

Unlawful Assembly as Social Control

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ABSTRACT

Public protests from Occupy to Ferguson have highlighted anew the offense of unlawful assembly. This Article advances the simple but important thesis that contemporary understandings of unlawful assembly cede too much discretion to law enforcement by neglecting earlier statutory and common law elements that once constrained liability. Current laws also ignore important First Amendment norms intended to provide “breathing space” for expressive activity. In doing so, these laws fall short of the aspirations of the First Amendment by stifling dissent, muting expression, and ultimately weakening the democratic experiment. We can do better. We can start by reclaiming a more measured approach to unlawful assembly that recognizes both constitutional and common sense limitations.

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INTRODUCTION

Local police arrested Antonio French on the evening of August 13, 2014, in Ferguson, Missouri.¹ French, a city alderman, had been one of the most visible activists protesting police actions in the wake of the shooting death of Michael Brown four days earlier.² On August 13, French joined a crowd of protesters gathered in Ferguson. Police responded by displaying armored vehicles and high-powered rifles. The show of force increased tensions and heightened emotions. Around 8:30 PM, an exasperated French tweeted the county executive: “@CharlieADooley please de-escalate now. This is not necessary.”³ Six minutes later, French tweeted that police had announced through a loudspeaker: “Please step away 25 ft from the vehicles. All sides of the vehicle. And you may peacefully continue to assemble.”⁴ But during the next eight minutes, the tone changed. A police helicopter arrived and the officers fired tear gas. By 8:45 PM, the officers announced: “This is no longer a peaceful assembly. Go home or be subject to arrest.”⁵ Fifteen minutes later, French tweeted the police

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1. Booking Report of Antonio Dominick French, Ferguson Police Department (Aug. 13, 2014), https://muckrock.s3.amazonaws.com/foia_files/booking_sheet_-_Redacted.pdf [<https://perma.cc/S7WW-A9DC>].
 2. Mark Berman, *What You Need to Know About the Death of an Unarmed Black Teenager in Missouri*, WASH. POST (Aug. 11, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/08/11/what-you-need-to-know-about-the-death-of-an-unarmed-black-teenager-in-missouri/?tid=a_inl&utm_term=.20df2351d435 [<https://perma.cc/6624-TBVJ>]; Sarah Larimer, *Who Is Antonio French, the Alderman Providing Updates From Ferguson?*, WASH. POST (Aug. 14, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/08/14/who-is-antonio-french-the-alderman-providing-updates-from-ferguson/?utm_term=.ffd3f73f2288 [<https://perma.cc/7XSX-Y9WQ>].
 3. Antonio French (@AntonioFrench), TWITTER (Aug. 13, 2014, 6:31 PM), <https://twitter.com/antoniofrench/status/499729905845035008> [<https://perma.cc/DLC7-WMH8?type=image>] (the Twitter time stamps are recorded as two hours earlier than local St. Louis time).
 4. Antonio French (@AntonioFrench), TWITTER (Aug. 13, 2014, 6:37 PM) <https://twitter.com/AntonioFrench/status/499731423755239424> [<https://perma.cc/SN3E-XUC5?type=image>].
 5. Antonio French (@AntonioFrench), TWITTER (Aug. 13, 2014, 6:45 PM) <https://twitter.com/AntonioFrench/status/499733507397402626> [<https://perma.cc/4Q5M-BA9V?type=image>].

announcement: “Final Warning.”⁶ Then French stopped tweeting—he had been arrested and booked on charges of unlawful assembly.

In Missouri, a person commits unlawful assembly “if he knowingly assembles with six or more other persons and agrees . . . to violate . . . the criminal law[] . . . with force or violence.”⁷ Yet police arrested French without even bothering to specify what offense he had allegedly conspired to commit or the identities of his alleged co-conspirators.⁸ Nor did they suggest that French was planning to use force or violence to break the law. There was, in other words, little indication that police had sufficient evidence that French had met the material elements of unlawful assembly necessary to arrest him for that crime.

This Article advances the simple but important thesis that contemporary understandings of unlawful assembly cede too much discretion to law enforcement by neglecting earlier statutory and common law elements that once constrained liability. Antonio French is not the only casualty of these laws. In fact, unlawful assembly restrictions target citizens across the political spectrum, including civil rights workers, antiabortion demonstrators, labor organizers, environmental groups, Tea Party activists, Occupy protesters, and antiwar protesters.⁹

Take, for example, antiwar protesters. From the Vietnam War to today, citizens protesting U.S. military operations have encountered unlawful assembly restrictions near federal buildings and monuments and at the sites of political rallies.¹⁰ In May of 1971, police arrested thousands of protesters

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6. Antonio French (@AntonioFrench), TWITTER (Aug. 13, 2014, 7:02 PM) <https://twitter.com/AntonioFrench/status/499737919457083393> [<https://perma.cc/7NGY-CBPL?type=image>].
 7. MO. REV. STAT. § 574.040 (2016); *see infra* Part II.A.
 8. Missouri’s statute required police to identify at least six other people who had agreed with French to violate the law through the use of force or violence. MO. REV. STAT. § 574.040 (2016).
 9. *See, e.g.,* Hill v. Colorado, 530 U.S. 703 (2000) (restrictions against antiabortion protesters); TIMOTHY ZICK, SPEECH OUT OF DOORS: PRESERVING FIRST AMENDMENT LIBERTIES IN PUBLIC PLACES 223–42, 277–81 (2009) (“free speech zones” restricting political protests). *See generally* Marion Crain & John Inazu, *Re-Assembling Labor*, 2015 U. ILL. L. REV. 1791 (2015) (restrictions on labor protests); Jeremy Kessler, *The Closing of the Public Square*, NEW REPUBLIC (Jan. 11, 2012), <https://newrepublic.com/article/97901/the-closing-the-public-square-john-inazu-timothy-zick> [<https://perma.cc/42YE-3WV6>] (restrictions against Occupy protesters); Paul Szoldra, *SWAT Team Called on Peaceful Protesters in Ferguson—Police Arrest Journalists, Fire Tear Gas and Rubber Bullets*, BUSINESS INSIDER (Aug. 13, 2014, 7:13 PM), <http://www.businessinsider.com/swat-ferguson-protest-2014-8> [<https://perma.cc/FBB5-2FAM>] (restrictions on protesters in Ferguson).
 10. *See generally* United States v. Cassagnol, 420 F.2d 868 (4th Cir. 1970) (antiwar demonstration at the Pentagon); Feeley v. District of Columbia, 387 F.2d 216 (D.C. Cir. 1967) (peace protest march from the Monument Grounds up the Mall to the Capitol); Kelly v. City of St. Paul, No. 09-461, 2010 WL 4272460 (D. Minn. Oct. 18, 2010) (protests against the Iraq War near the Republican National Convention).

demonstrating against the Vietnam War on the east steps of the U.S. Capitol, despite the lack of any indication that the protesters were contemplating the use of force or violence.¹¹ A generation later, activists demonstrating against the war in Iraq were met with similar treatment.¹²

Unlawful assembly restrictions have plagued organized labor for even longer. Courts have long been unsympathetic to labor protests, with one early twentieth-century judge colorfully opining that “[t]here . . . can be no such thing as peaceful picketing[] any more than there can be chaste vulgarity, or peaceful mobbing, or lawful lynching.”¹³ Local government officials have been similarly dismissive of labor protesters, frequently relying upon unlawful assembly statutes to regulate even nonviolent demonstrations. In 1924, officials in Paterson, New Jersey, quashed a labor protest “under no authority save a penal statute against unlawful assembly.”¹⁴ In 1967, Texas officials selectively enforced the state’s unlawful assembly statute against workers attempting to organize.¹⁵ In 1992, police relied on a city ordinance to disperse workers protesting the labor practices of a supermarket chain.¹⁶ Just three years ago, Arizona pursued charges of “unlawful mass assembly” against labor organizers until a federal district court in Arizona invalidated the vague regulation.¹⁷

These examples highlight some of the problems with unlawful assembly, an offense that typically criminalizes a group of people who are gathered in a common location and agree to commit some future unlawful act. Because unlawful assembly focuses on an agreement that *precedes* an unlawful act, law

11. *Dellums v. Powell*, 566 F.2d 167, 173–74 (D.C. Cir. 1977). The protesters eventually prevailed in challenging their arrests. *Id.* at 177–83.

