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Let My People Go, Part One: Black Rebellion and the Second Amendment Political Necessity Defense

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LET MY PEOPLE GO, PART ONE: BLACK REBELLION AND THE SECOND AMENDMENT POLITICAL NECESSITY DEFENSE

Kindaka Sanders*

ABSTRACT

This Article argues that when an individual or group acts to protect a government-assailed constitutional right by criminal means, the doctrine of political necessity may serve as a constitutionally protected defense. The doctrine of political necessity builds on the common law doctrine of necessity. The necessity doctrine, also referred to as the “choice of evils” defense, exonerates an individual who creates a social harm to allay a greater harm to herself or others. Both state and federal courts have been especially reluctant to allow the use of the necessity defense in cases with political implications, in which the defendant acts to address a government-enabled social wrong.

The leading federal case on political necessity, *United States v. Schoon*, held that the defense is per se inapplicable in cases of indirect purposeful lawlessness, in which the defendant violates a law unrelated to the law the defendant endeavored to change. Under this rule, acts of purposeful lawlessness critical to this country’s founding—e.g., the Boston Tea Party and the Stamp Act Riots—and crucial to its development—e.g., the illegal marches that made the civil rights movement successful—would have been deemed more harmful to society than beneficial, as a matter of law.

This Article argues that all forms of purposeful lawlessness—direct or indirect, forcible or peaceable—are protected under the Second Amendment. That is, the Second Amendment embraces its own version of the political necessity defense. The history of the Second Amendment as well as the Supreme Court’s two most influential Second Amendment cases, *District of Columbia v. Heller* and *McDonald v. Chicago*, provide the proof. This Article explores this proof in detail. It also highlights tumultuous social upheavals that have occurred throughout the course of American history—including the country’s founding acts of resistance as well as major slave rebellions and modern urban riots growing out of analogous oppressions—and describes how they provide proof of the Second Amendment political necessity defense, thus providing context for the types of social wrongs potentially covered by the defense. Race massacres are also discussed, to provide both examples of

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when the defense is clearly not applicable and additional evidence as to why certain counter-government acts of forcible resistance may be justified under the Second Amendment. Finally, this Article uses the recent storming of the Capitol as a test case for the application of the Second Amendment political necessity defense.

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INTRODUCTION

On January 6, 2021, hundreds of supporters of President Donald Trump stormed the U.S. Capitol, assaulting, looting, and threatening to hang elected congressional officials. Many of the participants claimed afterwards that the then-president implicitly commanded them to do whatever it took to stop the election count scheduled for that day. It was the first attack on the Capitol building since British forces torched it along with other local landmarks in 1814, and the only time that U.S. citizens have attacked the seat of the national government. However, it was hardly the first siege of government from within the United States.

In May of 1822, Denmark Vesey planned such a siege. A formerly enslaved African Methodist Episcopal (AME) minister, he and several other African American men made an elaborate plan to engage and neutralize enslavers in Charleston, South Carolina, and liberate their bound brethren.¹ They planned to battle their way to the Charleston Harbor and commandeer ships so they could sail to the recently formed independent Black nation of Haiti in the Caribbean, home of the most successful slave insurrection in world history.² The Africans in Haiti, led by Toussaint

¹ DEBORAH G. WHITE ET AL., *FREEDOM ON MY MIND: A HISTORY OF AFRICAN AMERICANS WITH DOCUMENTS*, VOL. 2: SINCE 1865, at 178 (1st ed. 2016).

² DOUGLAS R. EGERTON, *HE SHALL GO OUT FREE: THE LIVES OF DENMARK VESLEY* 126 (2d ed. 2004); James N. Spady, *Power and Confession: On the Credibility of the Earliest*

Louverture, outwitted and outmaneuvered the armed forces of one of the greatest military commanders in world history, Napoleon Bonaparte, en route to winning their freedom as well as their independence.³ Vesey inspired his followers to rebel by placing their freedom struggle in the context of the Hebrew people of biblical lore who—led by the prophet Moses—escaped the bondage of their Egyptian slave masters.⁴ African Americans have employed this allegory throughout their history in this country and at every stage of their struggle, from slavery to the Civil Rights Movement, expressing it most poignantly through the old Negro spiritual, “Go Down Moses”⁵:

Go down Moses
Way down in Egypt land
Tell old Pharaoh
To let my people go.⁶

It is often said that slavery is the United States’ original sin.⁷ However, it is clear from the country’s founding ideals pitted against its subsequent history that the country’s original sin is hypocrisy, and slavery only its most horrible symptom. Nearly two hundred years separate the Vesey Plot and the storming of Capitol Hill. Hundreds of revolts, massacres, riots, uprisings, and rebellions have punctuated the period in between. Rebellion, as a form of political dissent, is as American as apple pie and hypocrisy itself. The same theme has underlaid all such incidents: the war between the freedom to *be* and the freedom to oppress. This battle, fought in the American consciousness and on American streets, is the primary source of American hypocrisy. But there has been little tension in the methods used to effect these freedoms.

Another case from history illustrates this conflict: On October 16, 1859, abolitionist John Brown, a white American patriot, approached the U.S. Military Arsenal at Harpers Ferry, Virginia alongside a few other compatriots.⁸ They sought to commandeer the stores of weapons that were rumored to be in the arsenal.⁹

Reports of the Denmark Vesey Slave Conspiracy, WM. & MARY Q. 287, 287 (2011); Evan Andrews, 7 *Famous Slave Revolts*, HISTORY.COM (Jan. 15, 2013), <https://www.history.com/news/7-famous-slave-revolts> [<https://perma.cc/AA4S-JAHJ>].

³ See generally PHILLIPPE R. GIRARD, *THE SLAVES WHO DEFEATED NAPOLEON: TOUSSAINT LOUVERTURE AND THE HAITIAN WAR OF INDEPENDENCE, 1801–1804* (2011).

⁴ WHITE ET AL., *supra* note 1, at 178.

⁵ *Id.*

⁶ STEVEN CORNELIUS, *MUSIC OF THE CIVIL WAR ERA* 118 (2004).

⁷ Jeffrey Ostler, *The Shameful Final Grievance of the Declaration of Independence*, ATLANTIC (Feb. 8, 2020), <https://www.theatlantic.com/ideas/archive/2020/02/americas-two-fold-original-sin/606163/> [<https://perma.cc/6NK7-5DUM>].

⁸ *John Brown’s Harpers Ferry*, HISTORY.COM (Mar. 4, 2010), <https://www.history.com/topics/harpers-ferry> [<https://perma.cc/PGG5-2ZDQ>].

⁹ *Id.*

Brown already had a history of violent resistance. As pro-slavery forces attempted to establish Kansas as a slave state, he and his five sons traveled there to fight them.¹⁰ In 1856, they attacked a group of cabins along a creek, killing five men with broad swords.¹¹ Guerilla warfare continued throughout the summer.¹²

In 1857, Brown began to amass resources to fund his war on slavery.¹³ His goal was to free enough of enslaved people to end slavery as an institution.¹⁴ Brown secured funds from a few prominent abolitionists and assembled a fighting force of around two dozen, including three of his four sons who had survived the summer of 1856,¹⁵ for the raid at Harpers Ferry.¹⁶ Brown approached prominent African American abolitionists Harriet Tubman and Frederick Douglass to join the effort, but Tubman was ill and Douglass believed—rightly—that the effort was doomed to fail.¹⁷

On the eve of the raid, Brown's army holed up in a farm near Harpers Ferry and prepared their attack. At the appointed hour, they approached the armory and cut the telegraph wires to prevent communication between the guards at the armory and the outside world.¹⁸ Brown and his forces easily took the arsenal.¹⁹ They then took several hostages.²⁰

Before the rebels could get away with the weapons, a passenger train happened to approach the arsenal.²¹ The baggage master detected that the armory was under siege and ran to warn the passengers.²² Brown's men ordered him to halt but he did not. The baggage master, Harvard Shepherd, a free Black man, was the first casualty of the Harpers Ferry raid.²³

For some reason, Brown decided to let the train escape.²⁴ As a result, news of the raid rapidly spread.²⁵ The next day, a company of U.S. Marines led by General Robert E. Lee cornered Brown and his compatriots who were holed up in a hotel near the arsenal.²⁶ Many of Brown's men escaped; the next morning, Lee's forces

¹⁰ *Id.*

¹¹ PAUL FINKELMAN, *SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES 188* (1998); *John Brown's Harpers Ferry*, *supra* note 8.

¹² *John Brown's Harpers Ferry*, *supra* note 8.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ MARIAN TAYLOR, *HARRIET TUBMAN: ANTISLAVERY ACTIVIST 68–69* (1997).

¹⁸ *Id.* *The Harpers Ferry Raid*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/brown-harpers-ferry-raid/> [<https://perma.cc/RX9R-GYM6>] (last visited Mar. 1, 2023).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ FINKELMAN, *supra* note 11, at 190.

surrounded the room.²⁷ Lee then demanded that Brown surrender or die; Brown chose death.²⁸ Lee's troops promptly stormed the premises and unleashed a hail of gunfire, wounding Brown and killing ten of his men.²⁹

Soon after Brown was captured, the Governor of Virginia, an Ohio congressman, a Virginia Senator, and several military officials questioned him. The congressman, Clement L. Vallandigham, asked Brown who sent him.³⁰ "No man sent me here," replied Brown.³¹ "It was my own prompting. And that of my maker, or that of the devil, which ever you please to ascribe it to. I acknowledge no man in human form."³² The senator, John Murray Mason, asked Brown, "What was your object in coming?"³³ "We came to free the slaves, and only that."³⁴ "How do you justify your acts?" asked the Senator.³⁵ Brown answered:

I think, my friend you are guilty of a great wrong against God and humanity—I say it without wishing to be offensive—and it would be perfectly right in any one to interfere with you so far as to free those you willfully and wickedly hold in bondage. I do not say this insultingly. I think I did right and that others will do right who interfere with you at any time and all times. I hold that the golden rule, "Do unto others that you would that others should do unto you," applies to all who would help others to gain their liberty.³⁶

This statement essentially articulated the political necessity defense. Brown justified his otherwise criminal act on the basis that the social utility of his act outweighed the social harm the criminal infraction itself caused.³⁷ That is, when the magnitude of the political harm is greater than the harm caused to society by the criminal act, the defendant—in committing the criminal act to abate the political harm—has chosen the lesser of two evils.³⁸ The defense has four elements: (1) the harm averted must be greater than the harm caused; (2) there must be no reasonable alternatives to breaking the law; (3) the criminal act must have the potential to directly abate the

²⁷ *Id.*

²⁸ *Id.*

²⁹ JON T. HOFFMAN, *USMC: A COMPLETE HISTORY* 84 (2002).

³⁰ MARK S. WEINER, *BLACK TRIALS: CITIZENSHIP FROM THE BEGINNINGS OF SLAVERY TO THE END OF CASTE* 175 (2006).

³¹ *Id.*

³² *Id.*

³³ *Id.* at 175–76.

³⁴ *Id.* at 176.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

harm (setting in motion a chain of events is insufficient); and (4) the harm to be averted must be imminent. The rationale behind the defense is that an individual ought not to be criminally punished for doing what, in the balance, is the right thing.³⁹

By referencing the magnitude of the social harm of slavery, Brown implied that he had chosen the lesser of two evils: “[Y]ou are guilty of a great wrong against God and humanity.”⁴⁰ In asserting that “it would be perfectly right in any one to interfere with you so far as to free those you willfully and wickedly hold in bondage,”⁴¹ Brown implied that all means are justifiable to abate the evil of slavery and thus all alternatives are reasonable. Brown was asserting that the interdiction of slavery is justifiable “by any means necessary,” in the words of 1960s Black rights advocate Malcolm X.⁴² Brown’s response also tracks the ultimate reasoning behind the political necessity defense when he stated flatly, “I think I did right.”⁴³

Furthermore, Brown delivered a closing address to the court after the verdict that essentially stated, in the nomenclature of the political necessity defense, that he chose the lesser of two evils. His address also places into perspective the most controversial element of the political necessity defense: the lack of reasonable alternatives. He stated:

Had I interfered in the manner which I admit, and which I admit has been fairly proved (for I admire the truthfulness and candor of the greater portion of the witnesses who have testified in this case), had I so interfered in behalf of the rich, the powerful, the intelligent, the so-called great, or in behalf of any of their friends, either father, mother, brother, sister, wife, or children, or any of that class, and suffered and sacrificed what I have in this interference, it would have been all right; and every man in this court would have deemed it an act worthy of reward rather than punishment.⁴⁴

Here, Brown explains that slavery is a greater evil than murder, conspiracy, and treason. But for the blinding hypocrisy of the court and jury, he suggests, they would have seen it that way too. Brown was also arguing that he had no reasonable legal alternative, the second requirement, because of the racial hypocrisy that infected the nation.

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² Videotape: Malcolm X: Founding Rally of Organization of Afro-American Unity (OAAU) Speech Excerpt (Educational Video Group June 28, 1964).

⁴³ WEINER, *supra* note 30, at 176.

⁴⁴ STEPHEN B. OATES, *TO PURGE THIS LAND WITH BLOOD: A BIOGRAPHY OF JOHN BROWN* 1351 (1970); JAMES REDPATH, *THE PUBLIC LIFE OF CAPTAIN JOHN BROWN* 240 (1860).

Brown was convicted of murder and treason and was sentenced to die.⁴⁵ He was hanged on December 2, 1859.⁴⁶ His prophetic last words, which he wrote down, captured most poignantly the gist of the reasonable alternative element of the political necessity: “I John Brown am now quite certain that the crimes of this guilty land; I had as I now think; vainly flattered myself that without very much bloodshed; it might be done.”⁴⁷

Brown was saying no reasonable alternative existed to ending slavery because the ill of slavery—in Brown’s opinion—was so deeply lodged in the body politic and the wellspring of social sentiment informing it that the political system that created slavery and kept it in place could not be reasonably expected to resolve it. As well as predicting the Civil War, historians believe, Brown hastened it through his raid on Harpers Ferry.⁴⁸

The political necessity defense requires a jury to determine the justifiability of a defendant’s conduct without the guidance of duly promulgated laws, exceptions, and defenses covering the defendant’s conduct under the circumstances at issue because legislators have not addressed those circumstances. Ultimately, a jury determines whether the political necessity defense applies to the facts of a case.

However, most cases of political necessity do not make it to the jury. Most, if not all, modern courts would not allow a defendant to raise the defense of political necessity in circumstances analogous to John Brown’s raid of Harper’s Ferry. For one, Brown’s form of dissent was forcible, falling outside of the civil lawbreaking the political necessity defense traditionally covers. Second, many courts, even in civil disobedience cases, preclude the defense, opining that the political process is always available as a reasonable alternative to breaking the law.⁴⁹ Third, federal courts have held that a duly passed law or policy, like legalized slavery, works no cognizable harm to society, irrespective of the actual harm incurred by society.⁵⁰ Fourth, abating the social wrong of slavery might require a third party, the government or slaveholders as a class, to act to ultimately abate the harm, dissipating the causal relationship between Brown’s criminal acts and the prohibition of slavery.⁵¹

While courts might be justified in imposing these types of limitations on the traditional political necessity defense, they would not be justified in imposing such limitations on a political necessity defense rooted in the Second Amendment. Indeed, as argued herein, the political necessity defense is a constitutional defense protected by the Second Amendment to the U.S. Constitution.

⁴⁵ FINKELMAN, *supra* note 11, at 191.

⁴⁶ *Id.*

⁴⁷ OATES, *supra* note 44, at 351.

⁴⁸ *John Brown’s Harpers Ferry*, *supra* note 8.

⁴⁹ *United States v. Schoon*, 971 F.2d 193, 199 (9th Cir. 1991), *as amended* (Aug. 4, 1992).

⁵⁰ *See infra* text accompanying notes 174–76.

⁵¹ James L. Cavallaro, Jr., *The Demise of the Political Necessity Defense: Indirect Civil Disobedience and United States v. Schoon*, 81 CALIF. L. REV. 351, 366 (1993).

The “Let My People Go” Article series has two parts. Part One discusses the political necessity defense, the underpinnings of the political necessity defense, the types of political necessity, and Black rebellion. Part Two discusses the constitutional basis for the political necessity defense, including the historic and modern Second Amendment right to rebel, the violent veto power of the Second Amendment and its relationship to the right to rebel, and the connection between the violent veto power and the political necessity defense. Part Two refines the political necessity defense to meet Second Amendment standards, then applying the elements of the refined political necessity defense to the storming of Capitol Hill on January 6, 2020.

Section II of Part One of this Article discusses the doctrine of political necessity and the historical underpinnings of the necessity doctrine in general. It also discusses a series of social upheavals in American history—including the founding acts of resistance leading to the American Revolution, major slave rebellions, and urban riots—to provide context for the types of social wrongs the Second Amendment political necessity defense contemplates. Section III concludes Part One of the Article and introduces Part Two.

I. THE DOCTRINE OF POLITICAL NECESSITY

The necessity defense, often referred to as the choice-of-evils defense, applies when an individual violates the law in order to avert a greater harm.⁵² It “excludes from punishment illegal conduct that is reasonably designed to advance the common good.”⁵³ It is a justification defense as opposed to an excuse defense in that it applies when the defendant’s conduct is not only legally non-culpable, but also socially desirable.⁵⁴

In most jurisdictions, the necessity defense only applies if the defendant: (1) reasonably believed, (2) his conduct “was necessary to avoid a harm, (3) more serious than that sought to be prevented by the statute defining the offense.”⁵⁵ Furthermore, the defense is unavailable if there is a reasonable legal alternative to committing the crime.⁵⁶ At common law, in order for the defense to apply, natural forces must have created the threat of harm⁵⁷ and the crime could not be murder.⁵⁸

⁵² United States v. Bailey, 444 U.S. 394, 410 (1980); *see also* GLANVILLE WILLIAMS, *THE SANCTITY OF LIFE AND THE CRIMINAL LAW* 198 (1957) (“[S]ome acts that would otherwise be wrong are rendered rightful by a good purpose, or by the necessity of choosing the lesser of two evils.”).

⁵³ Shaun P. Martin, *The Radical Necessity Defense*, 73 UNIV. CIN. L. REV. 1527, 1532 (2005).

⁵⁴ Edward B. Arnolds & Norman F. Garland, *The Defense of Necessity in Criminal Law: The Right to Choose the Lesser Evil*, 65 NW. J. CRIM. L. & CRIMINOLOGY 289, 296 (1975).

⁵⁵ *Bailey*, 444 U.S. at 410; *see also* WILLIAMS, *supra* note 52, at 198.

⁵⁶ *Bailey*, 444 U.S. at 410.

⁵⁷ *Id.*

⁵⁸ John A. Cohan, *Homicide by Necessity*, 10 CHAP. L. REV., 120, 120 (2006).

Some modern statutes—as well as the Model Penal Code—allow the necessity defense in murder prosecutions.⁵⁹ In those jurisdictions, for instance, defendants can claim necessity if they killed one person in order to save the lives of two or more people.⁶⁰ Every jurisdiction in the United States has adopted the necessity defense in one form or another.⁶¹

Examples of the types of circumstances that have traditionally supported the necessity defense include: a prisoner escaping a burning prison;⁶² a person lost in the woods stealing food from a cabin to survive;⁶³ a crew committing mutiny when their ship is unseaworthy;⁶⁴ and individuals destroying property to prevent the spread of fire.⁶⁵

According to Professor Wayne LaFave and Dean Austin Scott, Jr., the rationale behind the necessity defense stems from the premise that “the law ought to promote the achievement of higher values at the expense of lesser values, and sometimes the greater good for society will be accomplished by violating the literal language of the criminal law.”⁶⁶

In its basic form, the necessity defense is inherently political, in both its origins and mechanics. A feature of English common law, the defense developed its American features in the wake of the Revolutionary War.⁶⁷ As such, it was imbued with prevailing fears at the time that “[f]ederal or state executives still might abuse their powers under the new regime, and even the most conscientious government officials might not share popular values or be aware of fundamental changes in public morality.”⁶⁸

The manner in which the defense operates today also has political implications. The Ninth Circuit opined in *United States v. Schoon* that “in some sense, the necessity defense allows us to act as individual legislatures, amending a particular criminal provision or crafting a one-time exception to it, subject to court review, when a real legislature would formally do the same under those circumstances.”⁶⁹

Professor Shaun P. Martin describes the doctrine’s operational features in somewhat more radical terms, observing that the “necessity defense, notwithstanding its

⁵⁹ *Id.* at 133.

⁶⁰ *Id.* at 133–34.

⁶¹ Martin, *supra* note 53, at 1535.

⁶² *See, e.g.*, *Baender v. Barnett*, 255 U.S. 224, 226 (1921).

⁶³ *See* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193, 1205 (1985).

⁶⁴ *See* *United States v. Ashton*, 24 F. Cas. 873, 874 (Mass. Cir. 1834).

⁶⁵ *See, e.g.*, *Surocco v. Geary*, 3 Cal. 69, 74 (1853).

⁶⁶ WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HANDBOOK ON CRIMINAL LAW* § 5.4(a), at 442 (2d ed. 1986).

