment managed to defeat the Dorr Rebellion with military force.¹⁸⁵ Dorr returned to the state, was convicted of treason, sentenced to hard labor, and died not long after his

173. *Luther v. Borden*, 48 U.S. 1, 36 (1849).

174. *Id.* at 37.

175. *Id.*; SCHWARTZ, *supra* note 168, at 95.

176. *Luther*, 48 U.S. at 37.

177. *Id.*

178. *Id.* at 34.

179. *Id.* at 44.

180. *Id.* at 34.

181. R. KENT NEWMYER, *SUPREME COURT JUSTICE JOSEPH STORY* 362 (1985).

182. *Luther*, 48 U.S. at 38, 52.

183. *Luther v. Borden*, 48 U.S. 1 (1849).

184. *Id.* at 42.

185. SCHWARTZ, *supra* note 168, at 95.

release from prison.¹⁸⁶ The Dorr Rebellion is an instance of populists frustrated with the impossibility of legal change turning to peaceful though extra-legal methods to change the existing system. Although the rebellion was forcibly put down, it did cause the state establishment to produce a new Constitution that enfranchised more people, though not as many as they had hoped for.¹⁸⁷

B. *The Dred Scott Decision and Lincoln's Response*

In 1857, the Supreme Court handed down its infamous decision in *Dred Scott v. Sandford*, holding that the Missouri Compromise, which had expired, was unconstitutional, at least to the extent that it would free slaves brought into a free territory.¹⁸⁸ The Court also noted in dicta that a slave or descendant of a slave could not bring suit in federal court pursuant to diversity jurisdiction.¹⁸⁹ The decision essentially rendered the purpose of the recently formed Republican party, halting the spread of slavery to the territories, illegal.

The year following the *Dred Scott* decision, Stephen A. Douglas and Abraham Lincoln engaged in a series of debates in the course of the senatorial campaign in Illinois.¹⁹⁰ The *Dred Scott* decision was a matter discussed.¹⁹¹ Douglas took a rule of law approach and argued that since the Supreme Court had resolved the constitutional issue, citizens were obligated to obey.¹⁹² Lincoln took a more nuanced approach. First, he declared that he would abide by the specific factual ruling.¹⁹³ That is, given that the Court had held that Scott remained a slave, Lincoln would not attempt to set him

186. *Thomas Wilson Dorr Trial: 1844*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/law/law-magazines/thomas-wilson-dorr-trial-1844> [https://perma.cc/Y3L5-KKGD].

187. *Id.*

188. *Id.* at 418.

189. *Id.* at 427; see DON FEHRENBACHER, *THE DRED SCOTT CASE 6* (1978) (expounding on Chief Justice Taney's distinct positions on the rights of private property, the relationship between the Constitution and the Articles of Confederation, the privileges-and-immunities clause, and the meaning of due process).

190. See generally THE LINCOLN—DOUGLAS DEBATES OF 1858, IN 3 COLLECTIONS OF THE ILLINOIS STATE HISTORICAL LIBRARY: 1 LINCOLN SERIES (1908) (transcribing the debate between Abraham Lincoln and Stephen A. Douglas in Ottawa, Illinois, August 21, 1858.).

191. *Id.* at 96, 105, 108.

192. *Id.* at 38–39. Lincoln mocked Douglas's position by characterizing it as the Supreme Court opinions are equivalent to "Thus saith the Lord." *Id.* at 114.

193. ARCHIBALD LEWIS BOUTON, *THE LINCOLN AND DOUGLAS DEBATES* 105, 108 (1905).

free.¹⁹⁴ However, regarding the larger constitutional question, whether Congress could prohibit slavery in the territories, Lincoln argued that the Court lacked the final authority to resolve such an important issue in litigation between two private parties.¹⁹⁵ At least until the Court reaffirmed that holding in subsequent cases, public officials had the right to attempt to change it. As usual, Lincoln walked a fine line. He did not attempt to justify outright defiance of the Court, however, unlike Douglas, he did not argue for automatic obedience either.

Rather, he seemed to suggest, that at least with respect to some decisions of extreme public significance, public officials had a right to push back against rulings that they believed to be clearly in error. Lincoln's statements on *Dred Scott* have been viewed as a challenge to automatic assumptions of judicial supremacy and exclusivity. Perhaps they are. On the other hand, they may be viewed as an example of using all lawful means to challenge and hopefully obtain reversal of an egregiously bad decision.

VIII. SECESSION AND THE CIVIL WAR

At least in retrospect, secession from the Union might seem like the ultimate act of defiance of law. And yet that may depend on who won the war. Theoretically, at least, the Civil War developed out of a longstanding disagreement over the nature of the nation's origin. Abraham Lincoln fought the Civil War under the banner of popular sovereignty, that is, the people, through their ratifying conventions in 1788, formed the Union and the states did not have the power to dissolve it.¹⁹⁶ The states, however, believed in a different theory of national origin. They believed that the Constitution, and the nation were created by a compact between the states, and if the United States government violated that compact, then the states, or at least some states, could dissolve it and go their own way.¹⁹⁷ This disagreement went back to the founding of the nation.¹⁹⁸ Chief Justice Marshall resolved the matter in favor of the popular sovereignty theory in *M'Culloch v. Maryland* in 1819.¹⁹⁹ Given contemporary

194. *Id.* at 119–20.

195. *Id.*

196. James McPherson, *A Brief Overview of the American Civil War*, AM. BATTLEFIELD TRUST (Nov. 20, 2008), <https://www.battlefields.org/learn/articles/brief-overview-american-civil-war> [https://perma.cc/QF53-5FVD].

197. *Id.*

198. *Id.*

199. *M'Culloch v. Maryland*, 17 U.S. 316, 388 (1819).

respect for the Court, that would presumably resolve the matter, and hence, secession would be defiance of the law as pronounced by the Supreme Court. However, that was not the case in the mid-nineteenth century. Perhaps the issue was simply too large and essential to be resolved in one Supreme Court opinion. Indeed, a decade after *M'Culloch* was decided, Webster and Hayne debated the matter in the Senate.²⁰⁰ Or perhaps the Court had not yet established sufficient respect with the public to have the final word on a constitutional issue of this magnitude. In any event, at least as a political matter, the question of the origin of the Constitution was still alive in 1861 and perhaps could only be resolved through bloodshed. Had Lincoln decided not to fight or had the Confederacy won the war, then perhaps the compact theory would have prevailed. Thus, at the time of secession, it was unclear whether the seceding states were acting in defiance of the law. They certainly believed that they were not. Following the war in *Texas v. White*,²⁰¹ the Supreme Court reaffirmed the popular sovereignty theory concluding that secession was indeed illegal.²⁰²

Quite apart from whether the Confederacy defied the law by seceding, historians have questioned whether President Lincoln defied the law in responding, particularly by suspending habeas corpus, declaring martial law and imprisoning supporters of the confederacy without cause.²⁰³ Lincoln believed and asserted that all the steps which he took were legal.²⁰⁴ Both at the time and later, some have disagreed.²⁰⁵ One of the most prominently discussed incidents involved the arrest of John Merryman, a vocal secessionist in Maryland, at the behest of President Lincoln.²⁰⁶ In *Ex Parte Merryman*,²⁰⁷ Chief Justice Roger Taney, sitting as a circuit judge, ruled that Lincoln had no authority to suspend the writ of habeas corpus, thus,

200. *The Most Famous Speech*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/The_Most_Famous_Senate_Speech.htm#:~:text=Observers%20then%20and%20since%20have,famous%20speech%20in%20Senate%20history [https://perma.cc/S3UT-XBK2].

201. *Texas v. White*, 74 U.S. 700 (1868).

202. *Id.* at 725–26.

203. SCHWARTZ, *supra* note 168, at 127; *see generally* MARK H NEELY, JR., *THE FATE OF LIBERTY* (1991) (explaining Lincoln's willingness to suspend civil liberties once he saw there would be no political consequence).

204. SCHWARTZ, *supra* note 168, at 128.

205. *See generally* NEELY, *supra* note 203 (describing Justice Taney's disagreement with Lincoln).

206. *Id.* at 10.

207. *Ex parte Merryman*, 17 F. Cas. 144 (C.C.Md. 1861) (No. 9,487).

Merryman should be set free.²⁰⁸ It has been argued that Lincoln defied the Chief Justice; however, that is not necessarily the case.²⁰⁹ Merryman was remanded to civil authorities, eventually released, and never tried for treason.

Certainly, actions taken while defending the nation during a civil war were *sui generis* and perhaps cannot be compared to actions taken while the nation is at peace. However, as Lincoln came to realize, even a justified suspension of civil liberties during war time may be difficult to revoke subsequently in peacetime.

Regardless of whether secession and the Civil War constitutes defiance of law, certain incidents which occurred during the war, such as the New York Draft Riots of 1863,²¹⁰ certainly qualify. The draft was instituted in New York City in 1863.²¹¹ The population of the city was heavily Irish, most employed as laborers.²¹² The Irish working class engaged in violent rioting which soon turned into a race riot.²¹³ Several African Americans were lynched and an African American orphanage was burned down.²¹⁴ There is a dispute over how many were killed during the riots, with estimates ranging from 120 to 2000.²¹⁵ President Lincoln sent federal troops to quell the riots from the forces assembled at Gettysburg, where the battle occurred almost contemporaneously with the riots.²¹⁶ To some extent, the New York City Draft Riots were a protest against the new Republican government in Washington, D.C., which was perceived as overreaching and unduly coercive.²¹⁷ The draft riots were an example of a common occurrence: a protest or riot started with one object (the draft) which is then turned to a different subject (racial animus). The New York Draft Riots were a shameful incident in American history.

208. *Id.* at 152.

209. See Seth Barrett Tillman, *Ex Parte Merryman: Myth History and Scholarship*, 224 *MIL. L. REV.* 481, 498–99 (2016) (arguing President Lincoln did not defy Chief Justice Taney).

210. See generally JAMES MCPHERSON, *ORDEAL BY FIRE: THE CIVIL WAR AND RECONSTRUCTION* (1982) (chronicling the events of the draft resistance).

211. *Id.* at 357.

212. GILJE, *supra* note 47, at 123.

213. DAVID M. BARNES, *THE DRAFT RIOTS IN NEW YORK, JULY 1863*, at 7, 107 (1863).

214. MCPHERSON, *supra* note 210, at 357.

215. Compare *id.* at 358 (explaining estimates have scaled between 120 and 1,200 killed), with HERBERT ASHBURY, *THE GANGS OF NEW YORK* 169 (1928) (providing 2,000 casualties as a “conservative” estimate).

216. IVER BERNSTEIN, *THE NEW YORK CITY DRAFT RIOTS: THEIR SIGNIFICANCE FOR AMERICAN SOCIETY AND POLITICS IN THE AGE OF THE CIVIL WAR* 3 (1990).

217. *Id.* at 10–11.

IX. RESISTANCE TO RECONSTRUCTION

Following the end of the Civil War, the Republican Congress embarked on Reconstruction—an effort to put the nation back together and to protect the rights of recently freed slaves in the South.²¹⁸ Reconstruction was extraordinarily unpopular in the South and provoked significant defiance, including violent resistance.²¹⁹ In response to efforts to accord former slaves legal protection and civil rights, the Ku Klux Klan was formed to resist these changes.²²⁰ Less violently, southern states enacted Black Codes to deprive recently freed slaves of virtually all civil rights.²²¹ In response, the Reconstruction Congress passed several laws and ultimately drafted the Fourteenth Amendment.²²² Most of the activities of the Klan were clearly in defiance of law. Intimidation, terrorism, and murder²²³ can scarcely be defended as legitimate means of protest in a law-abiding society. Nevertheless, the Klan's activities are an example of what can occur when a significant segment of the public loses confidence and respect for the law. The Reconstruction Congress drafted the Fifteenth Amendment, guaranteeing the right to vote without racial discrimination.²²⁴ However, this was readily evaded by various devices such as the poll tax, literacy tests, grandfather clauses, and White primaries.²²⁵

The most infamous incident of White resistance to Reconstruction was the Colfax Massacre of 1873.²²⁶ Following a disputed election in Grant Parish, Louisiana, in which charges of election fraud circulated, Black Republicans surrounded the Colfax courthouse to protect the newly elected Republican officials.²²⁷ A mob of paramilitary White men gathered

218. Eric Foner, *The End of Reconstruction*, BRITANNICA, <https://www.britannica.com/event/Reconstruction-United-States-history/The-end-of-Reconstruction> [<https://perma.cc/N7F7-78UZ>].

219. *Id.*

220. BROGAN, *supra* note 119, at 362, 378.

221. *Id.*

222. Foner, *supra* note 218.

223. BROGAN, *supra* note 119, at 378.

224. Farrell Evans, *How Jim Crow-Era Laws Suppressed the African American Vote for Generations*, HIST. (Aug. 8, 2023), <https://www.history.com/news/jim-crow-laws-black-vote> [<https://perma.cc/A62F-869A>].

225. *Id.*

226. *See generally* CHARLES LANE, *THE DAY FREEDOM DIED: THE COLFAX MASSACRE, THE SUPREME COURT, AND THE BETRAYAL OF RECONSTRUCTION* (2008) (contextualizing the Colfax Massacre).

227. LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* 100 (2008).

outside.²²⁸ The mob stormed the courthouse killing at least fifty Black defenders.²²⁹ A truce was called.²³⁰ A White man was shot and killed.²³¹ A dispute ensued over who was responsible.²³² At that point, the mob killed the Black men hiding in the courthouse, and those attempting to flee.²³³ Federal troops arrived to restore peace.²³⁴ Ninety-six men were indicted for violating the federal Enforcement Act of 1870 for attempting to deprive African Americans of their civil rights.²³⁵ In an appeal to the Supreme Court in *United States v. Cruikshank*,²³⁶ the Court held Congress lacked the authority to reach private violence and the Enforcement Act required specific allegations of deprivation of rights on account of race.²³⁷ The Colfax Massacre was the single greatest act of violence committed in resistance to reconstruction.²³⁸

Perhaps the sudden change from slavery to civil rights, on the heels of the defeat in the Civil War, was too much for the South to accommodate in a short period of time. Perhaps violent resistance was inevitable. Society, including the federal courts, was not prepared after Reconstruction ended to give former slaves complete civil rights protection.

X. PERSECUTION OF THE MORMONS

The basic beliefs of the Mormon religion, established in the early part of the nineteenth century, seemed strange and alien to many in the public, especially the belief in polygamy.²³⁹ From the outset, the Mormons and their founder and prophet Joseph Smith were met with violence.²⁴⁰ In 1844,

228. *Id.* at 96.

229. *Id.* at 104–05, 109.

230. *Id.* at 103.

231. *Id.* at 102.

232. *Id.*

233. LANE, *supra* note 226, at 102–03.

234. *The Colfax Massacre*, HIST., <https://www.history.com/this-day-in-history/colfax-massacre-louisiana> [<https://perma.cc/8JMH-HGDF>].

235. *Id.*

236. *United States v. Cruikshank*, 92 U.S. 542 (1875).

237. *Id.* at 554, 559.

238. ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 437 (1988); *see* GILJE, *supra* note 47, at 94–108 (describing other incidents of racial intimidation and violence that occurred in the wake of Reconstruction).

239. BROGAN, *supra* note 119, at 240.

240. *Id.* at 239–41.

a mob in Illinois lynched Smith.²⁴¹ The Mormons faced violent attacks and responded in kind.²⁴² Thus, both the persecutors and the Mormons defied the law. Following Smith's death, Brigham Young, the new leader of the Mormons, decided that the church needed to move farther West. They left Illinois and traveled to Utah to escape persecution, which indeed they did.²⁴³ The church grew in the Utah territory, which the Mormons called Deseret.²⁴⁴ With Young's blessing, the Mormons continued to respond violently to both insiders and outsiders.²⁴⁵ Utah had filed petitions for statehood four times.²⁴⁶ The obstacle was the church's endorsement of polygamy.²⁴⁷ In *Reynolds v. United States*,²⁴⁸ the Supreme Court held that the Free Exercise Clause of the First Amendment did not protect polygamy.²⁴⁹ To attain statehood for Utah, the Mormon Church was forced to alter its belief that God required polygamy, which it did.²⁵⁰ The fact that the Federal Government coerced the Mormon Church into changing its beliefs stands as one of the greatest affronts to freedom of religion in American history.

XI. LABOR WARS

Starting in the 1870s and extending at least for a period of fifty to sixty years, there were a series of violent labor disputes, resulting in the destruction of property and the loss of many lives.²⁵¹ There were thousands of such incidents.²⁵² This Article will only discuss the most prominent examples. Although each has its own peculiar features, nevertheless, a familiar pattern developed. The laborers (mostly European immigrants) would call a strike over low pay, substandard working conditions, or perhaps

241. *Timeline: The Early History of the Mormons*, PBS AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/mormons-timeline/> [<https://perma.cc/4X9F-R7D9>] [hereinafter *Timeline*].

242. BROGAN, *supra* note 119, at 241; GILJE, *supra* note 47, at 77–79.

243. *Timeline*, *supra* note 241.

244. *Id.*

245. *Id.*

246. Leonard James Arrington & Gregory Lewis McNamee, *Statehood of Utah*, BRITANNICA, <https://www.britannica.com/place/Utah/Statehood> [<https://perma.cc/RD7U-VMQA>].

247. *Timeline*, *supra* note 241.

248. *Reynolds v. United States*, 98 U.S. 145 (1878).

249. *Id.* at 168.

250. Arrington & McNamee, *supra* note 246.

251. GILJE, *supra* note 47, at 117.

252. *Id.* at 113–20.

both.²⁵³ The workers would leave the employer's premise.²⁵⁴ The employer would then lock the workers out and replace them with strikebreakers, often African Americans.²⁵⁵ The striking workers would attack the strikebreakers, and the employers would call in security, usually Pinkerton detectives, to protect the strikebreakers. At that point, a gun battle would break out between the strikers and the Pinkertons. Many would be killed on both sides. Then, either the Governor would send in the National Guard, or the President would send in federal troops to stop the violence. The workers would return to work having accomplished little or nothing. Initially, the public tended to sympathize with the employers over the strikers.²⁵⁶ This shifted over time, and the employees eventually became objects of public sympathy, as their complaints were perceived as valid.²⁵⁷ Initially, the strikers were considered unsympathetic because they destroyed property and engaged in violence to achieve their ends. The fact that most workers tended to be eastern or southern European immigrants or Irish did not increase their popularity with the public.²⁵⁸ Also, the fact that their strikes were influenced or endorsed by well-known and despised radical groups, including socialists, communists, anarchists, and the International Workers of the World (IWW), known as the Wobblies, didn't help the public perception of the labor movement.²⁵⁹

Eventually, the right to form a union and to strike was embodied by federal law.²⁶⁰ The strikers achieved their goals, but not necessarily due to the pressure they brought to bear through their strikes. By the right to organize unions and the duty of employers to negotiate in good faith, rule of law values eventually prevailed in the labor context.

Strikes continued to occur, but they became less violent, both in terms of damage to property and loss of life.²⁶¹ This may be partially attributed to the labor movement now enjoying greater legal protection, and a shift in societal values that strongly condemned violence, particularly murder.

253. *Id.* at 117–18.

254. *Id.*

255. *Id.* at 117.

256. *Id.* at 122–23.

257. *Id.* at 123.