12. *See generally* *Tetaz v. District of Columbia*, 976 A.2d 907 (D.C. 2009). During one protest, approximately twenty-five people lay outside of the Rayburn House Office Building with sheets pulled over their bodies and mock coffins placed near the entrances. *Id.* at 911. In upholding their convictions for unlawful assembly, the District of Columbia Court of Appeals emphasized that the Iraq War protesters had impeded entrance into the Rayburn House Office Building. *Id.* at 910–12. But as Judge Ruiz argued in dissent, “notwithstanding the belief . . . that police intervention was necessary to ‘let Congress complete their mission,’ the ‘mission’ of members of Congress and of many persons who visit the Capitol routinely includes intense and sometimes even heated dialogue about issues of policy that affect the Nation.” *Id.* at 919.

13. *Atchison, Topeka & Santa Fe Ry. Co. v. Gee*, 139 F. 582, 584 (S.D. Iowa 1905). For an overview of judicial treatment of labor protests, see Crain & Inazu, *supra* note 9; Steven R. Morrison, *The System of Modern Criminal Conspiracy*, 63 CATH. U.L. REV. 371, 379–88 (2014).

14. William B. Murrish, Comment, *Constitutional Law: Freedom of Speech in Labor Disputes*, 29 CALIF. L. REV. 366, 374 n.20 (1941). The New Jersey Supreme Court unanimously overturned the convictions in *State v. Butterworth*, 142 A. 57 (N.J. 1928).

15. *Allee v. Medrano*, 416 U.S. 802 (1974).

16. *United Food & Commercial Workers Union Local 442 v. City of Valdosta*, 861 F. Supp. 1570 (M.D. Ga. 1994). Two years later, a federal court ruled the ordinances unconstitutional. *Id.*

17. *United Food & Commercial Workers Local 99 v. Bennett*, 934 F. Supp. 2d 1167 (D. Ariz. 2013).

enforcement can intervene prior to that act actually occurring. In other words, as with other inchoate crimes, government officials are forced to rely on judgments and inferences about future acts.

To be sure, these judgments and inferences are sometimes warranted. Moreover, the state properly restricts certain attempted or completed actions by the members of an assembly.¹⁸ Our laws do not allow civil rights protesters to hurl glass bottles at police, antiwar protesters to break into government buildings, or labor protesters to assault replacement workers who cross the picket lines. These laws are good things. But modern approaches to unlawful assembly have gone well beyond these measured restrictions and have instead opened the door to arbitrary enforcement by government authorities. That enforcement has stretched beyond concerns of preventing violent lawbreaking; sometimes it restricts even nonviolent lawbreaking. Although constitutional challenges to these latter restrictions have sometimes prevailed in court, the expressive goals of citizens have too often already been thwarted by that time. Unlawful assembly as a form of social control manifests not only in criminal prosecution but also in the threat of prosecution and the chilling effect that accompanies such a threat. For example, a risk-averse citizen may comply with a dispersal order predicated on a declaration of unlawful assembly even if a successful prosecution is unlikely.

Current interpretations of unlawful assembly also fail to give sufficient consideration to the expressive interests of those assembled.¹⁹ Officials can disperse a protest as long as they conclude that participants are at some point planning to engage in forceful or violent lawbreaking. In some jurisdictions, they can even dispense with the requirement of force or violence. That kind of discretion delegates significant authority to local officials who may undervalue expressive interests in their assessments.²⁰

Restrictions on peaceful protest are all the more striking because they exist alongside federal and state guarantees of the right to peaceable assembly.²¹ One

18. It is, however, also the case that modern approaches to attempt law might overcriminalize. *See, e.g.*, Gideon Yaffe, *Criminal Attempts*, 124 *YALE L.J.* 92, 118–19 (2014) (contending that “[t]he place to start in thinking about attempts is with an effort to identify [a] kind of trying” to complete a prohibited act rather than with conduct that “is not in any sense wrongful”).

19. *Cf.* John D. Inazu, *The First Amendment’s Public Forum*, 56 *WM. & MARY L. REV.* 1159 (2015) (arguing that time, place, and manner restrictions under modern public forum doctrine elide important expressive interests).

20. *Cf.* Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 *MO. L. REV.* 961, 963 (2015) (“Black Lives Matter protests often bear little resemblance to our idealized conceptions of public discourse—as reasoned disquisitions on difficult choices of public policy . . .”).

21. *See generally* JOHN D. INAZU, *LIBERTY’S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY* (2012).

might think that the most logical safeguard against restrictions on public protest would lie in the First Amendment's right of assembly.²² But that right has long been dormant, owing in large part to a fundamental misreading of the First Amendment suggesting that assembly was limited to the purposes of petitioning the government.²³ Such a narrow right would indeed offer little meaningful protection to most expressive protests or to the groups that enable those protests. Yet even though generations of courts and scholars have erroneously concluded otherwise, the First Amendment's right of assembly is not limited to purposes of petitioning the government.²⁴

A proper understanding of the right of assembly gives us one reason to rethink current approaches to unlawful assembly. But there are practical as well as theoretical reasons for rethinking our current approaches to unlawful assembly.²⁵ In an earlier era, unlawful assembly prohibitions extended significant preemptive discretion to local law enforcement officials because those officials lacked sufficient resources and personnel to maintain public order in the face of rebellions and revolts. In many parts of the country today, highly trained and lethal police forces have far greater firepower than the people assembled, and state and federal reinforcements are a phone call or a text away. These shifting contextual realities suggest yet another reason that the current approach to unlawful assembly should give us pause. And our worries might increase when we learn that earlier understandings of unlawful assembly were in some ways *more* protective of peaceful gatherings than current laws.

Many of today's laws neglect important elements of unlawful assembly recognized in earlier common law and statutory formulations.²⁶ They also ignore constitutional principles meant to constrain discretionary enforcement by public authorities. In doing so, they fall short of the aspirations of the First Amendment.²⁷ This failure stifles dissent, mutes expression, and ultimately weakens the

22. U.S. CONST. amend. I.

23. The Supreme Court introduced this erroneous interpretation in *Presser v. Illinois*, 116 U.S. 252, 267 (1886), when it suggested that the First Amendment protected the right of assembly only if "the purpose of the assembly was to petition the government for a redress of grievances." That erroneous interpretation has been followed in decades of scholarship, but it has never been reinforced by the Court. See INAZU, *supra* note 21, at 202 n.44 (collecting examples).

24. See generally INAZU, *supra* note 21, at 21–25 (showing that textual and historical evidence suggests that the framers understood assembly and petition to be two separate rights).

25. See *infra* Part V.C.

26. See *infra* Parts II, III.

27. By "the aspirations of the First Amendment," I mean an understanding that accounts for text, meaning, history, and other factors. I do not propose an originalist interpretation. See generally INAZU, *supra* note 21, at 17–19 (discussing my interpretive methodology).

democratic experiment. This Article explains how we can do better—and why it matters that we do.

Part I explores historical understandings of unlawful assembly. Jurisdictions varied in their precise formulations of the offense, but many of them included requirements about the nature and purpose of an assembly and its contemplated actions. Some of these requirements limited the scope of liability under the offense.

Part II examines two contemporary approaches to unlawful assembly to illustrate how today's laws are in some ways less protective of peaceful protest. It turns first to the Missouri statute that governed the Ferguson protests. Missouri's statutory framework neglects two important antecedent elements that once constrained the enforcement of unlawful assembly. The first is that an unlawful assembly had to create a reasonable perception of harm. The second is that the harm threatened by the assembly had to be both likely and severe. Part II then moves to Wisconsin to illustrate a third element from earlier formulations now lacking in some jurisdictions: the requirement that an assembly contemplate the use of force or violence.

Part III examines these three missing elements in greater detail. It explores how broader shifts in criminal law from more objective to more subjective inquiries exacerbate the absence of these elements in modern unlawful assembly statutes. These changes allow law enforcement officials to intervene at an earlier stage in their regulation of collective expressive activity.