⁶⁷ Martin, *supra* note 53, at 1542.

⁶⁸ *Id.*

⁶⁹ *United States v. Schoon*, 971 F.2d 193, 196–97 (9th Cir. 1991), *as amended* (Aug. 4, 1992).

seemingly innocuous nature, articulates a profoundly revolutionary principle, both as a jurisprudential doctrine and as a vehicle for social change.”⁷⁰ According to Martin, this is because the doctrine “conflicts with prevailing principles of the ‘rule of law’”⁷¹ by authorizing “individualized legal disobedience as a means to advance the greater collective social good.”⁷²

Martin notes in addition that “[t]he necessity doctrine anticipates and expects the abuse of democratic governmental power and a divergence of belief between the governed and their representatives.”⁷³ According to Martin, proof of this assumption lies in the defense’s very existence. He argues that the necessity defense “would be entirely unnecessary if the judicial system was expected to operate as it was intended.”⁷⁴ He cites abuse of prosecutorial discretion as one example of the type of governmental abuse of power that the necessity defense was meant to anticipate.⁷⁵

Prosecutors act as the gatekeepers of the criminal justice system.⁷⁶ They have an enormous amount of discretion in terms of selecting the individuals and the types of cases to prosecute.⁷⁷ A prosecutor’s political and social beliefs inevitably influence this discretion.⁷⁸ According to Martin, prosecutors will not typically prosecute necessity cases if they have a racial or political component.⁷⁹ Conversely, prosecutors are more likely to prosecute those cases possessing racial or political undertones if those undertones impugn their beliefs or aggravate their prejudices.⁸⁰

The necessity defense theoretically offers a way to check the prosecutor’s bias. However, as Martin notes, “[n]ecessity . . . serves its intended function only if . . . a jury may insist that a given illegal act increases net social utility even though the executive has concluded otherwise.”⁸¹ In other words, the defense only provides a check on a prosecutorial abuse of power if the defendant is allowed to present the defense to the jury. Thus, the fact that judges typically refuse to allow defendants to argue necessity in cases that have political implications presents a problem.⁸²

However, if the defense is cognizable as a constitutional right—as argued herein—judges would, in many cases, be forced to allow defendants to present the defense.

⁷⁰ Martin, *supra* note 53, at 1529.

⁷¹ *Id.* at 1530.

⁷² *Id.*

⁷³ *Id.* at 1544–45.

⁷⁴ *Id.* at 1539.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.* at 1564–65.

⁷⁹ *See id.* at 1564–65, 1565 n.161.

⁸⁰ *See generally id.*

⁸¹ *Id.* at 1540.

⁸² JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 271–77 (8th ed. 2018).

II. THE POLITICAL NECESSITY DEFENSE

The political necessity doctrine applies the basic tenets of the necessity doctrine to situations where an individual breaks the law to address a political concern.⁸³

Proponents argue that the defense is justified because it “empowers the individual primarily by presenting a forum in which stifled minority or unheeded majority viewpoints receive a public hearing and a governmental response.”⁸⁴ Similarly, the elements of the defense aid defendants in publicizing their political motivations. As Steven M. Bauer and Peter J. Eckerstrom writes:

[I]n proving the imminence of the harm, [defendants] can demonstrate the urgency of the social problem[;] in showing the relative severity of the harms, they can show the seriousness of the social evil they seek to avert[;] in establishing the lack of reasonable alternatives, they can assault the unresponsiveness of those in power in dealing with the problem and prod them to action[;] and in presenting evidence of a causal relationship, they can argue the importance of individual action in reforming society.⁸⁵

Proponents also argue that allowing defendants to present the defense “conveys the symbolic message that our society highly values political input and gives special attention to apparent systemic failures in our form of democratic government.”⁸⁶ The defense also empowers juries to serve as a check on law enforcement as it “conforms with a longstanding American willingness to use citizens as a buffer between the defendant and the harsh and sometimes arbitrary enforcement of the law.”⁸⁷

Opponents of the political necessity defense argue that criminal conviction is the price protestors must be willing to pay for standing up for their beliefs and that the law should not be made to support the political beliefs of those who act outside of the political process.⁸⁸ Another concern opponents voice is that the defense “violates the principle of majority rule because the jury is asked to decide whether actors were justified in seeking to avert an unwise policy.”⁸⁹ In other words, the defense transforms the jury into “a quasi-legislative or executive body that can in effect veto duly promulgated policies” without the safeguards of accountability to the electorate,

⁸³ *Id.* at 266–77.

⁸⁴ Steven M. Bauer & Peter J. Eckerstrom, *The State Made Me Do It: The Applicability of the Necessity Defense to Civil Disobedience*, 39 STAN. L. REV. 1173, 1184 (1987).

⁸⁵ *Id.* at 1176.

⁸⁶ *Id.* at 1185.

⁸⁷ *Id.* at 1186.

⁸⁸ DRESSLER, *supra* note 82, at 276–77.

⁸⁹ John A. Cohan, *Civil Disobedience and the Necessity Defense*, 6 PIERCE L. REV. 111, 122 (2007).

including elections, and the need to justify decision making that characterizes the legislative and executive branches.⁹⁰

Opponents also argue that jurors are without the political sophistication to comprehend and apply the complicated policy judgments required to evaluate a defendant's claim to the defense.⁹¹ They also argue that "factors that have nothing to do with the policy issues often enter into a jury's consideration," such as "[s]ubjective notions about the parties, actions by the judge, and the lawyers' ability to inflame the jury."⁹²

The political necessity defense, similar to the basic necessity defense, requires four elements of proof: (1) that the defendant was faced with a choice between evils and chose the lesser evil; (2) that he or she acted to prevent imminent harm; (3) that the defendant reasonably anticipated a causal relation between the conduct and the harm to be avoided; and (4) that there were no other legal alternatives to violating the law.⁹³

The first requirement, the balance of harms element, does not usually present an insurmountable hurdle for defendants who engage in non-violent forms of protest.⁹⁴ For instance, a criminal trespass on government property in protest of nuclear proliferation obviously works less harm on society than the threat of nuclear war. Similarly, the imminence requirement is usually not prohibitively difficult to establish.⁹⁵ In the context of nuclear proliferation, for example, many courts would view the threat of nuclear war to be an imminent harm.

The last two prongs, requirement of a causal link and a lack of legal alternatives, have produced the most trouble for defendants. Courts customarily question the existence of a causal link between the defendant's political activity and the abatement of the object of the protest.⁹⁶ In the context of nuclear proliferation, for instance, a court would probably hold that trespassing on government property is not reasonably likely to end the manufacture and proliferation of nuclear weapons.

The causal link requirement assumes that the only utility of the political act is to bring about the immediate end to the harm the act is designed to avert. It overlooks the potential aggregate effect of other acts of political necessity by other unrelated defendants in redress of the same issue, as well as the potential effect of the unlawful acts combined with the political process, as is the case when the criminal act forces the government to act. Moreover, as discussed fully in Section III, the requirement of a direct causal link is out of step with the history and rationale behind the Second Amendment, which supplies the political necessity defense with an additional form.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² Bauer & Eckerstrom, *supra* note 84, at 1198.

⁹³ Cavallaro, *supra* note 51, at 356.

⁹⁴ *Id.* at 357.

⁹⁵ *Id.*

⁹⁶ *Id.* at 358.

Regarding the legal alternatives element, courts typically hold that the political process is always a legal alternative to criminal action.⁹⁷ These findings reflect concerns that the political necessity defense subverts the democratic process. However, while such concerns might hold sway under a traditional approach to the political necessity defense, the same concerns are subordinated in merit when imported into the context of the Second Amendment. As discussed in detail in Section III, the concept at the very heart of the Second Amendment is subversion of the political process.

Again, although the casual requirement and the legal alternatives factors present a substantial bar to the successful use of the traditional political necessity defense, processing the defense through the Second Amendment demands a reshuffling of the hierarchy of rationales underlying the traditional version of the defense and the ideas giving birth to the Second Amendment. Even still, the applicability of the constitution-based political necessity defense depends not just on the analysis of the traditional elements of the defense, but also on the types of circumstances the Second Amendment was designed to anticipate. These circumstances track roughly the type or category of political necessity.

A. Types of Political Necessity

Many types of unlawful activities can be categorized under the banner of political necessity. They range from acts as violent as homicide, rioting, and rebellion to acts as peaceful as disobeying a municipal ordinance by kneeling to pray in the middle of a public thoroughfare.

1. Civil Disobedience

Civil disobedience is the most common type of political necessity or, stated differently, the most common category of criminal acts committed to protest a government-inflicted social wrong. Sanford J. Rosen defines civil disobedience as “open and purposeful law breaking that is politically motivated, and normally is accompanied by the actors’ sense of moral indignation and duty.”⁹⁸ John Rawls explains that civil disobedience is “a public, nonviolent, conscientious yet political act contrary to law usually done with the aim of bringing about a change in the law or policies of the government.”⁹⁹

The expression “civil disobedience” is derived from Henry David Thoreau’s essay “Resistance to Civil Government,” published in 1849 and later renamed “Essay on Civil Disobedience.”¹⁰⁰ In the essay, Thoreau assailed the institution of slavery and

⁹⁷ *Id.* at 359.

⁹⁸ Sanford J. Rosen, *Civil Disobedience and Other Such Techniques: Law Making Through Law Breaking*, 37 GEO. WASH. L. REV. 435, 442 (1969).

⁹⁹ JOHN RAWLS, A THEORY OF JUSTICE 364 (Harvard Univ. Press 1971).

¹⁰⁰ HENRY DAVID THOREAU, RESISTANCE TO CIVIL GOVERNMENT (1849), as reprinted in

questioned the feasibility of changing the government through the political process.¹⁰¹ He took the position that citizens should simply refuse to recognize the authority of an unjust government by disobeying its laws.¹⁰² Thoreau himself refused to pay taxes in protest of slavery and was temporarily jailed as a result.¹⁰³

Civil disobedience is quintessentially American. As Justice Bright documents in *United States v. Kabat*, “[c]ivil disobedience has been prevalent throughout this nation’s history extending from the Boston Tea Party and the signing of the Declaration of Independence to the freeing of the slaves by operation of the Underground Railroad in the mid-1880s.”¹⁰⁴ Civil disobedience was also an essential part of the “labor, women’s rights, civil rights, antiwar, and antinuclear movements”¹⁰⁵ of the twentieth century.

In a real sense, the country itself is a product of civil disobedience. Civil disobedience was at the heart of the events which fueled the American Revolution. The Boston Tea Party and the Stamp Act Riots are prominent examples.

On December 16, 1773, under the cover of night, several men disguised as Mohawks crept aboard three ships docked in the Boston harbor.¹⁰⁶ The three vessels were packed with tons of tea being shipped to the colonies by the Dutch East India Company.¹⁰⁷ The marauders dumped the entirety of the shipments into Boston Harbor, an amount that totaled 342 chests of tea.¹⁰⁸

The bandits were American colonists.¹⁰⁹ The dumping of the tea was the opening salvo in an organized campaign to undermine British colonial rule.¹¹⁰ This act of civil disobedience came to be known as the Boston Tea Party.¹¹¹

Two years prior to the Boston Tea Party, Parliament passed the Tea Act which increased the retail sales tax of tea in the colonies.¹¹² The Act also awarded the Dutch East India Company a monopoly over the shipment—and by extension the sale—of tea in the colonies.¹¹³ Colonists objected to the Tea Act primarily on the

THE WRITINGS OF HENRY D. THOREAU: REFORM PAPERS 63–76, 86–90 (Wendell Glick ed., 1973), https://www.norton.com/college/history/archive/resources/documents/ch13_04.htm [https://perma.cc/RMP2-HZAK].

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *United States v. Kabat*, 797 F.2d 580, 601 (8th Cir. 1986) (Bright, J., dissenting).

¹⁰⁵ *Bauer & Eckerstrom*, *supra* note 84, at 1176.

¹⁰⁶ PETER D. G. THOMAS, *TEA PARTY TO INDEPENDENCE: THE THIRD PHASE OF THE AMERICAN REVOLUTION 1773–1776*, at 20–21 (Clarendon Press 1991).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 21, 24–25.

¹¹¹ *Id.* at 24.

¹¹² ELLA WAGNER, *GALE RESEARCHER GUIDE FOR: THE TEA ACT AND ITS AFTERMATH* 2 (2018).

¹¹³ *Id.*

ground that it—as well as all other acts passed by Parliament—constituted “taxation without representation,” a violation of their rights as English citizens.¹¹⁴ That is, the colonists were afforded no independent representatives in British Parliament who would represent their distinct issues as colonists.¹¹⁵ They claimed that they had no corresponding duty to abide by English law, particularly with regard to the payment of taxes.¹¹⁶ The Tea Tax was particularly troubling because the British government controlled the revenue it generated and used some of it to pay public officials in the colonies, effectively bringing the colonies under British control.¹¹⁷

Importantly, the Tea Act itself worked no tangible economic harm on the colonists.¹¹⁸ Although it increased the tax on the retail sale of tea, colonial consumers ultimately would pay less for it because of the Tea Act.¹¹⁹ The Act lowered the duty amount the Dutch East India Company had to pay to import tea into Britain, a saving that the company passed on in part to colonial consumers.¹²⁰ Additionally, the Act enabled the Dutch East India Company to ship tea directly to the colonies, cutting out charges British merchants added when the company was required to sell the product wholesale in Britain.¹²¹

Thus the “taxation without representation” involved in the Tea Act was a matter of principle, not economics.¹²² Enough colonists considered this and other acts of the British Crown egregious enough to engage in a violent revolution that would claim tens of thousands of lives.¹²³

Founding father Samuel Adams opined at the time that the Boston Tea Party was a righteous and principled protest born of necessity and not, as some claimed, the result of the reactive rage of a lawless mob.¹²⁴ He described the drowning of the tea, which was a criminal act under English law, as the last option available to the people to preserve their constitutional rights.¹²⁵ In the parlance of the political necessity defense, Adams claimed that the colonials had no reasonable legal alternatives.¹²⁶

¹¹⁴ *Id.*

¹¹⁵ William Jennings Bryan, *The World's Famous Orations: William Pitt on the Right to Tax America* (1766), BARTLEBY, <https://www.bartleby.com/268/3/23.html> [<https://perma.cc/P3YZ-Z5XV>] (last visited Mar. 1, 2023).

¹¹⁶ *Id.*

¹¹⁷ PETER D. G. THOMAS, *THE TOWNSHEND DUTIES CRISIS* 252–54 (Clarendon Press 1987).

¹¹⁸ PAUL S. BOYER ET AL., *THE ENDURING VISION: A HISTORY OF THE AMERICAN PEOPLE* 146 (8th ed. 2014).

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² CHARLES M. DOLLAR ET AL., *AMERICA, CHANGING TIMES* 108 (2d ed. 1982).

¹²³ *Id.*

¹²⁴ JOHN K. ALEXANDER, *SAMUEL ADAMS: AMERICA'S REVOLUTIONARY* 126, 129 (2002).

¹²⁵ *Id.*

¹²⁶ *Id.*

2. Twentieth-Century Applications of the Doctrine

The Boston Tea Party was but one act of civil disobedience in a long line of acts that would come to characterize the American architecture of social change.¹²⁷ In the 1950s and 60s, civil disobedience played an inextricable role in abolishing legal segregation—a social, economic, and political artifice designed to perpetuate and buttress the contrivance of white supremacy.¹²⁸ Civil rights activists employed direct action, a brand of civil disobedience, to eliminate laws that relegated African-Americans to the backs of busses, the balconies of theaters, and the side windows of restaurants in the South that served whites.¹²⁹ Similarly, in the 1970s, anti-war activists violated selective service laws in protest of the Vietnam War.¹³⁰ Their efforts contributed to the nation's military withdrawal from Vietnam.¹³¹

Modern courts distinguish between two types of civil disobedience, indirect and direct, for the purposes of determining the applicability of the political necessity defense.¹³² Indirect civil disobedience “challenges the legitimacy of a given act or policy through the violation of a law that is not itself challenged.”¹³³ Indirect civil disobedience typically involves the violation of trespass law.¹³⁴ Examples include the protestors who unlawfully occupied the South African consulate to protest apartheid and the civil rights activists who marched without a license to protest segregation. Direct civil disobedience, in contrast, “challenges a particular policy or law by contravening that same policy or law.”¹³⁵ Examples of direct civil disobedience would be abolitionists disobeying fugitive slave laws by refusing to turn in any enslaved people who escaped, pro-legalization activists who smoke marijuana in public as part of a protest, and the famous act of Rosa Parks when asked to give up her seat on a public bus.¹³⁶

Although the federal government has been hostile to defenses based on civil disobedience—particularly regarding indirect civil disobedience—several state courts have allowed the necessity defense in many instances involving protests.¹³⁷ William P. Quigley cites several more modern successful uses of the political necessity

¹²⁷ Cavallaro, *supra* note 51, at 384.

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

¹³¹ *United States v. Kabat*, 797 F.2d 580, 601 (8th Cir. 1986) (Bright, J., dissenting).

¹³² Lance N. Long, *The Climate Necessity Defense: Proof and Judicial Error in Climate Protest Cases*, 38 STAN. ENV'T L.J. 57, 104 (2018).

¹³³ Cavallaro, *supra* note 51, at 352.

¹³⁴ Cohan, *supra* note 89, at 114.

¹³⁵ Cavallaro, *supra* note 51, at 352.

¹³⁶ Cohan, *supra* note 89, at 114.

¹³⁷ Cavallaro, *supra* note 51, at 351.

defense in state courts, including *Washington v. Bass*, *Massachusetts v. Carter*, *Vermont v. Keller*, *Chicago v. Streeter*, and *California v. Halem*.¹³⁸

In *Washington v. Bass*, several students attending Evergreen State College sat in the Washington State Capitol to protest apartheid in South Africa and to support an anti-apartheid divestment bill.¹³⁹ The students were asked to leave and several of them refused. These students were arrested and charged with trespass and disorderly conduct.¹⁴⁰

At their trial, the trial judge allowed the defendants to admit statistical and expert evidence on the defense of necessity. All were acquitted.¹⁴¹

In *Massachusetts v. Carter*, student activists disrupted recruitment activities at the University of Massachusetts–Amherst by the Central Intelligence Agency (CIA) in protest of the agency’s use of illegal drug money to make off-the-book purchases of weapons to supply anti-communist rebel forces in Nicaragua in the Iran-Contra scandal.¹⁴² The protesters, among them Amy Carter, the daughter of former President Jimmy Carter, were arrested and charged with trespass and disorderly conduct.¹⁴³ At trial, the defendants presented a defense based on political necessity and related doctrines.¹⁴⁴ They argued that their crimes created far less social harm than the crimes the CIA was committing in Central America.¹⁴⁵ In support of their argument, they presented the testimony of an erstwhile contra leader as well as former CIA officials.¹⁴⁶ The judge instructed the jurors that they could acquit if they found that the defendants believed their protest would help to prevent a clear and immediate threat of public harm.¹⁴⁷ The defendants were acquitted in three hours.¹⁴⁸

In *Vermont v. Keller*, demonstrators staged a sit-in at the Vermont office of U.S. Senator Robert Stafford, in an effort to secure a public meeting on American policy

¹³⁸ William P. Quigley, *The Necessity Defense in Civil Disobedience Cases: Bring in the Jury*, 38 NEW ENG. L. REV. 1, 26–37 (2003); see also Human Rights and Peace Law Docket: 1945–1993 (Ann Fagan Ginger & Jim Ginger eds., 5th ed. 1945–1993) (case summary of *Chicago v. Streeter*) (defendants arrested for trespass at South African consulate; necessity defense permitted; jury acquitted defendants); Human Rights and Peace Law Docket: 1945–1993, PL-219/25.10 (Ann Fagan Ginger & Jim Ginger eds., 5th ed. 1945–1993) (case summary of *Washington v. Bass*) (defendants staged sit-in at state capital in support of South African divestment bill; arrested after refused to disperse; necessity defense).

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² Human Rights and Peace Law Docket: 1945–1993, PL-185/25.9 (Ann Fagan Ginger & Jim Ginger eds., 5th ed. 1945–1993) (case summary of *Massachusetts v. Carter*).

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ Matthew L. Wald, *Amy Carter Acquitted Over Protest*, N.Y. TIMES (Apr. 16, 1987), <https://www.nytimes.com/1987/04/16/us/amy-carter-is-acquitted-over-protest.html> [https://perma.cc/HDB7-TPJ5].

¹⁴⁸ *Id.*

in Central America.¹⁴⁹ The demonstrators were arrested and charged with trespass-related offenses.¹⁵⁰ At trial, the court allowed the defendants to call expert witnesses with expertise in human rights to testify about the human rights violations in El Salvador and Nicaragua.¹⁵¹ The court also allowed evidence on reasonable likelihood of success element of the necessity defense.¹⁵² For instance, experts could testify about the efficacy of protest in impacting American foreign policy.¹⁵³ The court also allowed testimony from the defendants on the “lack of legal alternatives” element of the political necessity defense.¹⁵⁴ To this end, the defendants testified that they had attempted “every reasonable manner to communicate” with the Senator.¹⁵⁵ The jury acquitted.¹⁵⁶

In *Chicago v. Streeter*, a jury acquitted demonstrators of trespass. The demonstrators had refused to leave the office of the South African consul in protest of apartheid. The court allowed expert testimony helping to establish the defense of necessity and related defenses.