258. *Id.* at 123–30.

259. *Id.* at 130–38.

260. National Labor Relations Act, 29 U.S.C. §§ 151–69.

261. James Gregory, *Strikes & Unions*, CIV. RTS. & LAB. HIST. CONSORTIUM, UNIV. OF WASH., https://depts.washington.edu/depress/strikes_unions.shtml [<https://perma.cc/C7FN-RRLN>].

A. *The Molly Maguires*

The Molly Maguires were a secret and violent terrorist organization that originated in Ireland but was later re-instituted in the anthracite coal mining region of Pennsylvania to support Irish coal miners.²⁶² The Coal Miners Union aimed to advocate for better wages and safer working conditions through peaceful means.²⁶³ The Molly Maguires attempted to achieve the same goals through violence and murder.²⁶⁴ Due to the secretive nature of the Molly Maguires, it is unclear how much overlap there was between the miners' union and the Molly Maguires.²⁶⁵ In 1876, in response to layoffs in the Pennsylvania coal mining industry, the miners went on strike, and the Molly Maguires engaged in violent acts against the mining companies.²⁶⁶ A Pinkerton Detective, James McParlan, infiltrated the Molly Maguires.²⁶⁷ Based on the evidence he uncovered, several of the members were executed.²⁶⁸ Some doubt has been cast on the guilt of at least some of the men who were convicted and executed, with one being posthumously pardoned by the governor of Pennsylvania.²⁶⁹ This stands as an example of a violent terrorist organization defying the law, at least for a while.

B. *The Railroad Strike of 1877*

The Great Railroad Strike of 1877 began in Martinsburg, West Virginia, in response to wage cuts by the B&O Railroad but quickly spread across the Eastern Seaboard.²⁷⁰ Many were shot and killed in Baltimore and Pittsburgh as federal troops and armed vigilantes battled with the workers who, in their protests, destroyed railroad property.²⁷¹ Riots and violence also occurred in

262. KEVIN KENNY, MAKING SENSE OF THE MOLLY MAGUIRES 3 (1998); LOUIS ADAMIC, DYNAMITE: THE STORY OF CLASS VIOLENCE IN AMERICA 11–18 (2008); ARTHUR CONAN DOYLE, THE VALLEY OF FEAR (1915) (basing his story on the Molly Maguires in Pennsylvania).

263. KENNY, *supra* note 262, at 3.

264. *Id.*

265. *Id.* at 4.

266. BROGAN, *supra* note 119, at 429.

267. KENNY, *supra* note 262, at 3.

268. *Id.*

269. "Molly Maguires" Records, PA. HIST. & MUSEUM COMM'N, <https://www.phmc.pa.gov/Archives/Research-Online/Pages/Molly-Maguires.aspx> [<https://perma.cc/7BFP-8QQ2>].

270. BROGAN, *supra* note 119, at 429.

271. EDWARD WINSLOW MARTIN, THE HISTORY OF THE GREAT RIOTS 21, 23, 118–19 (1877).

Albany, New York, Philadelphia, Reading, Scranton, and St. Louis.²⁷² The company brought in Pinkerton detectives to protect replacement workers.²⁷³ The striking workers attacked the Pinkerton detectives and a gun battle erupted.²⁷⁴ The Pennsylvania militia was brought in to suppress the strike.²⁷⁵ It was a violent strike resulting in great destruction of railroad property.²⁷⁶ It has been characterized as “the most spectacular and widespread strike in American history.”²⁷⁷ It was spontaneous, unorganized, and driven by desperation.²⁷⁸ As it unfolded, it involved defiance of law by both the workers and the companies.

C. *The Haymarket Affair*

One of the most momentous incidents in the history of labor violence was the Haymarket Affair, as it has come to be known.²⁷⁹ Chicago became the epicenter for labor violence because it was a major railroad and manufacturing center and because many of the workers were southern and eastern European immigrants, partial to radical dogma.²⁸⁰ Workers at the McCormick Plant in Chicago went on strike for an eight-hour work day.²⁸¹ The company brought in a security force that opened fire on the striking workers, killing several.²⁸² A rally was held in Haymarket Square the following evening to protest McCormick’s violent action and to support the eight-hour workday movement.²⁸³ A squad of 300 police officers converged on the square to break up the rally,²⁸⁴ which was probably a major error. Someone threw a bomb, killing at least one police officer.²⁸⁵ Six more police

272. Joseph Adamczyk, *Great Railroad Strike of 1877*, BRITANNICA (Feb. 16, 2024), <https://www.britannica.com/topic/Great-Railroad-Strike-of-1877> [<https://perma.cc/UM6W-T3D5>]; ERNEST KIRSCHTEN, *CATFISH AND CRYSTAL* 363–75 (1960).

273. PAUL KRAUSE, *THE BATTLE FOR HOMESTEAD, 1880–1892: POLITICS, CULTURE, AND STEEL* 3 (1992).

274. *Id.*

275. GHJE, *supra* note 47, at 117.

276. *See id.* at 118 (describing the fights that occurred between the strikers and the militia).

277. *Id.* at 117.

278. ADAMIC, *supra* note 262, at 35.

279. *See generally* PAUL AVRICH, *THE HAYMARKET TRAGEDY* (1984) (detailing the pivotal Haymarket Affair which was spurred by a police officer firing into a crowd); JAMES GREEN, *DEATH IN THE HAYMARKET* (2006) (presenting analysis on the Haymarket strike).

280. *See generally* AVRICH, *supra* note 279 (describing the focus put on Chicago).

281. ADAMIC, *supra* note 262, at 68.

282. GREEN, *supra* note 279, at 170.

283. AVRICH, *supra* note 279, at xi.

284. *Id.*

285. *Id.*

officers were killed in the ensuing gunfight.²⁸⁶ Eight anarchists were arrested, tried, and sentenced to death for having delivered speeches that may have encouraged the bomb thrower (who was never identified).²⁸⁷ Subsequent investigations have shown that none of the men arrested, convicted, and executed had anything to do with the bomb.²⁸⁸ The Haymarket Affair became a rallying cry for the labor movement but a very polarizing incident in the struggle between capital and labor.²⁸⁹

D. *The Homestead Steel Strike*

The 1892 strike at the Homestead Steel mill owned by Andrew Carnegie was a major incident in the development of labor relations in the United States.²⁹⁰ Due to an economic downturn resulting in a decreased demand for steel, Homestead cut workers' wages.²⁹¹ The workers went on strike, and the company locked them out to then replace them with strikebreakers.²⁹² The striking workers attacked the strikebreakers.²⁹³ The company brought in Pinkerton detectives, who arrived by boat to protect the strikebreakers.²⁹⁴ A gun battle broke out between the striking workers and the Pinkertons.²⁹⁵ The striking workers prevailed and forced the Pinkertons to exit through a brutal gauntlet.²⁹⁶ The strike was crushed when the National Guard was called in to restore order.

Eleven were killed in the gun battle.²⁹⁷ The strike ended after Alexander Berkman, a New York anarchist, attempted to assassinate Henry Frick, the head of Homestead Steel.²⁹⁸ The strike failed and the union was destroyed.²⁹⁹ As a result of the incident, several states passed laws prohibiting companies from hiring security forces to break strikes; however, unionization of the steel industry was set back for decades.³⁰⁰

286. ADAMIC, *supra* note 262, at 74.

287. *Id.* at 76–77.

288. AVRICH, *supra* note 279, at xi.

289. *Id.* at xi–xii.

290. KRAUSE, *supra* note 273, at 3.

291. ADAMIC, *supra* note 262, at 104.

292. KRAUSE, *supra* note 273, at 3.

293. *Id.*

294. *Id.*

295. *Id.*

296. ADAMIC, *supra* note 262, at 105.

297. KRAUSE, *supra* note 273, at 3–4.

298. *Id.* at 3.

299. ADAMIC, *supra* note 262, at 105.

300. KRAUSE, *supra* note 273, at 4–5.

Both sides acted in defiance of law by resorting to a gun battle, which was clearly an unacceptable method of settling the dispute.

E. *The Pullman Strike*

In 1894, a strike was called in the Pullman plant in Chicago.³⁰¹ Pullman owned a company town where many of the workers lived.³⁰² When business declined, Pullman changed salaries for workers to a piecework system.³⁰³ The workers went on strike, disabling rail transportation nationwide.³⁰⁴ President Cleveland sent in federal troops to break up the strike.³⁰⁵ The strikers called for a boycott of any train carrying a Pullman car, which stunted rail traffic nationwide.³⁰⁶ With the arrival of federal troops, a mob assembled, destroying Pullman and railroad property.³⁰⁷ The violence and destruction spread throughout the Midwest and West.³⁰⁸ In view of the violence, a federal judge in Chicago entered an injunction ordering the union to cease interfering with rail traffic and to cease urging workers to strike.³⁰⁹ Eugene V. Debs, a leader of the union, was charged with contempt for violating the injunction, was convicted, and sent to prison for six months.³¹⁰ The equitable authority to issue the injunction and the contempt conviction of Debs for violating it were upheld by a unanimous Supreme Court in 1895.³¹¹ Following the *Debs*³¹² case, the labor injunction became ubiquitous until Congress prohibited it in 1932 in the Norris-LaGuardia Act.³¹³ At least thirty people were killed in the violence accompanying the Pullman Strike.³¹⁴ This strike was the largest and most violent labor strike in United States history at the time, but certainly not the last.

301. DAVID RAY PAPKE, *THE PULLMAN CASE 2* (1999); *see generally* ADAMIC, *supra* note 262 (explaining the events of the Pullman strike).

302. ADAMIC, *supra* note 262, at 116.

303. PAPKE, *supra* note 301, at 16.

304. ADAMIC, *supra* note 262, at 118.

305. PAPKE, *supra* note 301, at 20.

306. *Id.* at 24.

307. *Id.* at 33.

308. *Id.* at 34.

309. *Id.* at 41.

310. *Id.* at 38–50.

311. *In re Debs*, 158 U.S. 564, 599–600 (1895).

312. *In re Debs*, 158 U.S. 564 (1895).

313. PAPKE, *supra* note 301, at 98.

314. *Id.* at 33, 35.

F. *Idaho Mine Wars*

In 1892, in Coeur d'Alene, Idaho, a gun battle broke out between striking miners and mine guards hired by the mining company.³¹⁵ The strike was called after the miners' already low wages were cut further.³¹⁶ The miners killed two guards and forced sixty others to surrender.³¹⁷ The Governor declared martial law and sent in the National Guard to restore order.³¹⁸ Several miners were convicted of various offenses and imprisoned.³¹⁹ Seven years later, the mining company's president fired seventeen miners suspected of being union members.³²⁰ Miners then hijacked a train, loaded it with dynamite, and used the dynamite to blow up the mine, killing two people.³²¹ Quite obviously, violence by both sides, including destruction of property and murder, constituted defiance of law for which there was no excuse.

G. *Ludlow*

The wars between the miners and the mine owners spread through Colorado.³²² The miners were supported by the IWW, a very violent union.³²³ The miners went on strike primarily for safer working conditions.³²⁴ The mine owners locked the miners out and brought in strikebreakers to keep the mines in operation.³²⁵ The miners and their families set up tent cities to live in, especially in Ludlow in south-central Colorado.³²⁶ In response to a strike called by the miners, the company called in the National Guard which was eventually composed at least partially of

315. See J. ANTHONY LUKAS, *BIG TROUBLE: A MURDER IN A SMALL WESTERN TOWN SETS OFF A STRUGGLE FOR THE SOUL OF AMERICA* 134 (1997) (explaining the beginning of the Idaho mine conflict; see also ADAMIC, *supra* note 262, at 124–27 (expanding on the Idaho wars).

316. LUKAS, *supra* note 315, at 132.

317. *Id.* at 134.

318. *Id.*

319. *Id.* at 135.

320. *Id.* at 111.

321. *Id.* at 112–14; *Matt McCune, Bunker Hill and the Sullivan Mill Explosion*, INTERMOUNTAIN HIST. (May 16, 2023), <https://www.intermountainhistories.org/items/show/118> [<https://perma.cc/636G-HURU>].

322. THOMAS G. ANDREWS, *KILLING FOR COAL: AMERICA'S DEADLIEST LABOR WAR* 1 (2010).

323. ADAMIC, *supra* note 262, at 158.

324. ANDREWS, *supra* note 322, at 9.

325. *Id.* at 7.

326. *Id.* at 1.

mine guards employed by the mine owners.³²⁷ The guard brought in Gatling guns and opened fire.³²⁸ Twenty were killed, including women and children who were huddled in depressions beneath the tents.³²⁹ Following the massacre, the miners destroyed company property and engaged in violence in retaliation.³³⁰ The massacre spoiled the reputation of mine owner, John D. Rockefeller, Jr.³³¹ President Wilson sent in federal troops to end the strike.³³² The Ludlow massacre became an iconic incident in the labor movement.³³³ The site of the massacre is now a national historic site.³³⁴ The defiance of law was initially by the company and the government, but eventually, the miners in retaliation.

H. *Eastern Coal Wars*

Labor violence, especially in the coal industry, continued for the next forty years.³³⁵ All parties had some share of the blame. Workers went on strike for better working conditions,³³⁶ sometimes in violation of local law and federal court injunctions. In 1897, a labor march in Lattimer, Pennsylvania, led to violence.³³⁷ The local sheriff ordered the marchers to disperse.³³⁸ They continued the march and the police opened fire, killing nineteen immigrant miners.³³⁹ The sheriff was charged, tried, and acquitted.³⁴⁰ The incident became known as the Lattimer Massacre.³⁴¹

327. *Id.*

328. *Id.* at 12.

329. ADAMIC, *supra* note 262, at 185–87 (2008); *see generally* ANDREWS, *supra* note 322 (describing the Ludlow massacre); *see also* *Colorado Experience: Ludlow Massacre* (PBS television broadcast Apr. 18, 2013) (explaining many of the facts in the Ludlow massacre come from the documentary film *Colorado Experience-The Ludlow Massacre*).

330. *See Colorado Experience: Ludlow Massacre, supra* note 329 (outlining facts of the Ludlow massacre).

331. ANDREWS, *supra* note 322, at 9.

332. *Colorado Experience: Ludlow Massacre, supra* note 329.

333. *Id.*

334. *Id.*

335. Peter A. Shackel, *How a 1897 Massacre of Pennsylvania Coal Miners Morphed from a Galvanizing Crisis to Forgotten History*, SMITHSONIAN MAG. (Mar. 13, 2019), <https://www.smithsonianmag.com/history/how-1897-massacre-pennsylvania-coal-miners-morphed-galvanizing-crisis-forgotten-history-180971695/> [https://perma.cc/DU8H-CHDN].

336. *Id.*

337. *Id.*

338. *Id.*

339. *Id.*

340. *Id.*

341. *Id.*

The following year, when the Chicago-Virden Coal Company attempted to replace striking workers with African Americans, the striking workers opened fire on the train carrying the replacements.³⁴² Many on both sides were shot. Twelve persons were killed.³⁴³ The Governor called in the National Guard.³⁴⁴ The incident became known as The Battle of Virden.³⁴⁵

In 1902, when anthracite coal miners in Pennsylvania called a strike for, among other things, higher wages, President Theodore Roosevelt threatened to seize the coal mines, forcing the owners to negotiate.³⁴⁶ Although the strike was ultimately settled with a victory for the union, in the interim, several people, mostly strikers, were killed in battles between the strikers and the police.³⁴⁷

Yet another violent incident in the mining community occurred in Matewan, West Virginia.³⁴⁸ There, a strike was called over an attempt to obtain recognition of the United Mineworkers of America (UMW) union.³⁴⁹ Later, in 1920, four people were killed in a gun battle between miners and sheriffs in McDowell County.³⁵⁰ In 1921, hundreds of miners attacked coal mines along the Mingo River in West Virginia.³⁵¹ The Governor declared martial law and called in close to three thousand officers.³⁵² A force of vigilantes also appeared.³⁵³ A miners' march was assembled in Logan County, West Virginia, to come to the aid of imprisoned miners in Mingo County.³⁵⁴ The miners would have to march through Logan County,

342. See generally David Markwell, *A Turning Point: The Lasting Impact of the 1898 Virden Mine Riot*, 99 J. ILL. STATE HIST. SOC. 211 (2006) (discussing the Virden mine riot in greater detail).

343. *Id.* at 218.

344. *Id.*

345. *Id.* at 221.

346. See ROBERT J. CORNELL, *THE ANTHRACITE COAL STRIKE OF 1902*, at 110 (1957) (describing Roosevelt's brief foray into becoming involved in the continued difficulties laborers faced with low wages, irregular employment, and hazardous working conditions).

347. *Id.* at 153.

348. Lorraine Boissoneault, *The Coal Mining Massacre America Forgot*, SMITHSONIAN MAG., (Apr. 25, 2017), <https://www.smithsonianmag.com/history/forgotten-matewan-massacre-was-epicenter-20th-century-mine-wars-180963026/> [<https://perma.cc/CAE8-2V2F>].

349. *Id.*

350. *Id.*

351. *Id.*

352. Evan Andrews, *The Battle of Blair Mountain*, HIST. (Sept. 1, 2018), <https://www.history.com/news/americas-largest-labor-uprising-the-battle-of-blair-mountain> [<https://perma.cc/6KUH-AKW3>].

353. *Id.*

354. Boissoneault, *supra* note 348. The marchers also intended to seek retribution for the murder of Sheriff Sid Hatfield. LON SAVAGE, *THUNDER IN THE MOUNTAINS* 73, 97 (1990).

where the local sheriff and armed men awaited their arrival.³⁵⁵ President Harding issued a proclamation ordering both sides to disperse.³⁵⁶ Both sides ignored the proclamation and fighting commenced.³⁵⁷ The Army arrived and dispersed the combatants.³⁵⁸ It is believed that as many as sixteen were killed.³⁵⁹

In 1922, members of the UMW in Williamson County, Illinois assaulted a group of non-union workers resulting in a lengthy gun battle in which three were killed.³⁶⁰ Nineteen of the strike breakers who surrendered were killed in cold blood by union members.³⁶¹ This incident became known as the Herrin Massacre.³⁶² As one author noted, “No episode in the history of American industrial warfare has ever shocked public opinion more violently than the Herrin Massacre.”³⁶³

In 1932, Congress passed and President Hoover signed the Norris-LaGuardia Act, which guaranteed workers the right to form and join a union and prohibited federal judges from enjoining non-violent strikes.³⁶⁴ These were the issues that gave rise to much of the labor violence over the past several decades.³⁶⁵ Further federal labor legislation protecting the rights of workers would follow.³⁶⁶

I. *The Bombing Campaign*

Over a five-year period beginning in 1906, a bombing campaign sponsored by the International Association of Bridge Structural and Iron

355. Boissoneault, *supra* note 348.

356. *Battle of Blair Mountain: Topics in Chronicling America*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-blair-mountain> [<https://perma.cc/R55M-XEVY>].

357. *Id.*

358. Boissoneault, *supra* note 348.

359. John Raby, ‘*Matewan Massacre*’ a Century Ago Embodied Miners’ Struggles, AP NEWS (May 18, 2020, 10:13 AM), <https://apnews.com/article/34af5e97aaa1241aa3dadf669d43686b> [<https://perma.cc/N2FJ-KJ94>].