Part IV considers how subjectivist trends in criminal law theory are in some tension with another dimension of the law relevant to the policing of unlawful assembly: the First Amendment requirement that the harm be *imminent* prior to curtailing expressive freedoms. Standard First Amendment doctrine counsels government officials to exercise restraint in their regulation of expressive freedoms unless those freedoms threaten imminent harm.²⁸

Part V examines three developments that further complicate contemporary unlawful assembly laws. The first is the role of social media in modern protests and the ways in which unlawful assembly intersects with “virtual assembly.”²⁹ The second is changes in local policing. The third is the increased access to state and federal resources available to local law enforcement.

Part VI proposes changes to unlawful assembly that better align with current understandings of the First Amendment and push back on some trends that expand the reach of inchoate liability in criminal law theory. It suggests that legislatures should only apply unlawful assembly to inchoate actions that

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

29. See John D. Inazu, *Virtual Assembly*, 98 CORNELL L. REV. 1093 (2013).

contemplate forceful and violent lawbreaking. With respect to nonviolent lawbreaking, law enforcement officials may sometimes need to wait until an act occurs (or is clearly about to occur) before they can intervene and arrest offenders. This distinction reflects a longstanding principle of civil disobedience: Protesters are not immune from prosecution, but they are often afforded the opportunity to disobey civilly and nonviolently.

I. HISTORICAL UNDERSTANDINGS

A. Common Law Antecedents

Common law authorities were split on the scope and purpose of unlawful assembly. The most striking disagreement unfolded between William Hawkins's relatively broad approach to liability and William Blackstone's narrower approach. Hawkins wrote first. In 1716, he critiqued the "common opinion" that an unlawful assembly was "a disturbance of the peace by persons barely assembling together with an intention to do a thing which, if it were executed, would make them rioters."³⁰ He thought this formulation "much too narrow of a definition."³¹ Hawkins argued instead that "any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly."³² In other words, Hawkins sought to expand the reach of unlawful assembly to encompass conduct that would itself fall short of riot if acted upon but which nevertheless endangered the public peace. Presumably, that included nonviolent lawbreaking.

Blackstone embraced the narrower version of unlawful assembly that Hawkins had criticized. He defined the offense as "when three, or more, do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it."³³ A riot, in contrast, was "where three or more actually do an unlawful act of violence."³⁴ The close connection between unlawful assembly and

30. WILLIAM HAWKINS, 1 A TREATISE OF THE PLEAS OF THE CROWN 516 (8th ed. London, n. pub. 1824).

31. *Id.*

32. *Id.*

33. WILLIAM BLACKSTONE, 4 COMMENTARIES ON THE LAWS OF ENGLAND 146 (1769). Unlawful assemblies of three to eleven persons were punishable by "fine and imprisonment only," but "if to the number of twelve," the punishment "may be capital, according to the circumstances that attend to it." *Id.*

34. In full, Blackstone defined a riot as "where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel: as if they beat a man; or hunt and kill game in

riot led one later commentator to assert that “there is no English case since the Revolution in which ‘unlawful assembly’ was even charged, much less adjudged, which was not intimately connected with the element of riot.”³⁵

B. Early American Understandings

Early American restrictions on unlawful assembly emphasized significant threats to the public order, including threats that local officials could not control on their own.³⁶ In fact, these larger threats to stability might explain why unlawful assembly emerged alongside the separate offenses of conspiracy (an unlawful agreement between two or more persons) and riot (the violent actions of a group).³⁷ Taken together, these two other offenses cover much of the social harm of unlawful assembly. But recognizing a separate offense between conspiracy and riot gave public authorities a preemptive enforcement tool that allowed them to intervene before they were overwhelmed by rioters. Many jurisdictions also bootstrapped an additional police power onto this underlying rationale: They required other citizens in the area to help disperse an assembly once officials declared it unlawful. Imposing omission liability on otherwise law-abiding citizens who failed to assist in the dispersal illustrates the degree to which legislatures sought to strengthen a fragile enforcement power.

These concerns were no small matter in the political instability of the early days of our nation. Within a few years of independence, Shays’s Rebellion had called into question the federal government’s ability to control instability under the Articles of Confederation.³⁸ In 1792, Congress enacted the Calling Forth Act, which authorized the president to deploy the militia at the request of state authorities or in cases of insurrection “by combinations too powerful to be suppressed by the ordinary course of judicial proceedings, or by the powers

another’s park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner.” *Id.*

35. *Id.* at 233.

36. This Article focuses on U.S. statutory formulations of unlawful assembly, some of which drew from English common law antecedents.

37. Some jurisdictions also recognize an intermediate offense of rout, which is usually defined as an unlawful assembly that has taken steps toward culminating in a riot. *See, e.g.*, CAL. PENAL CODE § 406 (West 1872); OKLA. STAT. tit. 21, § 1313 (2001); NEV. REV. STAT. ANN. § 203.070 (LexisNexis 2012).

38. CHARLES DOYLE & JENNIFER K. ELSEA, CONG. RESEARCH SERV., THE POSSE COMITATUS ACT AND RELATED MATTERS: THE USE OF THE MILITARY TO EXECUTE CIVILIAN LAW 7 n.26 (2012), <https://www.fas.org/sgp/crs/natsec/R42659.pdf> [<https://perma.cc/65A7-8VDV>].

vested in the marshals.”³⁹ Two years later, President Washington invoked the Calling Forth Act in response to the Whiskey Rebellion.⁴⁰

Local insurrections continued in the early Republic, including Fries’s Rebellion in 1799, opposition in Vermont to the Embargo Act in 1808, resistance in southern states to protective tariffs in 1832, an eruption of violence among Irish laborers in Maryland in 1834, violent responses to state elections in Pennsylvania in 1838, and political instability in Rhode Island in 1842.⁴¹ State and local authorities encountered many other acts of local instability. The threat to public order loomed large in early America; criminalizing inchoate behavior before it turned violent offered one way to mitigate that threat.⁴²

The earliest American statutes looked to common law antecedents and split between Blackstone’s narrower approach and Hawkins’s broader one. The laws governing the Territory of Louisiana adopted something closer to the former. They criminalized activity when:

[T]hree or more persons shall assemble together with an intent to do an unlawful act, with force and violence, against the person or property of another, or to do any other unlawful act, against the peace and to the terror of the people; or being unlawfully assembled, shall agree with each other to do any unlawful act as aforesaid, and shall make any movement or preparation therefor.⁴³

Two aspects of this provision suggest a narrower Blackstonian approach to liability. First, the final clause introduces an act requirement of “movement or

39. Calling Forth Act of 1792, ch. 28, § 2, 1 Stat. 264 (repealed 1795) (current version at 10 U.S.C. § 332 (2012)). The Act required the President to issue a dispersal proclamation before activating the militia. *Id.* § 3.

40. DOYLE & ELSEA, *supra* note 38, at 7 (citing Presidential Proclamations of Aug. 7, 1794, and Sept. 25, 1794).

41. *Id.* at 8–11.

42. Commentators also acknowledged the use of unlawful assembly as a preventative enforcement tool. Francis Wharton, for example, noted that a magistrate issuing a dispersal order “is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is better to anticipate more dangerous results, by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities.” FRANCIS WHARTON, A TREATISE ON THE CRIMINAL LAW OF THE UNITED STATES 831 (3d ed., Phila., Kay & Brother 1855).

43. 1 LAWS OF A PUBLIC AND GENERAL NATURE, OF THE DISTRICT OF LOUISIANA, OF THE TERRITORY OF LOUISIANA, OF THE TERRITORY OF MISSOURI, AND OF THE STATE OF MISSOURI, UP TO THE YEAR 1824, at 215 (Jefferson City, W. Lusk & Son 1842) [hereinafter TERRITORY LAWS]. The Territory laws also conflated unlawful assembly with riot—the singular statutory provision punished both the inchoate attempt and the completed offense exactly the same. The lack of any grading in punishment left those engaged in an unlawful assembly with little incentive to stop short of a completed riot, particularly since either the inchoate unlawful assembly or the actual riot was enough to trigger a proclamation and dispersal order.

preparation” when members of an assembly that had initially lawfully gathered entered into an unlawful agreement during their gathering.⁴⁴ The requirement of movement toward lawbreaking guards against an entirely peaceful assembly being deemed unlawful based on a mere agreement to violate the law at some later point in time. Think, for example, of an assembled crowd that agrees to return at some future time to engage in lawbreaking but does nothing disruptive in their actual gathering.