In 1993, Chicago AIDS activists mounted a successful necessity defense after they were charged with illegally supplying clean needles.¹⁵⁷ Similarly, AIDS activists in California were acquitted after successfully arguing that committing the crime of dispensing clean needles without a prescription was necessary to protect people from the spread of the AIDS virus.¹⁵⁸

Federal courts draw a distinction between cases of indirect civil obedience as exemplified by *Bass*, *Carter*, *Keller*, *Streeter*, *Halem*, and the direct civil disobedience typified by the clean needle cases.

3. The *Schoon* Dilemma

The primary obstacle to raising a successful political necessity defense is a court’s refusal to allow the defendant to present the defense to the jury. This, of course, means that the defendant cannot introduce evidence highlighting the nature and

¹⁴⁹ See, e.g., HUMAN RIGHTS AND PEACE LAW DOCKET: 1945–1993, at PL-39/25.2–25.3 (case summary of *Vermont v. Keller* (Winooski 44)), <http://sunsite.berkeley.edu/meiklejohn/meik-peacelaw/meik-peacelaw-16.html> [<https://perma.cc/RTQ7-8DTJ>] (last visited Mar. 1, 2023).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² See Quigley, *supra* note 138, at 30 (“The defendants further testified they had attempted ‘every reasonable manner to communicate’ with the Senator.”) (implying that the defendants asserted a likelihood of success in their actions).

¹⁵³ *Id.*

¹⁵⁴ Laura J. Schulkind, *Applying the Necessity Defense to Civil Disobedience Cases*, 64 N.Y.U. L. REV. 79, 93 (1989).

¹⁵⁵ Quigley, *supra* note 138, at 30.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 35.

¹⁵⁸ *Id.*

magnitude of the social harm. This not only nearly guarantees the defendant's conviction, but also robs defendant-dissidents of one of the most valuable tools they have in changing the target law or policies, drawing attention to and winning public support for the championed cause.¹⁵⁹ Furthermore, precluding the political necessity defense discourages others from engaging in socially desirable behavior.¹⁶⁰ The barriers to the successful mounting of the political necessity defense are typified by *United States v. Schoon*, the leading case on the matter.

In *Schoon*, demonstrators were tried for invading the Internal Revenue Service (IRS) office at the federal building in Tucson, Arizona, in protest of U.S. involvement in El Salvador.¹⁶¹ They had overrun the office, splashing mock blood throughout.¹⁶²

The U.S. government was supporting an El Salvadoran government that deployed "death squads" against dissenters.¹⁶³ These death squads killed several El Salvadorans.¹⁶⁴ The protest at the Tucson federal building followed the massacre of six Jesuit priests and a teenage girl.¹⁶⁵

After a standoff with law enforcement, the protestors were arrested for obstructing government operations and failure to obey.¹⁶⁶ At trial, the defendants attempted to argue that their actions were necessary to end the massacres in El Salvador.¹⁶⁷ The trial court, however, refused to allow the defendants to present evidence supporting their necessity argument.¹⁶⁸ The court held that "(1) the requisite immediacy was lacking; (2) the actions taken would not abate the evil; and (3) other legal alternatives existed."¹⁶⁹ The defendants were convicted and appealed to the Ninth Circuit.¹⁷⁰

The Ninth Circuit, in affirming the trial court's decision, created a *per se* rule prohibiting the use of the necessity defense in all indirect civil disobedience cases.¹⁷¹ The court declared that three of the four elements needed to mount a successful political necessity defense were unalterably lacking in indirect civil disobedience cases.¹⁷² Those elements are (1) balance of harms, (2) lack of reasonable alternatives, and (3) direct causal relationship—the imminence requirement being the sole element not deflowered by the Court.¹⁷³

¹⁵⁹ Cavallaro, *supra* note 51, at 351–85.

¹⁶⁰ *Id.*

¹⁶¹ 971 F.2d 193, 195 (9th Cir. 1991), *as amended* (Aug. 4, 1992).

¹⁶² *Id.*

¹⁶³ Cavallaro, *supra* note 51, at 362.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *United States v. Schoon*, 971 F.2d 193, 195 (9th Cir. 1991).

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 199–200.

¹⁷² *Id.* at 197.

¹⁷³ *Id.* at 197–98.

The Ninth Circuit's analysis of the four elements is critical because *Schoon* is the paradigmatic case on the political necessity defense and, as such, serves as the perfect prototype against which to analyze the effect of the Second Amendment on the traditional political necessity defense.

The first element the Court evaluated was the balance of harms element. The Court framed the harm the defendants sought to allay in invading the federal building in purely abstract terms. While the actual harm the defendants were trying to prevent was the gratuitous loss of life encouraged by U.S. policy, the Court framed the relevant harm as the government policy itself. The court held that "the mere existence of a constitutional law or governmental policy cannot constitute a legally cognizable harm."¹⁷⁴ The court reasoned via presumption that "these protestors violate a law, not because it is unconstitutional" nor because "the procedure by which the policy was adopted was in any way improper" nor because they are "prevented systematically from participating in the democratic processes through which the policy was chosen," "but because doing so calls public attention to their objectives."¹⁷⁵ The court concluded that since lawfully enacted government policies cause no harm, the social harm caused by the criminal infraction automatically carries the day.¹⁷⁶ In other words, the court, in balancing the harm the defendants sought to allay (U.S. policy in El Salvador) against the harm caused by the criminal act (threat to rule of law, disorder caused by the trespass, etc.) concluded that there existed only one harm, the harm caused by the criminal offense, and that one harm, no matter how trivial, wins the balance.

In assessing the legal alternatives prong of the necessity defense in indirect civil disobedience cases, the court held "because congressional action can *always* mitigate this 'harm,' [i.e., the one protestors sought to address] lawful political activity to spur such action will always be a legal alternative."¹⁷⁷ In discussing the reasonableness of the alternative, the court stated, "[w]e assumed there that the 'possibility' that Congress will change its mind is sufficient in the context of the democratic process to make lawful political action a reasonable alternative to indirect civil disobedience."¹⁷⁸

In discussing the causal element of the necessity defense, which requires a causal relationship between the criminal conduct and the harm to be allayed, the *Schoon* court held that acts of indirect civil disobedience are not likely to change government policy as an immediate result of the criminal acts. The court explained that this is so because "it takes another *volitional* actor not controlled by the protestor to take a further step; Congress must change its mind."¹⁷⁹ The court reasoned that

¹⁷⁴ *Id.* at 197.

¹⁷⁵ *Id.* at 197–98.

¹⁷⁶ *Id.* at 198.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 199.

¹⁷⁹ *Id.* at 198.

“[i]f the criminal act cannot abate the threatened harm, society receives no benefit from the criminal conduct.”¹⁸⁰

The political history of the United States does not support the Ninth Circuit’s findings regarding each of the disqualifying elements, balance of harm, reasonable alternatives, and direct causal relationship, as the above instances of civil disobedience show. The country’s history of not-so-civil disobedience also provides several instances undermining many of the *Schoon* court’s findings.

B. Riots, Rebellions, and Other Forcible Acts of Political Necessity

In addition to civil disobedience, protestors sometimes commit more aggressive acts of protest, such as assault, rioting, looting, arson, and even murder to protest or escape the effect of an oppressive law or policy.¹⁸¹ Typically these acts are taken in response to greater social evils than those associated with civil disobedience. Such acts also come with graver criminal charges and potential penalties. The charges civil disobedient defendants face are relatively minor misdemeanor offenses, like trespass and disturbing the peace, while the charges forcible resisters usually face are felonious and come with substantially higher penalties, including death.

The commission of forcible crimes out of political necessity undoubtedly create heavy amounts of social harm. The purely economic harm caused by rioting and the concomitant destruction of property in and of itself is high, not to mention the massive human costs to society caused by assault and homicide. As a result, only the most egregious brands of social wrongs should be deemed to necessitate the use of violent means of protest.

The more digestible forms of forcible dissent acceptable to the modern American imagination, outside of the American Revolution, commence with the riots that preceded it, including the Stamp Act riots of 1765 and the riots leading to the Boston Massacre of 1768.

The former were among the earliest examples of violence dispatched in protest of government action. In 1765, British Parliament passed a law requiring American printers to use only paper produced in Britain for documents such as legal papers and newspapers.¹⁸² Acceptable documents were identifiable by a revenue stamp.¹⁸³

¹⁸⁰ *Id.*

¹⁸¹ Cohan, *supra* note 89, at 114–15.

¹⁸² Donna Jane Spindel, *The Stamp Act Riots*, 59 GA. HIST. Q. 111, 111 (1975).

¹⁸³ Smithsonian Institution, *Stamp from the Stamp Act of 1765*, https://collections.si.edu/search/detail/edanmdm:npm_0.022044.2?q=guId%3A%22ark%3A%2F65665%2Fhm83345b23b31424209b18cea01981b98ba%22&record=1&hlterm=guId%3A%26quot%3Bark%3A%2F65665%2Fhm83345b23b31424209b18cea01981b98ba%26quot%3B [https://perma.cc/6BXR-6LW6] (last visited Mar. 1, 2023).

The paper carried a tax to defray the cost of maintaining British troops in the colonies after the French and Indian War.¹⁸⁴ Britain claimed that the troops were necessary to protect the colonists from a French invasion.¹⁸⁵ However, the colonists did not want the troops in the colonies and never requested them. They believed the tax to be a ruse set up to provide patronage to British officers and career soldiers at their expense.¹⁸⁶

The colonists were outraged by the Stamp Act.¹⁸⁷ They considered it a violation of their rights as Englishmen to be free from “taxation without representation.”¹⁸⁸ However, as certain members of Parliament pointed out, only landowners, not all Englishmen, had a right to direct representation in Parliament, and the colonists owned no land in England.¹⁸⁹ Nonlandowners were deemed to be virtually represented by their landowning counterparts.¹⁹⁰ In this way, the colonists were arguably no different from Englishmen residing in Britain who did not own land.¹⁹¹

The colonists, however, saw their situation as distinguishable. A series of protests against the Stamp Act, escalating in intensity, broke out in several American colonies, most notably in Boston.¹⁹² There, protestors hung the stamp distributor, Andrew Oliver, in effigy from a giant tree which was later dubbed the “Liberty Tree.”¹⁹³ Then they paraded the effigy down the street to Oliver’s home.¹⁹⁴ They then burned down Oliver’s stable house and set his coach and chaise ablaze.¹⁹⁵ When Lieutenant Governor Thomas Hutchinson and Sheriff Greenleaf tried to stop the protestors, they were mercilessly stoned.¹⁹⁶ The protestors went on to loot Oliver’s

¹⁸⁴ DAVID BRION DAVIS & STEVEN MINTZ, *THE BOISTEROUS SEA OF LIBERTY: A DOCUMENTARY HISTORY OF AMERICA FROM DISCOVERY THROUGH THE CIVIL WAR* 144 (1999).

¹⁸⁵ Victoria, *Parliamentary Debates*, House of Representatives, 7 September 1869, 2667 (Austl.).

¹⁸⁶ Founders Online, *Examination Before the Committee of the Whole of the House of Commons, 13 February 1766*, NAT’L ARCHIVES, <https://founders.archives.gov/documents/Franklin/01-13-02-0035#BNFN-01-13-02-0035-fn-0001> [<https://perma.cc/JTS3-SHZH>] (last visited Mar. 1, 2023).

¹⁸⁷ JONATHAN MERCANTINI, *THE STAMP ACT OF 1765: A HISTORY IN DOCUMENTS* 149 (2017).

¹⁸⁸ *Id.* at 12, 13.

¹⁸⁹ J.P. GREENE, *THE CONSTITUTIONAL ORIGINS OF THE AMERICAN REVOLUTION* 71 (2010).

¹⁹⁰ *Id.*

¹⁹¹ *Id.*; see generally EDWARD G. GRAY, *COLONIAL AMERICA: A HISTORY IN DOCUMENTS* (2003).

¹⁹² DENNIS B. FRADIN, *THE STAMP ACT OF 1765*, at 25 (2010).

¹⁹³ MURRAY NEWTON ROTHBARD, *CONCEIVED IN LIBERTY* 869 (2011).

¹⁹⁴ *Id.*

¹⁹⁵ GARY B. NASH, *THE UNKNOWN AMERICAN REVOLUTION: THE UNRULY BIRTH OF DEMOCRACY AND THE STRUGGLE TO CREATE AMERICA* 47 (2006).

¹⁹⁶ *Id.*

home. Items they did not steal, they destroyed.¹⁹⁷ Protestors eventually paraded Oliver himself through the streets of Boston. The grand finale was strong-arming Oliver under penalty of violence into publicly resigning while under the very tree where he was hung in effigy.¹⁹⁸ However, resignation “didn’t douse the violent protests in Boston.” On August 26, another mob attacked the home of Lieutenant Governor Hutchinson, who was Oliver’s brother-in-law. The rioters stripped the mansion, one of the finest in Boston, of its doors, furniture, paintings, silverware, and even the slate from its roof.”¹⁹⁹

A wave of violent protest spread throughout the colonies as word spread of what had happened in Boston.²⁰⁰ They forced government officials to resign under the threat of violence, burned homes to the ground, looted wine cellars, and forcibly evicted the officials’ families from their homes.²⁰¹ As a result of the riots, the British Parliament repealed the Stamp Act.²⁰² The Stamp Act Riots also played an essential role in inspiring the Declaration of Independence and facilitating the organized resistance that culminated in the American Revolution.²⁰³

The most important violent protest in U.S. history is the riot that ended in the Boston Massacre and fast-tracked the American Revolution. At dusk on March 5, 1770, American patriot Crispus Attucks, a Black man, and a crowd of other Boston colonists confronted a British soldier who had assailed a boy after the boy demanded pay from the soldier for a haircut.²⁰⁴ The soldier was a part of a unit that had been deployed to Boston to manage colonial unrest following the passage of the Stamp Act and the Townsend Acts,²⁰⁵ which resulted in several attacks on local officials.²⁰⁶ He told the boy that he should be more respectful to officers, and then, after a minor physical exchange, the soldier struck the boy on the side of the head with his musket, causing the boy to writhe in pain.²⁰⁷ Over fifty Bostonians, led by Attucks,

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 53.

¹⁹⁹ Christopher Klein, *The Stamp Act Riots*, HISTORY.COM (Aug. 14, 2015) (last updated Aug. 31, 2018), <https://www.history.com/news/the-stamp-act-riots-250-years-ago> [<https://perma.cc/L687-KZZB>].

²⁰⁰ S.G. WOOD, *THE AMERICAN REVOLUTION: A HISTORY* 29–30 (2002); DOUGLASS ADAIR & JOHN A SCHULTZ, *PETER OLIVER’S ORIGIN AND PROGRESS OF THE AMERICAN REBELLION: A TORY VIEW* 52 (1961).

²⁰¹ *Id.*

²⁰² Klein, *The Stamp Act Riots*, *supra* note 199.

²⁰³ History.com Editors, *Stamp Act*, HISTORY.COM (July 31, 2019), <https://www.history.com/topics/american-revolution/stamp-act> [<https://perma.cc/A78M-CLKH>].

²⁰⁴ JESSIE CARNEY SMITH, *NOTABLE BLACK AMERICAN MEN* 41 (1991).

²⁰⁵ Jacob Devasagayam, *The Bloody Massacre*, BALLSTONAPUSH (2012), <http://ballstonapush.pbworks.com/w/page/46095870/The%20Bloody%20Massacre> [<https://perma.cc/GKK4-UZJN>].

²⁰⁶ *See* SMITH, *supra* note 204.

²⁰⁷ *Id.*

surrounded the soldier, hurling snowballs and other debris at the soldier, daring him to fire his rifle.²⁰⁸

When other members of the British army gathered in support of the soldier, the colonists attacked the soldiers with snowballs and small objects and taunted them.²⁰⁹

Attucks, armed with a club, then led the group of protestors to the Old State House, where he struck a British soldier with a weapon made of wood. The soldier responded by opening fire on Attucks and his followers. When the smoke cleared, five colonists lay dead, and six others wounded. Having been struck and killed first, Attucks had become the first casualty of the American Revolution.²¹⁰

Founding father John Adams defended the British soldiers at their murder trial. He argued that the protesters who engaged the soldiers consisted of a “motley rabble of saucy boys, negros, mulattoes, Irish Teagues and outlandish Jack Tars.”²¹¹ He described Crispus Attucks as having “undertaken to be the hero of the night.”²¹² But Adams would later write that the “foundation of American independence was laid” by the incident, and Samuel Adams and other patriots commemorated the massacre annually to protest British rule.²¹³

Some of the starkest examples of purposeful violence committed out of absolute political necessity occurred in the context of slavery. If the political necessity defense should only be deployed as a defense of actions taken to abate only the most egregious social wrongs, human trafficking is undoubtedly such a wrong. Slavery is a consensus social wrong, at least in hindsight, that falls in the most egregious category, and as such, provides a yardstick for assessing other social wrongs, particularly modern social wrongs, and the relative justifiability of forcible acts taken in response to these wrongs.

Slavery is also an especially relevant context because it was essentially a government policy. That is, slavery was legal when various forcible resisters undertook arms to eliminate the practice. So, any acts undertaken to this end were criminal even though the institution itself was patently odious and derelict to the core ideas upon which this country was founded.

²⁰⁸ *Black History Boston: The Hero of the Boston Massacre, Crispus Attucks*, CITY OF BOS. (last updated Feb. 21, 2020), <https://www.boston.gov/news/black-history-boston-hero-boston-massacre-crispus-attucks> [<https://perma.cc/KJ8Y-SLUL>].

²⁰⁹ *Id.*

²¹⁰ LESLIE ALEXANDER & WALTER C. RUCKER JR., *ENCYCLOPEDIA OF AFRICAN AMERICAN HISTORY* 328 (2010).

²¹¹ LAWRENCE GROSSBERG ET AL., *CULTURAL STUDIES* 191 (1992).

²¹² RAY RAPHAEL, *A PEOPLE’S HISTORY OF THE AMERICAN REVOLUTION: HOW COMMON PEOPLE SHAPED THE FIGHT FOR INDEPENDENCE* 281 (2011); *see also* John Adams, *Speech by John Adams at the Boston Massacre Trial*, BOS. MASSACRE HIST. SOC’Y, <http://www.bostonmassacre.net/trial/acct-adams3.htm> [<https://perma.cc/DM3E-DAP2>].

²¹³ HILLER B. ZOBEL, *THE BOSTON MASSACRE* 301 (1st ed. 1970).

The first major slave revolt occurred well before the American Revolution in 1712 in what is now known as New York City.²¹⁴ The province at the time was home to one of the largest enslaved populations in the colonies.²¹⁵ It was a Dutch colony until 1664,²¹⁶ and the Dutch enslaved had a measure of rights greater than enslaved Americans would have under English colonial rule.²¹⁷ When the English took over, they required enslaved people to carry a pass, prohibited marriage, and outlawed gatherings among groups of more than three persons.²¹⁸ Twenty-three enslaved Africans took to the streets in protest.²¹⁹ They killed nine whites and wounded five to six others,²²⁰ and the colonial government retaliated by arresting over seventy Blacks during the revolt, most of whom had nothing to do with the rebellion.²²¹ The colonial government tried twenty-seven of the rebels, sentenced twenty-one of them to death, and then burned twenty of them at the stake—a punishment reserved for Blacks sentenced to death.²²²

More than two decades later, in September of 1739, a group of enslaved Africans from the Central African Kingdom of the Kongo, an area the colonists believed nurtured a less pliable brand of slave than some other African countries, met near the Stono River near Charleston, South Carolina, on the day following the Feast of Nativity of May.²²³ The group organized and planned a military campaign to St. Augustine, Florida, a Catholic city the Spanish had established as a free zone, under the leadership of Jemmy Cato.²²⁴ Cato, like most leaders of slave rebellions (including Toussaint Louverture of Haiti), was literate, a fact of which the white planter

²¹⁴ Letter from Robert Hunter, *The New York Slave Revolt of 1712*, SLAVE REBELLION WEBSITE (citing E.B. CALLAGHAN, DOCUMENTS RELATIVE TO THE COLONIAL HISTORY OF THE STATE OF NEW YORK (1885)), <https://web.archive.org/web/20160614121602/http://slave-rebellion.org/index.php?page=new-york-slave-revolt-1712> [<https://perma.cc/B7ZN-ELBV>] (last visited Mar. 1, 2023).

²¹⁵ *Id.*

²¹⁶ Dana Schulz, *356 Years Ago, New Amsterdam Became New York City*, 6SQFT (Sept. 8, 2020), <https://www.6sqft.com/353-years-ago-new-amsterdam-became-new-york-city> [<https://perma.cc/RU24-985Y>].