360. See PAUL M. ANGLE, BLOODY WILLIAMSON: A CHAPTER IN AMERICAN LAWLESSNESS 4–8 (1952) (describing the gun battle and resulting casualties).

361. *Id.* at 10.

362. *Id.* at 28.

363. *Id.* President Harding condemned the massacre as “‘a shocking crime’ . . . ‘butchery . . . wrought in madness . . .,’ and . . . ‘barbarity.’” *Id.* at 34. Williamson County became a national disgrace. See *id.* (acknowledging President Harding’s condemnation of the massacre and his labeling of the event as a disgrace).

364. Norris-LaGuardia Act, ch. 90, 47 Stat. 70 (1932) (codified as amended at 29 U.S.C. § 101).

365. *Id.*

366. *Id.*

Workers focused on construction sites which hired non-union workers.³⁶⁷ At least one hundred structures were destroyed in different states.³⁶⁸ Perhaps the most extreme event connected with the bombing campaign involved the bombing of the offices of the Los Angeles Times.³⁶⁹ Harrison Gray-Otis, the publisher of the Times, was a vigorous opponent of labor unions.³⁷⁰ On October 1, 1910, a bomb was detonated at the office of the Times killing twenty-one people and injuring many others.³⁷¹ It was alleged that there was no bomb at all and that the explosion was attributable to a gas leak.³⁷² The McNamara brothers, officers of the Iron Workers Union, were charged with the bombing.³⁷³ The McNamaras, in somewhat of a shock, pled guilty to the bombing.³⁷⁴ Their attorney, Clarence Darrow, declared that a guilty plea was the only way to save the McNamaras from execution.³⁷⁵ However, it was rumored at the time that the real reason for the surprising guilty pleas was to protect Darrow from conviction for jury tampering.³⁷⁶ Several more bombs were set off over the next several months.³⁷⁷ This may be partially attributable by the infiltration of the labor movement by organized crime.³⁷⁸ Many—including labor leader Samuel Gompers—condemned the bombing.³⁷⁹ The guilty pleas and convictions in the bombing cases went a long way towards domesticating the labor movement. Only the IWW remained committed to violence.³⁸⁰

367. ADAMIC, *supra* note 262, at 188–189, 196, 200.

368. *See id.* at 196–97 (“[T]he Iron Workers’ international union dynamited about 150 buildings and bridges . . .”).

369. *Id.* at 206.

370. *Id.* at 203.

371. *See id.* at 212 (characterizing the damage caused by the bombing); *Los Angeles Times Bombing (1910): Topics in Chronicling America*, LIBR. OF CONG., <https://guides.loc.gov/chronicling-america-los-angeles-times-bombing> [<https://perma.cc/Y7NM-ZSB8>].

372. *See* ADAMIC, *supra* note 262, at 209, 212 (identifying the gas-explosion theory).

373. *Id.* at 214–15.

374. *Id.* at 229.

375. *Id.* at 232.

376. *Id.* at 233, 239.

377. *See id.* at 244–46, 253 (describing “a nationwide dynamite conspiracy”).

378. *See id.* at 253, 349 (explaining how “organized labor and organized crime” were intertwined).

379. *See id.* at 252 (“So Gompers pleaded with the ‘gorillas’ to refrain from dynamite in the future, and for a few years he was heeded.”).

380. *Id.* at 164.

J. *Bread and Roses Strike*

In 1912, in Lawrence, Massachusetts, workers, mostly women and immigrants, went on strike against a wage cut.³⁸¹ The IWW arrived to organize and lead the strike and the mayor called out the militia to maintain order.³⁸² This became known as the “Bread and Roses Strike.”³⁸³ Strikers engaged in violence against the mill, slashing the machines.³⁸⁴ The police turned fire hoses on the strikers.³⁸⁵ Two strikers were killed in the escalating violence.³⁸⁶ Parents attempted to send their children from the city, however, local officials intervened to prevent them from leaving.³⁸⁷ Due to the bad publicity, Congress held hearings on the poor working conditions.³⁸⁸ Eventually, the dispute was settled, and it is considered a significant victory for the labor movement.³⁸⁹

K. *Steel Strike of 1919*

In 1919, steelworkers in Gary, Indiana went on strike for higher wages leading to a nationwide steel strike.³⁹⁰ Martial law was declared in Gary, and the United States Army took control of the city.³⁹¹ The strike was broken

381. Christopher Klein, *The Strike that Shook America*, HIST. (Nov. 26, 2019), <https://www.history.com/news/the-strike-that-shook-america> [https://perma.cc/RRR3-4GJ9]; see also BRUCE WATSON, *BREAD AND ROSES: MILLS, MIGRANTS, AND THE STRUGGLE FOR THE AMERICAN DREAM 1–4* (2006) (analyzing the history of the strike); see generally ROBERT FORRANT & SUSAN GRABSKI, *LAWRENCE AND THE 1912 BREAD AND ROSES STRIKE* (2013) (containing primary sources from the strike).

382. See FORRANT & GRABSKI, *supra* note 381, at 8, 40–41, 67 (detailing the actions of IWW organizer Joseph Ettor in galvanizing the Lawrence factory workers); Emma Goldman, *The Industrial Workers of the World*, PBS AM. EXPERIENCE, <https://www.pbs.org/wgbh/americanexperience/features/goldman-industrial-workers-world/> [https://perma.cc/5RG3-2NTH] (describing the IWW as “a union based on the principles of Marxist conflict and the indigenous American philosophy of industrial unionism”).

383. Klein, *supra* note 381. But see WATSON, *supra* note 381, at 3 (“Through the mysterious process that propagates fable and folk song, what happened in Lawrence is now known as the ‘Bread and Roses’ strike, although the slogan was probably never used during the uprising.”).

384. Klein, *supra* note 381.

385. FORRANT & GRABSKI, *supra* note 381, at 44.

386. *Id.* at 66, 69.

387. *Id.* at 75, 82.

388. *Id.* at 85, 88.

389. Klein, *supra* note 381.

390. Erin Blakemore, *Why the Great Steel Strike of 1919 Was One of Labor’s Biggest Failures*, HIST. (Sept. 23, 2019), <https://www.history.com/news/steel-strike-of-1919-defeat> [https://perma.cc/NSW3-QUFB] [hereinafter Blakemore, *The Great Steel Strike*].

391. *Id.*; Gary Pub. Lib. & Jennifer Guiliano, *The Steel Strike of 1919 in Gary*,

with a “crushing defeat” for the labor movement.³⁹² Concerns that the strike was a product of foreign Bolshevism as well as racial prejudice against Black strikebreakers contributed to the failure of the strike.³⁹³

L. *Republic Steel Strike of 1937*

On Memorial Day 1937, workers at Republic Steel in Chicago protested the company's refusal to sign a union contract.³⁹⁴ The bigger steel mills had signed the contract.³⁹⁵ This became known as the Little Steel Strike.³⁹⁶ The police were called in to disperse the protestors, and in the process, ten workers were shot and killed.³⁹⁷ This was an instance in which the police brutally murdered peaceful protestors.³⁹⁸ The company signed the contract and the strikers returned to work.³⁹⁹ The strike gave rise to President Franklin D. Roosevelt's famous quotation from Shakespeare's *Romeo and Juliet*: “A plague on both your houses.”⁴⁰⁰

M. *Flint Sit-Down Strike*

The same year, workers at the Flint, Michigan General Motors plant engaged in a sit-down strike at the plant to preclude the company from bringing in replacement workers.⁴⁰¹ The strike continued for forty-four days.⁴⁰² The company obtained an injunction requiring the workers to vacate the plant.⁴⁰³ Initially, the company attempted to retake the plant with security guards, resulting in a violent battle between the workers and the

DISCOVER IND. (Nov. 6, 2021)

<https://publichistory.iupui.edu/items/show/603#:~:text=By%20the%20end%20of%20the,less%20than%20a%20month%20later> [<https://perma.cc/3KME-2F4T>].

392. Blakemore, *The Great Steel Strike*, *supra* note 390.

393. *Id.*

394. AHMED WHITE, *THE LAST GREAT STRIKE: LITTLE STEEL, THE CIO, AND THE STRUGGLE FOR LABOR RIGHTS IN NEW DEAL AMERICA* 3–4 (2016).

395. *Id.* at 102.

396. *Id.* at 3–4.

397. *Id.* at 134, 136; Carol Quirke, *Reframing Chicago's Memorial Day Massacre, May 30, 1937*, 60 AM. Q. 129, 134 (2008).

398. See Quirke, *supra* note 397, at 132–33 (“Most in the crowd were peaceful . . .”).

399. WHITE, *supra* note 394, at 272.

400. Milton J. Bracker, *In Strike, Roosevelt Feels; Blasts Shut Cambria Plant*, N.Y. TIMES, June 30, 1937, at 1 (quoting WILLIAM SHAKESPEARE, *ROMEO AND JULIET*).

401. Erin Blakemore, *The 1936 Sit-Down Strike that Shook the Auto Industry*, HIST. (Sept. 14, 2023) <https://www.history.com/news/flint-sit-down-strike-general-motors-uaw> [<https://perma.cc/ZLG9-7WPM>].

402. *Id.*

403. *Id.*

guards.⁴⁰⁴ Eventually, Governor Murphy sent the National Guard in as a peace keeping force, leading to a settlement favoring labor by recognizing the union, agreeing not to punish the striking workers and to raise wages.⁴⁰⁵ This was seen as a significant victory for labor, more attributable to the depression and the New Deal than a response to violent labor confrontations which had occurred for a sixty-year period with slight victories for the labor movement.⁴⁰⁶

N. *Labor Violence*

Over a lengthy period, violence continually erupted in the midst of labor strikes.⁴⁰⁷ Both sides must bear some of the blame. The workers had little in the way of legal protection.⁴⁰⁸ The states and communities often overreacted to peaceful demonstrations with a show of force.⁴⁰⁹ The demonstrators were only too ready to respond violently.⁴¹⁰ Positions on both sides hardened and many were itching for a fight.⁴¹¹ Although there was a large amount of defiance of law by the workers, employers, and government officials, ultimately, the workers and the unions obtained the legal protection to organize and engage in collective bargaining.⁴¹² This was an instance in which years of defiance and violent outbreaks seemed to lead to positive results, although the causal connection between the strikes and the legislation was less than clear.

404. *Id.*

405. *Id.*

406. *See id.* (“And labor would never be the same”).

407. *See generally* *Labor Wars in the U.S.*, PBS AM. EXPERIENCE <https://www.pbs.org/wgbh/americanexperience/features/theminewars-labor-wars-us/> [https://perma.cc/2YKY-EQ8L] (discussing various instances of violence related to labor from 1874 to 1989).

408. *See id.* (claiming the workers sought “safety regulations, better wages, fewer hours, and freedom of speech and assembly”).

409. *See, e.g.*, Ben Railton, *Considering History: When Labor Strikes Were Met with Violence 100 Years Ago*, SATURDAY EVENING POST (Oct. 19, 2021), <https://www.saturdayeveningpost.com/2021/10/considering-history-when-labor-strikes-were-met-with-violence-100-years-ago/> [https://perma.cc/9RWX-5YPA] (“Those attempts at unionization were consistently opposed by repressive and violent responses . . .”).

410. *See* Philip Taft & Philip Ross, *American Labor Violence: Its Causes, Character, and Outcome*, in *VIOLENCE IN AMERICA: HISTORICAL AND COMPARATIVE PERSPECTIVES* 221 (Hugh Davis Graham & Ted Robert Gurr eds., 1969) (describing violence by “pickets and sympathizers” during labor disputes).

411. *See id.* at 222 (characterizing some labor violence as unavoidable).

412. *Collective Bargaining Rights*, NLRB, <https://www.nlr.gov/about-nlr/rights-we-protect/the-law/employees/collective-bargaining-rights> [https://perma.cc/4BHD-MLCU].

Even after workers and unions obtained legal protection, labor violence continued.⁴¹³ A well-known example of this was the 1968 African American sanitation workers strike in Memphis.⁴¹⁴ The labor dispute began when two sanitation workers were crushed to death by defective machinery and the city refused to pay compensation to their families.⁴¹⁵ The workers went on strike bearing signs which read “I Am a Man.”⁴¹⁶ The mayor ordered the strikers to return to work.⁴¹⁷ The police used tear gas to disperse peaceful protestors.⁴¹⁸ Dr. Martin Luther King, Jr. came to Memphis to support the strikers and later was assassinated there.⁴¹⁹ Dr. King led a march, which was infiltrated by outsiders and turned violent resulting in a death.⁴²⁰ After the King assassination, a settlement with the strikers was reached with the intervention of President Johnson.⁴²¹

Much of the violence in later strikes was directed at strikebreakers and companies that hired replacement workers after a strike had been called. This was certainly the case when in 1979, members of the striking United Farm Workers attacked strikebreakers and the companies that hired them.⁴²²

413. See *The Right to Strike*, NLRB, <https://www.nlr.gov/strikes> [<https://perma.cc/AK8T-B9SD>] (outlining legal protections for employees).

414. The Martin Luther King, Jr. Rsch. & Edu. Inst., *Memphis Sanitation Workers' Strike*, STANFORD U., <https://kinginstitute.stanford.edu/memphis-sanitation-workers-strike> [<https://perma.cc/VWL6-6M87>] [hereinafter *Memphis Sanitation Workers' Strike*]; see generally, STEVE ESTES, *I AM A MAN!: RACE, MANHOOD, AND THE CIVIL RIGHTS MOVEMENT* (2005) (describing the impact of race and gender on civil rights organizing); JASON SOKOL, *THE HEAVENS MIGHT CRACK: THE DEATH AND LEGACY OF MARTIN LUTHER KING, JR.* (2018) (explaining America's reaction to King's death).

415. *Memphis Sanitation Workers' Strike*, *supra* note 414.

416. *Id.*

417. See DeNee L. Brown, *I Am a Man': The Ugly Memphis Sanitation Workers' Strike that Led to MLK's Assassination*, WASH. POST (Feb. 12, 2018, 11:03 AM), <https://www.washingtonpost.com/news/retropolis/wp/2018/02/12/i-am-a-man-the-1968-memphis-sanitation-workers-strike-that-led-to-mlks-assassination/> [<https://perma.cc/BQJ7-W2YC>] (recognizing the mayor refused to concede to the demands of the union).

418. *Memphis Sanitation Workers' Strike*, *supra* note 414.

419. *Id.*; DAVID J. GARROW, *BEARING THE CROSS: MARTIN LUTHER KING, JR., AND THE SOUTHERN CHRISTIAN LEADERSHIP CONFERENCE* 609–24 (1986) (describing King's dealings in Memphis and his subsequent demise).

420. Brown, *supra* note 417.

421. *Memphis Sanitation Workers' Strike*, *supra* note 414.

422. Ronald B. Taylor, *UFW Employed Violence During Strike, Judge Rules*, L.A. TIMES (May 14, 1986, 12:00 AM), <https://www.latimes.com/archives/la-xpm-1986-05-14-me-5351-story.html> [<https://perma.cc/VYD7-8QLY>].

Similar incidents occurred over the next four decades in which strikebreakers and non-union workers were beaten or shot and company property was vandalized.⁴²³ Sometimes, when the criminals have been identified, they have been charged, convicted, and imprisoned.⁴²⁴ It would seem that with some frequency, unions and workers cannot resist violent action to achieve their ends. The employers as well as law enforcement often responded in kind.⁴²⁵ As such, a cycle of violence has been perpetuated over decades.⁴²⁶ Eventually, the violence to persons declined, however, the destruction of property remained.⁴²⁷ There may be several explanations for this. Over time, society may have placed a greater value on life and bodily integrity. Correspondingly, the civil and criminal penalties for taking the life of a human being may have increased, providing a disincentive to murder. Alternatively, with victories through the legislative process protecting the right to organize as well as many of the substantive goals of prior labor conflicts, perhaps the labor movement mellowed somewhat.

XII. WORLD WAR I PROTESTS

With the advent of American entry into the first world war, a significant number of protests occurred followed by criminal convictions, imprisonments, and sometimes deportations.⁴²⁸ The protestors came from a variety of perspectives. Some were committed to peace and opposed entry into the war on moral grounds, some were German sympathizers, some were Marxists, while others were anarchists.⁴²⁹ Virtually all violated the strict and harsh laws in place which prohibited interference with the war effort, including by speech.⁴³⁰ As such, most of these persons were clearly defying the law as it then stood. Most of this activity would be protected by the

423. See Taft & Ross, *supra* note 410, at 221 (describing the likely causes of labor violence in America).

424. See, e.g., *id.* at 243 (recalling the arrest of violent strikers).

425. See, e.g., *id.* (“The pickets, on the other hand, complained that they were victims of repeated assaults by the police and hired sluggers of the employers.”).

426. See generally *id.* (explaining the violent history of the labor movement).

427. GILJE, *supra* note 47, at 170, 174.

428. See GEOFFREY STONE, *PERILOUS TIMES* 137 (2003) (describing political unrest at home and abroad).

429. See *id.* at 136–37 (acknowledging the different sentiments expressed by Americans toward the war).

430. See *id.* at 137 (explaining Wilson’s detestation of disloyalty and criticism concerning America’s involvement in the war).

First Amendment guarantee of freedom of speech as it has evolved; however, free speech jurisprudence was in its infancy and the courts generally upheld the convictions.⁴³¹ Given how the First Amendment has developed, most of these convictions are now seen as unjust and unconstitutional, however at the time they were certainly legally legitimate. Some of the defendants sincerely believed in a more expansive conception of freedom of speech than the contemporary judiciary was prepared to recognize.⁴³² As such they did not believe that they were violating the law. Rather, they believed, if anything, the government was violating their constitutional rights by harassing, arresting, and prosecuting them.⁴³³ Others were radical ideologues who did not respect the system and simply did not care that they were defying its laws. Indeed, their ultimate purpose was to destroy the system and its laws.

In subsequent years, legislative and prosecutorial focus would shift from war protestors to Marxists, known to the law as syndicalists.⁴³⁴ Some of these defendants were idealistic innocents caught up in radical movements, while others were hardened radicals intent on bringing down the system whether peacefully or otherwise.⁴³⁵ As with the war protesters, First Amendment doctrine at the time was insufficiently developed to protect what has since been recognized as lawful activity.⁴³⁶ Several states passed anti-syndicalism laws which made it a crime to belong to an organization that was committed to eventual overthrow of national or state governments.⁴³⁷ Mere membership in such an organization would now be

431. See, e.g., *Schenck v. U.S.*, 249 U.S. 47, 52–53 (1919) (upholding an espionage conviction despite the First Amendment concerns).

432. See, e.g., *id.* at 49 (raising the issue of free speech).

433. See, e.g., *id.* at 51–52 (denying relief based on the First Amendment).

434. See, e.g., *Congress Passes Communist Control Act*, HIST. (Aug. 21, 2020)

<https://www.history.com/this-day-in-history/congress-passes-communist-control-act> [<https://perma.cc/MVu9-ACUJ>] (detailing anticommunist laws).

435. See Christina D. Romer & Richard H. Pells, *Great Depression*, BRITANNICA, <https://www.britannica.com/money/Great-Depression/Political-movements-and-social-change> [<https://perma.cc/YU5P-6S3X>] (describing a “time when a significant number of Americans flirted with Marxist movements and ideas”); James Gregory, *Special Section: Radicalism*, GREAT DEPRESSION WASH. STATE, <https://depts.washington.edu/depress/radicalism.shtml> [<https://perma.cc/K6Q9-Y3L8>] (chronicling radical movements within Washington).