The second reason to think that the Louisiana Territory laws contemplated a relatively narrow form of liability is that they required a threat of force or violence directed either “against the person or property of another” or “against the peace and to the terror of the people.” The latter reinforced the seriousness of the threat—not simply “against the peace” but also “to the terror of the people.” Separate provisions included elaborate instructions for “all judges and justices of the peace, and sheriffs and all ministerial officers,” who upon witnessing or learning of the unlawful conduct must “make proclamation in the hearing of such offenders, if silence can be obtained, commanding them in the name of the United States, to disperse and depart to their several homes or lawful employments.”⁴⁵ If officials could not silence the crowd or failed to disperse the assembly through their proclamation, the law required them “to call upon persons near and of abilities, and throughout the district if necessary, to be aiding and assisting in dispersing and taking into custody all persons assembled as aforesaid.”⁴⁶

Other jurisdictions seemed to contemplate broader approaches to liability for unlawful assembly. Maine, which joined the Union in 1820, included such a provision in its legislative code:

When three or more persons, in a violent or tumultuous manner, assemble together to do an unlawful act, or, when together, attempt to do, or make any advance or motion towards doing any act, whether

44. The most natural reading of the cumbersome provision suggests a significant break at the semicolon. This break, alongside the disjunctive “or,” establishes two separate avenues for liability: either assembling with the original purpose of committing an unlawful act with force or violence, or establishing that purpose through agreement after assembling for lawful purposes. Given the relatively lax punctuation norms at the time of the provision’s enactment, it is also possible to read the overt act requirement as reaching the first form of liability (in other words, as requiring an overt act even when an assembly met with an initially unlawful purpose). See Caleb Nelson, *Preemption*, 86 VA. L. REV. 225, 258 (2000) (noting that at the time of the founding “punctuation marks [were] thought to lack the legal status of words”).

45. TERRITORY LAWS, *supra* note 43, at 215.

46. *Id.* The laws also specified the role of military officers in controlling the assembly, asserted a kind of sovereign immunity, and set forth the punishments for the unlawful activity. *Id.*

lawful or unlawful, in an unlawful, violent or tumultuous manner, to the terror or disturbance of others.⁴⁷

Like the Louisiana Territory laws, Maine required that those comprising the unlawful assembly contemplate “violent or tumultuous” lawbreaking.⁴⁸ But Maine’s provision extended liability for assemblies that pursued lawful as well as unlawful actions, as long as the manner of engagement was “unlawful, violent or tumultuous.” Separate provisions singled out larger gatherings for additional restrictions. One of them required officials to order an immediate dispersal for an unlawful assembly of thirty or more people, a threshold reduced to twelve or more people if “any of them [are] armed with clubs or other dangerous weapons.”⁴⁹ The dispersal order applied if the armed crowd of at least twelve or the unarmed crowd of at least thirty “unlawfully, riotously or tumultuously assembled in any city or town.”⁵⁰

C. Nineteenth- and Twentieth-Century Legal Treatises

Echoing the split in early American statutes, commentators pitted Blackstone’s narrow definition against Hawkins’s more expansive one.⁵¹ Early editions of Joel Prentiss Bishop’s *Commentaries on the Criminal Law* relied on Blackstone’s narrow definition.⁵² But in 1882, Bishop’s seventh edition switched from Blackstone to Hawkins, observing that while “[i]t is generally understood that the act intended must be such as, when done, will amount to riot,” it was also the case that “[u]ndoubtedly persons may be indictable for

47. ME. REV. STAT. tit. XII, ch. 159, § 2 (1840).

48. The provision is not without ambiguity. It is possible to interpret the phrase “an unlawful, violent or tumultuous manner” at the end of the statute as permitting restrictions against an assembly that engages in either an “unlawful” or a “violent or tumultuous” manner. But the absence of an Oxford comma suggests that “unlawful” and “violent or tumultuous” conjunctively modify “manner.”

49. ME. REV. STAT. tit. XII, ch. 159, § 5 (1840).

50. *Id.* This is another instance of the Oxford comma ambiguity. The “or” preceding “tumultuously” might suggest that the assembly need not have gathered violently or tumultuously as long as it gathered unlawfully. But even if that were the case, the most natural description of an assembly that gathered unlawfully would be an “unlawful assembly,” which the earlier section suggests would have to contemplate “violent or tumultuous” lawbreaking.

51. *Unlawful Assemblies*, 36 IRISH L. TIMES & SOLIC. J. 232 (1902) (equating Blackstone’s “narrow view of ‘unlawful assembly’” with what Hawkins described as “the common opinion”); see also THOMAS EDLYNE TOMLINS, 2 THE LAW DICTIONARY: EXPLAINING THE RISE, PROGRESS, AND PRESENT STATE OF THE BRITISH LAW xxv (3d ed., London, n. pub. 1820) (favorably citing Hawkins’s critique of “much too narrow a definition” because in some instances “no one can foresee what may be the event of such an assembly”).

52. Bishop’s third edition (1865) and sixth edition (1877) both quote Blackstone.

assembling to commit an offence other than riot.”⁵³ Bishop noted that “the books are not clear” about “whether it is correct in legal language to call their coming together an unlawful assembly, or whether the act is to be regarded as a criminal attempt to do the wrong intended.”⁵⁴

The influence of Hawkins’s broader view of liability was also reflected in other American authorities. In 1855, Francis Wharton offered a fairly elaborate definition of unlawful assembly as:

Any tumultuous disturbance of the public peace by three persons or more, having no avowed, ostensible, legal or constitutional object, assembled under such circumstances, and deporting themselves in such a manner, as to produce danger to the public peace and tranquility; and which excites terror, alarm, and consternation in the neighborhood.⁵⁵

Wharton nevertheless highlighted an important procedural protection that would be lost in some later formulations: “Evidence of riotous assemblages in previous years is not admissible, either for the purpose of rebutting a defence that [an] assemblage was peaceful, by comparing it with former assemblages, or of giving a character in the first instance to the assemblage in question.”⁵⁶

Most criminal law treatises that emerged toward the end of the nineteenth century also emphasized the requirement of force or violence underlying an unlawful assembly.⁵⁷ The eminent English jurist James Fitzjames Stephen defined an unlawful assembly in his 1877 treatise as “an assembly of three or more persons: (a) With the intent to commit a crime by open force; or (b) With intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it.”⁵⁸ Stephen then offered some illustrations:

53. JOEL PRENTISS BISHOP, 2 COMMENTARIES ON THE CRIMINAL LAW 689 (7th ed., Boston, Little Brown & Co. 1882).

54. *Id.* Curiously, he dismissed the significance of the ambiguity: “The question, being one of mere words, is not important.” *Id.* To the extent that the criminal law treated unlawful assembly and attempts toward substantive offenses identically, the distinction may have lacked importance. But any broadening of unlawful assembly to encompass actions other than criminal attempts would increase the significance of differences between the former and the latter.

55. WHARTON, *supra* note 42, at 825.

56. *Id.*

57. One notable exception is BISHOP, *supra* note 53, at 689 (“An unlawful assembly is a congregating of three or more persons to do some unlawful act.”). Bishop relied explicitly on Hawkins’s broader definition. *Id.* at 689 n.2 (quoting 1 Hawkins, P.C. 516 § 9).