²¹⁷ Michael Pollak, *Determining the Legal Rights of Slaves*, N.Y. TIMES (Mar. 27, 2014), <https://www.nytimes.com/2014/03/30/nyregion/determining-the-legal-rights-of-slaves.html> [<https://perma.cc/4YJP-4UBC>].

²¹⁸ Lorraine B. Diehl, *Skeletons in the Closet*, N.Y. MAG., Oct. 5, 1992, at 78, 80.

²¹⁹ *Id.*

²²⁰ JESSIE CARNEY SMITH, *BLACK FIRSTS: 4,000 GROUND-BREAKING AND PIONEERING HISTORICAL EVENTS* 126 (3d ed. 2012).

²²¹ WILLIAM PENCAK, *HISTORICAL DICTIONARY OF COLONIAL AMERICA* 161 (2011).

²²² *Id.*

²²³ Marjoleine Kars, *1739 Stono Rebellion*, in *DISASTERS, ACCIDENTS, AND CRISES IN AMERICAN HISTORY: A REFERENCE GUIDE TO THE NATION'S MOST CATASTROPHIC EVENTS* 22, 22–23 (2008).

²²⁴ *Id.* at 23.

class was acutely aware.²²⁵ He and his followers had been Catholic soldiers in their home country.²²⁶ The army commenced its campaign by openly marching down the road, chanting “Liberty!” and bearing a banner that bore the word.²²⁷ An additional sixty or so joined them on this march.²²⁸

The army destroyed six plantations and neutralized approximately twenty whites along the way before the South Carolina militia intercepted them.²²⁹ In the battle that followed, twenty-five white militia members and thirty-five of the rebels were killed.²³⁰ Those who were captured were tried.²³¹ However, the trials were not reported, so there is no record of the proceedings.²³² The colonial government mounted the severed heads of the rebel leaders on stakes along the most populous roadways near the sites of capture as an unmistakable omen to aspiring insurgents.²³³ To this day, the roadway is called “Blackhead Signpost Road.”²³⁴

In addition to the multitude of consummated slave rebellions, several planned rebellions were thwarted before coming to fruition. One of the most notable of these is commonly known as Gabriel’s Rebellion, organized by Gabriel Prosser in 1800.²³⁵

Like Cato, Prosser was literate.²³⁶ He was also a tradesman.²³⁷ He and a small group of others planned to attack Richmond, the capital of Virginia.²³⁸ The plan was to target Federalists and prominent white business owners and traders in order to further democratize Virginia.²³⁹ The group planned to gather additional soldiers as

²²⁵ See NATIONAL HUMANITIES CENTER, TWO VIEWS OF THE STONO SLAVE REBELLION: SOUTH CAROLINA 1739 4 (2009) (describing that Cato was literate); SMITH, *supra* note 220 (describing Toussaint Louverture as a “self-educated slave”).

²²⁶ Steven J. Niven, *Jemmy*, ENSLAVED.ORG (May 31, 2013), <https://enslaved.org/fullStory/16-23-92889/> [<https://perma.cc/B867-MHS7>].

²²⁷ *Id.*

²²⁸ Kars, *supra* note 223, at 23.

²²⁹ James Moore, *South Carolina*, DIGITAL HIST. (2021), https://www.digitalhistory.uh.edu/disp_textbook.cfm?smtID=3&psId=89 [<https://perma.cc/J3C2-Q2NA>].

²³⁰ Kars, *supra* note 223, at 23.

²³¹ See PAUL FINKELMAN, SLAVERY IN THE COURTROOM: AN ANNOTATED BIBLIOGRAPHY OF AMERICAN CASES 197 (1998).

²³² *Id.*

²³³ NATIONAL HUMANITIES CENTER, *supra* note 225, at 1.

²³⁴ MANNING MARABLE, LIVING BLACK HISTORY: HOW REIMAGINING THE AFRICAN-AMERICAN PAST CAN REMAKE AMERICA’S RACIAL FUTURE 4 (2006).

²³⁵ See generally James O’Neil Spady, *Power and Confession: On the Credibility of the Earliest Reports of the Denmark Vesey Slave Conspiracy*, 63 WM. & MARY Q. 287, 287–304 (2011).

²³⁶ Simon Newman, *The World Turned Upside Down: Revolutionary Politics, Fries’ and Gabriel’s Rebellions, and the Fears of the Federalists*, 67 J. MID-ATLANTIC STUD. 5, 6 (2000).

²³⁷ *Id.*

²³⁸ *Id.*

²³⁹ *Id.*

they progressed, marching under a banner that read “Death or Liberty.”²⁴⁰ However, they were betrayed.²⁴¹ Prosser and his twenty-five soldiers were hanged.²⁴²

After thwarting Gabriel’s Rebellion, South Carolina lawmakers made the education of Black Americans, free and enslaved alike, more difficult to prevent additional revolts.²⁴³ Knowledge was thought to lead to elevated self-worth and to the development of the type of critical thinking that illuminated conceptual inconsistencies, ultimately aggravating a latent rage and desire for freedom.²⁴⁴ South Carolina lawmakers also placed draconian restrictions on travel and prohibited Blacks from assembling for any reason in an effort to thwart opportunities for planning and organization.²⁴⁵

Lawmakers likely understood Denmark Vesey’s thwarted slave rebellion as further proof of the dangers of Black education, for he was also literate. Like Prosser, Vesey was exposed by a turncoat.²⁴⁶ His elaborate military plan necessarily included many moving parts and demanded the cooperation and confidentiality of several individuals.²⁴⁷ This, in turn, made the plan vulnerable to infiltrators, cowards, and the slow-witted who loved their masters more than they loved freedom, probably more than they loved themselves, and definitely more than they loved those similarly situated to them. Indeed, George Wilson informed due to an inexplicable, emotion-soaked loyalty to his master.²⁴⁸ Joe LaRoche, who had originally supported the uprising, informed because he was a coward.²⁴⁹ Vesey and five of his soldiers were convicted post-haste and promptly hanged.²⁵⁰

In addition to literacy, South Carolina lawmakers attributed the rebellion to the influence of Christianity and the African Methodist Episcopal (AME) Church,

²⁴⁰ Mark Weakley, *RVA50 Object 10: “Death or Liberty, 1933”*, VALENTINE (Jan. 3, 2014), <https://thevalentine.org/rva50-object-10-death-or-liberty-1993> [https://perma.cc/TC5S-48AL].

²⁴¹ *Id.*

²⁴² Jchaverswric, *Memorial Service Held for Gabriel Prosser and Other Slaves Hanged*, ABC8NEWS (Aug. 31, 2017, 8:47 PM), <https://www.wric.com/news/memorial-service-held-for-gabriel-prosser-and-other-slaves-hanged/> [https://perma.cc/T5Q3-2MYQ].

²⁴³ Antonio T. Bly, *Slave Literacy and Education in Virginia*, ENCYCLOPEDIA VA. (Apr. 26, 2021), <https://encyclopediavirginia.org/entries/slave-literacy-and-education-in-virginia/> [https://perma.cc/ZL9S-J7HU].

²⁴⁴ See PATRICK RAE, *EIGHTY-EIGHT YEARS: THE LONG DEATH OF SLAVERY IN THE UNITED STATES, 1777–1865*, at 166 (2015).

²⁴⁵ See BRITISH AND FOREIGN ANTI-SLAVERY SOCIETY, *SLAVERY AND THE INTERNAL SLAVE TRADE IN THE UNITED STATES OF NORTH AMERICA* 194 (1841).

²⁴⁶ Philip Rubio, “*Though He Had a White Face, He Was a Negro in Heart*”: Examining the White Men Convicted of Supporting the 1822 Denmark Vesey Slave Insurrection Conspiracy, 113 S.C. HIST. MAG. 50, 55 (2012).

²⁴⁷ *Id.* at 53–55.

²⁴⁸ See Spady, *supra* note 235, at 289.

²⁴⁹ See *id.* at 294–95.

²⁵⁰ Richard C. Wade, *The Vesey Plot: A Reconsideration*, 30 J. S. HIST. 143, 144 (1964).

where Vesey was a pastor.²⁵¹ As a result, government officials, many, no doubt, self-professed Christians, razed the AME church and prohibited the congregation from assembling elsewhere, effectively curtailing the practice of religion and forcing the worship of their own God underground.²⁵² The South Carolina government also placed severe restrictions on travel and passed legislation that effectively made it impossible for enslaved Black Americans to obtain their freedom.²⁵³

The most successful insurrection precipitated by government oppression in African American history was led by one of the most enigmatic figures in American history. As a toddler, Nat Turner would eerily provide details about events that occurred before his birth.²⁵⁴ He would also, according to some, have visions of things to come.²⁵⁵ One of his visions, one that undoubtedly fueled his later rebellions, appeared when he:

[H]eard a loud noise in the heavens, and the Spirit instantly appeared to me and said the serpent was loosened, and Christ had laid down the yoke he had borne for the sins of men, and that I should take it on and fight against the serpent for the time was fast approaching when the first should be last and the last should be first.²⁵⁶

While the visions are not known to be typical, like other leaders of slave rebellions, (1) he was literate, (2) he was a minister, (3) he was hanged for his crimes, and (4) his rebellion resulted in anti-American laws suppressing the right to read, the right to assemble, and the right to travel.²⁵⁷

Turner famously said prior to the rebellion that he was going to “slay my enemies with their own weapons.”²⁵⁸ One wonders whether Turner understood the overall political import of this statement, the irony it revealed, and the American hypocrisy it fossilized. No doubt Turner meant it quite literally; he and his soldiers would turn any weapons used against them on their capturers. The figurative import

²⁵¹ Lacy Ford, *An Interpretation of the Denmark Vesey Insurrection Scare*, in THE PROCEEDINGS OF THE SOUTH CAROLINA HISTORICAL ASSOCIATION 7, 9 (2012).

²⁵² *See id.* at 14–15.

²⁵³ The Southern “Black Codes” of 1856–66, CONST. RTS. FOUND., <https://www.crf-usa.org/brown-v-board-50th-anniversary/southern-black-codes.html> [<https://perma.cc/5DSG-LEDA>] (last visited Mar. 1, 2023).

²⁵⁴ Christopher Klein, *10 Things You May or May Not Know About Nat Turners Rebellion*, HISTORY.COM (May 24, 2016), <https://www.history.com/news/10-things-you-may-not-know-about-nat-turners-rebellion> [<https://perma.cc/K865-96N9>].

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ Stephen Oates, *Children of Darkness*, AM. HERITAGE (Oct. 1973), <https://www.americanheritage.com/children-darkness> [<https://perma.cc/V3K7-BPXN>] (last visited Mar. 1, 2023).

of the statement, however, highlights one of the less conspicuous themes of this Article: underscoring how the laws erected by the status quo to effect their ends can be equally applicable to subvert those ends.

On February 12, 1831, Nat Turner looked up towards the heavens and envisaged an incredible blue-green-colored sun.²⁵⁹ He interpreted this stunning, mysterious solar eclipse as a sign from God to commence the rebellion that he had been considering for some time.²⁶⁰ He began organizing his troops and coordinating a plan. On August 21, Turner gathered his most trustworthy advisors as well as his most loyal troops.²⁶¹ The revolt began successfully enough the next day. The ranks of Turner's rebel army swelled as they swerved from house to house, emancipating other enslaved African Americans.²⁶² Turner and his rebel army neutralized 55–65 people, the overwhelming majority of whom were wealthy, landed individuals of the planter class.²⁶³ They granted clemency to impoverished whites and their families, believing them to be relatively blameless.²⁶⁴ Ultimately, the state militia quelled the rebellion through overwhelming force.²⁶⁵ The effort took thousands of militiamen, hundreds of federal troops,²⁶⁶ and mobile artillery units.²⁶⁷

Per usual, the retaliation was barbarous, alarmingly disproportionate, and imposed on the Black community, collaborators, civilians, and bootlickers alike. Suspected participants were beheaded, and “their severed heads were mounted on poles as a grisly form of intimidation.”²⁶⁸ As many as 200 Black people were killed, most of whom had no part in the uprising.²⁶⁹

Turner, himself, evaded capture for several weeks. When he was finally apprehended, he was charged and convicted for “conspiring to rebel and making insurrection.”²⁷⁰ In addition to being hanged, his dead body was drawn and quartered.²⁷¹ But what happened next shocks the conscience.

²⁵⁹ Klein, *supra* note 254.

²⁶⁰ Oates, *supra* note 258.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ ROBERT W. COAKLEY, THE ROLE OF FEDERAL MILITARY FORCES IN DOMESTIC DISORDERS 1789–1878, at 94 (1988).

²⁶⁶ Klein, *supra* note 254.

²⁶⁷ *Id.*

²⁶⁸ THOMAS C. PARRAMORE, TRIAL SEPARATION: MURFREESBORO, NORTH CAROLINA AND THE CIVIL WAR 10 (1998).

²⁶⁹ Christine Gibson, *Nat Turner: Lightning Rod*, AM. HERITAGE (Nov. 11, 2005), <http://www.americanheritage.com/articles/web/20051111-nat-turner-slavery-rebellion-virginia-civil-war-thomas-r-gray-abolitionist.shtml> [https://perma.cc/A5AL-ASCL] (last visited Mar. 1, 2023).

²⁷⁰ Klein, *supra* note 254.

²⁷¹ *Id.*

According to John W. Cromwell, “Turner was skinned to supply such souvenirs as purses, his flesh made into grease, and his bones divided as trophies to be handed down as heirlooms.”²⁷² Other sources report that Turner’s body was dissected and portions of his body parts given to doctors for study, and the remaining parts distributed to white slave owners as memorabilia.²⁷³ Still others claim that not only was Turner’s body boiled down to grease, but that it was then consumed by white, slave-owning elites.²⁷⁴

In typical fashion, the Virginia state legislature passed a law making it a crime to teach African Americans, including both the free and the bonded, to read and write.²⁷⁵ It prevented all Black Americans from congregating for religious services. This restriction had one exception that was, of course, devoured by the rule²⁷⁶: African American South Carolinians could worship their Lord so long as they were chaperoned by a licensed, white minister.²⁷⁷

The draconian laws passed by the South Carolina legislature in the wake of the Turner rebellion were mimicked by other slaveholding states. All the states that would later comprise the confederacy now prohibited African Americans from reading, writing, assembling, and worshipping.²⁷⁸

The only successful slave rebellion, both in terms of the immediate objective and the legal outcome, occurred on the high seas on board the slave ship *Amistad* in 1839.²⁷⁹ Cinque and other citizens of Sierra Leone were unlawfully kidnapped by slavers, illegally sold into slavery, and transported from their mother country to Cuba, where they were to be sold at retail.²⁸⁰ At some point, near the coast of Cuba, Cinque and his compatriots gained the upper hand on their capturers. They managed to escape their manacles and overtake their kidnappers. They killed two slavers, the captain, and the ship’s cook, in the process.²⁸¹ The crew, upon witnessing the carnage, abandoned ship, save the navigators whom Cinque and his soldiers captured then strategically preserved to shuttle them back to Sierra Leone.²⁸²

Instead of taking them back to Sierra Leone, however, the navigators surreptitiously sailed north under the cover of night.²⁸³ When the ship neared the East Coast

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ VINCENT WOODARD, *THE DELECTABLE NEGRO: HUMAN CONSUMPTION AND HOMOSEXUALITY WITHIN US SLAVE CULTURE* 91 (2014).

²⁷⁵ ALTON HORNSBY, *A COMPANION TO AFRICAN AMERICAN HISTORY* 296 (2008).

²⁷⁶ Nicholas May, *Holy Rebellion: Religious Assembly Laws in Antebellum South Carolina and Virginia*, 3 AM. J. LEGAL HIST., 237, 237 (2007).

²⁷⁷ *Id.* at 239, 242.

²⁷⁸ ANGELA Y. DAVIS, *WOMEN, RACE, AND CLASS* 106 (1981).

²⁷⁹ HOWARD JONES, *MUTINY ON THE AMISTAD: THE SAGA OF A SLAVE REVOLT AND ITS IMPACT ON AMERICAN ABOLITION, LAW, AND DIPLOMACY* 12–13 (1997).

²⁸⁰ *United States v. Amistad*, 40 U.S. 518, 593 (1841).

²⁸¹ JONES, *supra* note 279, at 5.

²⁸² *Amistad*, 40 U.S. at 522.

²⁸³ JONES, *supra* note 279, at 5.

of the United States, it was boarded by the 1831 equivalent of the U.S. Coast Guard.²⁸⁴ Cinque and his compatriots were apprehended, arrested, and tried for mutiny, a capital crime.²⁸⁵

In 1840, a federal district court held that the men were unlawfully kidnapped and illegally transported to the Americas in violation of international law.²⁸⁶ The court further found that, since their subjugation was illegal, they had the right of freemen to use any means necessary, including killing, to escape their illegal confinement.²⁸⁷ The U.S. Supreme Court denied the government's appeal.²⁸⁸

The last major slave rebellion was John Brown's raid on Harpers Ferry, discussed in detail in the introduction. Brown's rebellion helped to hasten the end of slavery by fomenting tensions between the North and South, which soon escalated into the Civil War. The Civil War brought an end to chattel slavery, constitutionalized by the Thirteenth Amendment. However, right from its inception, it was clear that the end of chattel slavery did not mean the end of involuntary servitude for Black folks. In prohibiting enslavement, the Thirteenth Amendment contained one gaping exception: It did not apply to those "duly" convicted of a crime—regardless of how ridiculous, oppressive, and unfair the law violated.²⁸⁹ As long as the law was manufactured by the proper legislative process and implemented according to the precepts, principles, and procedural safeguards of the criminal justice system, it supported the massive chasm created by the convict exception to the Thirteenth Amendment.²⁹⁰

The convict exception begot a perpetual effort by racial conservatives to return African Americans to the whip end of the white landed class's dominion.²⁹¹ It is an effort, according to many commentators and scholars, that continues to this day.²⁹² What is indisputable, however, is the astonishing adaptability and relentlessness of this effort from the passage of the Thirteenth Amendment in 1865 right up until the turn of the new millennium, some 135 years later.

Almost immediately after the passage of the Thirteenth Amendment, the South began to contrive artifices to circumvent the amendment by exploiting the amendment itself.²⁹³ Southern lawmakers first instituted the Black Codes in 1865 and 1866,

²⁸⁴ *Amistad*, 40 U.S. at 526–27.

²⁸⁵ Samuel Momodu, *The Amistad Mutiny*, BLACKPAST (Aug. 23, 2017), <https://www.blackpast.org/african-american-history/amistad-mutiny-1839/> [<https://perma.cc/CY63-WNPV>].

²⁸⁶ *The Supreme Court Rules on Amistad Slave Ship Mutiny Case*, HISTORY.COM, <https://www.history.com/this-day-in-history/supreme-court-rules-on-amistad-mutiny> [<https://perma.cc/3EBT-WBHK>].

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ U.S. CONST. amend. XIII.

²⁹⁰ *Id.*

²⁹¹ MICHELLE ALEXANDER, *THE NEW JIM CROW MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 39 (2020).

²⁹² *Id.*

²⁹³ 5 SCOTT W. GAYLORD ET AL., *FEDERAL CONSTITUTIONAL LAW: THE FOURTEENTH AMENDMENT* 29 (2d ed. 2017).

a series of laws attaching petty offenses, like vagrancy, to inordinate sentences and fabricating completely new crimes, like being out at night without a work permit.²⁹⁴ The purpose of the Black Codes was to return African Americans to slavery in effect with agency by law.²⁹⁵ They compelled African Americans to work for emaciated wages by requiring them to sign annual labor contracts to avoid vagrancy charges, requiring permission to travel and permission to sell farm produce. The Black Codes also compelled Black Americans to work for phantom wages by consigning them to jail upon conviction of vagrancy, one of the recently fabricated criminal offenses, or upon conviction of trumped charges.²⁹⁶ While in jail, of course, African American prisoners were forced to work for the state, county, or local government that manufactured the laws underlying their sentences.²⁹⁷

As a result of the Black Codes, outraged Republican national legislators passed the Civil Rights Act of 1866 and the Fourteenth Amendment, which expressly afforded citizenship to the newly freed, the right to equal protection under the law, and the right to due process.²⁹⁸ The former rebel states responded by refusing Blacks the franchise or erecting insurmountable barriers to voting, allowing white southerners to preserve the political power they had prior to the Civil War.²⁹⁹

The Republican Congress countered with the Fifteenth Amendment, which guaranteed African American men the right to vote.³⁰⁰ This particularly stoked the wrath of white southerners, giving rise to the Ku Klux Klan who reigned terror down on Black folk and white Republican legislators alike.³⁰¹ The Klan murdered several Republican officials and outspoken Blacks during their warpath.³⁰²

Incensed Republicans responded with the Enforcement Acts, also known as the Ku Klux Klan acts, and, in 1867, the Reconstruction Acts, which placed the former Confederate states under military jurisdiction.³⁰³ As a result, federal troops were dispatched to the South to protect the newly minted constitutional rights of African Americans.³⁰⁴ The troops monitored local governments, supervised elections, and worked to protect the newly freed, as well as Republican elected officials, from white supremacist vigilantes, white supremacist organizations, and law enforcement

²⁹⁴ ALEXANDER, *supra* note 291, at 46.