436. See Marc Rohr, *Communists and the First Amendment: The Shaping of Freedom of Advocacy in the Cold War Era*, 28 SAN DIEGO L. REV. 1, 2 (1991) (characterizing free speech jurisprudence as “remarkably undeveloped” during the Cold War era).

437. See *Gitlow v. New York*, 268 U.S. 652, 671–72 (1925) (sustaining a conviction under an anti-syndicalism law).

constitutionally protected but was not then.⁴³⁸ As such, members of these organizations were ultimately defying the law. Arguably, some were unsuccessfully simply testing the limits of the law. These and others, through their conduct, were paving the way to a more expansive and better understanding of First Amendment protection. As such, since they were defying the law, perhaps by doing so, they were helping to create a better understanding of constitutional rights. And yet others were dangerous radicals, intent on violently destroying the system who the government had the right to prosecute and imprison.

The prosecution of radicals starting around 1917 and continuing for several decades thereafter was a mixed bag. Clearly, most of the defendants were guilty of publicly defying the law as it then stood. As such, prosecution was warranted. Certainly, in retrospect and to some at the time, the laws in question were generally unconstitutional and unjust. To a certain extent then, the criminal defendants in these cases were often change agents pushing society to a better conception of constitutional rights. Societal change is generally slow to occur however, and few of the defendants experienced the benefits of the changes for which they campaigned. Should the defendants in these cases be viewed as defiers of the law, which they were at the time, or should they be viewed as constitutional pioneers to whom we owe a debt of gratitude. This issue arises frequently with respect to defiance of the law.

XIII. TULSA MASSACRE OF 1921

The Tulsa Massacre of 1921 is one of the most ignominious and tragic events in American history. African Americans had been attracted to Tulsa, Oklahoma and had formed a successful community there, the Greenwood District, which became known as the “Black Wall Street.”⁴³⁹ The incident started when a Black shoe shine attendant allegedly molested a White female elevator operator.⁴⁴⁰ He was arrested and confined in the

438. See Rohr, *supra* note 436, at 1–3 (celebrating the evolution of First Amendment jurisprudence and the freedom to associate).

439. TIM MADIGAN, *THE BURNING: MASSACRE, DESTRUCTION, AND THE TULSA RACE MASSACRE OF 1921*, at 3 (St. Martin’s Publ’g Grp. 2021); see ALFRED L. BROPHY, *RECONSTRUCTING THE DREAMLAND: THE TULSA RIOT OF 1921: RACE, REPARATIONS, AND RECONCILIATION* 10 (2002) (characterizing Greenwood as “a vibrant African American community whose entrepreneurial verve led some to call its main thoroughfare ‘the black Wall Street’”).

440. JAMES S. HIRSCH, *RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY* 78 (2002); SCOTT ELLSWORTH, *THE GROUND BREAKING: AN AMERICAN CITY AND ITS SEARCH FOR JUSTICE* 18 (2021).

local jail.⁴⁴¹ A lynch mob gathered outside of the jail.⁴⁴² A group of armed African Americans gathered to prevent a lynching.⁴⁴³ There was an attempt to disarm one of the African Americans.⁴⁴⁴ A gun battle broke out and twelve were killed.⁴⁴⁵ That evening, a White mob burned thirty-five blocks of Greenwood to the ground killing at least 100 African Americans.⁴⁴⁶ It was alleged that airplanes were used to drop bombs on Black owned structures and to shoot fleeing Black citizens.⁴⁴⁷ The remaining, now homeless, African Americans were placed in internment camps.⁴⁴⁸ The Oklahoma National Guard arrived and martial law was declared.⁴⁴⁹ This tragic event was covered up and ignored for decades.⁴⁵⁰ Eighty years later, the Oklahoma Commission to Study the Tulsa Race Riots of 1921 recommended that reparations be paid to survivors and their descendants.⁴⁵¹ The Tulsa Riot of 1921 was an instance in which the government and various private White citizens of Tulsa were clearly defying the law by engaging in violent terroristic and murderous activity.⁴⁵² The African American community of Tulsa was free from blame.

XIV. PROHIBITION AND THE DEFIANCE OF PROHIBITION

The temperance movement leading to Prohibition and the consistent willful violations of prohibition provide a study of defiance of law on both sides of a controversial political issue. The temperance movement had been a force in American political life from before the American Revolution and the ratification of the Constitution.⁴⁵³ However, it gained momentum in the 19th century, particularly following the Civil War especially with the

441. HIRSCH, *supra* note 440, at 79; Yuliya Parshina-Kottas et al., *What the Tulsa Race Massacre Destroyed*, N. Y. TIMES (May 24, 2021) <https://www.nytimes.com/interactive/2021/05/24/us/tulsa-race-massacre.html> [https://perma.cc/DA5B-E4RK].

442. HIRSCH, *supra* note 440, at 81.

443. *Id.* at 82–83.

444. *Id.* at 89.

445. *Id.* at 89–90.

446. ELLSWORTH, *supra* note 440, at 31–33.

447. *Id.* at 32–33.

448. HIRSCH, *supra* note 440, at 142–43.

449. *Id.*; Scott Ellsworth, *Tulsa Race Massacre*, ENCYCLOPEDIA OF OKLA. HIST. & CULTURE (Jan. 15, 2010), <https://www.okhistory.org/publications/enc/entry.php?entry=TU013> [https://perma.cc/63FM-5QVY].

450. HIRSCH, *supra* note 440, at 168–169; ELLSWORTH, *supra* note 440.

451. ELLSWORTH, *supra* note 440, at 248–49.

452. *Id.*

453. EDWARD BEHR, PROHIBITION: THIRTEEN YEARS THAT CHANGED AMERICA 13–15 (1996).

founding of the Women's Temperance Union in 1873.⁴⁵⁴ The temperance supporters, or "drys" as they were known believed that public consumption of alcohol resulted in moral decay, economic waste, family violence and crime.⁴⁵⁵ The movement was inspired by certain Protestant denominations which were spiritually opposed to drinking as well as a rural sensibility that urban saloons were dens of corruption.⁴⁵⁶ To at least some extent, the battle between drys and wets became a battle between different Christian denominations, between nativists and European immigrants and between rural and urban America.⁴⁵⁷ Eventually, the Women's Temperance Union was displaced at the head of the movement by the Anti-Saloon League.⁴⁵⁸

For the most part, the temperance movement was a peaceful political movement that attempted to influence legal change.⁴⁵⁹ However, there were notable exceptions. Perhaps the most famous of these was Carrie Nation who repeatedly entered saloons in Kansas, which had already adopted prohibition, and smashed liquor bottles with a hatchet.⁴⁶⁰ She was arrested and imprisoned on several occasions garnering much publicity, mostly negative, for the temperance movement.⁴⁶¹ Clearly, her destruction of property was vigilante action in violation of the law, however zealous her motivation for the cause.

The Prohibitionist movement was legislatively successful, at least temporarily.⁴⁶² By enacting a constitutional amendment authorizing the income tax, the temperance movement was able to meet the argument that Prohibition would deprive the nation of a crucial source of revenue—the tax on alcoholic beverages.⁴⁶³ By engaging in alliance with suffragettes supporting an amendment to the Constitution guaranteeing women the

454. *Id.* at 36–38.

455. *Id.*

456. *Id.* at 26–27.

457. *Id.* at 47–49.

458. *Id.* at 52.

459. *Id.* at 35.

460. *Id.* at 40–44.

461. *Id.*

462. *Prohibition: A Case Study of Progressive Reform*, LIBR. OF CONG., <https://www.loc.gov/classroom-materials/united-states-history-primary-source-timeline/progressive-era-to-new-era-1900-1929/prohibition-case-study-of-progressive-reform/#:~:text=The%20prohibition%20movement%20achieved%20initial,successful%20in%20more%20urban%20states> [https://perma.cc/VTS4-VD4A].

463. DANIEL OKRENT, *LAST CALL: THE RISE AND FALL OF PROHIBITION* 55–58 (2010). Ken Burnes produced a documentary on prohibition inspired by Daniel Okrent's book. *Prohibition* (PBS television broadcast Oct. 2, 2011).

right to vote, the Anti-Saloon League accomplished at least two things: expanding the coalition supporting the Prohibition Amendment as well as enfranchising a group, who on the whole, were likely to favor Prohibition.⁴⁶⁴ A number of state legislatures enacted prohibition laws followed by the ratification of the Eighteenth Amendment banning “the manufacture, sale and transportation” of alcoholic beverages.⁴⁶⁵ The Volstead Act was passed by Congress as Enabling legislation for the Eighteenth Amendment.⁴⁶⁶ Prohibition lasted for thirteen years until 1933 when the Eighteenth Amendment was repealed by the Twenty-First Amendment.⁴⁶⁷ During that period there was widespread defiance of the law especially by organized crime which imported and distributed alcoholic beverages and by “speakeasies” which served them.⁴⁶⁸

The response to Prohibition, especially in urban areas, was perhaps the most extreme instance of defiance of legal authority in United States history. Unlike the Civil Rights Movement of the 1950s and 1960s, the defiance was private rather than public.⁴⁶⁹ And it was not part of a protest movement to change the law. Rather, it was simply to make money, or to have a good time.⁴⁷⁰ The defiance of the law during prohibition stemmed mostly from a difference in rural and urban values.⁴⁷¹ To use modern terminology, it was part of a “culture war.” The Eighteenth Amendment and the Volstead Act gave rise to massive bootlegging.⁴⁷² This was criminal activity to be sure. However, the public demand which made bootlegging a profitable business rendered it something more than ordinary criminal activity. It became widespread defiance of the law. Prohibition may have led to the large-scale creation of organized crime.⁴⁷³ Moon shining operations developed

464. Olivia B. Waxman, *The Surprisingly Complex Link Between Prohibition and Women's Rights*, TIME (Jan. 18, 2019) <https://time.com/5501680/prohibition-history-feminism-suffrage-metoo/> [<https://perma.cc/9U3E-L8AD>].

465. BEHR, *supra* note 453, at 77–80.

466. *Id.*

467. *Id.* at 235–36.

468. *Id.* at 87–89.

469. *Prohibition: A Case Study of Progressive Reform*, *supra* note 462.

470. Mark Thornton, *Alcohol Prohibition Was a Failure*, CATO INST. POL'Y ANALYSIS NO. 157, <https://www.cato.org/policy-analysis/alcohol-prohibition-was-failure> [<https://perma.cc/JY8Y-6VGM>].

471. *Hicks and Slicks: The Urban-Rural Confrontation of the Twenties*, AUSTIN CMTY. COLL., <https://www.austincc.edu/lpatrick/his1302/hicks.html> [<https://perma.cc/7SEM-EUKK>].

472. Thornton, *supra* note 470.

473. OKRENT, *supra* note 463, at 320, 365–67.

throughout the South to provide illegal alcohol.⁴⁷⁴ Illegal stills were often operated by otherwise law-abiding people to profit from defiance of a particularly unpopular law.⁴⁷⁵ Speakeasies proliferated in urban areas to serve the thirsty public.⁴⁷⁶ This was not open defiance of law to be sure that in some sense, the defiance took place privately, but it was often semi-open in that enforcement officials were often paid off to look away.⁴⁷⁷ The case for the enforcement of prohibition laws was not helped by the fact that high federal officials, including presidents and congressmen, fairly openly defied it.⁴⁷⁸

The case for repeal included arguments that prohibition encouraged organized crime, deprived the nation of much needed tax revenue on liquor and illustrated the futility of attempting to legislate morality, at least where a significant portion of the nation did not accept the underlying moral principles embodied in prohibition giving rise to cynicism with respect to the law and law enforcement, as well as deaths and maiming attributable to adulterated alcohol.⁴⁷⁹ With the triumph of Franklin D. Roosevelt in the election of 1932, the Twenty-First Amendment—repealing the Eighteenth Amendment—was ratified in 1933, effectively ending the prohibition era.⁴⁸⁰

The failed experiment in prohibition has taught that it is probably impossible to enforce morals legislatively when a significant portion of the public rejects the underlying moral sentiments and is prepared to defy enforcement of the law. The failed experiment of prohibition injected in the public at large a cynical attitude toward law, law enforcement and authority in general. Prohibition provides an object lesson in the limits of law. It illustrates that at some point, and it may be difficult to know in advance where that point is, the law cannot effectively prohibit the acquisition of something that a substantial segment of the public desires. A black market will develop to provide the forbidden substance.

474. BEHR, *supra* note 453, at 172.

475. *Id.*

476. OKRENT, *supra* note 463, at 207–09.

477. *Id.* at 208, 319–20.

478. BEHR, *supra* note 453, at 85, 115.

479. OKRENT, *supra* note 463, at 373–76.

480. *Id.* at 351–54; ADAMIC, *supra* note 262, at 235.

XV. DEFIANCE BY THE JEHOVAH'S WITNESSES AND THEIR OPPONENTS

During the 1930s and 1940s, a group consistently prosecuted for public defiance of law was the Jehovah's Witnesses, who, through public preaching and hand-billing, managed to be arrested and convicted of various local offenses such as disturbing the peace.⁴⁸¹ Indeed, much modern Free Speech and Free Exercise of Religion jurisprudence doctrine is attributable to litigation on behalf of the Jehovah's Witnesses.⁴⁸² Some of the persecution of the Witnesses began as they vigorously attacked other religions, especially Roman Catholics.⁴⁸³ Given their commitment to provocative public preaching, the Jehovah's Witnesses regularly violated local ordinances prohibiting disorderly conduct and distributing literature without a license.⁴⁸⁴ They were frequently arrested and convicted finding relief consistently in the United States Supreme Court.⁴⁸⁵

Perhaps the most celebrated cases of defiance involved the refusal of Jehovah's Witness children to recite the Pledge of Allegiance or salute the flag since, according to their religious beliefs, that would amount to worshiping a graven idol. In 1935, William and Lillian Gobitis were expelled from the Minersville, Pennsylvania public school for refusing to salute the American flag in violation of state law. The Supreme Court upheld the expulsions.⁴⁸⁶ The *Gobitis*⁴⁸⁷ decision was issued in the earliest days of World War II, a time of intense patriotic fervor. Following the *Gobitis* decision, Jehovah's Witnesses were subjected to extreme legal harassment and physical brutality nationwide.⁴⁸⁸ Three years later, two Jehovah's Witness children were sent home from school in West Virginia for refusal to salute the flag.⁴⁸⁹ In *West Virginia Board of Education v.*

481. SHAWN FRANCIS PETERS, JUDGING JEHOVAH'S WITNESSES 33 (2000).

482. Among the major cases that the Witnesses won before the Supreme Court were *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Marsh v. Alabama*, 326 U.S. 501 (1946); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Martin v. City of Struthers*, 319 U.S. 141 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Jamison v. Texas*, 318 U.S. 413 (1943); *Largent v. Texas*, 318 U.S. 418 (1943); *Lovell v. City of Griffin*, 303 U.S. 444 (1938); *Schneider v. New Jersey*, 308 U.S. 147 (1939). Even cases in which the Witnesses did not prevail they established significant principles of First Amendment doctrine in *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); *Cox v. New Hampshire*, 312 U.S. 569 (1941); *Jones v. Opelika*, 316 U.S. 584 (1942).

483. PETERS, *supra* note 481, at 34.

484. *Id.* at 12.

485. *Id.*

486. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586, 600 (1940).

487. *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940).

488. PETERS, *supra* note 481, at 95.

489. *West Virginia Bd. Of Educ. v. Barnette*, 319 U.S. 624, 629–30 (1943).

Barnette,⁴⁹⁰ the Supreme Court, in a classic opinion by Justice Jackson, reversed *Gobitis* and held that the children had a right pursuant to the First Amendment to refuse a compulsory flag salute requirement.⁴⁹¹ The Court's opinion in *Barnette* is one of its greatest explications of the meaning of freedom of speech guaranteed by the Constitution. Harassment of the Witnesses continued after the *Barnette* decision however without legal sanction.⁴⁹²

The Jehovah's Witnesses continually, during this period, willfully defied the law acting on deeply held religious convictions. They were arrested, convicted and often vindicated by the courts, especially the Supreme Court.⁴⁹³ In retrospect, they appear to be courageous civil liberties crusaders to whom we all owe a debt. But at the time, they couldn't know or appreciate that. They were annoying to the public.⁴⁹⁴ Rather, they publicly violated laws which infringed their religious convictions and were quite willing to accept the legal consequences of their actions.

XVI. *BROWN V. BOARD OF EDUCATION*, SCHOOL DESEGREGATION AND RESISTANCE

In 1954, in *Brown v. Board of Education*, the Supreme Court unanimously declared that legally enforced racial segregation in public schools violated the Fourteenth Amendment of the Constitution.⁴⁹⁵ Racial segregation in the South and in many border states had been practiced for decades, at least in partial reliance on the Court's 1896 decision in *Plessy v. Ferguson*.⁴⁹⁶ Many states and individual school districts, including the Topeka School District, the defendant in *Brown*, complied with the decision readily, but some did not.⁴⁹⁷ In oral arguments focusing on the remedy, the state's attorney for South Carolina would not commit to compliance by the state.⁴⁹⁸ The

490. *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

491. *Id.* at 642.

492. *Id.*

493. PETERS, *supra* note 481, at 12.

494. *Id.* at 33–34.

495. *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954).

496. *Plessy v. Ferguson*, 163 U.S. 537 (1896) (holding legislation requiring railways to provide accommodations for the separation of “white and colored persons” are constitutional).

497. Transcript of Oral Argument at 18, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (No. 101) at 10.

498. *Id.* at 18.

justices assumed that there would be resistance to school integration but probably underestimated the breadth and intensity of that resistance.⁴⁹⁹

The crucial case with respect to defiance of judicial desegregation mandates came with respect to Central High School in Little Rock, Arkansas. In an attempt to resist integration of Central High, Governor Orville Faubus attempted to resurrect the long-discredited doctrine of interposition.⁵⁰⁰ He argued that in order to protect the citizens of Arkansas from overreaching by the federal government, he would interpose Arkansas law enforcement officers between the federal government and the high school.⁵⁰¹ In negotiations with President Eisenhower, Faubus backed down, but he declined to order Arkansas law enforcement to protect the nine African American students assigned to Central High.⁵⁰² As a result, defiance by a state official was replaced by defiance by an angry mob.⁵⁰³ Eventually, President Eisenhower sent in National Guard troops and Central High was desegregated.⁵⁰⁴ In response to Governor Faubus's resistance to a federal district court order, the Supreme Court published its opinion in *Cooper v. Aaron*,⁵⁰⁵ signed, as if co-authored, by all nine justices.⁵⁰⁶ The Court obviously viewed this as a severe challenge to its authority, as ultimate constitutional interpreter as well it was. Perhaps, the Court may have overstated its role as ultimate and exclusive interpreter of the Constitution, however it saw itself as backed into a corner as had not been the case since the early days of the republic.

Despite the strong language employed by the Court in *Cooper v. Aaron*, resistance to desegregation decrees did not cease in 1958 but continued for the better part of another decade.⁵⁰⁷ The Court has been criticized for not standing behind lower federal courts who were bearing most of the brunt of resistance to desegregation.⁵⁰⁸ Indeed, some school districts resisted desegregation with vigor.⁵⁰⁹ Prince Edward County, Virginia closed its

499. *Id.* at 14.