58. JAMES FITZJAMES STEPHEN, A DIGEST OF THE CRIMINAL LAW: CRIMES AND PUNISHMENTS 49–50 (4th ed. 1887). Clark and Marshall use the same definition. WILLIAM L. CLARK & WILLIAM L. MARSHALL, A TREATISE ON THE LAW OF CRIMES 637 (2d ed. 1905); *see also* ROBERT DESTY, A COMPENDIUM OF AMERICAN CRIMINAL LAW 246 (1882) (“An

- (a) Sixteen persons meet for the purpose of going out to commit the offence of being by night, unlawfully, upon land, armed in pursuit of game. This is an unlawful assembly.
- (b) A, B, and C meet for the purpose of concerting an indictable fraud. This, though a conspiracy, is not an unlawful assembly.
- (c) A, B, and C, having met for a lawful purpose, quarrel and fight. This (though an affray) is not an unlawful assembly.
- (d) A large number of persons hold a meeting to consider a petition to parliament lawful in itself but they assemble in such numbers with such a show of force and organization and when assembled make use of such language as to lead persons of ordinary firmness and courage in the neighbourhood to apprehend a breach of the peace. This is an unlawful assembly.⁵⁹

Later in the treatise, Stephen provided an additional illustration to explain the differences between unlawful assembly, rout, and riot: “A, B, and C met at A’s house for the purpose of beating D, who lives a mile off. They then go together to D and there beat him. At A’s house the meeting is an unlawful assembly, on the road it is a rout, and when the attack is made upon D, it is a riot.”⁶⁰

John Minor’s 1894 *Exposition of the Law of Crimes and Punishments* specified two ways to find an unlawful assembly. The first followed Blackstone: “a disturbance of the peace by three or more persons assembling together, with intent to do a thing which, if done, would make them rioters, but neither actually executing nor making a motion towards executing it.”⁶¹ The target offense of riot made clear that this prong of unlawful assembly required the use of force or violence, with riot defined as: “a tumultuous disturbance of the peace by three or more persons assembling together and actually executing some object of a private nature in a violent and turbulent manner, to the terror of the people.”⁶² Minor’s second definition reflected Hawkins’s influence and expanded liability to “any meeting of three or more persons with such circumstances of terror (arms,

unlawful assembly is an assemblage of three or more persons, threatening a tumultuous disturbance of the peace, to the fear and terror of the people.”).

59. STEPHEN, *supra* note 58, at 50. The second example makes clear that not all contemplated lawbreaking (like “indictable fraud”) rose to a “breach of the peace.”

60. *Id.* at 51. Stephen also noted a separate restriction on “political meetings in Westminster” that declared a meeting of more than fifty people an unlawful assembly in certain political contexts. *Id.* at 56.

61. JOHN B. MINOR, *EXPOSITION OF THE LAW OF CRIMES AND PUNISHMENTS* 163 (Richmond, Anderson Bros. 1894) (emphasis omitted).

62. *Id.* at 162 (emphasis omitted).

threats, &c.) as to endanger the public peace, and raise fears and jealousies amongst the people.”⁶³

Thomas Hughes’s 1919 *Treatise on Criminal Law and Procedure* explained in similar fashion that:

Unlawful assembly consists in three or more persons assembling together with intent to commit a crime by open force, or with intent to carry out a common purpose, either lawful or unlawful, in a manner that will give firm and courageous persons reasonable grounds to apprehend a breach of the peace.⁶⁴

Hughes observed that not all disruptive assemblies were unlawful or breaches of the peace:

[I]t is not unlawful assembly for members of the Salvation Army to assemble and march through the streets quietly and peaceably, although tumultuous and riotous proceedings, with stone throwing and fighting causing a disturbance of the public peace and terror to the inhabitants of the city is likely to result solely because of unlawful and unjustifiable interference and molestation by a body of persons opposed to them.⁶⁵

John May’s 1905 treatise, *The Law of Crimes*, noted that an unlawful assembly required “a mere assembly of persons upon a purpose which, if executed, would make them rioters, but which they do not execute, or make any motion to execute.”⁶⁶ As with other commentaries, the target offense of riot made clear that the restrictions focused on violence: “A Riot is a tumultuous disturbance of the peace, by three or more persons assembling together of their own authority, . . . and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people.”⁶⁷

The treatises that emerged during this period deemphasized the overt act requirement that had appeared in parts of the Louisiana Territory laws and the early Maine laws. Minor’s definition, for example, specified that

63. *Id.* at 163 (emphasis omitted).

64. T. W. HUGHES, *A TREATISE ON CRIMINAL LAW AND PROCEDURE* 455 (1919).

65. *Id.* at 456.

66. JOHN WILDER MAY, *THE LAW OF CRIMES* 148 (3d ed. 1905) (citing 1 Hawk P.C. 513–16, §§ 1, 8, 9 (8th ed.)). May had been the Chief Justice of the Municipal Court in Boston. *Id.* at iii. The volume was edited by University of Chicago law professor Harry Augustus Bigelow. *Id.* It was intended as “an elementary treatise” that “might be of service both to the student and to the profession at large.” *Id.* at v.

67. *Id.* at 147–48. The full provision reads: “A Riot is a tumultuous disturbance of the peace, by three or more persons assembling together of their own authority, with an intent to assist one another against any one who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act itself be lawful or unlawful.” *Id.*

liability attached when those assembled were “neither actually executing nor making a motion towards executing” riotous acts.⁶⁸ May noted similarly that the offense punished a “mere assembly” comprised of those who “do not execute, or make any motion to execute,” a riotous act.⁶⁹ This explicit rejection of an overt act requirement may have emerged in part to distinguish unlawful assembly from the separate offenses of rout and riot. But these clarifications also pushed the underlying offense of unlawful assembly further away from any tangible social harm, broadening the scope of liability beyond either Blackstone’s or Hawkins’s approaches.

II. MODERN APPROACHES

Contemporary approaches to unlawful assembly differ from their historical antecedents. Rather than attempt a comprehensive survey of modern jurisdictions, this Part uses two states as case studies. The first is Missouri, whose statutory framework emerged out of the Louisiana Territory laws. The second is Wisconsin, whose unlawful assembly provision traces its origins to Maine’s laws. Together, these statutes show how some modern unlawful assembly laws neglect three important elements that once constrained the enforcement of unlawful assembly: (1) a fear of harm that disturbs the peace; (2) the likelihood of severe harm; and (3) the contemplated use of force or violence.

A. Missouri

Missouri’s criminal code specifies that “[a] person commits the crime of unlawful assembly if he knowingly assembles with six or more other persons and agrees with such persons to violate any of the criminal laws of this state or of the United States with force or violence.”⁷⁰ The offense differs from conspiracy in three important ways.⁷¹ First, it introduces a higher numerical threshold than

68. MINOR, *supra* note 61, at 163.

69. MAY, *supra* note 66, at 148.

70. MO. REV. STAT. § 574.040 (2016). The provision includes an explicit mens rea term of knowledge and implies purpose as to the act of agreement. The knowledge mens rea term plausibly distributes to both the act of assembling and the attendant circumstance of seven or more people (the defendant and the six or more others with whom he agrees). The mens rea required for the agreement to violate criminal law with force or violence is likely purpose, as it is difficult to enter into an agreement with anything less than purpose.

71. Missouri’s conspiracy statute provides that “[a] person is guilty of conspiracy with another person or persons to commit an offense if, with the purpose of promoting or facilitating its commission he agrees with such other person or persons that they or one or more of them will engage in conduct which constitutes such offense.” MO. REV. STAT. § 564.016(1) (2016). Missouri is a unilateral conspiracy jurisdiction. *State v. Welty*, 729 S.W. 2d 594 (Mo. Ct. App. 1987).

conspiracy. Second, it requires that the actors be assembled. Third, the actors must agree to use force or violence. Each of these additional elements narrows the social harm otherwise covered by conspiracy, which is a broader doctrine that encompasses agreements temporally distant from an actual gathering as well as agreements to engage in non-forceful and nonviolent lawbreaking.⁷²

Missouri's requirement that the actor agree with "such persons" suggests that every member of the assembly must agree to violate the law with force or violence, and that liability would not attach unless the state could prove agreement between at least seven people (the "person" plus "six or more other persons"). But Missouri case law lowers the evidentiary threshold to such a degree that the element of multiple-party agreement is almost meaningless. Law enforcement officials and prosecutors can apparently rely on discrete acts to impute liability to all members of the assembly.⁷³

The requirement that the agreed upon lawbreaking be pursued "with force or violence" implies that law enforcement should focus on the threat of violent activity, not just any potential lawbreaking.⁷⁴ It suggests, for example, that actors who contemplate only nonviolent illegal acts like littering or loitering should not constitute an unlawful assembly. The same might be true of at least some forms of criminal trespass.⁷⁵

72. Cf. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 423 (6th ed. 2012) (observing "the potential temporal remoteness of the agreement to the target offense" under conspiracy law).