²⁹⁵ *How the Black Codes Limited African American Progress After the Civil War*, HISTORY.COM (Oct. 1, 2020), <https://www.history.com/news/black-codes-reconstruction-slavery> [<https://perma.cc/6SKK-YTL3>].

²⁹⁶ *Id.*

²⁹⁷ ALEXANDER, *supra* note 291, at 39; *id.*

²⁹⁸ RICHARD ZUCZEK, *ENCYCLOPEDIA OF THE RECONSTRUCTION ERA* 166 (2006).

²⁹⁹ *Id.*

³⁰⁰ *Id.* at 250.

³⁰¹ *Id.* at 358–59.

³⁰² *Id.*

³⁰³ *Id.* at 171, 244, 365.

³⁰⁴ *Id.* at 245.

officials.³⁰⁵ The military presence gave rise to an unprecedented explosion in Black political power.³⁰⁶

At the beginning of 1867, African Americans did not occupy a single seat in any elective office in the South.³⁰⁷ In a few years, African Americans held over fifteen percent of public offices in the South. This was a larger percentage of Black office-holders in the region than in 1990.³⁰⁸ From 1867 to 1877, over 600 Black Americans were elected to state legislatures and seventeen Black men were elected to the U.S. Congress or Senate.³⁰⁹ Another 900 or so occupied elective offices in local government.³¹⁰ This period from 1867 to 1877, known as Reconstruction, was an oasis for African Americans in a desert of deprivation, repression, and disenfranchisement.³¹¹ Yet it was only an oasis.³¹²

Reconstruction ended after the Republicans cut a backroom deal with Democrats that allowed the Republican Rutherford B. Hayes to be seated as President in exchange for the removal of the federal troops in the South.³¹³ The troops were the last line of defense between African Americans and the despotism of white supremacy. Public support for Reconstruction in the North had long waned, and the Republican Party misplaced its stomach for eliminating the injustices slavery left in its wake.³¹⁴ Predictably, when the federal troops were removed, the nightmare for African Americans resumed in the South, ushering in a new era of terror, repression, and disenfranchisement. This era, commonly known as Jim Crow, would last nearly a hundred years.³¹⁵ Legal segregation, an unprecedented number of lynchings, and the near complete disembowelment of Black political power marked the era.³¹⁶

Southern lawmakers also gave slavery a new face during Jim Crow: convict leasing. Convict leasing resembled its cousin, the Black Codes, insofar as the contrivance of criminal offenses and the bestowal of wildly disproportionate sentences.³¹⁷

³⁰⁵ *Id.* at 362.

³⁰⁶ *Id.*

³⁰⁷ History.com Editors, *Black Leaders During Reconstruction*, HISTORY.COM (June 24, 2010), <https://www.history.com/topics/american-civil-war/black-leaders-during-reconstruction> [<https://perma.cc/Z4EE-NYEM>].

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² C. VANN WOODWARD, REUNION AND REACTION: THE COMPROMISE OF 1877 AND THE END OF RECONSTRUCTION 3–21 (1991).

³¹³ *Id.* at 7–8.

³¹⁴ *See id.* at 9–10.

³¹⁵ *What Was Jim Crow*, FERRIS STATE UNIV., <https://www.ferris.edu/HTMLS/news/jimcrow/what.htm> [<https://perma.cc/TSC7-AJ8N>] (last visited Mar. 1, 2023).

³¹⁶ *See* Michael O'Malley, *Jim Crow and the 1890s*, FERRIS STATE UNIV. (Spring 1999), <https://www.ferris.edu/HTMLS/news/jimcrow/links/misclink/1980s.htm> [<https://perma.cc/87Z5-29Y5>].

³¹⁷ William Andrew Todd, *Convict Lease System*, NEW GA. ENCYCLOPEDIA (2005),

However, instead of the government directly exploiting the labor of inmates, the state would lease the prisoners out to private businesses for a fee, and the private entities then exploited the inmates for capital gain.³¹⁸ This system endured for several decades, making only incremental adjustments to survive.³¹⁹

In the early 1970s, convict leasing mutated into mass incarceration. Mass incarceration is described by Michele Alexander as “a stunningly comprehensive and well-disguised system of racialized social control that functions in a manner strikingly similar to Jim Crow.”³²⁰ Spurred by the racially coded language of “law and order,” an alleged “war on drugs” led to an exponential rise in incarceration rates. It continues today, although a new awareness is developing, and a consensus is beginning to form that mass incarceration is an unqualified social ill.

From 1865 until the 1950s, the Black community’s response to the various permutations of slavery was relatively docile. There were no Nat Turners, Denmark Vesey, or Gabriel Prossers. This was the case in part because of the effectiveness of white domestic terror perpetrated by white doctors, lawyers, businessmen, and other respected members of the white establishment, including police officers, doubling as KKK members. The primary vehicles of this white domestic terrorism were lynching, and ironically, riots. These riots, these white riots, unlike the riots of their forefathers, were not used to protest tyranny but, indeed, to impose it. Sparked mostly by Black social, political, and economic advances,³²¹ the 100-year white riot sought to and was successful at almost completely wiping out any political and economic monuments of Black advancement almost as quickly as these monuments were erected.

1. The White Riot

Rioting has been the primary vehicle for expressing forcible rage and tumultuous dissent in this country since the Stamp Act Riots of 1765.³²² Prior to the 1960s, most of the almost innumerable riots involved violent white aggression against people of color. Disgruntled whites were able to engage in violent acts, including rioting and lynching with impunity.³²³

<https://www.georgiaencyclopedia.org/articles/history-archaeology/convict-lease-system> [https://perma.cc/E6M8-UQ43].

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ ALEXANDER, *supra* note 291, at 4.

³²¹ KLAUS P. FISCHER, *AMERICA IN WHITE, BLACK, AND GRAY: A HISTORY OF THE STORMY 1960S*, at 18 (2007).

³²² *See generally* Donna Spindel, *The Stamp Act Riots (Jan. 27, 1765)* (Ph.D. thesis, Duke University).

³²³ *See generally* VIOLENCE IN AMERICA: AN ENCYCLOPEDIA (Ronald Gottesman & Richard Maxwell Brown eds., 1989); TERENCE FINNEGAN, *A DEED SO ACCURSED LYNCHING IN MISSISSIPPI AND SOUTH CAROLINA* (2013).

In 1863, white rioters in New York went on a killing spree, responding to a federal announcement of a draft to raise an army for the Civil War.³²⁴ Hell-bent on destruction, the rioters, in addition to murdering innocent Blacks, set Black-owned businesses ablaze, ransacked their schools and orphanages, and razed their churches.³²⁵

In 1866, riots broke out in Memphis, Tennessee, after an altercation between a white cop and Black soldiers recently returned home after the Civil War.³²⁶ White mobs from around the city stormed Black neighborhoods, raped five, murdered forty-six, maimed seventy-five (including women and children), committed one-hundred robberies, and torched ninety-one homes.³²⁷ No charges were ever brought against either the instigators of the riot or the participants.³²⁸

In Colfax, Louisiana, in 1873, a contingency of white Democrats, enraged about the resolution of an election dispute which placed a Republican in the governor's seat, murdered approximately 150 African Americans, most of whom had surrendered peacefully, in what would come to be known as the Colfax Massacre.³²⁹ A handful of the perpetrators were convicted,³³⁰ but the defendants appealed to the Supreme Court, which held that the Enforcement Act, which previously allowed the federal government the reach to prosecute civilians who committed acts of domestic terrorism, including the perpetrators in Colfax, was unconstitutional.³³¹

White paramilitary groups like the White League were now free to pursue their agendas of terror and intimidation virtually unobstructed. And they did. Not long thereafter, the Democratic Party, peopled as it were by white supremacists, regained political power through murder, intimidation, and suppression of the Black vote.³³²

In 1898, a prosperous and politically powerful Black elite raised the envy and ire of white politicians in Wilmington, North Carolina.³³³ In an effort to exterminate

³²⁴ ERIC FONER, *RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863–1877*, at 32 (1988); *see generally* ADRIAN COOK, *THE ARMIES OF THE STREETS: THE NEW YORK CITY DRAFT RIOTS OF 1863* (2015).

³²⁵ *See generally* COOK, *supra* note 324.

³²⁶ *See generally* STEPHEN V. ASH, *A MASSACRE IN MEMPHIS: THE RACE RIOT THAT SHOOK THE NATION ONE YEAR AFTER THE CIVIL WAR* (2013).

³²⁷ H.R. REP. NO. 101-39, at 34 (1866).

³²⁸ *May 1–3, 1866: Memphis Massacre*, ZINN EDUC. PROJECT (Oct. 28, 2022), <https://www.zinnproject.org/news/tdih/1866-memphis-riots/> [<https://perma.cc/SDR3-6C7N>].

³²⁹ *The Colfax Massacre Occurs*, AFRICAN AM. REGISTRY, <https://aaregistry.org/story/the-colfax-massacre-occurs> [<https://perma.cc/ZRK5-D8KL>] (last visited Mar. 1, 2023); *see also* LEEANNA KEITH, *THE COLFAX MASSACRE: THE UNTOLD STORY OF BLACK POWER, WHITE TERROR, AND THE DEATH OF RECONSTRUCTION* (2009).

³³⁰ *The Colfax Massacre Occurs*, *supra* note 329.

³³¹ *United States v. Cruikshank*, 92 U.S. 542, 548, 560 (1875).

³³² *See* KEITH, *supra* note 329, at 60–61.

³³³ DAVID ZUCCHINO, *WILMINGTON'S LIE: THE MURDEROUS COUP OF 1898 AND THE RISE OF WHITE SUPREMACY* (2020); Ta-Nehisi Coates, *Black Pathology Crowdsourced: Why We Need Historians In Debates About Today's Cultures*, ATLANTIC (Apr. 4, 2014), <https://www.theatlantic.com/politics/archive/2014/04/black-pathology-crowdsourced/360190> [<https://www.theatlantic.com/politics/archive/2014/04/black-pathology-crowdsourced/360190>].

Black political power and retake city government, white Democrats staged a coup.³³⁴ The politicians concocted a lie, one that was tried and true, that Black men were raping a white woman.³³⁵ All hell broke loose.³³⁶ Up to 250 African Americans were killed in the carnage that followed.³³⁷ The white supremacist Democrats, Dixiecrats, fully took over the Wilmington government without intervention by either the state or federal government. It has been the only successful coup d'état in American history and the most extreme attack on the idea of democracy since the founding of the British colonies.³³⁸ The Wilmington massacre led to a new era of Jim Crow, an era of extreme segregation, economic repression, and political disenfranchisement, and one where the primary means of enforcing all of these were lynching, assassinations, and mass murder.³³⁹

In 1906, playing on the fear of working white Americans of the ascending Black middle class in Atlanta, the Democratic candidates for Georgia governor, Clark Howell, and Hoke Smith, ramped up their racial rhetoric.³⁴⁰ When a newspaper published a false story about two white women being raped, a white mob, 10,000 strong, took to the streets, killing as many as 100 African Americans and wounding several hundred more.³⁴¹

perma.cc/J4MB-GAXF]; John DeSantis, *Wilmington, N.C., Revisits a Bloody 1898 Day*, N.Y. TIMES (June 4, 2006), <https://www.nytimes.com/2006/06/04/us/04wilmington.html> [https://perma.cc/3Z4M-8R2V]; Kent McCoury, *Alfred Moore Waddell (1834–1912)*, N.C. HIST. PROJECT, <https://northcarolinahistory.org/author/kent-mccoury> [https://perma.cc/VY45-AAG7]; Richard L. Watson Jr, *Furnifold Simmons and the Politics of White Supremacy*, in RACE, CLASS AND POLITICS IN SOUTHERN HISTORY 133 (Lindsey Butler & Alan Watson eds., 1989).

³³⁴ Lauren Collins, *A Buried Coup d'État in the United States*, NEW YORKER (Sept. 19, 2016), <https://www.newyorker.com/magazine/2016/09/19/a-buried-coup-detat-in-the-united-states> [https://perma.cc/KTE7-ALD4].

³³⁵ 1898 WILMINGTON RACE RIOT COMMISSION, 1898 WILMINGTON RACE RIOT REPORT 349 (2006), <https://digital.ncdcr.gov/digital/collection/p249901coll22/id/5353> [https://perma.cc/AZM5-2A46].

³³⁶ *Id.*

³³⁷ Scott Neuman, *Wilmington Marks 123 Years Since Coup and Massacre*, NPR (Nov. 10, 2021), <https://www.npr.org/2021/11/10/1053562371/1898-wilmington-coup-massacre> [https://perma.cc/GY5E-E32X].

³³⁸ Will Doran, *White Supremacists Took Over a City—Now NC Is Doing More to Remember the Deadly Attack*, WINSTON-SALEM J. (Jan. 1, 2018), https://journalnow.com/white-supremacists-took-over-a-city-now-nc-is-doing-more-to-remember-the-deadly/article_a9d267b6-4b8c-5710-8548-c6c40af495a4.html [https://perma.cc/5Y24-GLFR].

³³⁹ James Loewen, *Democracy Betrayed: The Wilmington Race Riot of 1898 and Its Legacy*, 6 SOUTHERN CULTURES 90, 90–91 (Fall 2000) (reviewing DAVID N. CECELSKI & TIMOTHY B. TYSON, *DEMOCRACY BETRAYED* (1998)).

³⁴⁰ Gregory Mixon & Clifford Kuhn, *Atlanta Race Riot of 1906*, NEW GA. ENCYCLOPEDIA (Sept. 23, 2005), <https://www.georgiaencyclopedia.org/articles/history-archaeology/atlanta-race-riot-1906> [https://perma.cc/8AHS-N9LL]; see generally MARK BAUERLEIN, *NEGRO-PHOBIA A RACE RIOT IN ATLANTA 1906* (2001).

³⁴¹ *Id.*

In 1917, several white massacres occurred in East St. Louis, Illinois and Chester, Pennsylvania, claiming over a hundred of Black lives.³⁴²

In 1919, one of the greatest massacres in American history was perpetrated in Elaine, Arkansas. White Negrophobes murdered over 200 Black men, women, and children after Black workers dared to unionize.³⁴³ Not only did the state and federal government not intervene, both governments actually participated in the slaughter of dozens of American citizens.³⁴⁴

The death toll increased after whites surrounded both sides of a church where Blacks had taken cover. The lynch mob began to fire into the church so recklessly that they ended up shooting one another.³⁴⁵ The friendly fire killed one of the mob members.³⁴⁶ However, the word went out throughout the state and neighboring states that Blacks were shooting back in Elaine, Arkansas.³⁴⁷ Lynch mobs comprised of plantation owners formed throughout the area.³⁴⁸ Then white supremacist murderers formed posses around Arkansas and neighboring states and flooded Elaine. Their first target was an elderly Black woman standing on her porch.³⁴⁹ After murdering her, they continued down the road and started shooting at random Black people they found working in the fields.³⁵⁰ The Governor of Arkansas contacted the White House and requested the military to come down and quash the rebellion—Elaine’s Black people.³⁵¹ The White House complied, and federal troops started firing indiscriminately at Black folks on sight. They shot down workers tending the fields in a spectacle that observers likened to hunting “rabbits . . . with machine guns” and others who were held up in their homes, scared to death, but who hoped that the military was there to protect them.³⁵² The Elaine Massacre was only one of twenty-six incidents of racial violence that took place in the Red Summer of 1919.³⁵³

³⁴² *The East St. Louis Riot*, PBS, <https://www.pbs.org/wgbh/americanexperience/features/garvey-riot/> [<https://perma.cc/T9DV-RHS8>]; Will Mack, *The Chester, Pennsylvania Race Riot (1917)*, BLACKPAST (Nov. 22, 2017), <https://www.blackpast.org/african-american-history/1917-race-riot-chester-pennsylvania-1917/> [<https://perma.cc/KMB2-B799>].

³⁴³ Clay Cane, *Not Just Tulsa: Race Massacres That Devastated Black Communities In Rosewood, Atlanta and Other American Cities*, BET (July 19, 2020), <https://www.bet.com/news/national/2019/12/17/not-just-tulsa--five-other-race-massacres-that-devastated-black.html> [<https://perma.cc/6P4N-MJZ9>].

³⁴⁴ THE ELAINE MASSACRE: THE RED SUMMER OF 1919 (MjrVisuals 2019).

³⁴⁵ *Id.*

³⁴⁶ *Id.*

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 28:52.

³⁴⁹ *Id.* at 29:42.

³⁵⁰ *Id.* at 29:45.

³⁵¹ *Id.*

³⁵² *Id.* at 31:28.

³⁵³ *Red Summer*, NAT’L WWI MUSEUM & MEM’L (Oct. 19, 2022, 5:43 PM), <https://www.theworldwar.org/learn/about-wwi/red-summer> [<https://perma.cc/4PFC-96TH>].

In 1921, white rioters in Tulsa, Oklahoma obliterated one of the most prosperous Black communities in the history of the country.³⁵⁴ The rioters dropped bombs on Black businesses and homes from aircraft and shredded innocent Black people with hot lead, discharged from rapid-fire machine guns.³⁵⁵ When it was complete, several hundred innocent Black Americans, citizens of Tulsa, lay slain, riddled with bullets or sheathed in charred skin.³⁵⁶

In 1923, in Rosewood, Florida, an estimated 150 African Americans were murdered in cold blood after a white woman claimed she had been assaulted by an African American man.³⁵⁷

There were also several white massacres in the 1940s, most related to African Americans moving into white neighborhoods and integrating other spaces. These include the Airport Homes white riots in Chicago, the Fernwood Park White Massacre in Chicago, the Fairground Park Riots, the Anacostia Pool Riot in Washington D.C., the Peekskill White Riots in Peekskill, New York, and the Englewood White Riot in Englewood, Chicago.³⁵⁸ Additionally, in the 1950s there was the Cicero White Riot in Cicero, Illinois.³⁵⁹

It is estimated that white domestic terrorists murdered close to 50,000 African Americans over the course of 1865–1895 alone.³⁶⁰ None of the perpetrators ultimately received a criminal sentence,³⁶¹ an impunity never extended to Black Americans.³⁶² Indeed, forcible dissent has been met not only with criminal penalties, following

³⁵⁴ See generally TIM MADIGAN, *THE BURNING: MASSACRE, DESTRUCTION, AND THE TULSA RACE RIOT OF 1921* (2013).

³⁵⁵ See generally *id.*

³⁵⁶ See generally *id.*

³⁵⁷ Cane, *supra* note 343.

³⁵⁸ Caroline Harney & James Charlton, *The Siege on South Peoria Street*, CHI. READER (Jan. 13, 2000), <https://chicagoreader.com/news-politics/the-siege-on-south-peoria-street/> [<https://perma.cc/ZX7L-HL6B>]; Emma Newcombe, *The Legacy of the St. Louis Municipal Pool Race Riots*, GOVERNING (Aug. 15, 2021), <https://www.governing.com/now/the-legacy-of-the-st-louis-municipal-pool-race-riots> [<https://perma.cc/45QB-GK84>]; John Kelly, *Bathing Suits and Civil Rights*, WASH. POST (June 10, 2017), https://www.washingtonpost.com/local/bathing-suits-and-civil-rights-integrating-the-districts-pools-was-not-easy/2017/06/10/e3efcf3a-4c4c-11e7-a186-60c031eab644_story.html [<https://perma.cc/FNG4-AAU7>]; Ross Coen, *Peekskill Riot (1949)*, BLACKPAST (Sept. 19, 2022), <https://www.blackpast.org/african-american-history/peekskill-riot-1949/> [<https://perma.cc/E9V3-N49R>].

³⁵⁹ Samuel Momodu, *The Cicero Riot of 1951*, BLACKPAST (Jan. 22, 2022), <https://www.blackpast.org/african-american-history/events-african-american-history/the-cicero-riot-of-1951/> [<https://perma.cc/RR63-NEZ7>].

³⁶⁰ Gregory P. Downs, *Why the Second American Revolution Deserves as Much Attention as the First*, WASH. POST (July 19, 2017, 6:00 AM), <https://www.washingtonpost.com/news/made-by-history/wp/2017/07/19/why-the-second-american-revolution-deserves-as-much-attention-as-the-first/> [<https://perma.cc/FP8D-7WJQ>].

³⁶¹ Cane, *supra* note 343.