500. JUAN WILLIAMS, *EYES ON THE PRIZE* 97 (1987).

501. *Id.* at 99.

502. *Id.* at 102–03.

503. MICHAEL KLARMAN, *FROM JIM CROW TO CIVIL RIGHTS* 326 (2004).

504. *Id.*

505. *Cooper v. Aaron*, 358 U.S. 1 (1958).

506. *Id.* at 4.

507. *See* KLARMAN, *supra* note 503, at 373, 434–36 (discussing civil rights efforts and various states' opposition to desegregation).

508. *Id.* at 343.

509. *Id.*

public schools rather than desegregate.⁵¹⁰ The Court invalidated this tactic as inconsistent with the district court's mandate.⁵¹¹

Eventually, federal aid conditioned on specific progress on desegregation brought hard core resistance to an end.⁵¹² The resistance to desegregation orders illustrated that over time, the federal government could overcome intense resistance if all three branches of government employed the means at their disposal to address the problem.

XVII. THE CIVIL RIGHTS MOVEMENT

Perhaps the most prominent example of defiance of existing law as a means of challenging the legitimacy of that law involves the Civil Rights Movement of the 1950s and 1960s especially in the American South. Dr. Martin Luther King, Jr. developed the strategy of non-violent civil disobedience as a means of challenging and hopefully changing laws requiring racial segregation.⁵¹³ Dr. King wrote and spoke extensively explaining the theory.⁵¹⁴ The genesis of the Civil Rights Movement dated to the reconstruction era following the abolition of slavery.⁵¹⁵ Given years of oppression, especially in the South, the modern civil rights movement did not emerge until the mid-nineteen fifties.⁵¹⁶

The non-violent protest movement probably started in 1955 when Rosa Parks refused to relinquish her seat on a bus in Montgomery, Alabama, as required by a local ordinance.⁵¹⁷ She was arrested.⁵¹⁸ Miss Parks was a civil rights activist who was well aware that she was violating the law.⁵¹⁹ She took this action to publicly challenge the legitimacy of the law.⁵²⁰ Her arrest occurred in a context of rising anger in the African American community

510. *Griffin v. Cnty. Sch. Bd. of Prince Edward*, 377 U.S. 218, 222–23 (1964).

511. *See id.* at 225 (acknowledging the school district had been one of the parties in the five cases decided in *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

512. The Fifth Circuit Court of Appeals decision in *United States v. Jefferson Cnty. Bd. Of Educ.*, 372 F.2d 836, 847 (1966) is often considered the key case in which Judge Wisdom tied desegregation efforts to the 1965 HEW guidelines.

513. GARROW, BEARING THE CROSS, *supra* note 419, at 619.

514. *Id.* at 609–24.

515. *Id.*

516. *Id.* It may be with the decline of lynching in the South, African Americans became more assertive. GILJE, *supra* note 47, at 152.

517. GARROW, BEARING THE CROSS, *supra* note 419, at 11–14.

518. *Id.* at 12.

519. *Id.* at 13.

520. *Id.* at 14.

over segregation and mistreatment.⁵²¹ There had been a boycott of local bus segregation a few years earlier in Baton Rouge, Louisiana.⁵²² A Black teenager, Emmet Till, had been murdered by White men in Mississippi earlier in the year.⁵²³ There was a lengthy history of Montgomery bus drivers abusing African American passengers.⁵²⁴

Following the arrest of Rosa Parks, a meeting was called by the local chapter of the NAACP to determine how to respond.⁵²⁵ A young local minister, Dr. Martin Luther King, Jr was selected to lead the protest.⁵²⁶ The organization Montgomery Improvement Association (known as the MIA) called for a boycott of the Montgomery buses.⁵²⁷ The boycott lasted for a year until the Supreme Court affirmed a decision of a three judge district court holding that the segregation of the buses in Montgomery was unconstitutional in 1956 in *Gayle v. Browder*.⁵²⁸ Despite the fact that Dr. King's home was firebombed and that he was arrested and jailed for conspiring to interfere with business under a local ordinance, the Montgomery bus boycott was an enormous success providing inspiration and a model for future civil rights action.⁵²⁹ It also thrust Dr. King to the forefront of the Civil Rights Movement.⁵³⁰

Perhaps the next celebrated act of defiance of law as part of the Civil Rights Movement was the lunch counter sit-ins at Woolworth's stores in Greensboro, North Carolina in 1960 to protest local segregation laws.⁵³¹ The Greensboro four sat at the segregated lunch counters at Woolworths and after being refused service, declined to leave.⁵³² This was not the first sit-in but became the most famous.⁵³³ The group of protestors swelled to

521. *Id.* at 12–13.

522. KLARMAN, *supra* note 503, at 371.

523. *Id.* at 424–25.

524. GARROW, BEARING THE CROSS, *supra* note 419, at 11–13.

525. *Id.* at 12.

526. *Id.* at 82. The boycott was not intended to end racial segregation on the busses but merely to modify it so that an African American would not need to relinquish his or her seat to a White person. *Id.* at 24. Under Dr. King's proposal, African Americans would still be required to sit in the back of the bus.

527. GARROW, BEARING THE CROSS, *supra* note 419, at 14.

528. *Gayle v. Browder*, 352 U.S. 903 (1956).

529. GARROW, BEARING THE CROSS, *supra* note 419, at 83.

530. *Id.*

531. KLARMAN, *supra* note 503, at 373.

532. *Id.*

533. DAVID HALBERSTAM, THE CHILDREN 234 (1998).

over 300 in the next few days.⁵³⁴ The sit-ins spread throughout the South.⁵³⁵ The sit-ins transformed into a boycott of stores operating segregated lunch counters.⁵³⁶ The loss of business pursuant to the boycotts prompted the stores to desegregate their lunch counters.⁵³⁷

In spring 1961, The Freedom Riders movement began.⁵³⁸ Civil rights activists boarded buses bound for the South to protest segregation of transportation in the South.⁵³⁹ The Freedom Riders were not defying federal law although they were in violation of petty local ordinances. They were severely beaten by angry mobs in various southern cities while state and federal law enforcement declined to intervene and provide protection.⁵⁴⁰ In this instance, it was the violent mobs rather than the civil rights activist who were acting in defiance of law.

The Civil Rights Movement scored a major victory with Dr. King's direct action protest movement in Birmingham, Alabama in spring 1963.⁵⁴¹ Protest marches were scheduled to attempt to reach the city center.⁵⁴² The organizers of the marches expected that hard-core segregationist Commissioner of Public Safety, Bull Connor, would overreact to the challenge to his authority and use force which the national media would cover and bring national publicity to the violence directed against African Americans in the South.⁵⁴³ He did just that turning police dogs and water hoses against the protestors, many of whom were children.⁵⁴⁴ Pictures of this violent reaction were featured in the national media.⁵⁴⁵ This one event was probably the point at which the civil rights non-violence movement and Dr. King began to achieve victory.⁵⁴⁶ It was recognized in Birmingham and later in Selma, that it was not the peaceful protest march

534. *Id.* at 93; *Greensboro Sit-In*, HIST. (Jan 25, 2022), <https://www.history.com/topics/black-history/the-greensboro-sit-in> [<https://perma.cc/E78C-S93P>].

535. *Id.* at 234.

536. *Id.*

537. *Id.*

538. THOMAS REEVES, *A QUESTION OF CHARACTER* 339 (1992).

539. *Id.*

540. *Id.*

541. GARROW, *BEARING THE CROSS*, *supra* note 419, at 231–86 (describing the events of the Birmingham march and the aftermath).

542. *Id.* at 248–49.

543. *Id.* at 248–49. Wyatt Walker who directed the protest for the Southern Christian Leadership Conference later explained, “We did with design precipitate crises, crucial crises in order to expose what the black community was up against.” *Id.* at 248.

544. KLARMAN, *supra* note 503, at 434.

545. *Id.* at 434–35.

546. *Id.* at 435–36.

that achieved results, but rather the violent overreaction of law enforcement officials covered in detail by the national media that made the difference.⁵⁴⁷ It was Bull Connor's police dogs and fire hoses instead of Dr. King's peaceful march that achieved the ends of the movement.

The cases of *Walker v. City of Birmingham*⁵⁴⁸ and *Shuttlesworth v. City of Birmingham*⁵⁴⁹ illustrate the Supreme Court's approach to defiance of legal authority. Birmingham, Alabama had been a hotbed of civil rights protest throughout the Spring of 1963.⁵⁵⁰ Dr. Martin Luther King, Jr. had been arrested and wrote his famous letter from the Birmingham jail.⁵⁵¹ Commissioner Bull Connor had inadvertently evoked strong national sympathy for the civil rights movement by turning police dogs and fire hoses on peaceful protestors.⁵⁵² The controversial Children's Crusade had taken place.⁵⁵³

A protest march had been planned for Easter Sunday.⁵⁵⁴ A local ordinance prohibited the march without a permit.⁵⁵⁵ A local judge issued an injunction against the march specifically naming some of the organizers and including the text of the ordinance in the injunction.⁵⁵⁶ Nevertheless the march took place.⁵⁵⁷ One group of marchers, who violated the ordinance but who had not been named in the injunction were arrested for violating the ordinance.⁵⁵⁸ In the *Shuttlesworth* case, they successfully argued to the Supreme Court that the ordinance was unconstitutional and that their convictions should be reversed.⁵⁵⁹ However, another group of marchers who were named in the injunction were not so fortunate. They had been held in contempt for violating the injunction.⁵⁶⁰ In *Walker*, the Supreme Court in a 5–4 decision upheld their convictions on the ground that when a court issues an order to named parties, the only proper way to

547. *Id.* at 436.

548. *Walker v. City of Birmingham*, 388 U.S. 307 (1967).

549. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

550. KLARMAN, *supra* note 503, at 434–35.

551. TAYLOR BRANCH, PILLAR OF FIRE 47–49 (1998).

552. KLARMAN, *supra* note 503, at 434–35.

553. HALBERSTAM, *supra* note 533, at 439–43.

554. *Walker v. City of Birmingham*, 388 U.S. 307, 308–309, 311 (1967).

555. *Id.* at 309.

556. *Id.*

557. *Id.* at 311.

558. *Id.* at 312.

559. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969).

560. *Walker v. City of Birmingham*, 388 U.S. 307, 312 (1967).

challenge it is through the legal process.⁵⁶¹ In other words, a party could march now and challenge a legislative act later, but not so with a judicial order. Even if illegal, the judicial order could only be challenged through the appropriate legal process. Defiance and subsequent challenge were impermissible.

A cynical view of the distinction might suggest that the courts were overly sensitive to defiance of their own authority. Why shouldn't the challenge now through appropriate channels, march later principle apply to legislation as well as injunctions? Or alternatively, why shouldn't defiance of either, assuming a successful judicial challenge be acceptable?

Along with the Birmingham protests, the Selma march of 1965 was an iconic moment for the Civil Rights Movement.⁵⁶² Various civil rights groups organized a march from Selma, Alabama to the capital in Montgomery, Alabama—a distance of 54 miles—to protest for greater legal protection of voting rights.⁵⁶³ Three separate marches commenced from Selma.⁵⁶⁴ The first march on March 7, 1965 was turned back at the Edmund Pettis Bridge by state troopers and vigilantes who violently attacked the peaceful marchers.⁵⁶⁵ The second march took place two days later on March 9th.⁵⁶⁶ The troopers on the bridge stepped aside to allow the marchers to pass, however Dr. King, acting pursuant to a federal injunction, led the marchers back to a church in Selma.⁵⁶⁷ The third march began on March 21st.⁵⁶⁸ The marchers were escorted by the Alabama National Guard as well as FBI agents.⁵⁶⁹ This time, the marchers made it to Montgomery.⁵⁷⁰ The federal Voting Rights Act of 1965 was passed on August 6, 1965.⁵⁷¹ Selma, like Birmingham, was successful in advancing the civil rights cause, not because of the peaceful protest itself but rather because of national media coverage of the violent overreaction of the local

561. *Id.* at 320.

562. *See generally* DAVID GARROW, PROTEST AT SELMA (1978) [hereinafter GARROW, PROTEST] (detailing the planning and outcomes of various marches advancing voting rights in Selma, Alabama).

563. *Id.* at 39.

564. *Id.* at 66.

565. *Id.* at 76.

566. *Id.*

567. *Id.*

568. *Id.* at 115.

569. *Id.*

570. *Id.* at 116.

571. *Id.* at 133.

authorities.⁵⁷² The organizers of the protests anticipated the violent reaction and deliberately provoked it through peaceful protest.⁵⁷³

Civil rights protestors defied many other laws as well. In some instances, the laws were either passed or administered for the purpose of targeting and quashing civil rights protests.⁵⁷⁴ Such laws were regularly invalidated.⁵⁷⁵ Other laws were deemed to have legitimate purposes and were upheld in the face of defiance.⁵⁷⁶ These included conducting a protest in a near jail for instance.⁵⁷⁷

The defiance of law by the Civil Rights Movement is celebrated today as historic activity.⁵⁷⁸ There are several explanations for this. Perhaps it is because the segregation laws which the protest was aimed at were so unjust. Perhaps it is also because the defenders of segregation used such violence in defense of the laws. Perhaps, another reason is because under Dr. King's stewardship, the protests, though defiant of existing laws, proceeded non-violently. It is also significant that the protests were successful in ending legal segregation in the South.⁵⁷⁹ Nothing succeeds like success. Defiance of law which leads to a significant change in legal and social norms tends to be accepted, at least in retrospect.

XVIII. RESISTANCE TO SCHOOL PRAYER DECISIONS

In 1962, in *Engel v. Vitale*,⁵⁸⁰ the Supreme Court held that it was a violation of the Establishment Clause of the First Amendment for a public school to require the recitation of a prayer.⁵⁸¹ The following year, the Court held that the reading of the Bible over the intercom at the beginning of the school day also violated the Establishment Clause.⁵⁸² There is a consensus that the school prayer decisions are among the most defied decisions of the United States Supreme Court.⁵⁸³ In many school districts, mandatory prayer

572. *Id.* at 228.

573. *Id.* at 135.

574. *Id.* at 87, 132.

575. *Id.* at 132.

576. *Adderley v. Florida*, 385 U.S. 39, 48 (1966).

577. *Id.* at 40.

578. GARROW, PROTEST, *supra* note 562, at 133.

579. *Id.*

580. *Engel v. Vitale*, 370 U.S. 421 (1962).

581. *Id.* at 436.

582. *Sch. Dist. of Abington v. Shempp*, 374 U.S. 203, 227 (1963).

583. LUCAS POWE, THE WARREN COURT AND AMERICAN POLITICS 363 (2000); BRUCE DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER 147, 183 (2007).

had been a part of public education as long as public education had existed.⁵⁸⁴ Given this tradition as well as the importance that many attached to prayer in public schools, the decisions were frequently seen as a secular mandate imposed by a distant, arrogant, and unresponsive institution.⁵⁸⁵ As such, for many, the decisions lacked legitimacy and should be ignored.⁵⁸⁶ A reason why defiance was successful, was due to lack of effective enforcement capability.⁵⁸⁷ If a community believed that regardless of what the Court in Washington, D.C. said, prayer in schools mattered and was appropriate, there were limits to what federal authorities could do to enforce the decisions in *Engel* and *Schempp*. Prayer would occur in local schools far removed from media limelight.⁵⁸⁸ If the community supported school prayer, it would take a principled and courageous parent to challenge the practice recognizing that his child and family would be ostracized or worse. For most objectors, the best course was simply to ignore the defiance of the schools. The defiance generally was not reduced to an easily challengeable written policy. Rather, it simply happened and almost certainly still happens.

The widespread defiance of the school prayer decisions illustrates that the courts, as well as other legal institutions, lack power to impose their will against popular cultural beliefs and traditions absent dedicated executive enforcement power. And if the judicial mandate runs sufficiently counter to widely and deeply held cultural values, such enforcement authority may be difficult, if not impossible to marshal. Those who control enforcement authority, unlike the federal judiciary will probably be electorally accountable and will be disinclined to devote resources to the enforcement of unpopular laws.

XIX. THE 1960S: VARIOUS PROTEST MOVEMENTS, ESPECIALLY ANTI-WAR PROTESTS

The 1960s is seen as a decade of defiance and protest. Protests and defiance focused on civil rights (discussed above), the Vietnam War and the draft, women's rights, and gay rights. Perhaps, the anti-segregation protests in the South led by Dr. King, legitimized and normalized large scale protest including defiance of law as a means of affecting legal and societal change. The Vietnam War protest was also at the heart of defiance of law in the

584. POWE, *supra* note 583, at 363; DIERENFIELD, *supra* note 583, at 183.

585. POWE, *supra* note 583, at 363; DIERENFIELD, *supra* note 583, at 147.

586. DIERENFIELD, *supra* note 583, at 147.

587. POWE, *supra* note 583, at 363; DIERENFIELD, *supra* note 583, at 147, 183.

588. DIERENFIELD, *supra* note 583, at 183.

1960s.⁵⁸⁹ Some of the protest arose from genuine disagreement with the war. However, the war was personalized by the draft. Many who paid slight interest to politics and foreign affairs became involved in widespread protest movements when they were placed in danger of being drafted and sent to Southeast Asia where they might well be killed or seriously maimed.⁵⁹⁰ One at least must wonder whether the 1960s as a decade of protest and defiance would have looked different, absent the draft. Still, there was a legitimate call for change in social norms and various institutions. Perhaps protest movements would have materialized anyway though it is likely that the different protest movements fed off and inspired each other. In other words, the 1960s may have been “the perfect storm.”

Vietnam War and draft protests readily involved overt defiance of law especially in the form of burning draft cards and on occasion the American flag.⁵⁹¹ Burning a draft card was clearly illegal,⁵⁹² however, violating this particular law as a means of political protest may have paled beside the prospect of being drafted and perhaps killed in the war.

A prominent example of defiance of law involved the sometimes-violent protests outside of the Democratic Convention in Chicago in 1968.⁵⁹³ Seven leaders of the demonstrations, “the Chicago Seven,” were arrested and prosecuted in what turned out to be a show trial and media circus.⁵⁹⁴ The defendants, mostly hard-core activists, refused to cooperate with the court and obey its rules.⁵⁹⁵ One of the defendants, Black Panther Bobby Seale, was bound and gagged to prevent outbursts.⁵⁹⁶ The situation was complicated by the arbitrary approach of Judge Julius Hoffman.⁵⁹⁷ The guilty verdicts were reversed by the Seventh Circuit Court of Appeals.⁵⁹⁸ Though the trial of the Chicago Seven was an extreme case, it came to represent the chaos and defiance of the 1960s. Shooting by the

589. GILJE, *supra* note 47, at 175.

590. *Vietnam War Protest*, HIST. (Nov. 1, 2022), <https://www.history.com/topics/vietnam-war/vietnam-war-protests#antiwar-movement-begins> [<https://perma.cc/2UCF-57VU>].

591. *See* *United States v. O'Brien*, 391 U.S. 367, 388 (1968) (discussing the legality of burning draft cards as protest).

592. The Court so confirmed in *O'Brien*, 391 U.S. at 367.

593. NORMAN MAILER, *MIAMI AND THE SIEGE OF CHICAGO* 22 (1968).

594. JON WIENER, *CONSPIRACY IN THE STREETS* 3, 56 (2006).

595. *Id.* at 3.