73. See *infra* text accompanying notes 92–94 (discussing *Mast*). Missouri's criminal code distinguishes the inchoate crime of unlawful assembly from the target offense of riot: "A person commits the crime of rioting if he knowingly assembles with six or more other persons and agrees with such persons to violate any of the criminal laws of this state or of the United States with force or violence, and thereafter, while still so assembled, does violate any of said laws with force or violence." MO. REV. STAT. § 574.050 (2016). The connection between the two offenses is also clarified in Missouri's practice guide: "Unlawful assembly is identical to rioting, except that the assemblage of six or more persons need not commit an overt act in violation of the criminal law, but merely must agree to violate the criminal laws (state or federal) by force or violence." 32 MISSOURI PRACTICE, MISSOURI CRIMINAL LAW § 43.2 (2d ed. 2004). Both unlawful assembly and riot can be charged alongside other offenses. For example, an individual who attempts to or actually destroys property during an unlawful assembly or a riot can be separately charged with destruction of property.

74. MO. REV. STAT. § 574.040 (2016).

75. The common law distinguished "forcible entry" from "mere trespass." See DESTY, *supra* note 58, at 252. Forcible entry could be charged not only for trespass involving "a show of force, as with weapons," but also for trespass from "a multitude of people, so as to involve a breach of the peace." *Id.* Even then, however, the common law specified that the crowd must place the property owners in fear of bodily harm. *Id.* at 253 ("The offense [of forcible entry] is committed by violently taking possession of lands or tenements with menaces, force, and arms, and without the authority of law; with violence, or putting in fear of bodily hurt, by weapons, or by threats, or from a crowd."); cf. CLARK & MARSHALL, *supra* note 58, at 988 ("An indictment for forcible entry or forcible detainer will also lie at common law, provided there is such an actual force, or menace of actual force, as to constitute a breach of the peace, but not otherwise.").

In the past fifty years, only two Missouri cases have construed its unlawful assembly statute. These two cases illustrate the poles of activities encompassed by unlawful assembly: from civil rights protesters to Halloween pranksters. The first case, *Rollins v. Shannon*, involved a series of protests by the St. Louis Committee of Racial Equality (CORE) at the infamous Pruitt-Igoe Housing Project.⁷⁶ On August 19, 1967, a St. Louis police officer shot and killed Leroy Tungstall, an African-American man who was engaged in a robbery.⁷⁷ CORE scheduled a series of rallies to protest Tungstall's shooting and other recent police actions. The rally on the evening of August 23 drew roughly two hundred participants. At one point in the evening, one of CORE's leaders stated, "We are tired of white honky cops killing our people. It's time for us to break in gun stores, not grocery stores."⁷⁸ Police dispersed the crowd and charged several CORE leaders with unlawful assembly and related offenses.⁷⁹

A federal district court characterized Missouri's statute as "basically a codification of the common law offense of unlawful assembly with some variations."⁸⁰ Noting that unlawful assembly at common law was a lesser included offense in the riot laws, the court contended that modern unlawful assembly statutes "have as their purpose nipping in the bud, as it were, of incipient conspiracies, embryonic tumults, and plottings against the public peace."⁸¹ The court concluded that the evidence indicated that the CORE leaders "far exceeded the permissible bounds of free speech by urging the crowd to violence against the officers of the law and the white community."⁸²

Rollins also examined the First Amendment implications of Missouri's unlawful assembly statute. Relying on recent Supreme Court decisions addressing

76. *Rollins v. Shannon*, 292 F. Supp. 580 (E.D. Mo. 1968).

77. *Id.* at 585.

78. *Id.* at 586.

79. *Id.* at 586–87.

80. *Id.* at 589.

81. *Id.* (quoting *State v. Woolman*, 33 P.2d 640, 647 (1934)).

82. *Id.* at 586. Turning to the plaintiff's challenge that the statute was void for vagueness, the court focused on the requirement that the unlawful assembly be "to the terror of the people." *Id.* at 591. The court cited Blackstone for the view that this phrase had "a well-settled common law meaning" of "tending to inspire courageous persons with well-grounded fear of serious breaches of public peace." *Id.* Here, it appears that the court may have been mistaken. The definition it attributes to Blackstone actually appears in *Black's Law Dictionary*, as quoted in *Heard v. Rizzo*, 281 F. Supp. 720, 740 (1968). Blackstone defined the phrase differently. See BLACKSTONE, *supra* note 33, at 146 ("An unlawful assembly is when three, or more, do assemble themselves together to do an unlawful act, as to pull down inclosures, to destroy a warren or the game therein; and part without doing it, or making any motion towards it."). Thanks to Dan Epps for pointing out to me the definitional misattribution in *Rollins*.

civil rights protests in *Cox v. Louisiana*⁸³ and *Frank v. Magnum*,⁸⁴ the court rejected the plaintiff's overbreadth challenge, finding that "the statute limits itself to application to demonstrations which have surpassed the area of First Amendment protection."⁸⁵ Referring back to common law antecedents of Missouri's statutory provision, the court concluded that, "[s]ince the state has a strong and legitimate interest in prevention of mob rule and other criminal acts, we find that it may act through this statute to 'nip' them in the bud."⁸⁶

Missouri last revised its criminal code in 1979.⁸⁷ In the thirty-eight years since these revisions, only one Missouri appellate court has examined the state's unlawful assembly provision, in the 1986 decision *State v. Mast*.⁸⁸ The defendants were college students who had set out to commit some pranks on Halloween night. Members of the group set off bottle rockets, fire bombs, and M-80s; they egged a house; and they threw various items toward police officers.⁸⁹

The court drew attention to the inchoate nature of unlawful assembly: "The intent with which such persons assemble is the very offense of unlawful assembly in that this intent is reflected by the participants' acts, conduct and language."⁹⁰ In other words, *Mast* recognized that unlawful assembly, like any inchoate offense, placed a great deal of weight on the actor's state of mind. Authorities must rely on circumstantial evidence to corroborate the actor's intent. But the "acts, conduct and language" used to establish intent must be something other than the overt criminal activity undertaken by members of the assembly; otherwise, any unlawful assembly would be a riot.⁹¹

Mast also held that the statutory requirement of an agreement between seven or more people did not require an actual agreement. In fact, an actor could seemingly be culpable for unlawful assembly based on presence alone:

83. 379 U.S. 536 (1965).

84. 237 U.S. 309 (1915).

85. *Rollins*, 292 F. Supp. at 592.

86. *Id.*

87. See Alan Burdziak, *Prosecutors Discuss Changes to Missouri's Criminal Code*, COLUMBIA DAILY TRIB. (Feb. 12, 2015, 2:00 PM), http://www.columbiatribune.com/news/crime/prosecutors-discuss-changes-to-missouri-s-criminal-code/article_972acf33-08e4-5822-93b8-bae1b843070b.html [<https://perma.cc/BKC2-ENAL>].

88. 713 S.W.2d 601 (Mo. Ct. App. 1986).

89. *Id.* at 603. "In fact, Officer Callow was struck by an egg." *Id.* Because the defendants committed these acts together, they could have been charged with the completed offense of riot rather than the inchoate offense of unlawful assembly. Police or prosecutors may have opted to pursue unlawful assembly as a lesser-included offense.

90. *Id.* at 604.

91. *Cf.* MO. REV. STAT. § 574.016(7) (2016) ("A person may not be charged, convicted or sentenced on the basis of the same course of conduct of both the actual commission of an offense and a conspiracy to commit that offense.").