³⁶² See *infra* Section II.C.

convictions by all-white juries, but also with murders by the police, the militia, white rioters, or domestic terrorists.³⁶³

One of the few group acts of forcible Black resistance between the prohibition of slavery and the 1960s was orchestrated by Black soldiers in 1917 in Houston. By virtue of their military service, they developed a more elevated sense of self as well as a more accurate sentiment of entitlement.³⁶⁴ The incident unfolded after a complicated series of events, but the ire of the soldiers was raised after white police officers beat a Black woman and dragged her out of her home, then beat a soldier who attempted to come to her aid.³⁶⁵ The soldiers, members of the Twenty-Fourth Infantry, apparently decided to commit revolutionary suicide.³⁶⁶ Records suggest the plan was to march on Houston with the goal of either taking the city or dying trying.³⁶⁷

Several officers raided an army supply tent and recovered a number of rifles and several rounds of ammunition.³⁶⁸ Sergeant Vida Henry led the men towards Houston.³⁶⁹ They marched over two miles before facing six police, one of whom had been involved in the earlier beating.³⁷⁰ They killed the policeman and two others; records are not clear as to what happened to the other three.³⁷¹ The soldiers then shot and killed a National Guard captain, mistaking him for a police officer. Upon realizing he was a military officer like them, they decided to retreat, morale having plunged.³⁷² Sergeant Henry led them back to their camp, shook their hands, and apprised them of his lugubrious plan.³⁷³ He disappeared and did as he had promised—put a gun to his head and pulled the trigger.³⁷⁴ The death toll was nineteen, including Henry and

³⁶³ See generally WILLIAM G. JORDAN, *BLACK NEWSPAPERS AND AMERICA'S WAR FOR DEMOCRACY, 1914–1920* (2003); GREGG ANDREWS, *THYRA J. EDWARDS: BLACK ACTIVIST IN THE GLOBAL FREEDOM STRUGGLE* (2011).

³⁶⁴ *The 1917 Houston Riots/Camp Logan Mutiny*, TEX. A&M UNIV. PRAIRIE VIEW, <https://www.pvamu.edu/tiphc/research-projects/the-1917-houston-riotscamp-logan-mutiny/> [<https://perma.cc/S6PH-8FRK>].

³⁶⁵ JORDAN, *supra* note 363, at 85.

³⁶⁶ *Id.*

³⁶⁷ See *id.* (“[B]ut marched deliberately into town with a specific purpose in mind—to take revenge on police officers and streetcar conductors.”).

³⁶⁸ *The 1917 Houston Riots/Camp Logan Mutiny*, *supra* note 364.

³⁶⁹ See JORDAN, *supra* note 363, at 85.

³⁷⁰ Transcript of Record at 7–8, *United States v. Sergeant William Nesbit*, C.M. No. 1299 (C.M.R. trial Nov. 1, 1917).

³⁷¹ *United States v. Corporal Robert Tillman*, 2 General Court Martial Case 114575, at 535 (1918).

³⁷² *Id.* at 644, 650.

³⁷³ *United States v. Corporal Robert Tillman*, 3 General Court Martial Case 114575, at 1322 (1918).

³⁷⁴ Edgar Sandoval, *A Deadly Riot, and Then 3 Trials, 100 Convictions and 19 Executions*, N.Y. TIMES (Feb. 28, 2022), <https://www.nytimes.com/2022/02/26/us/houston-riot-black-soldiers.html> [<https://perma.cc/8FQR-748U>].

two other soldiers, four police officers, and nine others killed by the soldiers during the rebellion.³⁷⁵

The next day, the government placed Houston under martial law. The remaining thirteen soldiers were captured and court-martialed.³⁷⁶ All were taken to an undisclosed location and lynched a minute before sunrise the next day.³⁷⁷

The Houston rebellion was an aberration in the forms Black resistance took during the 100-year period from the end of slavery until the 1960s.³⁷⁸ Given the inevitable outcome of violent resistance, it was not popular. Indeed, peaceful resistance could be suicidal as well.³⁷⁹ The terror wrought by the Ku Klux Klan and the brutality promised by law enforcement officials, many of whom were Klan members, especially in the South, had kept forcible resistance in check.³⁸⁰

However, after several more decades of Jim Crow, Black Americans began to reach the limits of their apprehension. The top on the pressure pot of oppression, boiling over the last 100 years, was about to blow.

2. The Black Riot

The 1960s birthed an unprecedented number of movements addressing social, cultural, and economic problems. These diverse movements were accompanied by diverse strategies.³⁸¹ At the heart of each approach was some version, often less literal, of Nat Turner's strategy to use the enemy's weapons against him.³⁸² The civil rights movement weaponized the U.S. Constitution, intentionally displaying for all to see the stark contradiction between the promise of America and the country's unadorned face. Aware that the rabid racists of the South could not control themselves when challenged by people they believed inferiors, movement leaders crafted a non-violent strategy that was just as confrontational as it was non-violent.

The civil rights movement's greatest weapons were civil disobedience and the rise of live news. Leaders such as Dr. Martin Luther King Jr., C.T. Vivian, Reverend James Orange, and James Bevel knew they had to appeal to the nation's conscience

³⁷⁵ ROBERT HAYNES, *A NIGHT OF VIOLENCE: THE HOUSTON RIOT OF 1917*, at 169 (1976).

³⁷⁶ *Thirteen Negro Soldiers Hanged for Rioting in Houston, Texas*, N.Y. TIMES (Dec. 2, 1917), <https://www.nytimes.com/2022/02/26/us/houston-riot-black-soldiers.html> [<https://perma.cc/8FQR-748U>].

³⁷⁷ *Id.*

³⁷⁸ The 1931 Chicago Housing Protests, the Harlem Riot of 1935, and the Harlem Riot of 1943 are also notable exceptions.

³⁷⁹ *Social Protests*, CONST. RTS. FOUND., <https://www.crf-usa.org/black-history-month/social-protests> [<https://perma.cc/VA54-FA6R>] (last visited Mar. 1, 2023).

³⁸⁰ See GLADYS-MARIE FRY, *NIGHT RIDERS IN BLACK FOLK HISTORY* 114, 154, 158–59, 165–68 (2001).

³⁸¹ See generally TODD GITLIN, *THE SIXTIES: YEARS OF HOPE, DAYS OF RAGE* 411–16 (2013).

³⁸² CHRISTOPHER TOMLINS, *IN THE MATTER OF NAT TURNER: A SPECULATIVE HISTORY* 85 (2020).

to achieve their goals of desegregation and voting rights (Bevel was arguably the most brilliant strategist connected to the civil rights movement, though also severely morally disturbed). They orchestrated ingenious, non-violent attacks on segregated lunch counters, busses, and public accommodations, and on police and government officials restricting access to the polls, provoking the violent response they were counting on. They employed rhetoric appealing to fundamental American principles like democracy, freedom, justice, and equality, seeking to weaponize these ideals by intensifying the cognitive dissonance of white America, which seemed to want it both ways: a country where all men are created equal and endowed by their creator with certain inalienable rights and a country where the white masses' economic, political, social, and physical safety advantages would be protected.

The tipping point for the voting rights movement was Bloody Sunday. In 1965, county deputies, led by the infamous Jim Clark, beat civil rights marchers, including women and children, with cattle prods and bullwhips while Alabama state troopers trampled them with police horses on the Edmund Pettus Bridge in Selma, Alabama.³⁸³ As a result of this, and a subsequent march in Selma led by Dr. Martin Luther King Jr., Lyndon Johnson forced the Voting Rights Act into law.³⁸⁴

But the civil rights movement would not have been as effective if it were not for a concurrent movement offering a less peaceful solution that made its approach seem reasonable by comparison. This movement, the Black nationalist/Black Power movement, tethered closer to the literal Nat Turner approach. It focused primarily on economic justice and police brutality. These movements birthed over 100 Black riots in the 1960s.³⁸⁵

The major voice in the Sixties championing this approach was activist/icon and national spokesman for the Nation of Islam, Malcolm X. Malcolm's life experiences mirrored, in many ways, the experience of the urban poor, the group at the helm of all urban rebellions. As Henry Louis Gates explains, "Malcolm X spent much of his youth in northern cities and became radicalized by his experiences in prison. While there, he converted to the Nation of Islam and embraced the concept of armed self-defense."³⁸⁶ Malcolm spoke directly to the urban poor and working class. He "appealed to those impatient with the pace of the movement unfolding in the South. To them, non-violence looked like capitulation."³⁸⁷ In one of his most acclaimed speeches, "Message to the Grass Roots," Malcolm famously remarked: "There's no such thing as a nonviolent revolution. Whoever heard of a revolution where they lock arms, and sing 'we shall overcome.' Revolution is bloody. Revolution is hostile.

³⁸³ See GARY DONALDSON, *THE SECOND RECONSTRUCTION: A HISTORY OF THE MODERN CIVIL RIGHTS MOVEMENT* 43 (2000).

³⁸⁴ See *id.* at 43–44.

³⁸⁵ See *infra* text accompanying note 399.

³⁸⁶ The African Americans: Many Rivers to Cross: *Rise!* (PBS television broadcast Nov. 19, 2013) at 36:13.

³⁸⁷ *Id.* at 36:45.

Revolution knows no compromise. Revolution overturns and destroys anything that gets in its way.”³⁸⁸

Counterintuitively to many, Black riots, like the Stamp Act Riots of 1765, have been a surprisingly effective tool for catalyzing social change. This, of course, calls into question the common perception of riots as irredeemably destructive.³⁸⁹

The Birmingham riot of 1963, for instance, was pivotal in compelling President John F. Kennedy to propose a major civil rights bill that targeted discrimination in public accommodations.³⁹⁰ More importantly, the urban eruptions the following year compelled then-President Lyndon Johnson to ensure the passage of the Civil Rights Act of 1964, which was based, in large part, on the Kennedy proposal.³⁹¹

Kennedy biographer Nick Bryant explains:

It was the black-on-white violence of May 11 . . . that represented the real watershed in Kennedy’s thinking, and the turning point in administration policy. Kennedy had grown used to segregationist attacks against civil rights protesters. But he—along with his brother and other administration officials—was far more troubled by black mobs running amok.³⁹²

Timothy B. Tyson affirms this position, writing that “[t]he violence threatened . . . helped cement White House support for civil rights. It was one of the enduring ironies of the civil rights movement that the threat of violence was so critical to the success of nonviolence.”³⁹³

Dr. King referred to riots as “the language of the unheard.”³⁹⁴ Malcolm called them “the chickens coming home to roost.”³⁹⁵ Riots represented both the language of the poor, oppressed, and powerless and a creature of American history, policy, and indifference.

Beginning in the early 1960s, in response to decades of subjugation, suppression, and repressed rage, massive numbers of African Americans in major cities

³⁸⁸ *Id.* at 36:00, 36:29.

³⁸⁹ MARABLE, *supra* note 234, at 1359.

³⁹⁰ *Social Protests*, CONST. RTS. FOUND., <https://www.crf-usa.org/black-history-month/social-protests> [<https://perma.cc/9GDL-3NNN>] (last visited Mar. 1, 2023).

³⁹¹ See DONALDSON, *supra* note 383, at 37.

³⁹² NICK BRYANT, *THE BYSTANDER: JOHN F. KENNEDY AND THE STRUGGLE FOR BLACK EQUALITY* 393 (2006) (explaining that the photograph referenced shows a Birmingham police dog attacking a young protester (386–87)).

³⁹³ Timothy B. Tyson, *The Civil Rights Movement*, in *THE OXFORD COMPANION TO AFRICAN-AMERICAN LITERATURE* 147–50 (William L. Andrews et al. eds, 147, 150 1997).

³⁹⁴ Martin Luther King, Jr., *The Other America* (Apr. 14, 1967), <https://www.crmvet.org/docs/otheram.htm> [<https://perma.cc/CXF5-QWYP>].

³⁹⁵ Michael Kirkpatrick, “*Chickens Come Home To Roost*”/*Malcolm X*, YOUTUBE, <https://www.youtube.com/watch?v=oD6aX3dHR2k> [<https://perma.cc/7S7N-5R53>].

around the country stormed the streets, setting buildings ablaze, appropriating goods, and assaulting their perceived enemies, just as their colonial predecessors did before them in response to the Stamp Act Riots of 1765.³⁹⁶ However, unlike the white riots that had terrorized Black folk since the end of slavery, Black riots were almost always justifiable philosophically, even if not administratively, because these uprisings were, generally, based on legitimate concerns and historically grounded in the ideas and ideals underlying the Declaration of Independence and the Bill of Rights, ideas and ideals made applicable to all by the Fourteenth Amendment.³⁹⁷ Furthermore, Black riots have, for the most part, kept with the tradition of the Country's founding riots, a tradition perverted by a hundred years of murderous white rampages.³⁹⁸

Major urban upheavals have continued since, coming at least once a decade, and most have influenced public policy to some degree.³⁹⁹ The immediate causes almost invariably involve allegations of police brutality,⁴⁰⁰ although the solutions are rarely directed at urban policing.⁴⁰¹

The Birmingham riot of 1963 was typical. It began after members of the Ku Klux Klan terrorist organization, in cahoots with notorious bigot Bull Connor (the Birmingham Commissioner of Public Safety), bombed the homes of several prominent African American business and civil rights leaders.⁴⁰² It was the night of May 11, 1963, and violence began with the home where Martin Luther King's brother, A.D. King, lived with his wife and five small children.⁴⁰³ When the caravan arrived, a uniformed police officer placed a bomb on the front porch.⁴⁰⁴ Moments later, the bomb exploded, shattering the front of the home to smithereens.⁴⁰⁵ Fortunately, no one was hurt.⁴⁰⁶

³⁹⁶ *The Stamp Act Controversy*, U.S. HISTORY: PRE-COLUMBIAN TO THE NEW MILLENNIUM (2020), <https://www.ushistory.org/us/9b.asp> [<https://perma.cc/R4EM-PU6A>] (last visited Mar. 1, 2023).

³⁹⁷ THE DECLARATION OF INDEPENDENCE para. 1–3 (U.S. 1776); U.S. CONST. amend. XIV.

³⁹⁸ *Id.*

³⁹⁹ *See generally* TERRY ANDERSON, THE MOVEMENT AND THE SIXTIES 411–16 (1995).

⁴⁰⁰ 13TH (Netflix 2020) at 1:27:07.

⁴⁰¹ *See* Sarah Brady Siff, *Policing the Police: A Civil Rights Story*, OHIO ST. UNIV., <http://origins.osu.edu/article/policing-police-civil-rights-story> [<https://perma.cc/Y9ZV-HH6J>] (last visited Mar. 1, 2023).

⁴⁰² *See* LISA KLOBUCHAR, 1963 BIRMINGHAM CHURCH BOMBING: THE KU KLUX KLAN'S HISTORY OF TERROR 58, 60–62 (2009).

⁴⁰³ *See id.* at 58.

⁴⁰⁴ Ben Greenberg, *From Delmar to Bombingham (6): Coming Forward I*, HUNGRY BLUES (Aug. 19, 2004), <https://hungryblues.net/2004/08/19/delmar-to-bombingham-6-coming-forward-i/> [<https://perma.cc/DHX2-38MG>].

⁴⁰⁵ Ben Greenberg, *From Delmar to Bombingham (5): The Bombing*, HUNGRY BLUES (June 28, 2004), <http://hungryblues.net/2004/06/28/from-delmar-to-bombingham-5-the-bombing/> [<https://perma.cc/V5UU-58A6>].

⁴⁰⁶ *Id.*

An hour later, the state-sponsored terrorists performed a bombing by lobbing a live bomb from a moving vehicle into a room in the Black-owned Gaston Motel where Martin Luther King, Jr. had only just recently boarded. The bomb detonated on impact.⁴⁰⁷ The sound of the blast reverberated all around the city.⁴⁰⁸ When the rumbling from the explosion reached the city jail, a chorus of police officers broke out into a celebratory cover of “Dixie,” according to several witnesses.⁴⁰⁹

The Black community took to the streets, transforming white businesses into furnaces, hurling makeshift projectiles at law enforcement officials, and engaging in hand-to-hand combat with members of the police force.⁴¹⁰ It was the first major socio-political uprising that combined political protest with urban warfare, in a decade that would be defined by this brand of urban insurgency.⁴¹¹ By the end of the decade, the Black riot had become, arguably, the most transforming and effective means of social change since the civil war.⁴¹² Malcolm X described the White House’s response thus:

President Kennedy did not send troops to Alabama when dogs were biting black babies. He waited three weeks until the situation exploded. He then sent troops after the Negroes had demonstrated their ability to defend themselves. In his talk with Alabama editors Kennedy did not urge that Negroes be treated right because it is the right thing to do. Instead, he said that if the Negroes are not well treated the Muslims [meaning the Black Muslims] would become a threat. He urged a change not because it is right but because the world is watching this country. Kennedy is wrong because his motivation is wrong.⁴¹³

The Birmingham riot was succeeded by the Philadelphia and Harlem riots of 1964.⁴¹⁴ Much like those that follow in the 1960s and since, all three responded to social and economic oppression brought to a head by police violence.⁴¹⁵ The revolving

⁴⁰⁷ DIANE MCWHORTER, *CARRY ME HOME* 428 (2001).

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.*

⁴¹⁰ See generally Claude Sitton, *50 Hurt in Negro Rioting After Birmingham Blasts*, N.Y. TIMES (May 13, 1963), <https://archive.nytimes.com/www.nytimes.com/library/national/race/051363race-ra.html?scp=15&sq=Birmingham&st=cse> [<https://perma.cc/R3Y7-7J4T>].

⁴¹¹ See JASMIN A. YOUNG, *BLACK POWER ENCYCLOPEDIA: FROM “BLACK IS BEAUTIFUL” TO URBAN UPRISINGS* 112 (2018).

⁴¹² See *id.*

⁴¹³ Malcolm X, *Message to the Grass Roots*, in *MALCOLM X SPEAKS* (George Brietman ed., 1994).

⁴¹⁴ See *1964 Harlem Race Riot*, N.Y. DAILY NEWS (July 14, 2022, 3:45 PM), <https://www.nydailynews.com/new-york/manhattan/ny-1964-harlem-race-riot-20220714-q6ygh6ijqvfdvffjq6cjbhbpme-photogallery.html> [<https://perma.cc/FP22-7RGQ>].

⁴¹⁵ *Id.*

nature of the theme suggests that the problems underlying the riots have yet to be fundamentally redressed. On the one hand, it is clear that Black political pressure in the form of civil disobedience, boycotts, and rioting has forced a variety of social changes⁴¹⁶: the prohibition of de jure segregation, violence as a means of voter intimidation, and employment discrimination, to name a few.⁴¹⁷ Additionally, during the 1960s, the Supreme Court added significant safeguards to the criminal justice process that benefitted all Americans. These include Miranda rights, the right to an attorney for indigent defendants, and expanded privacy rights.⁴¹⁸

On the other hand, the disproportionate incarceration of African American citizens, Black men in particular, and the killing of unarmed men of color continue.⁴¹⁹ The political motive and the desired social effect of the Black Codes in 1865 are of the same political design and predetermined social outcome as mass incarceration over 150 years later.⁴²⁰ Furthermore, the underlying social conditions that fueled Black outrage during the 1960s are the same lingering conditions that stirred Black fury in Ferguson, Missouri, in 2014.⁴²¹ The allegations of police misconduct that lifted the top off Black rage in the Sixties are the same type of allegations that lit the fuse of Black indignation in Baltimore in 2015 after the murder of Freddie Gray and all around the country in 2020 with the asphyxiation of George Floyd by a Minnesota police officer.⁴²² The apparent intractability of these particular problems, mass incarceration and police misconduct, is not insignificant. It bears directly on the applicability of the political necessity defense to forcible acts of resistance, stemming from these same issues today.

The most tumultuous Black riot of the 1960s occurred in the Watts neighborhood of Los Angeles. On August 11, 1965, law enforcement pulled 21-year-old Marquette Frye over and placed him under arrest for reckless driving.⁴²³ Marquette's stepbrother, who was a passenger in the car, walked to their nearby home to fetch their mother, Rena Frye.⁴²⁴ She hurried to the scene. At some juncture, an officer shoved Price and struck Frye.⁴²⁵ A group of angry community members formed, after they caught wind of a rumor that police officers had abused a woman.⁴²⁶ Rena

⁴¹⁶ *The Civil Rights Act of 1964: A Long Struggle for Freedom, Civil Rights Era (1950–1963)*, LIBR. CONG., <https://www.loc.gov/exhibits/civil-rights-act/civil-rights-era.html> [<https://perma.cc/88JH-HGDX>].

⁴¹⁷ *Id.*

⁴¹⁸ See generally *Miranda v. Arizona*, 384 U.S. 436 (1966); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Loving v. Virginia*, 388 U.S. 1 (1967).

⁴¹⁹ YOUNG, *supra* note 411, at 113.

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.*

⁴²³ *Id.*

⁴²⁴ *Id.*

⁴²⁵ BLACK PANTHER PARTY'S NEWSPAPER, Vol. IV, No. 2, Dec. 1969.

⁴²⁶ YOUNG, *supra* note 411, at 113.