596. *Id.* at 53.

597. *Id.* at 15.

598. *United States v. Dellinger*, 472 F.2d 340, 409 (7th Cir. 1972).

National Guard of student protestors at Kent State University in May 1970 had an extreme effect.⁵⁹⁹

The women's liberation movement, or second wave feminism also emerged in the late 1960s.⁶⁰⁰ To some extent, it was modeled after the Civil Rights Movement.⁶⁰¹ It tended to be philosophically grounded and did not initially involve explicit defiance of law.⁶⁰²

Not so the gay rights movement. Although, it had been around for a while, the movement officially got its start from the Stonewall Riots of 1969.⁶⁰³ The Stonewall Inn was a gay bar in Greenwich Village owned by the Mafia, which made money by blackmailing some of the wealthier patrons.⁶⁰⁴ The police regularly raided the bar and harassed the patrons.⁶⁰⁵ On June 28, 1969, the police raided the Stonewall and the clientele and others in the neighborhood fought back violently, setting fires and pelting the police with bricks and bottles.⁶⁰⁶ The riot continued on the following evening.⁶⁰⁷ The Stonewall Riots were a response to years of abuse by the police.⁶⁰⁸ The response was violent and defiant of law and order but so was the police harassment that encouraged the response. As with several other riots that have occurred, once frustration and anger reach a boiling point, respect for law and order vanished.

XX. URBAN RIOTS (THE 1960S-ESPECIALLY)

Urban riots have been occurring for over 100 years. Perhaps the most famous early urban riot was the New York Draft Riot of 1863, which continued for four days and was provoked by recently enacted draft laws during the Civil War.⁶⁰⁹ The riots occurred shortly after the Battle of

599. GILJE, *supra* note 47, at 168.

600. Elinor Burkett, *Women's Rights Movement*, BRITANNICA, <https://www.britannica.com/event/womens-movement/Successes-and-failures> [https://perma.cc/6QP7-UR3M].

601. *Id.*

602. *Id.*

603. *See generally* DAVID CARTER, *STONEWALL: THE RIOTS THAT SPARKED THE GAY REVOLUTION* (2010) (explaining the history behind the Stonewall riots of 1969).

604. *Id.* at 1.

605. *Id.* at 82, 161.

606. *Id.* at 138, 141.

607. *Id.* at 137, 184.

608. *See id.* at 79–82, 161 (describing the hostile relationship between patrons of the Stonewall and local police).

609. *See supra* notes 210–17 and accompanying text.

Gettysburg further south.⁶¹⁰ Over the decades, race riots broke out in several big cities including Chicago in 1919,⁶¹¹ Tulsa in 1921,⁶¹² and Harlem in 1948.⁶¹³ These riots were usually provoked by incidents relating to segregation and police brutality.⁶¹⁴ African Americans generally suffered most of the violence.⁶¹⁵

The 1960s were the decade in which “race riots” in major urban areas occurred with some frequency.⁶¹⁶ They were often provoked by police shootings African Americans, however racial discrimination, lack of opportunity, growing Black militancy, and stifling summer heat all contributed to a combustible situation.⁶¹⁷

Though not the first of the 1960s urban riots, the 1965 riots in the Watts segment of Los Angeles was perhaps the most well-known of the disturbances.⁶¹⁸ The riots which occurred over a six-day period from August 11th to August 16th began with a confrontation between police and an intoxicated African American driver, who was hit with a baton by the police in the course of making an arrest.⁶¹⁹ Rumors which distorted the nature of the incident spread throughout the community.⁶²⁰ There had been extreme segregation in housing and a history of police brutality aimed at minorities prior to this incident.⁶²¹

The incident quickly escalated into a full-scale riot.⁶²² Over 14,000 National Guardsmen joined over 2,000 law enforcement officers in an attempt to put down the riot.⁶²³ African Americans threw bricks and bottles at law enforcement officers.⁶²⁴ Several blocks of businesses were burned.⁶²⁵

610. BERNSTEIN, *supra* note 216, at 3.

611. GILJE, *supra* note 47, at 113–14.

612. *Id.* at 114; *see supra* notes 439–52 and accompanying text.

613. GILJE, *supra* note 47, at 157.

614. *Id.* at 158.

615. *Id.* at 159.

616. *Id.* at 158–59.

617. *Id.*

618. *Id.* at 158; *see generally* JERRY COHEN & WILLIAM S. MURPHEY, *BURN BABY BURN* (1967) (providing a detailed account of the Watts riots of 1965).

619. COHEN & MURPHEY, *supra* note 618, at 286.

620. *Id.*

621. *Id.* at 257.

622. GILJE, *supra* note 47, at 157–58.

623. James Queally, *Watts Riots; Traffic Stop Was the Spark that Ignited Days of Destruction in L.A.*, L.A. TIMES (July 29, 2015), <https://www.latimes.com/local/lanow/la-me-ln-watts-riots-explainer-20150715-htmlstory.html> [https://perma.cc/7T79-JMF7].

624. GILJE, *supra* note 47, at 160.

625. *Id.* at 159–60.

White motorists were pulled from their cars and beaten.⁶²⁶ Thirty-four people were killed, mostly residents of Watts, and forty million dollars of property damage was done.⁶²⁷

The causes of the riots were studied in extreme detail. Some pointed to discrimination in housing, lack of economic opportunity, as well as a history of harassment of African Americans by the police.⁶²⁸ Others blamed “outside agitators” waiting for a crisis to exploit.⁶²⁹ Others blamed the overly militaristic response of law enforcement for turning a limited urban disturbance into a full-scale riot and battle.⁶³⁰ Watts may have been one of the first urban uprisings, but hardly the last.⁶³¹ The record shows however legitimate the grievances of the African American community might have been, a full-scale riot broke out with a massive defiance of law, including mass destruction of property, as well as harm to individuals including fire fighters and police.⁶³² This was not legally justifiable by any theory; 1967 became the year of urban riots, however the riot from that year which stands out took place in Detroit.⁶³³ Like Watts, and most other urban areas, there was significant racial discrimination in housing due to redlining and restrictive covenants, high unemployment, especially among young Black citizens, and a pattern of police harassment and brutality.⁶³⁴ As with Watts, a specific incident triggered the riots. A celebration was being held for returning army veterans in a venue unlicensed to sell alcohol, known as a “blind pig.”⁶³⁵ The police learned of the event and arrested eighty-five people, all of whom were African Americans.⁶³⁶ This incident set off six days of rioting in which forty-three were killed, over 7,000 were arrested, and city blocks of businesses, many owned by African Americans, were looted and burned.⁶³⁷ Eventually, Governor Romney deployed the national guard and President Johnson sent in paratroopers to quell the

626. *Id.* at 160.

627. COHEN & MURPHEY, *supra* note 618, at 286–87.

628. GILJE, *supra* note 47, at 159.

629. *Id.* at 158.

630. *Id.* at 160–61.

631. *Id.* at 158.

632. *Id.*

633. *Id.* at 160.

634. *Id.* at 159.

635. *1967 Detroit Riots*, HIST. (Mar. 23, 2021), <https://www.history.com/topics/1960s/1967-detroit-riots> [<https://perma.cc/9UCJ-6RUT>].

636. *Id.*

637. *Id.*

disturbance.⁶³⁸ African American residents of Detroit had many legitimate grievances, but to some, the uprising was seen as an excuse to loot.⁶³⁹ The riots led to attempts to redress the grievances including the passage of fair housing laws and efforts to expand job opportunities for urban youth.⁶⁴⁰ Among the longer-term impacts of the riots were the increase in White flight from Detroit to the suburbs, as well as a strengthening of radical voices and a weakening of moderate voices within the African American community.⁶⁴¹ It was tragic that it took so much death and destruction to cause the political system to respond to the legitimate grievances of the African American community.

The riot in Detroit was the most famous and most deadly race riot to occur in the summer of 1967, but there were 158 others, including in Newark, Atlanta, Cincinnati, Milwaukee, Boston, Minneapolis, Portland, and many other cities.⁶⁴² In most of these cities, the underlying grievances were the same—discriminatory housing practices, high unemployment, and a history of police harassment.⁶⁴³ In most instances, the riots were set off by an encounter between the police and an African American.⁶⁴⁴ In most instances, the disturbances led to massive looting of businesses, many owned by African Americans. The overly militaristic response to these riots may have escalated the violence turning what started out as a disturbance into a pitched battle with law enforcement.

Following the assassination of Dr. Martin Luther King, Jr. in April 1968, riots broke out in over 100 cities.⁶⁴⁵ Perhaps the most prominent of the 1968 urban riots occurred in Washington, D.C. and lasted for five days.⁶⁴⁶ The riot was provoked by incendiary speeches by Stokely Carmichael of the Student Non-Violent Coordinating Committee (SNCC).⁶⁴⁷ More than 1,200 buildings were burned.⁶⁴⁸ Marines guarded the Capitol with the army

638. *Id.*

639. GILJE, *supra* note 47, at 159.

640. *Id.*

641. *1967 Detroit Riot*, *supra* note 635.

642. GILJE, *supra* note 47, at 159.

643. *Id.* at 156, 159.

644. *Id.* at 158.

645. *Id.* at 158.

646. Ben A. Franklin, *Army Troops in Capitol as Negroes Riot*, N.Y. TIMES, Apr. 6, 1968, at 16.

647. *Id.*

648. John Mintz, *Investors Reclaiming Riot Corridors*, WASH. POST, Apr. 7, 1988.

guarding the White House.⁶⁴⁹ The African American economy of the city was devastated.⁶⁵⁰

Riots occurred in many other cities including Chicago, New York, Cincinnati, and Kansas City. Apparently, a potential riot in Boston was defused by James Brown who was performing there.⁶⁵¹ The assassination of Martin Luther King, Jr. was the immediate cause of the riots, but they were primarily fueled by local grievances concerning discrimination, lack of employment opportunity, and harassment by police. Dr. King had preached non-violence.⁶⁵² After the assassination, the non-violent approach seemed pointless and ineffective to many.⁶⁵³ As with the early riots, the response of legislatures, especially the Congress, was to pass anti-discrimination legislation, particularly with respect to housing. The riots probably resulted in more political racial polarization, not less.

XXI. DEFIANCE OF ROE V. WADE AND ABORTION LAW

In 1973, the United States Supreme Court decided *Roe v. Wade*,⁶⁵⁴ recognizing a constitutional right to obtain an abortion prior to viability.⁶⁵⁵ The decision gave rise to a rabid pro-life movement, including Operation Rescue, which in the extreme, murdered doctors who performed abortions, and to a lesser extent, blocked access to abortion clinics.⁶⁵⁶ Murder is obviously against the law and is unacceptable under any circumstances. If the Supreme Court held that abortion is legally protected, as it did in *Roe*, then blocking access to abortion facilities is a defiance of law which the government had the right to prevent and punish. There were cases involving activity designed to deny complete access which were

649. BEN W. GILBERT, TEN BLOCKS FROM THE WHITE HOUSE 89, 98 (1968).

650. *Id.* at 212–14.

651. *James Brown Calms Boston Following the King Assassination*, HIST. (Apr. 2, 2021), <https://www.history.com/this-day-in-history/james-brown-calms-boston-following-the-king-assassination> [<https://perma.cc/A7N9-9AJP>].

652. *Id.*

653. *See id.* (describing the turbulence and uprisings immediately preceding Dr. King's assassination).

654. *Roe v. Wade*, 410 U.S. 113, 165–66 (1973), *holding modified by* Planned Parenthood of Se. Pennsylvania v. Casey, 505 U.S. 833 (1992), and *overruled by* Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022).

655. *Id.* at 165–66.

656. Hill v. Colorado, 530 U.S. 703 (2000); Liam Stack, *A Brief History of Attacks on Abortion Providers*, N.Y. TIMES (Nov. 29, 2015), <https://www.nytimes.com/interactive/2015/11/29/us/30abortion-clinic-violence.html> [<https://perma.cc/HR3R-HWJN>]; GILJE, *supra* note 47, at 170.

relatively easy under a rule of law approach. Preventive action proved to be more difficult. The states attempting to assure access to abortion clinics created “buffer zones” around clinic entrances and adjoining sidewalks prohibiting pro-life advocates from approaching persons within the buffer zone.⁶⁵⁷ The idea made sense as an attempt to ensure access to abortion clinics. At some point, however, the “buffer zone” concept would invade the First Amendment rights of the pro-life advocates.⁶⁵⁸ This produced a clash of constitutional rights and a delicate balance needed to be struck. It was argued that the Court gave preference to the abortion right in resolving the conflict.⁶⁵⁹ Whether or not that was true, the states certainly had a valid interest in protecting the constitutional right to obtain an abortion. Under a rule of law approach, pro-life advocates must accept the legal consequences of their actions, including fines and jail sentences.

XXII. 1992 LOS ANGELES RIOTS

As noted above, most of the severe urban riots occurred in the 1960s, particularly 1967 and 1968. However, the most devastating riot, at least in terms of loss of life and property damage, took place in Los Angeles in 1992.⁶⁶⁰ This riot was provoked by the acquittal of four police officers by a jury charged with the brutal beating of motorist Rodney King.⁶⁶¹ King led the police on a chase of speeds up to 115 miles per hour.⁶⁶² When he was finally arrested, he was brutally beaten by the officers.⁶⁶³ The incident was captured on videotape and shown frequently on television.⁶⁶⁴ The officers who inflicted the beating were charged, tried, and acquitted by a jury.⁶⁶⁵ The acquittals were met with outrage and rioting.⁶⁶⁶ During the six days of rioting, sixty-three people were killed, over 12,000 were arrested, and over

657. The Court upheld a fixed buffer zone but invalidated a floating buffer zone in *Schenk v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 380 (1999) and *Hill v. Colorado*, 530 U.S. 703, 734–35 (2000).

658. See *Schenk*, 519 U.S. at 380 (upholding a fixed buffer zone but invalidating a floating buffer zone during protests); *Hill*, 530 U.S. at 734–35 (upholding a buffer zone).

659. *Hill*, 530 U.S. at 765 (Kennedy, J., dissenting); *id.* at 741 (Scalia, J., dissenting).

660. CHARLES RIVERS EDITORS, *THE 1992 LOS ANGELES RIOTS: THE HISTORY OF CIVIL DISTURBANCES ACROSS LA AFTER THE BEATING OF RODNEY KING* (2021) [hereinafter 1992 RIOTS].

661. *Id.*

662. *Id.*

663. *Id.*

664. *Id.*

665. *Id.*

666. *Id.*

one billion dollars in property damages resulted.⁶⁶⁷ Prior to the riots, there was distress in the African American community over excessive use of force by the police.⁶⁶⁸ This pent-up rage at the police contributed to the violent reaction to the verdict.⁶⁶⁹ There was simmering resentment and violence between the African American and Korean communities in South Central Los Angeles.⁶⁷⁰ There was extensive looting by African Americans of stores owned by Asian Americans.⁶⁷¹ The police failed to protect Korean businesses from looting.⁶⁷² In condemning the jury verdict, Mayor Bradley may have inspired the ensuing riot.⁶⁷³ Rioters pulled White and Hispanic men from their vehicles and beat them severely.⁶⁷⁴ National Guard and federal troops were deployed to quell the riots. An assertion of superior force by law enforcement and the military brought the riots to an end.⁶⁷⁵

There was certainly much pent-up outrage over mistreatment of African Americans by the police and the city which resulted in the violent rioting.⁶⁷⁶ However, the vicious attacks on the Korean American community suggests that something else was involved. There was quite obviously much resentment by African Americans of Koreans and to some extent the acquittal of the police officers was seen as an excuse to attack a despised rival minority community. This in turn led to Korean American identity and activism.⁶⁷⁷

Unlike the urban riots of the 1960s, the 1992 Los Angeles Riot was primarily a singular affair. It was provoked by a local incident and responded to local conditions although smaller disturbances occurred in several other cities as well.

XXIII. GEORGE FLOYD PROTESTS AND RIOTS

In May 2020, George Floyd, an African American, was killed when a Minneapolis police officer placed his knee on Floyd's neck for almost nine

667. *Id.*

668. *Id.*

669. *Id.*

670. *Id.*

671. GILJE, *supra* note 47, at 175.

672. 1992 RIOTS, *supra* note 660.

673. *Id.*

674. *Id.*; GILJE, *supra* note 47, at 175.

675. 1992 RIOTS, *supra* note 660.

676. *Id.*

677. *Id.*

minutes.⁶⁷⁸ Protests broke out in Minneapolis and across the nation.⁶⁷⁹ The immediate subject of the protests was the death of George Floyd, however, the deaths of several other African Americans at the hands of the police in recent years were in the background.⁶⁸⁰ Most of the protests were peaceful but some turned violent with the burning of buildings and vehicles and the throwing of bricks and bottles at the police.⁶⁸¹ The corner where Floyd was killed was renamed George Floyd Square after being turned into an “autonomous zone” by protestors.⁶⁸² Protestors also seized several city blocks in Seattle and Portland and declared them autonomous zones.⁶⁸³ A mob destroyed many businesses along the “Magnificent Mile” in Chicago.⁶⁸⁴ Several monuments, including those to George Washington, Thomas Jefferson, Andrew Jackson, and Gandhi, were vandalized or

678. *How George Floyd Died, and What Happened Next*, N.Y. TIMES (July 29, 2022), <https://www.nytimes.com/article/george-floyd.html> [<https://perma.cc/S6S8-3T5H>].

Derrick Chauvin, the officer who knelt on Floyd's throat, was found guilty of second-degree murder and was sentenced to 22.5 years in prison. *Id.*

679. *Id.*

680. *George Floyd: Timeline of Black Deaths and Protests*, BBC (Apr. 22, 2021, 10:37 AM), <https://www.bbc.com/news/world-us-canada-52905408> [<https://perma.cc/Y4HP-XF3D>].

Included were the deaths of Michael Brown in Ferguson Missouri, Eric Garner in New York City, Freddie Gray in Baltimore, and Breonna Taylor in Louisville.

681. Ian Lovett, *1992 Los Angeles Riots: How the George Floyd Protests Are Different*, WALL ST. J. (June 4, 2020, 5:30 AM), <https://www.wsj.com/articles/how-george-floyd-protests-in-los-angeles-differ-from-1992-riots-11591263005#> [<https://perma.cc/5B92-QSXR>]; *George Floyd Death: Widespread Unrest as Curfews Defied Across U.S.*, BBC (May 31, 2020, 6:29 AM), <https://www.bbc.com/news/world-us-canada-52865206#> [<https://perma.cc/R7AA-CVLF>].

682. Betsy Reed, *Minneapolis Removes Barricades to Reopen George Floyd Square*, THE GUARDIAN (June 2021), <https://www.theguardian.com/us-news/2021/jun/03/george-floyd-square-minneapolis-barricades> [<https://perma.cc/4LLN-QXYC>]; James Walsh, *Shrine to George Floyd Could Be Permanent at Minneapolis Intersection*, MINNEAPOLIS STAR TRIB. (June 12, 2020, 9:59 PM), <https://www.startribune.com/shrine-to-george-floyd-could-be-permanent-at-38th-and-chicago/571211342/> [<https://perma.cc/8DVB-MM3Q>].