[D]efendant had been in Maywood on previous Halloweens, and so he was aware of the type of activities that take place there on Halloween. Therefore, it is evident that defendant knew the purpose of the gathering on Halloween night. To be convicted of unlawful assembly, . . . defendant need not have actually committed an unlawful act. His presence alone in the unlawful assembly was enough for conviction, because he knowingly assembled with the other members, and he was under a duty to disassociate himself from the group after other members of the group committed unlawful acts.⁹²

It is plausible (though not certain) that this reasoning leads to the right outcome based on the facts of *Mast*. But the court's language poses a substantial risk of overbreadth in other settings. The imputed liability in these circumstances also stands in tension with other aspects of the criminal law that resist liability for "mere presence."⁹³ In fact, *Mast* suggests that the defendant's conviction rested on a kind of omission liability resulting from a "duty to disassociate himself from the group."⁹⁴ That approach contrasts with even the relatively permissive approach of Wharton, who at least stipulated that "[e]vidence of riotous assemblages in previous years is not admissible."⁹⁵

The doctrinal formulation in *Mast* has real-world consequences. Consider a civil rights protest that comes on the heels of earlier demonstrations, some of which have turned violent. Are protesters constructively on notice that "the purpose of the gathering" could include violent acts such that "presence alone" could be sufficient for conviction? Suppose one person in a protest of one hundred demonstrators throws a bottle at police. Are the other ninety-nine now "under a duty to disassociate" from the group? Moreover, imputing the actions of anyone in a protest area to the entirety of the protest allows the assembly equivalent of the "heckler's veto." Under *Mast's* approach, a single actor, who is either opposed to the substantive goals of the protesters or convinced that other methods are required to accomplish those goals, could shut down a peaceful protest with a single act and render everyone in the vicinity criminally liable for failing to disperse.⁹⁶

92. *Mast*, 713 S.W.2d at 604.

93. See, e.g., DRESSLER, *supra* note 72, at 465–68 (observing that mere presence does not satisfy the actus reus for accomplice liability).

94. *Mast*, 713 S.W.2d at 604; see also Steven R. Morrison, *Relational Criminal Liability*, FLA. ST. U. L. REV. (forthcoming 2016) (raising similar concerns about liability imposed on one person for the acts of another).

95. WHARTON, *supra* note 42, at 825.

96. The Supreme Court has carefully distinguished between violent actors who are subject to expressive restrictions and others who, though affiliated with the violent actors, have not themselves engaged in violence. See, e.g., NAACP v. Claiborne Hardware Co., 458 U.S. 886, 915 (1982); JOHN D. INAZU, CONFIDENT PLURALISM: SURVIVING AND THRIVING THROUGH

Despite its flaws, *Mast* emphasized some of the earlier common law constraints on unlawful assembly. For example, the opinion concluded that the act contemplated or attempted by the members of an unlawful assembly must “cause[] a disturbance of the public order so that it is reasonable for rational, firm and courageous persons in the neighborhood of the assembly to believe the assembly will cause injury to persons or damage to property and will interfere with the rights of others by committing disorderly acts.”⁹⁷ The court also concluded that the unlawful assembly must be “to the terror and the disturbance of the public in general.”⁹⁸ Although this cumbersome language did not markedly improve upon the clarity of earlier common law phrasings, it suggests that the court added two additional elements to the statutory offense: (1) the intended or attempted actions of the unlawful assembly must disturb the public order by creating a perception of harm (and the threshold for ascertaining this disturbance must be based on the semi-objective standard of “rational, firm, and courageous persons in the neighborhood”); and (2) the intended or attempted actions must be likely to cause severe harm (in other words, those disturbed must reasonably believe that the assembly creates harm serious enough to “cause injury to persons or damage to property”).

These additional elements might have constrained the scope of liability under Missouri’s unlawful assembly statute if they were widely known. But *Mast* has been cited only once for its interpretation of Missouri’s unlawful assembly provision, in a decision that emerged out of the Ferguson protests. On August 18, 2014, five days after Antonio French’s arrest, law enforcement officials in Ferguson announced a “keep moving” policy that prohibited protesters from standing still on public sidewalks. Some officers informed protesters that they could not remain idle for more than five seconds. Senior law enforcement officials instructed their subordinates to enforce the “keep moving” policy through Missouri’s failure to disperse order (which police could issue after declaring an assembly unlawful). In an October 2014 opinion enjoining officials from continuing the “keep moving” policy, federal judge Catherine Perry cited *Mast* and

DEEP DIFFERENCE 109 (2016) (“The Court [in *Claiborne Hardware*] recognized that some boycotters had occasionally engaged in actual or threatened violence. But it distinguished the vast majority of the boycott as nonviolent activity fully protected under the First Amendment.”).

97. *Mast*, 713 S.W.2d at 603–04. On this point, *Mast* relies directly on *Rollins*’s mistaken attribution of the common law definition to Blackstone. *Id.* at 605 (citing *Rollins*).

98. *Id.* at 603.

observed “there is no doubt that people were ordered to keep moving in situations that could never have been covered by the refusal-to-disperse law.”⁹⁹

Judge Perry’s order is a welcome development in judicial attention to unlawful assembly. But it also illustrates that at the time of the Ferguson protests and French’s arrest, Missouri’s unlawful assembly statute left entirely unclear what “acts, conduct and language” could establish liability for the offense. Moreover, the only analysis that shed light on the nature and extent of the harm of unlawful assembly was buried in a single, never-previously-cited decision.

It is worth considering how a more nuanced understanding of unlawful assembly might have altered the real-time decisionmaking of law enforcement officials charged with policing the Ferguson protests. On its face, Missouri’s statute only required officers in Ferguson to infer that seven or more protesters had agreed to break a criminal law using force or violence. Those minimal requirements give a great deal of discretion to local law enforcement, and that discretion can tempt officers to act too quickly.¹⁰⁰ The additional requirements under *Mast* constrain some of that discretion, but the lack of attention to the decision gives us reason to believe that neither law enforcement officials nor prosecutors are aware of these constraints.

B. Wisconsin

Mast at least began with a statute that required the contemplated lawbreaking to anticipate the use of force or violence. Other jurisdictions have dispensed with this requirement altogether. Courts have upheld unlawful

99. *Abdullah v. Cty. of St. Louis*, 52 F. Supp. 3d 936, 944 (E.D. Mo. 2014). One other decision cites *Mast* for its standard of review for a motion of acquittal. *See State v. Bentz*, 766 S.W.2d 453, 458 (Mo. Ct. App. 1989).

100. The Supreme Court has viewed similar grants of discretion skeptically. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 62–63 (1999) (striking down Chicago’s Gang Congregation Ordinance because defining loitering as “remain[ing] in one place with no apparent purpose” afforded law enforcement too much discretion in deciding “which stationary persons to disperse under the ordinance”); *Papachristou v. City of Jacksonville*, 405 U.S. 156, 167 (1972) (striking down Jacksonville’s vagrancy ordinance in part due to the “unfettered discretion it place[d] in the hands of Jacksonville police” in making arrests).

assembly convictions for nonviolent action in Minnesota,¹⁰¹ New Hampshire,¹⁰² and the District of Columbia.¹⁰³

Wisconsin’s unlawful assembly statute provides one of the starkest examples. It criminalizes unlawful assembly that contemplates “blocking or obstructing the lawful use by any other person, or persons of any private or public thoroughfares.”¹⁰⁴ The law did not always reflect this broader approach to liability. The state originally adopted its unlawful assembly provision from Maine’s statute in the 1882 decision *Bonnville v. State*.¹⁰⁵ In *Bonnville*, the Wisconsin Supreme Court characterized an unlawful assembly as an attempt or motion toward “a lawful or unlawful act in a violent, unlawful, or tumultuous manner, to the terror or disturbance of others.”¹⁰⁶ The court suggested that the common law antecedents of this statutory prohibition focused on the demeanor of those gathered:

At common law an assembly became unlawful alone by the manner of it, as by such circumstances of terror as tended to endanger the public peace and excite fear, alarm, and consternation among the people; and there need be no common purpose of such assembly except such as