Frye, Marquette Frye, and Marquette Frye's brother were eventually arrested, but the crowd continued to swell.⁴²⁷

Police units attempted to subdue the protestors several times that night but were repelled by rocks and other debris.⁴²⁸ The next day Chief of Police William Parker declared that mass protest was an insurgency and as such demanded a paramilitary response.⁴²⁹ He even equated the uprising with the Vietnam War, and the protestors with the Viet Cong,⁴³⁰ comparing rioters to "monkeys in the zoo."⁴³¹ The police response was predictably harsh.⁴³²

Resistance continued. Like their predecessors in interest during the Stamp Act Riots, protestors hurled rocks and other debris at law enforcement, looted the area, and set buildings ablaze—targeting white-owned businesses.⁴³³ The protestors also engaged in hand-to-hand combat with the police officers and attacked white motorists who drove by yelling racial epithets.⁴³⁴

Eventually, the rebellion stretched 46 square miles and involved 16,000 law enforcement related personnel. To crush it, the chief of police implemented a policy of mass arrest and imposed a curfew for much of South Central Los Angeles and all of the Watts community.⁴³⁵ When it was all said and done, thirty-four people were killed, of which twenty three had been killed by law enforcement and the National Guard.⁴³⁶ The police made as many as 3,500 arrests.⁴³⁷ An estimated 35,000 protestors actively participated in the rebellion, while another 70,000 provided moral support.⁴³⁸

As with all Black riots in U.S. history, the immediate events that tipped over into the Watts riot involved police misconduct, but they only served as a spark. A somber reality invariably lurked beneath the immediate rage: unemployment, housing

⁴²⁷ *Id.* at 113–14.

⁴²⁸ *Id.* at 114.

⁴²⁹ ELIZABETH HINTON, *FROM THE WAR ON POVERTY TO THE WAR ON CRIME: THE MAKING OF MASS INCARCERATION IN AMERICA* 68–72 (2016).

⁴³⁰ Stephen Mihm, *The Riots of the 1960s Led to Rise in Militarization of Police*, BLOOMBERG (June 12, 2020), <https://www.bloomberg.com/opinion/articles/2020-06-12/militarization-of-police-is-tied-to-1960s-riots-and-race#xj4y7vzkg> [<https://perma.cc/S396-68ZE>].

⁴³¹ Anthony Oberschall, *The Los Angeles Riot of August 1965*, 15 *SOCIAL PROBLEMS* 324 (1968).

⁴³² YOUNG, *supra* note 411.

⁴³³ *Id.* at 114.

⁴³⁴ *Id.*

⁴³⁵ HINTON, *supra* note 429, at 70.

⁴³⁶ RANDALL E. PARKER, *ROUTLEDGE HANDBOOK OF MAJOR EVENTS IN ECONOMIC HISTORY* 215 (2013); Courtney Subramanaian, *Detroit Recalls Five Days of Violent Unrest a Half-Century Later*, BBC (July 26, 2017), <https://www.bbc.com/news/world-us-canada-40711211> [<https://perma.cc/LB5V-GEXF>].

⁴³⁷ John H. Barnhill, *Watts Riots (1965)*, in *REVOLTS, PROTESTS, DEMONSTRATIONS, AND REBELLIONS IN AMERICAN HISTORY* 966 (Steven L. Danver ed., 2011).

⁴³⁸ *Id.*

discrimination, unequal education, criminal injustice, and a general, overall cloak of disparity cropping the Black face out of the American dream.⁴³⁹

Most commentators condemned the Watts riots, as was the case with all Black riots, as being self-destructive and without redeeming value. At least one report charged that most of the “rioters” were criminals, although most of those arrested were without criminal records.⁴⁴⁰ The Black community had the opposite view. African Americans generally understood the rebellion to be an “uprising against an oppressive system.”⁴⁴¹

The year 1967 saw the outbreak of Black riots in astronomical proportions. A whopping 164 Black riots erupted across the United States in what was dubbed the “Long Hot Summer of 1967.”⁴⁴² Among these the most turbulent were in Newark and Detroit. The latter was the bloodiest. The 12th Street riot in Detroit in the end of July ended in forty three deaths, nearly 1,200 injuries, and over 7,000 arrests.⁴⁴³ It began with a police raid of an after-hours establishment but was a response to redlining, disproportionate policing of the Black community, the rhetoric of white supremacy, and police overzealousness.⁴⁴⁴

The Newark riots had similar causes.⁴⁴⁵ They began when two Newark police officers, both white, arrested and assaulted a Black cab driver.⁴⁴⁶ Residents of a nearby housing project witnessed the police officers dragging a Black body into the police station that seemed lifeless to them.⁴⁴⁷ Word quickly spread and within moments a crowd began to form in front of the precinct.⁴⁴⁸ A battalion of police officers streamed from the building toting Billy clubs.⁴⁴⁹ Protestors chucked bottles,

⁴³⁹ Jeanne Theoharis, *Alabama on Avalon, in THE BLACK POWER MOVEMENT: RETHINKING THE CIVIL RIGHTS—BLACK POWER ERA* 46–49 (Peniel E. Joseph ed., 2011).

⁴⁴⁰ Art Berman, *21000 Police Wage Guerilla War; 8 p.m. Curfew Invoked*, L.A. TIMES, Aug. 15, 1965; MCCONE COMMISSION REPORT (2 Dec. 1965).

⁴⁴¹ Barnhill, *supra* note 437.

⁴⁴² Bethany A. Corbin, *Should I Stay or Should I Go?: The Future of Disparate Impact Liability Under the Fair Housing Act and Implications for the Financial Services Industry*, 120 PA. ST. L. REV. 421, 428 (2015). Some of the cities include: Atlanta, Milwaukee, Rochester, NY, Boston, New Britain, CT, Plainfield, NJ, Cincinnati, Tampa, Newark, NJ, and Detroit. MALCOLM MCLAUGHLIN, *THE LONG, HOT SUMMER OF 1967: URBAN REBELLION IN AMERICA* (2014).

⁴⁴³ Subramanaian, *supra* note 436.

⁴⁴⁴ See generally MCLAUGHLIN, *supra* note 442.

⁴⁴⁵ *Id.*

⁴⁴⁶ TOM HAYDEN, *REBELLION IN NEWARK: OFFICIAL VIOLENCE AND GHETTO RESPONSE* (1967); Veronika Bondarenko, *The Newark Riots Began 50 Years Ago Today—Here’s Why They Still Matter*, BUS. INSIDER (July 12, 2017), <https://www.businessinsider.com/newark-riots-anniversary-new-jersey-2017-7> [<https://perma.cc/Z7H7-3U9E>].

⁴⁴⁷ HAYDEN, *supra* note 446, at 10.

⁴⁴⁸ *Id.*

⁴⁴⁹ *Id.* at 10, 14.

bricks, and rocks at the onrushing police officers.⁴⁵⁰ The police officers upped the ante with shotguns and were given the order to “fire if necessary.”⁴⁵¹ Twenty-six people died in the carnage that followed, including 24-year-old William Furr, who was shot to death by police officers after he was caught pilfering a six-pack of beer from a liquor store that had been ransacked.⁴⁵²

As a result of the rebellions during the “Long Hot Summer,” then President Lyndon B. Johnson established the Kerner Commission. He gave the commission three charges regarding the riots to find out: “What happened? Why did it happen? What can be done to prevent it from happening again and again?”⁴⁵³ The commission essentially found that institutionalized racism was the root cause of the urban rebellions cautioning, “[o]ur nation is moving toward two societies one black, one white—separate and unequal.”⁴⁵⁴ They identified racism as the cause for the paucity of economic opportunities that fomented unrest.⁴⁵⁵ The report castigated the federal government for failed social, economic, and education policies.⁴⁵⁶ It recommended more diverse and empathetic police officers, significant investments into housing programs, new opportunities for work, and policies aimed at eliminating residential segregation. These recommendations went largely unheeded.⁴⁵⁷

Roughly a month after the Kerner Report was issued, Dr. Martin Luther King was assassinated in Memphis, Tennessee, and riots occurred en masse throughout the country in response.⁴⁵⁸ Major uprisings took shape in Washington D.C., Baltimore, and Chicago. Over forty people died, more than 3,500 were injured, and upwards of 27,000 arrested during the week-length upheaval.⁴⁵⁹ The King Assassination Riots, also dubbed the Holy Week Uprising, comprised the greatest wave of social upheaval since the Civil War.⁴⁶⁰

The traditional socio-economic deprivations fueled the uprisings, but they were triggered by the Black community’s earned distrust of the American government. The Black community believed that the federal government was involved in King’s

⁴⁵⁰ *Id.* at 10, 14.

⁴⁵¹ *Id.* at 13–14.

⁴⁵² HAYDEN, *supra* note 446, at 511; Bondarenko, *supra* note 446.

⁴⁵³ LYNDON B. JOHNSON, REMARKS UPON SIGNING ORDER ESTABLISHING THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, AT THE UNIVERSITY OF SANTA BARBARA (July 29, 1967) (John T. Woolley & Gerhard Peters eds., 1967).

⁴⁵⁴ *Id.*

⁴⁵⁵ STEVEN M. GILLON, SEPARATE AND UNEQUAL: THE KERNER COMMISSION AND THE UNRAVELING OF AMERICAN LIBERALISM 151 (2018).

⁴⁵⁶ *Id.* at xii, 230–38.

⁴⁵⁷ *Id.* at 247–66.

⁴⁵⁸ *Id.* at 256.

⁴⁵⁹ Lorraine Boissoneault, *Martin Luther King Jr. ’s Assassination Sparked Uprisings in Cities Across America*, SMITHSONIAN MAG. (Apr. 4, 2018), <https://www.smithsonianmag.com/history/martin-luther-king-jrs-assassination-sparked-uprisings-cities-across-america-180968665/> [https://perma.cc/LQJ7-DQE5].

⁴⁶⁰ *Id.*

assassination. Because King was such a proponent of non-violence and reconciliation, the irony of his violent death triggered a mindset that only violent resistance to white supremacy translated,⁴⁶¹ a feeling that violence was the only language oppression understood.

In the aftermath, President Johnson was apocalyptic: “What did you expect? I don’t know why we’re so surprised. When you put your foot on a man’s neck and hold him down for three hundred years, and then you let him up, what’s he going to do? He’s going to knock your block off.”⁴⁶² The riots fast tracked the passage of the Civil Rights Act of 1968, including the Fair Housing Act.⁴⁶³

Even President Nixon, elected in 1969, whose taped comments revealed him to be an unrepentant racist, was compelled to address Black discontent and inequality by passing the first Affirmative Action legislation and creating various initiatives centered around the concept of Black capitalism.⁴⁶⁴

The curtain-call on the Sixties did not signal the end of forcible Black resistance as a political response to perceived government tyranny under aegis of law enforcement. During the late 1960s and the early 1970s, organized, paramilitary Black activist efforts grew for a time, but covert government efforts to neutralize the leaders and undermine the groups at the vanguard of the resistance squelched these efforts.⁴⁶⁵ Spurred on by the “by-any-means-necessary” rhetoric of Malcolm X groups like the Black Panther Party for Self-Defense and the Black Liberation Army began to eschew non-violence, which they associated with the National Association for the Advancement of Colored People as well as Dr. Martin Luther King.⁴⁶⁶ The Black Panther Party, formed by Bobby Seal and Huey Newton in 1966, was created initially to monitor unlawful police aggression in the Black neighborhoods of Oakland, California.⁴⁶⁷ The Panthers would essentially police the police, patrolling the community and standing guard, holding a copy of the California Penal Code in one hand

⁴⁶¹ *McKissick Says Nonviolence Has Become Dead Philosophy*, N.Y. TIMES (Apr. 5, 1968), <https://www.nytimes.com/1968/04/05/archives/mckissich-says-nonviolence-has-be-come-dead-philosophy.html> [<https://perma.cc/ASG7-3J3X>].

⁴⁶² Kyle Longley, *Our Leaders Can Look to Lyndon Johnson to See How to Minimize Damage Today*, WASH. POST (May 31, 2020), <https://www.washingtonpost.com/outlook/2020/05/31/our-leaders-can-look-lyndon-johnson-see-how-minimize-damage-today/> [<https://perma.cc/5TG6-HDJZ>].

⁴⁶³ PAUL MASON FOTSCH, *WATCHING THE TRAFFIC GO BY: TRANSPORTATION AND ISOLATION IN URBAN AMERICA* 172 (2009).

⁴⁶⁴ MEHRSA BARADARAN, *THE COLOR OF MONEY: BLACK BANKS AND THE RACIAL WEALTH GAP* 186 (2017); Rosie Perper, *New Report Highlights Comments Richard Nixon Made in Favor of a Debunked Racist Theory*, BUS. INSIDER (July 31, 2019), <https://www.businessinsider.com/richard-nixon-tapes-supported-theory-on-race-and-iq-2019-7> [<https://perma.cc/5CZ4-PJJY>].

⁴⁶⁵ YOUNG, *supra* note 411.

⁴⁶⁶ *Id.* at 146.

⁴⁶⁷ *Id.*

and a shotgun in the other, when they saw police/citizen interactions that they deemed to be suspicious.⁴⁶⁸ In an unabashed response to the Panther's invocation of their right to openly carry arms under California law, staunch, conservative, card-carrying members of the National Rifle Association enacted a law in 1967, the Mulford Act, signed into law by then Governor Ronald Reagan, repealing the California law allowing citizens to openly carry firearms in public law, thereby abridging the expanse of the Second Amendment.⁴⁶⁹ It had the appearance of hypocrisy to say the least.

Beginning in 1969 and stretching into the mid-1970s Panther activities focused almost exclusively on social programs like the Free Breakfast Program for Children, schools and after-school programs, and community health clinics.⁴⁷⁰ Huey Newton's philosophy was that the people could not begin to even really think about armed resistance, if they were hungry, sick, and unaware.⁴⁷¹ These social programs swelled the ranks of the Black Panther Party to a few thousand and made them heroes in the Black community.⁴⁷² Ironically, they stoked more apprehension among law enforcement, particularly alarming Federal Bureau of Investigation (FBI) Director J. Edgar Hoover than the Panthers' brazen advocacy of armed revolution had earlier.⁴⁷³ Now disclosed government documents indicate that in 1969, well after the end of the Party's armed patrols but before it had swelled beyond a few thousand, Hoover called the Panthers "the greatest threat to the internal security of the country."⁴⁷⁴

Hoover developed an extensive and highly orchestrated counterintelligence program (COINTELPRO) to disrupt the programs of the Panther Party.⁴⁷⁵ Measures included, at a minimum, secret surveillance, wiretapping, police harassment, use of agent provocateurs, and staged inflammatory correspondence.⁴⁷⁶ Some have charged that law enforcement, in conjunction with the FBI, orchestrated the assassination of key party members.⁴⁷⁷

The Panther Party had several armed standoffs with the police, at least one of which ended with the death of a police officer and the wounding of another.⁴⁷⁸ One

⁴⁶⁸ *Id.* at 571.

⁴⁶⁹ *Id.* at 709.

⁴⁷⁰ *Id.* at 106.

⁴⁷¹ See generally BLACK PANTHER PARTY'S NEWSPAPER, Vol. IV, No. 2, Dec. 1969.

⁴⁷² Robert O. Self, *The Black Panther Party and the Long Civil Rights Era*, 45–47, in IN SEARCH OF THE BLACK PANTHER PARTY: NEW PERSPECTIVES ON A REVOLUTIONARY MOVEMENT 5 (Jama Lazerow ed., 2006).

⁴⁷³ *Id.*

⁴⁷⁴ *Hoover Calls Panthers Top Threat to Security*, WASH. POST, July 16, 1969.

⁴⁷⁵ CHARLES EDWIN JONES, THE BLACK PANTHER PARTY (RECONSIDERED) 366 (1998).

⁴⁷⁶ *Id.* at 136.

⁴⁷⁷ See G. Flint Taylor, *The FBI COINTELPRO Program and the Fred Hampton Assassination*, HUFFINGTON POST (Feb. 2, 2017), https://www.huffpost.com/entry/the-fbi-coin-telpro-progra_b_4375527 [<https://perma.cc/XDE3-GAPK>].

⁴⁷⁸ David Ray Papke, *The Black Panther Party's Narratives of Resistance*, 18 VT. L. REV. 645 (1994); see Williams, *infra* note 480.

standoff in 1967 ended with police capitulation, after several Panthers refused to relinquish their weapons while reading out loud key provisions from the California Penal Code.⁴⁷⁹ However, a confrontation eight months later, on October 28, 1967, ended in violence. Huey Newton and another Panther member were returning home from a late-night event when a notoriously racist cop, John Frey, pulled them over.⁴⁸⁰ At some point, backup arrived, and Newton alighted from the vehicle.⁴⁸¹ What happened next has been the subject of great dispute.⁴⁸² But this we know: shots were fired.⁴⁸³ Newton was struck in the stomach.⁴⁸⁴ Frey was killed.⁴⁸⁵ And the other officer suffered gunshot wounds but survived.⁴⁸⁶ Newton was charged with murder and after several appeals was eventually acquitted.⁴⁸⁷

Two years later, the Panthers were at the center of what some consider to be amongst the biggest shootouts in American history.⁴⁸⁸ On the morning of December 9, 1969, 200 Los Angeles police officers, including several members of the newly formed Special Weapons and Tactics unit, S.W.A.T. (which many charge was created to undermine Black resistance), surrounded a building located at 41st and Central in Los Angeles, where there were six members at the party's southern California headquarters.⁴⁸⁹ For upwards of four hours, a hail of gunfire volleyed back and forth between law enforcement and the Panthers barricaded inside; the Panthers were fortunate and suffered no casualties.⁴⁹⁰

The Panthers have probably been the most relevant group since the Revolutionary War to invoke the right to rebel, a right that pervaded the Revolutionary War rhetoric of the founding fathers, a right recently rediscovered in the Second Amendment. The party's 10-point program included the statement, "[t]he Second Amendment to the Constitution of the United States gives a right to bear arms," and the document explicitly tied the party to the country's founders.⁴⁹¹ In fact, if one were to redact the word "Black" from the 10th point of the 10-point program, it would sound almost exactly like a colonial demand to the British Crown:

⁴⁷⁹ Adam Winkler, *The Secret History of Guns*, ATLANTIC (Sept. 2011), <https://www.theatlantic.com/magazine/archive/2011/09/the-secret-history-of-guns/308608/> [<https://perma.cc/BP2S-BWN7>].

⁴⁸⁰ Yohuru R. Williams, *In the Name of the Law: The 1967 Shooting of Huey Newton and Law Enforcement's Permissive Environment*, 61 NEGRO HIST. BULL. 6, 13–14 (1998).

⁴⁸¹ *Id.*

⁴⁸² *Id.*

⁴⁸³ *Id.*

⁴⁸⁴ *Id.*

⁴⁸⁵ *Id.*

⁴⁸⁶ *Id.*

⁴⁸⁷ *Id.*

⁴⁸⁸ See RADLEY BALKO, *RISE OF THE WARRIOR COP: THE MILITARIZATION OF AMERICA'S POLICE FORCES* 76–80 (2013).

⁴⁸⁹ *Id.*

⁴⁹⁰ *Id.* at 78.

⁴⁹¹ HUEY P. NEWTON ET AL., *REVOLUTIONARY SUICIDE* 117 (1973).

As our major political objective, [we want] a United Nations-supervised plebiscite to be held throughout the **Black** colony in which only **Black** colonial subjects will be allowed to participate, for the purpose of determining the will of **Black** people as to their nation destiny.⁴⁹²

The Panthers hijacked *en toto* an entire passage from the Declaration of Independence, quoting:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness.—That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed,—**That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government**, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness . . .

Prudence, indeed, will dictate that Governments long established should not be changed for light and transient causes; and accordingly all experience hath shewn that mankind are more disposed to suffer, while evils are sufferable than to right themselves by abolishing the forms to which they are accustomed. **But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security.**⁴⁹³

The 1970s, like the decade that preceded it and the decades that would follow, also hosted urban rebellions. Systemic issues related to the criminal justice system and the African American community's feelings of tainted liberty continued. It had to appear to Black folks that they were on permanent carousel of injustice, fighting to remedy one entrenched injustice only to confront another at the very next stop. Tempers flared. And the uprisings continued.

In 1980, the obligatory riot per decade erupted after another incident of police misconduct. This time it began in Miami after four Dade County police officers were

⁴⁹² *Id.* at 118.

⁴⁹³ *Id.* at 118–19 (quoting THE DECLARATION OF INDEPENDENCE (U.S. 1776)).

acquitted after murdering Arthur McDuffie, a salesman and former marine, during a traffic stop; McDuffie had a series of unpaid parking tickets.⁴⁹⁴ According to the prosecutor, the officers split McDuffie's head "like an egg."⁴⁹⁵ The officers tried to cover up their misconduct by running over McDuffie's motorcycle with their patrol vehicle to make it seem as if McDuffie perished as a result of a motorcycle accident.⁴⁹⁶ When the jury announced the acquittal, 5,000 Miamians took to the streets in protest. It quickly morphed into a riot that led to the death of 18 people, nearly 350, including women and children, injured, and nearly 600 arrests.⁴⁹⁷ The officers whose acquittals had sparked the riot were reinstated to their positions at the police department.⁴⁹⁸

Arguably, the most spectacular urban uprising in American history materialized in Los Angeles, California in 1992.⁴⁹⁹ This riot followed the acquittal of four officers responsible for the brutal beating of motorist Rodney King.⁵⁰⁰ The riot lasted an astounding six days, a time period more indicative of a small-scale war than a riot, and ended with more than fifty deaths, over 2,000 injuries, and astonishing 12,000 arrests.⁵⁰¹ 7,000 fires were also reported.⁵⁰²

The next decade, in 2001, a series of upheavals unfolded near downtown Cincinnati after patrol officer Stephen Roach shot unarmed 19-year-old Timothy Thomas to death during a traffic stop.⁵⁰³ Roach claimed that Thomas was reaching for a gun, but a subsequent police investigation dispelled this assertion.⁵⁰⁴ The incident happened amid boiling tension between the community and the police department growing out of several issues, including police officers killing fifteen African-Americans within fifteen years.⁵⁰⁵ The upheaval lasted four nights during which protestors employed a tactic that is characteristic of urban rebellions: debris artillery and rock warfare.⁵⁰⁶ Rioters hurled rocks and other street debris at law enforcement, who countered with tear gas, bean bag bullets, and pepper spray.⁵⁰⁷ In all, there were 800 arrests. Roach was tried and acquitted of negligent homicide.⁵⁰⁸

⁴⁹⁴ F. CLAYTON COBB, *THE PATHS I CHOSE: THE STORIES OF A BROTHA FROM THE SOUTH SIDE OF ATLANTA* (2018).