683. Mike Baker, *Free Food, Free Speech, and Free of Police: Inside Seattle's 'Autonomous Zone'*, N.Y. TIMES (July 6, 2020), <https://www.nytimes.com/2020/06/11/us/seattle-autonomous-zone.html> [<https://perma.cc/T553-ZC55>]; Mike Baker, *After Nearly a Year of Unrest, Portland Leaders Pursue a Crackdown*, N.Y. TIMES (June 18, 2021), <https://www.nytimes.com/2021/04/27/us/portland-protests-mayor-ted-wheeler.html#:~:text=655-After%20Nearly%20a%20Year%20of%20Unrest%2C%20Portland%20Leaders%20Pursue%20a,the%20murder%20of%20George%20Floyd.> [<https://perma.cc/L7RU-6VGX>].

684. Amanda Albright, *George Floyd Protests Hammer Cities Just as They Try to Reopen*, FORTUNE (May 31, 2020, 9:39 PM), <https://fortune.com/2020/05/31/george-floyd-protests-cities-reopen/> [<https://perma.cc/38JT-U4PS>].

destroyed.⁶⁸⁵ The riots, which continued for the better part of a year, resulted in at least two billion dollars of property damage.⁶⁸⁶ The National Guard and military were called in to assist law enforcement.⁶⁸⁷ At least nineteen people died and thousands were arrested.⁶⁸⁸ In almost every respect, the protests and riots constituted the largest civil disturbance in United States history.⁶⁸⁹ Unlike previous urban riots, the George Floyd riots involved extensive participation by street gangs and other criminal organizations.⁶⁹⁰

The George Floyd protests and riots provide an excellent case study for establishing a line dividing lawful constitutionally protected protest from unlawful defiance. Peacefully marching and chanting in public is activity firmly protected by the First Amendment.⁶⁹¹ Now, with respect to public demonstrations, the state does have the right to adopt and enforce

685. Joseph Guzman, *George Washington Statute Toppled, American Flag Burned by Portland Protestors*, THE HILL (June 19, 2020), <https://thehill.com/changing-america/respect/equality/503559-george-washington-statue-vandalized-and-toppled-by/> [<https://perma.cc/XN3H-PM7W>]; *A Disgrace, Says Trump on Gandhi Statue Desecration*, TRIB. INDIA (June 10, 2020, 8:38 AM), <https://www.tribuneindia.com/news/nation/a-disgrace-says-trump-on-gandhi-statue-desecration-96868> [<https://perma.cc/SU4X-G7YG>]; Katie Warren, *Four Men Were Charged for Trying to Tear Down a Statue of President Andrew Jackson Near the White House*, BUS. INSIDER (June 28, 2020, 4:27 PM), <https://www.businessinsider.com/andrew-jackson-statue-men-tried-tear-down-2020-6> [<https://perma.cc/P5WC-R6SR>].

686. Jennifer A. Kingson, *Exclusive: \$1 Billion-Plus Riot Damage Is Most Expensive in Insurance History*, AXIOS (Sep. 16, 2020), <https://www.axios.com/2020/09/16/riots-cost-property-damage> [<https://perma.cc/JX8S-DXQU>].

687. Katie Warren & Joey Hadden, *How All 50 States Are Responding to the George Floyd Protests, from Imposing Curfews to Calling in the National Guard*, BUS. INSIDER (June 4, 2020, 2:22 PM), <https://www.businessinsider.com/us-states-response-george-floyd-protests-curfews-national-guard-2020-6> [<https://perma.cc/46N2-6DNF>].

688. Jemima McEvoy, *14 Days of Protests, 19 Dead*, FORBES (June 8, 2020, 6:34 PM), <https://www.forbes.com/sites/jemimamcevoy/2020/06/08/14-days-of-protests-19-dead/?sh=48c7a5794de4> [<https://perma.cc/4LUF-5L2K>]; <https://www.usatoday.com/story/news/factcheck/2022/02/22/fact-check-thousands-black-lives-matter-protesters-arrested-2020/6816074001/>.

689. Kingson, *supra* note 686.

690. Evan Perez & David Shortell, *Police Point Finger at Gangs and Local Groups for Riot Damages, Contradicting Trump's Claims*, CNN (June 10, 2020, 10:01 AM), <https://www.cnn.com/2020/06/10/politics/gangs-protests-blame-antifa/index.html> [<https://perma.cc/JX4K-Y6JL>].

691. The doctrine is known as the public forum doctrine. *See* *United States v. Grace*, 461 U.S. 171, 177 (1983) (explaining the public forum doctrine limits the government's ability to restrict expressive conduct in public places); *see also* *Perry Educ. Ass'n v. Perry Loc. Educators Ass'n*, 460 U.S. 37, 55 (1983) ("In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject").

reasonable time, place, and manner restrictions.⁶⁹² In addition, the police can impose reasonable restrictions on protest activity to protect life and property.⁶⁹³ On the other hand, destruction of property, violence against law enforcement, and looting are unlawful and unprotected regardless of how just the underlying cause or how great the anger fueling the protest. This seems like an easy enough line to draw and yet enforcement may be difficult in the event of a mass peaceful demonstration which poses the likelihood of becoming violent and destructive in a moment. As with many previous demonstrations, some have used the mass movement and the righteous anger that provoked it as an excuse for looting.⁶⁹⁴ The inability to enforce the distinction between peaceful protest and violence may be blurred by official sympathy with the goals of the protest engendering a hesitancy to enforce the law against looting and burning. Moreover, when the subject of the protest is excessive use of force by the police, law enforcement may be hesitant to respond to violence, especially violence directed at them, with the force necessary to contain a riot. In addition, the theory exists that using force, especially military force to put down riots can be counterproductive increasing the likelihood of violence by protestors.⁶⁹⁵ As a result the police may be required to stand helplessly by and simply watch burning and looting instead of attempting to quell it. Thus, in the context of recent mass demonstrations, looting and violence seems inevitable.

XXIV. CAPITOL INVASION OF JANUARY 6

On January 6, as Congress was counting the electoral ballots, a mob of angry citizens stormed the Capitol delaying the vote count.⁶⁹⁶ The invasion

692. See *Clark v. Cmty. For Creative Non-Violence*, 468 U.S. 288, 294 (1984) (noting restrictions which may not have reference to the content of the related speech); *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972) (“Our cases make equally clear, however, that reasonable ‘time, place and manner’ regulations may be necessary to further significant governmental interests, and are permitted.”); *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 648 (1981) (reiterating the activities protected by the First Amendment are subject to reasonable time, place, and manner restrictions).

693. *Clark*, 468 U.S. at 294; *Grayned*, 408 U.S. at 116; *Heffron*, 452 U.S. at 648.

694. Perez & Shortell, *supra* note 690.

695. Shaila Dewan & Mike Baker, *Facing Protests Over Use of Force, Police Respond with More Force*, N.Y. TIMES (June 2, 2020), <https://www.nytimes.com/2020/05/31/us/police-tactics-floyd-protests.html> [<https://perma.cc/Q3FX-SZMK>].

696. Alex Woodward, *What Happened in Washington DC Yesterday? A Timeline of Insurrection*, THE INDEPENDENT (Jan. 7, 2021, 3:27 PM),

and the attempt to interfere with the confirmation of Joe Biden's election was planned well in advance.⁶⁹⁷ Authorities were aware of the plan to invade the Capitol due to online chatter at least a week beforehand, however, the Pentagon refused a request to deploy National Guard Troops because the "optics" would be bad.⁶⁹⁸

On the morning of January 6, President Trump held a rally on the Ellipse.⁶⁹⁹ He argued that Vice President Pence, presiding over the vote counting in the Senate, should send the ballots back to the state legislatures for further proceeding.⁷⁰⁰ Pence has argued that he lacked authority to do so, a position that almost certainly would have been sustained by the courts.⁷⁰¹ Trump did not urge the crowd to storm or invade the Capitol.⁷⁰² He did say that the crowd should peacefully march to the Capitol and he further declared the people would need to fight to save the country.⁷⁰³

<https://www.the-independent.com/news/world/americas/us-politics/capitol-riots-what-happened-washington-dc-timeline-b1783562.html> [https://perma.cc/4G9F-QGEV].

697. Jemima McEvoy, *Capitol Attack Was Planned Openly Online for Weeks—Police Still Weren't Ready*, FORBES (Jan. 7, 2021, 10:43 AM),

<https://www.forbes.com/sites/jemimamcevoy/2021/01/07/capitol-attack-was-planned-openly-online-for-weeks-police-still-werent-ready/?sh=315605ff76e2> [https://perma.cc/HH9G-WH7I].

698. Peter Beaumont, *Ex-Head of Capitol Police: Officials Reluctant to Call in National Guard*, THE GUARDIAN (Jan. 11, 2021, 5:50 PM), <https://www.theguardian.com/us-news/2021/jan/11/head-capitol-police-steven-sund-mob-assault-recounts-security-failings> [https://perma.cc/A6HB-BNRC].

699. Brian Naylor, *Read Trump's Jan. 6 Speech, A Key Part of Impeachment Trial*, NPR (Feb. 10, 2021, 2:43 PM), <https://www.npr.org/2021/02/10/966396848/read-trumps-jan-6-speech-a-key-part-of-impeachment-trial> [https://perma.cc/L7TX-QFHU].

700. Annie Karni & Maggie Haberman, *Trump Openly Condone Supporters Who Violently Stormed the Capitol, Prompting Twitter to Lock His Account*, N.Y. TIMES (Jan. 6, 2021),

<https://www.nytimes.com/2021/01/06/us/politics/trump-protesters.html>

[https://perma.cc/8W5D-8ELJ]; Aaron Glantz, *Read Pence's Full Letter Saying He Can't Claim 'Unilateral Authority' to Reject Electoral Votes*, PBS (Jan. 6, 2021, 1:43 PM),

<https://www.pbs.org/newshour/politics/read-pences-full-letter-saying-he-cant-claim-unilateral-authority-to-reject-electoral-votes> [https://perma.cc/LF7C-AD88]; see Sam Cabral, *Capitol riots: Did Trump's Words at Rally Incite Violence?*, BBC (Feb. 13, 2021), <https://www.bbc.com/news/world-us-canada-55640437> [https://perma.cc/76C7-FTDR].

Certainly, the indictment and any subsequent conviction will be dismissed for violation of his rights pursuant to the First Amendment.

701. Karni & Haberman, *supra* note 700; Jim Rutenberg et al., *77 Days: Trump's Campaign to Subvert the Election*, N.Y. TIMES (June 14, 2022), <https://www.nytimes.com/2021/01/31/us/trump-election-lie.html> [https://perma.cc/XC8T-EMZC].

702. Aaron Blake, *What Trump Said Before His Supporters Stormed the Capitol, Annotated*, WASH. POST (Jan 11, 2021), <https://www.washingtonpost.com/politics/interactive/2021/annotated-trump-speech-jan-6-capitol/> [https://perma.cc/M793-KD8R].

703. *Id.*

Trump finished his speech at 1:12 p.m.⁷⁰⁴ Prior to that time thousands were marching to the Capitol.⁷⁰⁵ Pipe bombs were discovered earlier near both the Democratic and Republican National Committee headquarters.⁷⁰⁶ It has been suggested that this was done to distract law enforcement from the imminent Capitol invasion.⁷⁰⁷ The mob arrived at the Capitol, overwhelmed the police and broke in.⁷⁰⁸ Among the invaders were members of various right wing extremist groups including the Proud Boys, the Oath Keepers, Q²Anon, and Boogaloo.⁷⁰⁹ Members of the Senate and House were rushed to safety.⁷¹⁰ The mob roamed freely through the Capitol building doing thirty million dollars' worth of damage.⁷¹¹ One of the invaders, Ashli Elizabeth Babbitt, was shot and killed by Capitol police as she

704. Lauren Leatherby et al., *How a Presidential Rally Turned into a Capitol Rampage*, N.Y. TIMES (Jan. 12, 2021), <https://www.nytimes.com/interactive/2021/01/12/us/capitol-mob-timeline.html> [<https://perma.cc/D2YA-LU8J>].

705. See generally *id.* (describing the events taking place at the capitol prior to Trump's speech ending).

706. Katie Benner et al., *An Explosive Device Is Found at the R.N.C., and the D.N.C. Is Evacuated*, N.Y. TIMES (Jan. 6, 2021), <https://www.nytimes.com/2021/01/06/us/politics/pipe-bomb-rnc.html> [<https://perma.cc/X2VD-ABL2>]; Betsy Woodruff Swann et al., *Harris Was Inside DNC on Jan. 6 When Pipe Bomb Was Discovered Outside*, POLITICO (Jan. 6, 2021, 4:55 PM), <https://www.politico.com/news/2022/01/06/harris-was-inside-dnc-on-jan-6-when-pipe-bomb-was-discovered-outside-526695> [<https://perma.cc/7CH7-UUJZ>].

707. Swann et al., *supra* note 706.

708. Ashley Parker et al., *How the Rioters Who Stormed the Capitol Came Dangerously Close to Pence*, WASH. POST (Jan. 15, 2021), https://www.washingtonpost.com/politics/pence-rioters-capitol-attack/2021/01/15/ab62e434-567c-11eb-a08b-f1381ef3d207_story.html [<https://perma.cc/6LWF-GCAG>]; see generally Charles D. Samuelson, *Why Were the Police Attacked on January 6? Emergent Norms, Focus Theory, and Invisible Expectations*, 26 GRP. DYNAMICS: THEORY, RSCH. & PRAC. 178 (2022) (discussing the violent acts of January 6).

709. Natalie Reneau et al., *Proud Boys Led Major Breaches of Capitol on Jan. 6, Video Investigation Finds*, N.Y. TIMES (July 11, 2022), <https://www.nytimes.com/2022/07/12/us/politics/proud-boys-jan-6.html> [<https://perma.cc/HQ6U-5M5C>]; Matthew Kriner & Jon Lewis, *The Oath Keepers and Their Role in the January 6 Insurrection*, COMBATING TERRORISM CTR. AT WEST POINT (Dec. 2021), <https://ctc.westpoint.edu/the-oath-keepers-and-their-role-in-the-january-6-insurrection/> [<https://perma.cc/ZK6P-WNCV>]; Alix Culberson, *U.S. Capitol: Q-Anon, Confederate Flag Man, and Baked Alaska—Here Are the People Who Stormed the Building*, SKYNEWS (Jan. 8, 2021, 11:44 AM), <https://news.sky.com/story/us-capitol-from-neo-nazis-and-conspiracy-theorists-to-a-politician-who-stormed-the-capitol-12181628> [<https://perma.cc/H55J-NFZ7>].

710. Karoun Demirjian et al., *Inside the Capitol Siege: How Barricaded Lawmakers and Aides Sounded Urgent Pleas for Help as Police Lost Control*, WASH. POST (Jan. 10, 2021, 12:07 AM), https://www.washingtonpost.com/politics/inside-capitol-siege/2021/01/09/e3ad3274-5283-11eb-bda4-615aaefd0555_story.html [<https://perma.cc/S77B-KR7H>].

711. Bill Chappell, *Architect of the Capitol Outlines \$30 Million in Damages from Pro-Trump Riot*, NPR (Feb. 24, 2021, 1:56 PM), <https://www.npr.org/sections/insurrection-at-the-capitol/2021/02/24/970977612/architect-of-the-capitol-outlines-30-million-in-damages-from-pro-trump-riot> [<https://perma.cc/V2NT-2WBA>].

attempted to climb through a broken glass door inside of the building.⁷¹² By late afternoon, order was restored and the vote counting proceeded.⁷¹³

President Trump was impeached by the Democrat controlled House of Representatives for inciting an insurrection, however he was acquitted by the Republican controlled Senate.⁷¹⁴ Over a thousand were arrested, many based on video taken during the invasion.⁷¹⁵ Although White supremacist and insurrectionist groups were involved in planning and participated in the event, a study in the Atlantic found that 89% of those arrested had no ties to these militant groups.⁷¹⁶ Approximately 20% of the participants had been in the military, many were business owners, twenty-eight law enforcement officers, at least fifty elected officials, and one former congressional candidate participated.⁷¹⁷ In other words, this was not an ordinary mob.

712. Rich Schapiro et al., *Officer Who Shot Ashli Babbitt During Capitol Riot Breaks Silence: 'I Saved Countless Lives'*, NBC NEWS (Aug. 26, 2021, 5:30 PM), <https://www.nbcnews.com/news/us-news/officer-who-shot-ashli-babbitt-during-capitol-riot-breaks-silence-n1277736> [<https://perma.cc/J52W-FKRV>].

713. CAROL LEONNIG & PHILIP RUCKER, *I ALONE CAN FIX IT, DONALD J. TRUMP'S CATASTROPHIC FINAL YEAR* 481–484 (2021).

714. Jeremy Herb & Manu Raju, *House of Representatives Impeaches President Donald Trump*, CNNPOLITICS (Dec. 19, 2019, 5:43 AM), <https://www.cnn.com/2019/12/18/politics/house-impeachment-vote/index.html> [<https://perma.cc/YK3T-HXPP>]; Nicholas Fandos, *Trump Acquitted of Inciting Insurrection, Even as Bipartisan Majority Votes 'Guilty'*, N.Y. TIMES (Feb. 13, 2021), <https://www.nytimes.com/2021/02/13/us/politics/trump-impeachment.html> [<https://perma.cc/UB7M-QNWF>].

715. Alan Feuer & Molly Cook Escobar, *The Jan. 6 Riot Inquiry So Far: Three Years, Hundreds of Prison Sentences*, N.Y. TIMES (Jan. 3, 2024), <https://www.nytimes.com/interactive/2024/01/04/us/january-6-capitol-trump-investigation.html> [<https://perma.cc/H6TQ-NU9E>]; Reneau et al., *supra* note 709.

716. Robert A. Pape & Keven Ruby, *The Capital Rioters Aren't Like Other Extremists*, THE ATLANTIC (Feb. 2, 2021), <https://www.theatlantic.com/ideas/archive/2021/02/the-capitol-rioters-arent-like-other-extremists/617895/> [<https://perma.cc/2XQX-EZNS>].

717. *Id.*; Michael Ricciardelli, *A Demographic and Legal Profile of January 6 Prosecutions*, SETON HALL UNIV. (July 26, 2023), <https://www.shu.edu/news/a-demographic-and-legal-profile-of-january-6-prosecutions.html> [<https://perma.cc/SM3F-HYUU>]; Linda So et al., *Off-Duty Cops, Other Officials Face Reckoning After Rallying for Trump in D.C.*, YAHOO!NEWS (Jan. 13, 2021), <https://news.yahoo.com/off-duty-cops-other-officials-214902576.html> [<https://perma.cc/W8GB-BM2Q>]; Shahid Meighan, *Columbus Man and Former Congressional Candidate Charged in Jan. 6 Assault on U.S. Capitol*, COLUMBUS DISPATCH (Feb. 24, 2024, 2:03 PM), <https://www.dispatch.com/story/news/local/2024/02/23/columbus-man-and-former-gop-congressional-candidate-charged-in-jan-6-assault-on-us-capitol/72718069007/> [<https://perma.cc/LAM9-96ZC>]. A response by the University of Maryland's Consortium for the Study of Terrorism and Responses to Terrorism pointed out that 35% of the persons arrested did have a link to extremist groups. Michael Jensen, *It Wasn't Just Proud Boys. Interconnected Extremists Converged on Jan. 6.*, WASH. POST (June 17, 2022, 4:38 PM),

The mob was upset by the belief that the election had been stolen.⁷¹⁸ As with the George Floyd rioters, their righteous anger did not excuse their violent behavior. A peaceful march and protest outside of the Capitol were certainly protected conduct. Breaking and entering the building, acting violently toward the police and destroying property was criminal behavior which could and should be punished. Insurrection is a federal crime.⁷¹⁹ Although politicians characterize the Capitol invasion as insurrectionary activity, the leaders were charged with seditious conspiracy.⁷²⁰ Individuals that deliberately defy the law and engage in violent and destructive behavior on behalf of a partisan cause must be prepared to accept the legal consequences without excuse.

The contrast between the treatment of those participating in the George Floyd riots and the Capitol invasion was stark. Both occurred in the same year. Both involved significant destruction of property and loss of life. Both were in defiance of law. Both were in violation of legitimate law and as such both warranted significant criminal punishment. The Capitol invaders were prosecuted vigorously, the leaders receiving lengthy prison sentences.⁷²¹ The George Floyd rioters were not.⁷²² There may be explanations for this discrepancy. Perhaps it was more difficult to identify and apprehend the George Floyd rioters. But one explanation stands out—elite sympathy for the cause. Severe police brutality toward African Americans was considered outrageous, which it was. Interfering with a presidential election favoring Donald Trump did not evoke the same emotional response by the elites and the media. Was the official response to the protests colored by partisan considerations? If so, it suggests that

<https://www.washingtonpost.com/outlook/2022/06/17/january-6-hearings-extremists-proud-boys/> [https://perma.cc/9LZS-APBP].

718. Blake, *supra* note 702.

719. Spencer S. Hsu et al., *Oath Keepers Founder Stewart Rhodes Guilty of Jan. 6 Seditious Conspiracy*, WASH. POST (Nov. 29, 2022, 7:52 PM), <https://www.washingtonpost.com/dc-md-va/2022/11/29/rhodes-oathkeepers-sedition-verdict-jan6/> [https://perma.cc/9KSF-RECS].

720. *Id.*

721. Many of the leaders of the Capitol invasion were sentenced between twelve and eighteen years in prison. *Court Sentences Two Oath Keepers Leaders to 18 Years in Prison on Seditious Conspiracy and Other Charges Related to U.S. Capitol Breach*, U.S. ATTY'S OFF. (May 25, 2023), <https://www.justice.gov/usao-dc/pr/court-sentences-two-oath-keepers-leaders-18-years-prison-seditious-conspiracy-and-other?ref=human-synthesis.ghost.io> [https://perma.cc/L6GE-T5NC].

722. Alanna Durkin Richer et al., *Records Rebut Claims of Unequal Treatment of Jan. 6 Rioters*, AP NEWS (Aug. 30, 2021, 4:59 AM), <https://apnews.com/article/records-rebut-claims-jan-6-rioters-55adf4d46aff57b91af2fdd3345dace8> [https://perma.cc/LAH2-JKQ6]. Although the article argued that there was no significant disparity, the facts that the article relied on suggested the opposite.

rule of law values may depend on whose ox is being gored. It may well be that the George Floyd Riots and the January 6 Capitol invasion were too recent and too controversial from a partisan standpoint to obtain sufficiently objective information.

CONCLUSION

Deliberate defiance of legal authority, usually as a protest against the legitimacy or justice of the law or that authority, has been part of the American landscape from the outset. As a matter of perspective, defiance is very much the exception rather than the rule. If it were otherwise, it would be impossible to maintain a civil society. Perhaps a reason why defiance, when it occurs, receives so much attention is because it is beyond the norm. Defiance of law teaches many lessons. One common lesson that defiance teaches is that the laws are unjust and need to be changed. This was the lesson of the Civil Rights Movement in the 1960s as well as the labor riots that extended for several decades. Another closely related lesson is that enforcement practices need adjustment. This was a lesson of the urban riots of the 1960s as well as those in response to the Rodney King case and the George Floyd murder as well as the Stonewall Riots. Yet another lesson of defiance, perhaps illustrated by many incidents including the George Floyd Riots as well as the Capitol invasion, is frustration with the seeming difficulty of obtaining legal change. Yet another lesson of defiance is that the law is extremely unpopular and unenforceable. This may be the lesson of the defiance of Prohibition laws as well as the Supreme Court's school prayer decisions. Sometimes, defiance of law led to major revision of the laws.⁷²³ But sometimes it did not, as with the resistance to the Court's school prayer decisions.⁷²⁴

Often defiance is the result of disagreement as to what the law is. That may have been the case with respect to the American Revolution. England declared that Parliament was the appropriate lawgiver and it had declared that it could tax and regulate the colonies under all circumstances.⁷²⁵ The colonists replied that the proper principle was "no taxation without representation."⁷²⁶ So, there was a basic disagreement as to the governing

723. See *Engel v. Vitale*, 370 U.S. 421, 424, 436 (1962) (discussing the legality of state officials endorsing a state prayer and decisively concluding such action violates the Establishment Clause).

724. See *State ex rel. Weiss v. Dist. Bd.*, 44 N.W. 967, 968, 982 (Wis. 1890) (holding a teacher's act of reading Bible to students violated the law).

725. MILLER, AMERICAN REVOLUTION, *supra* note 48, at 181.

726. *Id.* at 212.

democratic principle. Nevertheless, the colonists knew that by revolting, they were defying the existing governing law and that there would be consequences. The very attempt to justify such defiance in the Declaration of Independence illustrates that the colonists well understood that they were acting in defiance of the governing law despite considering that law oppressive and tyrannical.

Another example of such a disagreement is the Civil War. Lincoln and the North understood that the union was indivisible.⁷²⁷ The seceding states believed that secession was legally permissible if the federal government violated core principles such as prohibiting slavery in the territories or by abolishing slavery where it already existed.⁷²⁸ Both positions could not be realized. A bloody civil war was necessary to resolve the question. The Supreme Court in *M'Culloch v. Maryland* and Daniel Webster in his reply to Hayne had made the case for the popular sovereignty theory and hence the indivisibility of the union however that was not enough.⁷²⁹ The seceding states realized that they were defying the law as Lincoln understood it and that consequences would follow.

The reaction to the Supreme Court's decision in *M'Culloch v. Maryland* was another example of a disagreement as to what the law is. In *M'Culloch*, Chief Justice Marshall took a strong federalist view of constitutional power.⁷³⁰ Those who disagreed, like the political establishment of Ohio in *Osborn v. Bank of the United States*, took a states' rights view of constitutional power.⁷³¹ This was a question that would ultimately be resolved by the North's victory in the Civil War.

The same type of disagreement existed with respect to the Civil Rights Movement. Under the South's conception of federalism, the states were free to adopt laws imposing racial segregation across the board (validated by the Supreme Court in *Plessy v. Ferguson*) and localities were permitted to adopt ordinances which made it difficult if not impossible to conduct protests of such segregation laws.⁷³² The Civil Rights Movement

727. McPherson, *supra* note 196.

728. *Id.*

729. *See* *M'Culloch v. Maryland*, 17 U.S. 316, 322–30 (1819) (“Congress, by the constitution, is invested with certain powers; and as to the objects, and within the scope of these powers, it is sovereign.”).

730. *See id.* at 433–37 (upholding the supremacy of the federal government).

731. *Osborn v. Bank of U.S.*, 22 U.S. 738, 739–40 (1824).

732. *See* *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (holding that it was not the duty of the legislature to force comingling of the races—it only had to ensure races had “equal rights before the law”), *overruled by* *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

advocated that the south's conception of the Constitution was flawed.⁷³³ Although federalism was an important constitutional principle, with respect to racial segregation, it was overridden by the Equal Protection Clause of the Fourteenth Amendment.⁷³⁴ As to protest marches and activities, the Civil Rights Movement argued that the First Amendment, properly understood, prohibited localities from effectively banning such protests.⁷³⁵ So from this perspective, there was no defiance of law by the civil rights activists. It was merely a difference of opinion as to the proper understanding of the Constitution. Still like the American Revolution, the civil rights demonstrators understood that the southern states had laws on the books which would be enforced against them. One of the purposes of the marches and demonstrations was to obtain the invalidation of such laws.⁷³⁶

Another explanation for widespread defiance of law is a struggle for power (the very title of the book cited on the origins of the American Revolution). When two different groups disagree as to the values or principles that should control, one group has the sanction of law behind it, the other group may defy that law in order to achieve what it believes to be important ends. That may go a long way toward explaining the labor violence in the last quarter of the nineteenth century and the first third of the twentieth century. Businesses believed that they could operate as they chose without consulting with labor. The law as it stood agreed. Labor, on the other hand, believed it had the right to organize unions and that those unions had the right to negotiate with employers about substantive matters such as wages, the eight-hour workday, and protection for peaceful protest. Labor and employers' differing views led to decades of violent strikes.

Defiance of Supreme Court rulings may be attributable to two explanations. First, it may reflect a good faith disagreement with the Court's understanding of the law. This may explain resistance to the Court's decisions in *M'Culloch v. Maryland*, the *Dred Scott* case, and *Brown v. Board of Education*. Second, some of the resistance to earlier decisions of the Court,

733. See generally GARROW, BEARING THE CROSS, *supra* note 419 (discussing the Civil Rights Movement's consistent goal of equality).

734. U.S. CONST. amend. XIV, § 1.

735. See *United States v. Grace*, 461 U.S. 171, 177 (1983) (holding peaceful picketing and passing out pamphlets are protected speech); *Perry Educ. Ass'n v. Perry Loc. Educators Ass'n*, 460 U.S. 37, 46, 55 (1983) (holding, in a public forum, the State must "demonstrate compelling reasons for restricting access to a single class of speakers," but the same standard does not apply when dealing with "government property that has not been made a public forum").

736. GARROW, BEARING THE CROSS, *supra* note 419, at 176.

such as *M'ulloch*, the Cherokee territory decisions and perhaps even *Dred Scott*, may reflect the fact that the Court had not yet achieved the respect, which it now has, as the ultimate interpreter of the law. In other words, resistance to these decisions would have been less or non-existent if they occurred today.

Violence became a tool that defiers of the law could utilize. Most of the violence in labor demonstrations was attributable to overreaction by employers and law enforcement. Still, it was recognized that the media had slight interest in covering labor disputes until violence emerged.⁷³⁷

The same is true of the Civil Rights Movement. It was the violent overreaction of law enforcement in Birmingham and Selma which gave power to the movement and not the protest marches themselves. The organizers of the protests knew this and deliberately provoked a violent response.

At some point, violent defiance of law may be the result of frustration with the difficulty, if not the impossibility, of procuring peaceful legal change. This may be a partial explanation of the urban race riots. The kettle was boiling. Issues of police brutality, discrimination in all aspects of life, and lack of employment opportunities had been raised for years with no response.⁷³⁸ It only took an innocent incident to provide the spark to create a major conflagration.⁷³⁹ Burning and looting followed.⁷⁴⁰

Intense moral or religious beliefs may lead some persons or groups to engage in acts that are clearly in defiance of the law. This may explain defiance by abolitionists, Jehovah's Witnesses as well as pro-life activists. An important corollary is that persons or groups defying the law based on moral or religious principles must either invalidate the laws as unjust or be prepared to accept the legal consequences of disobedience.

Pure hatred may explain some of the acts of violence. This may explain the defiance perpetrated as the violent response to Reconstruction culminating in the Colfax massacre. The Tulsa Riot of 1921 would be another example as would the urban race riots during which individuals were attacked and beaten simply because they were White.

Ideally, the rule of law should prevail. In a democracy, there are legal methods of changing the law if it is outmoded or unjust. Peaceful protest,

737. See ADAMIC, *supra* note 262, at 327 (expressing union belief that the organization of the steel workers was unsuccessful because it was nonviolent).

738. GILJE, *supra* note 47, at 159.

739. *Id.* at 158.

740. *Id.* at 159.

as a means of calling attention to such change, is protected by the First Amendment. As such, there is no need for violent defiance of law. Injury to others as well as the destruction of property are criminal acts which should be punished.

However, there are problems with the alternative of peaceful protest. Once a peaceful protest march begins, it may be difficult if not impossible, to keep the protest focused on the issues that gave rise to it. Dr. King learned this the hard way with the protest march in support of the garbage workers in Memphis in 1968. The march commenced as a peaceful protest of working conditions however it was infiltrated and soon turned violent.⁷⁴¹

The same can be said with respect to most of the urban riots. They began as a legitimate response to police brutality, discrimination and lack of opportunity.⁷⁴² But they were soon transformed into an excuse for looting, arson and violence by persons who had no understanding of the underlying grievances.⁷⁴³ This was especially true of the 1992 Los Angeles Riots. These started out as a legitimate protest of the acquittal of four police officers who had beaten Rodney King.⁷⁴⁴ However, it was soon transformed into an excuse for settling old scores with the Korean community.⁷⁴⁵ Once a mob forms, it may be impossible to control its actions.

There remains the question of whether non-violent protest, as favored by Dr. King, is the appropriate strategy for effecting legal change. One problem with that approach is that it is inconsistent with human nature. Most people, when assaulted while exercising their constitutional rights, will respond violently. Few have the self-control or discipline of Dr. King. Another issue, as noted previously, is that it was not the peaceful marches in Birmingham and Selma that led to success but rather the violent response of the police. By way of contrast, Dr. King led a non-violent protest march in Albany, Georgia.⁷⁴⁶ The local sheriff did not respond violently and the protest accomplished very little.⁷⁴⁷

This observation raises the moral question of whether it is appropriate to provoke law enforcement to attack persons who are innocently exercising their constitutional rights for the long term good of the cause. Dr. King

741. Brown, *supra* note 417.

742. 1992 RIOTS, *supra* note 660.

743. *Id.*

744. *Id.*

745. *Id.*

746. See generally GARROW, BEARING THE CROSS, *supra* note 419 (detailing the facts of the Albany protests).

747. *Id.* at 175

seemed to say no, however other leaders of the Movement disagreed and deliberately provoked the police to respond violently.⁷⁴⁸

This leads to the question of whether non-violent protest of the type advocated by Dr. King was ineffective. If it only works where there is violent resistance, eventually law enforcement will learn that it can defeat the protest by not responding violently. If the cause is just and if the law sides with the Movement's opponents, why should the Movement restrict itself to non-violent protest? Dr. King debated this issue with those who favored proceeding by "any means necessary" such as Stokely Carmichael of the SNCC.⁷⁴⁹ For Dr. King, it was a matter of deeply held Christian faith. For those who were not as motivated by religious faith as Dr. King, pragmatic concerns govern. As Dr. King's example illustrates, non-violent protest frequently works. This is especially true given the positive publicity that has surrounded Dr. King and his non-violent approach. On the other hand, Dr. King's failure late in his career when he attempted to apply his southern strategy to a northern city along with his resulting despondency should give rise to caution.⁷⁵⁰ Perhaps there are inherent limits to the effectiveness of non-violent protest.

A partial explanation of violent labor strikes as well as the urban riots is pure frustration. In each instance, labor and African American urban dwellers were subjected to dreadful inhumane conditions with no hope for positive change through the legal process. The law was not simply neutral but was an opponent of change. In the labor context, law enforcement tended to side with employers against labor. While labor was responsible for the destruction of property, most loss of life was at the hands of employers and law enforcement. Over time, labor learned that there was no prospect for ameliorating dreadful working conditions through legal means.

The same was true with respect to urban African Americans. Complaints about police brutality, racial discrimination and the absence of economic opportunity had been raised for decades and seemed to fall on deaf ears. Frustration and pressure built up over decades. It only took a spark to set off the explosion.⁷⁵¹ If it appeared hopeless to proceed through peaceful legal channels, violent action seemed more appealing.

748. *Id.* at 248.

749. *Id.* at 481; Franklin, *supra* note 646.

750. GARROW, BEARING THE CROSS, *supra* note 419, at 495, 524–25, 611.

751. See COHEN & MURPHEY, *supra* note 618, at 257 (exploring the systemic problems that precipitated the race riots).

Law enforcement is justified taking whatever steps may be warranted to protect the public against bodily harm and to protect private property against injury or destruction. That is the very essence of the rule of law in a civilized society. In the process of enforcing the rule of law, innocent people may be injured or killed as happened in most of the urban riots. That is tragic but largely unavoidable. On the other hand, law enforcement must respect people's rights to the extent possible under the circumstances including the right to assemble and peacefully protest guaranteed by the First Amendment. This will cause law enforcement to make difficult decisions as to what is necessary to preserve peace and law and order. Deference should be accorded to decisions that are made in time of crisis so long as they take serious account of the rights of the people.

It may be, as a practical matter, that defiance which leads to well accepted changes in the law, may in retrospect seem warranted. This would certainly be the case with the American Revolution, the labor wars and the Civil Rights Movement. But this may be a matter of historical contingency. For instance, had the confederacy prevailed in the Civil War, would that justify secession? Perhaps this indicates that evaluating defiance is always a matter of somewhat subjective perspective. If one approaches the issue from a strong rule of law perspective, then perhaps all defiance of law, no matter how justified the cause, is wrong. Legal change can only be accomplished through the requisite orderly procedures. However, from an achievement of justice perspective, any defiance of legal authority which moves society closer to a particular conception of justice is justified. Between these extremes is room for debate on specific cases.

The inclusion of the American Revolution causes difficulty. If the American Revolution is an example, perhaps the ultimate example of the defiance of legal authority, then all that follows may be justified. The Revolution and the Constitutional Convention set up the rule of law system that follows. Does the example of the Revolution justify all subsequent defiance or is the appropriate lesson that it led to legal channels through which all legitimate protest must proceed? In other words, was the Revolution a "one off" or was it a grand example of the continual necessity of defiance?

In our divided and hyper-partisan environment, has defiance of law simply become one more partisan football to be kicked around for potential political gain? Should the defiance of law in the wake of the death of George Floyd be subject to the same analysis as the Capitol invasion which occurred in roughly the same time period? Both involved significant

destruction of property, loss of life and attacks on law enforcement officers. Both were inflamed by rage. And yet partisan politicians seemed to condemn one but not the other. Perhaps they are distinguishable. The George Floyd Riots persisted for much longer, resulted in greater destruction and involved looting that seemed to have been done entirely for personal gain rather than in a necessary support of a cause.⁷⁵² On the other hand, the Capitol invasion was an attack on the seat of and very processes of the constitutional order designed to ensure a peaceful transfer of political authority.⁷⁵³ Both were fueled by debatable factual assumptions. Is the United States an incurably racist nation and are the police on a mission to abuse unarmed African Americans? Was the Presidential election of 2020 stolen by illegal means? These are questions that inspire the wrath of the protestors. If persons believe either of these propositions, they are likely to be susceptible to violent mob activity since they believe that working through the system in a non-violent manner is bound to be ineffective. If persons who are convinced that the system has failed remain a minority, the process of non-violent resolution of disagreement can proceed with fits and starts. However, if a majority, or even a significant minority gives up hope in internal correction of issues, then the system of rule of law will collapse.

The United States has a long tradition both of respect for the rule of law and its procedures as well as defiance of the law and those procedures. It is probable that in a diverse and democratic society, defiance is a necessary part of the evolutionary process.

752. Kingson, *supra* note 686.

753. See Blake, *supra* note 702 (describing Trump's speech as urging a peaceful demonstration to preserve democracy).

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DEFLANCE

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