⁴⁹⁵ *Id.*

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.*

⁴⁹⁸ *Id.*

⁴⁹⁹ *See generally* REBECCA RISSMAN, *RODNEY KING AND THE L.A. RIOTS* (2014).

⁵⁰⁰ *Id.* at 48–59.

⁵⁰¹ *Id.* at 73.

⁵⁰² *Id.*

⁵⁰³ ROBERT A. CROPE, *AMERICAN PUBLIC ADMINISTRATION: PUBLIC SERVICE FOR THE 21ST CENTURY* 194 (2015).

⁵⁰⁴ WALTER C. RUCKER & JAMES N. UPTON, 1 *ENCYCLOPEDIA OF AMERICAN RACE RIOTS* 109 (2006).

⁵⁰⁵ CROPE, *supra* note 503, at 194.

⁵⁰⁶ *See id.*

⁵⁰⁷ RUCKER & UPTON, *supra* note 504, at 109.

⁵⁰⁸ *Id.* at 110.

The last decade has been no more immune to Black riots catalyzed by allegations of police misconduct than the preceding six decades, indicating a problem that is intransigent, to say the least. On August 9, 2014, for reasons that remain in contention, Darren Wilson of the Ferguson, Missouri, police department fired several shots at 18-year-old Michael Brown while Brown was in headlong flight away from him.⁵⁰⁹ Several shots ripped through Brown's flesh ending his young life.⁵¹⁰ Community members held a memorial for Brown the next day.⁵¹¹ The memorial morphed into an uprising, after a police officer allowed his dog to urinate on a makeshift monument of flowers and candles that aggrieved community members had painstakingly formed on the spot where Brown lay down his final burden.⁵¹²

The Ferguson unrest was unique in that the rebellion occurred in waves. The first, sparked by the shooting of Michael Brown, lasted from August 9, 2014, to August 21, 2014, when the National Guard was withdrawn from the area.⁵¹³ The second wave came upon the news that Officer Wilson was not indicted.⁵¹⁴ It lasted from November 24, 2014 to December 2, 2014.⁵¹⁵ The last wave, occurring on the 1-year anniversary of the shooting, raged from August 9, 2015, to August 11, 2015.⁵¹⁶ In all, 321 members of the public were arrested and charged, and six officers injured.⁵¹⁷

There was a period of interim rage between the second wave and another riot in Baltimore. From December of 2014 to April of 2015, the spirit of rebellion ignited by the Michael Brown killing, though still seething beneath the surface, took

⁵⁰⁹ See MICHAEL GLINT, *FERGUSON RIOTS: 50 FACTS YOU SHOULD KNOW ABOUT THE SHOOTING OF MICHAEL BROWN* ¶ 48 (2014).

⁵¹⁰ See generally *id.*

⁵¹¹ See *id.* ¶ 6.

⁵¹² *Id.* ¶ 7.

⁵¹³ *Michael Brown's Shooting and Its Immediate Aftermath in Ferguson*, N.Y. TIMES (Aug. 25, 2014), https://www.nytimes.com/interactive/2014/08/12/us/13police-shooting-of-black-teenager-michael-brown.html#time348_10369 [<https://perma.cc/5PJY-BH6Y>].

⁵¹⁴ Monica Davey & Julie Bosman, *Protests Flare After Ferguson Police Officer Is Not Indicted*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/ferguson-darren-wilson-shooting-michael-brown-grand-jury.html> [<https://perma.cc/R479-HMCF>].

⁵¹⁵ See Chris Branch, *Looking Ahead After Ferguson Protests: What Happens Next?*, HUFFINGTON POST (Dec. 2, 2014), https://www.huffpost.com/entry/ferguson-protests-end-goal_n_6256292 [<https://perma.cc/4HRQ-Y7XE>].

⁵¹⁶ See Elliot C. McLaughlin et al., *Ferguson Protestors Arrested as County Declares State of Emergency*, CNN (August 11, 2015, 5:51 PM), <https://www.cnn.com/2015/08/10/us/ferguson-protests/> [<https://perma.cc/Y4GY-SSJH>].

⁵¹⁷ *More than 50 Arrested at Ferguson Police Station on "Moral Monday" Other Events Elsewhere*, ST. LOUIS POST-DISPATCH (Oct. 13, 2014), https://www.stltoday.com/news/local/crime-and-courts/more-than-50-arrested-at-ferguson-police-station-on-moral-monday-other-events-elsewhere/article_c1752132-9731-542e-8525-1885fae7fd10.html [<https://perma.cc/PDZ5-RVAW>].

on a decidedly less turbulent character. Rage found expression in discussion groups, social media campaigns and community organizing. These efforts were aimed, for the most part, at bringing pressure to bear on elected officials, public figures, and private influencers with hidden hands wrapped around the means of social change or around the necks of those who controlled the means.

However, on April 12, 2015, Baltimore Police officers arrested 25-year-old Freddie Gray.⁵¹⁸ They handcuffed Gray's hands behind his back and threw him into the back of a police van, intentionally failing to secure him.⁵¹⁹ They then took him on a punitive excursion known as a "rough ride."⁵²⁰ When it ended, he was in a coma, his spinal cord was ripped, and his vocal box was shattered.⁵²¹ Gray died a week later.⁵²² When the police department was unable to adequately explain the cause of Gray's death, incensed protestors took to the streets.⁵²³ The rebellion resulted in at least 250 arrests and 20 police casualties.⁵²⁴

The most recent wave of urban uprisings began on May 25, 2020, after Officer Derek Chauvin of the Minnesota police department strangled 46-year-old George Floyd to death.⁵²⁵ The officer had a history of questionable uses of force but was retained on the police force nonetheless.⁵²⁶ By the time Chauvin encountered Floyd, he amassed seventeen citizen complaints, fifteen of which the internal investigation bureau had deemed baseless and two warranting only a slap on the wrist.⁵²⁷ Chauvin was an active participant in at least three police-involved shootings, in one of which he and five other officers fatally shot a civilian.⁵²⁸ Nonetheless, at the time he asphyxiated Floyd, he supervised two rookie officers who had received their law enforcement licenses the prior August.⁵²⁹

Chauvin killed Floyd by mashing his knee into his neck, which he then intentionally reinforced with the full weight of his body, for the better part of ten minutes.⁵³⁰ The most disturbing part of the incident was Floyd's constant cries for

⁵¹⁸ YOUNG, *supra* note 411, at 113.

⁵¹⁹ *Id.*

⁵²⁰ *Id.*

⁵²¹ *Id.*

⁵²² *Id.*

⁵²³ *Id.* at 300.

⁵²⁴ *Id.* at 300.

⁵²⁵ Brittany Shammass et al., *Murder Charges Filed Against All Four Officers in George Floyd's Death as Protests Against Biased Policing Continue*, WASH. POST (July 3, 2020, 11:45 PM), <https://www.washingtonpost.com/nation/2020/06/03/george-floyd-police-officers-charges> [<https://perma.cc/28ZW-RKKH>].

⁵²⁶ *See id.*

⁵²⁷ *See id.*

⁵²⁸ *Id.*

⁵²⁹ *Id.*

⁵³⁰ *Id.*

help.⁵³¹ The entire incident was caught on camera, so heart-wrenching videos of Floyd begging for his life with the meager breaths he had left, flooded the internet: “I can’t breathe,” “please, please, please,” and after these cries failed, he called on his deceased mother for intervention.⁵³² And when no form of help, from above, below, or around was forthcoming, he died.⁵³³

The next day unrest broke out in Minneapolis and quickly spread like wildfire across the nation, and, atypically, across the entire western world. The vast majority of the unrest took on a more peaceful tact, but initially, following escalating skirmishes between law enforcement and protestors, the outrage was so volcanic, so visceral, it seemed like entire cities might burn. In some cities around the country, there was widespread rioting and looting.⁵³⁴ National Guard units were activated in a whopping thirty-one states across the country.⁵³⁵ More than eighty localities around the country imposed curfews on its citizens.⁵³⁶ The President of the United States, in a nearly unprecedented move, federalized the national guard and attempted to unleash the power of U.S. Military on the civilian population in the cities, a specter of the exact type of action that had frightened this country into existence.⁵³⁷

The arrest rate was astronomical.⁵³⁸ An average of over sixty-five protestors were arrested each hour, for each hour in the day.⁵³⁹ By the end of the seventh day, over 11,000 protestors had been jailed.⁵⁴⁰ There were twenty-one deaths around the country, eighteen of which were from gunshots.⁵⁴¹

⁵³¹ *Id.*

⁵³² *George Floyd’s Sister Says Firing Officers Is Not Enough: ‘They Murdered My Brother’*, NBC PHILA. (May 28, 2020, 2:01 AM), <https://www.nbcphiladelphia.com/news/national-international/george-floyds-sister-says-firing-officers-is-not-enough-they-murdered-my-brother/2409047/> [<https://perma.cc/M7WG-2DL4>].

⁵³³ *Id.*

⁵³⁴ Scott Pham, *Police Arrested More Than 11,000 People at Protests Across the US*, BUZZFEED NEWS (June 2, 2020, 10:32 PM), <https://www.buzzfeednews.com/article/scott-pham/floyd-protests-number-of-police-arrests> [<https://perma.cc/R6V4-PPQ9>].

⁵³⁵ Jack Arnholz, *U.S. Protests Map Shows Where Curfews and National Guard Are Active*, ABC NEWS (June 4, 2020, 5:30 PM), <https://abcnews.go.com/US/locations-george-floyd-protests-curfews-national-guard-deployments/story?id=70997568> [<https://perma.cc/BTK5-MTBB>].

⁵³⁶ *Id.*

⁵³⁷ Thomas Gibbons-Neff et al., *Aggressive Tactics by National Guard, Ordered to Appease Trump, Wounded the Military, Too*, N.Y. TIMES (June 10, 2020), <https://www.nytimes.com/2020/06/10/us/politics/national-guard-protests.html> [<https://perma.cc/J9N9-GDDK>].

⁵³⁸ *See* Pham, *supra* note 534.

⁵³⁹ *See id.*

⁵⁴⁰ *Id.*

⁵⁴¹ Louis Beckett, *At Least 25 Americans Were Killed During Protests and Political Unrest in 2020*, GUARDIAN (2020), <https://www.theguardian.com/world/2020/oct/31/americans-killed-protests-political-unrest-acled> [<https://perma.cc/H8QZ-VPA8>].

George Floyd's niece, Brooke Williams, wise beyond her years, speaking at his funeral, summed up the mood of the people and the lived experience of twenty generations of Black folk when she preached: "Someone said make America great again. But when has America ever been great?"⁵⁴² Her words poured out over those in attendance and into the hearts of those connected through the airwaves, sweeping in their current the tortured hope of twenty generations of Black folk who, if there is, in fact, a world beyond this one, emoted in unison, "amen."⁵⁴³

While civil disobedience and forcible acts of Black resistance set off by the unarmed killing of African-Americans have, in the past, sparked debate and pulled at the levers of social change, in some instances even sparking positive government action, e.g., Lyndon Johnson's great society programs and Richard Nixon's Black Capitalism initiative, policing and police culture have remained virtually impregnable to positive change.⁵⁴⁴ The George Floyd rebellion so far has been different or, perhaps, in essence, the climax of, what can be seen as a continuous wave of rebellion that has ebbed and flowed, erupting at least once a decade since the 1960s.⁵⁴⁵ As of the publishing of this Article, reform measures were enacted in cities and states across the country by virtually all related government bodies, state legislatures, governors, attorney generals, city councils, and police departments themselves.⁵⁴⁶ Even Congress has gotten in on the act. The U.S. Senate proposed the George Floyd Justice in Policing Act of 2020.⁵⁴⁷ It includes a national standard for the use of force, outlaws the use of chokeholds, and prohibits pretextual stops based on race.⁵⁴⁸ Furthermore, the George Floyd riots and protests ended in precipitating an officer's conviction for the first time since the Black riot appeared in force during the Sixties. Derick Chauvin was convicted of second and third-degree murder and second-degree manslaughter.⁵⁴⁹

⁵⁴² Kelley Taylor Hayes, *'He's Going to Change the World': Family Members Give Tearful Eulogies for George Floyd in Houston Service*, FOX 5 (June 9, 2020), <https://www.fox5ny.com/news/hes-going-to-change-the-world-family-members-give-tearful-eulogies-for-george-floyd-in-houston-service> [<https://perma.cc/BV83-L52K>].

⁵⁴³ ABC News, *George Floyd's Niece Delivers Passionate Speech at His Funeral*, YOUTUBE (2020), <https://www.youtube.com/watch?v=hoUFyOCsuB8> [<https://perma.cc/Q56K-PVNQ>].

⁵⁴⁴ See generally BARADARAN, *supra* note 464.

⁵⁴⁵ Danielle Wallace & Michael Ruiz, *Hundreds, Including Al Sharpton, Eric Garner's Mom, Mourn at George Floyd Memorial in Minneapolis*, FOX NEWS (June 4, 2020, 5:09 PM), <https://www.foxnews.com/us/george-floyd-memorial-minneapolis-al-sharpton-eric-garner-mother> [<https://perma.cc/2UQ9-WHYG>].

⁵⁴⁶ *State Policing Since George Floyd's Murder*, BRENNAN CTR. FOR JUST. (2021), <https://www.brennancenter.org/our-work/research-reports/state-policing-reforms-george-floyds-murder> [<https://perma.cc/SNX5-VKT6>].

⁵⁴⁷ See H.R. 7120, 116th Cong. (2020).

⁵⁴⁸ *Id.*

⁵⁴⁹ Erin Donaghue, *Ex-cop Derek Chauvin Convicted of All Charges in George Floyd's*

C. The Slave Rebellion–Black Riot Continuum and the Political Necessity Defense

The continuity of the themes underlying African American acts of rebellion over the past three hundred years is striking. The Black community, it seems, has been in a perpetual struggle for equal rights from the state and decreased aggression from law enforcement. The continuity, or rather intractability, of these themes, has unique implications for the application of the political necessity defense in the context of riots and other manifestations of forcible resistance. On a purely doctrinal level, this continuity impacts at least two elements of the political necessity defense: (1) the lack of legal alternatives and the causal connection between these acts of forcible resistance and (2) the change of the relevant laws or policies. These cases will meet the lack of legal alternatives standard if the seeming intractability of the problem of police hostility and violence justify the use of force. The causality question concerns whether riots and other upheavals have the potential to change laws.

The relationship between slave rebellions and Black riots also has interesting implications. Are both methods of resistance responsive to the same types of deprivations of freedom? Counterintuitively, Black riots, in at least some ways, are responses to even greater deprivations of freedom than slave rebellions. Slave rebellions responded to the condition of enslavement, a lifelong seizure. Black riots, on the other hand, are, for the most part, responsive to the ultimate seizure, death. That is, many police shootings lead to death, which is the ultimate deprivation of freedom.

The relationship between slave rebellions and mass incarceration also has interesting implications. The deprivations caused by each are similar, although the justifications differ, in some cases, substantially (enslaved people had absolutely no hand in bringing about their condition whereas many low-level offenders, while treated grossly unfairly, have nonetheless offended).⁵⁵⁰ Both deprivations involve encroachment on individual liberty for extended periods of time. And, for a while at least, convict leasing and other enslavement contraptions sanctioned by law, compelled free labor.⁵⁵¹ Even many systems of incarceration today effectively compel labor so cheap that it is only a step removed from forced labor.⁵⁵²

If the relationships between liberty deprivations like slavery, police killings, and mass incarceration, on the one hand, and responses to the deprivations like slave rebellions and Black riots are real, this raises the question: Are the type of responses justified by the one also the types of responses justified by the other? In other words, if the slave rebellions of the nineteenth century were justifiable, are the Black riots

Death, CBS NEWS (Apr. 21, 2021), <https://www.cbsnews.com/live-updates/derek-chauvin-trial-george-floyd-death-guilty-three-counts-4-20-21/> [<https://perma.cc/L3MH-9XV2>].

⁵⁵⁰ See generally DOUGLASS BLACKMON, *SLAVERY BY ANOTHER NAME* (2008).

⁵⁵¹ See *id.* at 4.

⁵⁵² See MICHELE ALEXANDER, *THE NEW JIM CROW* 219–20 (2010); Arthur Delaney, *The ‘Modern Day Slavery’ of Prison Labor Really Does Have a Link to Slavery*, HUFFINGTON POST (Aug. 28, 2018), https://www.huffpost.com/entry/prison-strike-modern-day-slavery_n_5b857777e4b0511db3d21da8 [<https://perma.cc/3PXN-65G6>].

of the twenty-first century and, even more interestingly, any future rebellions or acts of resistance born from other age-old oppressions as well?

There is also the broader issue of whether there is a Constitutional right to riot. Consistent with the concepts of the right to rebel and the violent veto power of the Second Amendment discussed in Section III below, it is arguable that there is a constitutional right to riot.⁵⁵³ As explained in detail in *Fired Up: The Right To Riot* (forthcoming), a legitimate argument can be made that the Bill of Rights contains a right to riot, emanating from the Second Amendment right to rebel as well as from principles underlying the First Amendment and the Declaration of Independence.⁵⁵⁴ Using the methodology the Supreme Court uses to determine whether a constitutional right is a fundamental right, it would be difficult to argue that rioting is not an integral part of the “history and traditions” of this nation.⁵⁵⁵ For example, the riot as an instrument for social change is at the very heart of the founding of this country. The Stamp Act Riots of 1765 and the riots precipitating the Boston Massacre were the opening salvos of the American Revolution.⁵⁵⁶ The same can be said of the Black riots of the Sixties and the revolutionary changes in American political, economic, and social policy that these riots helped to generate.

Before the questions I have raised can be resolved, questions tackled at length in other installments of this Article series, it must first be resolved whether any acts of force are justified in response to group suppression, the focus of this Article.

Slim, if any, case law exists concerning the applicability of the political necessity defense to crimes of violence. However, the common law’s treatment of crimes of violence committed in response to non-human threats is instructive. At common law, the necessity defense was applicable, in some instances, to violent crimes but never to charges of murder.⁵⁵⁷ The Model Penal Code, on the other hand, allows for the necessity defense even when the crime is murder.⁵⁵⁸

Given that courts are reluctant to allow the political necessity defense where mere civil disobedience is involved, it is unlikely that most courts would recognize it where the crime is one of violence, and certainly not when the crime is murder, without significant constitutional prodding. The social harm caused by violent crimes would almost invariably be greater than the harm caused by acts of civil disobedience, which usually offend only relatively minor laws and produce relatively soft social consequences.⁵⁵⁹ However, if there indeed exists a Second Amendment

⁵⁵³ See Kindaka Sanders, *Let My People Go, Part Two: The Second Amendment Political Necessity Defense and the Storming of Capital Hill*, 31 WM. & MARY BILL RTS. J. (forthcoming May 2023).

⁵⁵⁴ See *id.*

⁵⁵⁵ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 710 (1997).

⁵⁵⁶ See ROBERT J. ALLISON, *THE AMERICAN REVOLUTION: A VERY SHORT INTRODUCTION* 10 (2015).

⁵⁵⁷ JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL LAW* 275 (2018).

⁵⁵⁸ *Id.* at 277.

⁵⁵⁹ *Id.* at 277–82.

political necessity defense, judicial opposition to it, whether deployed to justify non-violent crimes or crimes of violence, is largely unsustainable.

III. INTRODUCTION TO PART TWO

Let My People Go, Part Two: The Second Amendment Political Necessity Defense and the Storming of Capital Hill argues that all forms of purposeful lawlessness, direct or indirect, forcible, or peaceable, are protected under the Second Amendment. That is, the Second Amendment embraces its own political necessity defense. The history of the Second Amendment, as well as the Supreme Court's two most influential Second Amendment cases, *District of Columbia v. Heller* and *McDonald v. Chicago*, provide the proof. This Article explores this proof in detail. Finally, this Article applies the Second Amendment political necessity defense to the storming of the Capitol on January 6, 2021.