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101. *Bernini v. City of St. Paul*, 665 F.3d 997 (8th Cir. 2012) (affirming convictions for unlawful assembly where previously lawful assembly left sidewalks and blocked a major highway).
102. *State v. Inselburg*, 330 A.2d 457 (N.H. 1974). *Inselburg* affirmed convictions for failure to withdraw from a mob action under N.H. REV. STAT. ANN. § 609-A:4 (Supp. 1972), where individuals blocked the driveway of a laboratory, causing traffic to back up “in both directions for one-fourth of a mile” and refused to disperse when ordered to do so. *Id.* at 461. At the time of the decision, New Hampshire defined “mob action” as “the assembly of two or more persons to do an unlawful act.” *Id.* at 459 (quoting N.H. REV. STAT. ANN. § 609-A:1 II (Supp. 1972)). Nearly two years earlier, the New Hampshire Supreme Court had provided a limiting construction to the definition of mob action—what it referred to as the “unlawful assembly proscription”—requiring that the unlawful acts referred to in 609-A:1 II must be unlawful *criminal* acts. *State v. Albers*, 303 A.2d 197, 199–200 (N.H. 1973). The New Hampshire legislature repealed sections 609-A:4 and 609-A:1 II in 1973, and the “unlawful assembly” aspect of those laws now appears to fall under the state’s riot statute. *See* N.H. REV. STAT. ANN. § 644:1 I (2016). New Hampshire does not currently have a separate unlawful assembly provision in its criminal code.
103. *Tetaz v. District of Columbia*, 976 A.2d 907, 911 (D.C. 2009) (affirming convictions for unlawful assembly where anti-war protestors lay down within three feet of main entrance doors of a public building, forcing individuals who wished to enter the building to step over protestors or walk around the building to a different entrance because “while not 100 percent blocked, [the building entrance] was significantly impeded or incommoded”).
104. WIS. STAT. § 947.06(2) (2015) (“An ‘unlawful assembly’ includes an assembly of persons who assemble for the purpose of blocking or obstructing the lawful use by any other person, or persons of any . . . public thoroughfares” and “does in fact so block or obstruct the . . . public thoroughfares.” (emphasis added)).
105. 11 N.W. 427, 428 (Wis. 1882) (“Our statute . . . copied from the state of Maine . . .”); *see supra* note 47.
106. *Id.*

might be implied by an assembling in such manner, and which might be either lawful or unlawful¹⁰⁷

In other words, *Bonnville* interpreted the common law to have been focused primarily and perhaps exclusively on the “violent and tumultuous” manner of the assembly, not on the unlawfulness of the contemplated act.¹⁰⁸

Wisconsin’s unlawful assembly statute remained essentially unchanged until the mid-twentieth century.¹⁰⁹ It substantially revised its criminal code in 1955.¹¹⁰ In doing so, it replaced its longstanding unlawful assembly provision with a substantially more expansive definition: “An ‘unlawful assembly’ is an assembly which consists of 3 or more persons and which causes such a disturbance of public order that it is reasonable to believe that the assembly will cause injury to persons or damage to property unless it is immediately dispersed.”¹¹¹ The revised statute reflected two striking departures from the original. First, it dropped the distinction between an assembly that had gathered but not yet undertaken an overt act and one that had attempted or motioned toward an act.¹¹² Such a revision might have represented a narrowing of liability had it also decriminalized a gathering that lacked an overt act. But the rest of the revised statute indicated no such limitation. To the contrary, those assembled need only “cause[] such a disturbance of public order that it is reasonable to believe that the assembly will cause injury to persons or damage to property unless it is immediately dispersed.” This causal link could be predicated on an overt act, but it could also be inferred from the

107. *Id.*

108. *Id.* at 430 (“Under the statute, as at common law, the gravamen of the offence is the unlawful assembly; but under the statute another element has been added, and it must appear that the assembly which at common law becomes unlawful by the manner of it, and as tending to the breach of the public peace, was also to do something unlawful or some unlawful act.”). The *Bonnville* court also dispensed with an objection that “the qualifying words ‘violent or tumultuous’ in the disjunctive” suggested two different meanings. *Id.* The court concluded that the two words had essentially the same meaning: “Although perhaps strictly these two words are not synonymous, they are substantially as here used.” *Id.*

109. As late as the early 1950s, the wording looked remarkably similar to the original 1821 statute that Wisconsin had borrowed from Maine. Wisconsin defined an unlawful assembly as “[a]ny three or more persons who shall assemble in a violent or tumultuous manner to do an unlawful act, or, being together, shall make any attempt or motion towards doing a lawful or unlawful act in a violent, unlawful or tumultuous manner, to the terror or disturbance of others. WIS. STAT. § 347.02 (1951); see ME. REV. STAT. tit. I–XII (passed 1820); see also *Koss v. State*, 258 N.W. 860, 863 (Wis. 1935) (affirming convictions for unlawful assembly where protestors on a public sidewalk blocked sidewalk traffic and all street traffic in one direction because where “assembly attempted or made a move toward blockading the sidewalk or the street, or both, . . . such assembly became an unlawful assembly”).

110. See generally William A. Platz, *The Criminal Code*, 1956 WIS. L. REV. 350 (1956) (providing commentary and analysis on the 1955 revisions and highlighting their controversial nature).

111. WIS. STAT. § 947.06 (1955).

112. This is reflected in the clause preceding “or, being together” in the pre-1955 statute.

mere existence of the assembly, particularly if those assembled indicated an intent to violate the law.

Even more worrisome, the revised statute eliminated the requirement that action be undertaken in an “unlawful or tumultuous manner, to the terror or disturbance of others.” In doing so, it opened the door to liability even for the contemplation of nonviolent lawbreaking.¹¹³ To be sure, most disturbances that would cause “injury to persons or damage to property” would also include an element of violence. But in the absence of tumult or terror, an assembly could conceivably be dispersed if officials anticipated even minor injuries or slight property damage that accompanied a large crowd engaged in a peaceful march.¹¹⁴

The legislative history suggests that these substantive changes may have been unintended. The 1955 overhaul to Wisconsin’s criminal code began with proposed changes that included extensive commentary from Wisconsin’s judiciary committee. The commentary made clear that the revision to unlawful assembly was meant to be “a clarification rather than a major substantive change.”¹¹⁵ Moreover, the committee gave no hints that its amended definition of unlawful assembly was intended to remove the element of force or violence. To the contrary, committee members presumed that: “An unlawful assembly is basically an assembly which is so dominated by mob psychology that its members are very likely to do acts of violence which as individuals they would not do.”¹¹⁶ The committee seemed clear that its textual changes to the unlawful assembly statute were not eliminating the requirement of force or violence:

[Those involved] must be causing a disturbance of public order, and it must be such a disturbance that it is reasonable to believe that the assembly will cause injury to persons or serious property damage

113. The changes were apparently unremarkable at the time, particularly in light of other more controversial changes. Platz, *supra* note 110, at 382 (noting that the changes to unlawful assembly “require no comment”).

114. *See, e.g., Int’l Wire Works v. Hanover Fire Ins. Co.*, 283 N.W. 292, 293 (1939) (emphasizing “the risk of injury from the acts of a group publicly and tumultuously manifesting its purpose and placing in fear other persons” as elements of riot and unlawful assembly).

115. JUDICIARY COMMITTEE REPORT ON BILL NO. 100, A, at 216. In fact, the committee reviewed the earlier version as “broader than the new” because it allowed for an assembly to be declared “unlawful even though its purpose is to do a lawful act if such act is done in a manner disturbing to others.” *Id.*

116. *Id.* at 215 (“The crux of the matter is that most of the people in an unlawful assembly are peaceful citizens who would never commit a violent crime if it were not for the fact that mob psychology dominates their thinking. Therefore, it follows that if the assembly can be dispersed and mob spirit dissipated before violence results, a real step toward preventing crime has been taken.”).

unless it is immediately dispersed. This is the concept which commonly is phrased in such language [as] “violent or tumultuous” and “to the terror or disturbance of others.”¹¹⁷

The difficulty, of course, was that the committee’s effort to simplify the prose of Wisconsin’s criminal code removed all of the explicit references to force or violence in the statute. The breadcrumbs of legislative intent buried in the committee report would not suffice to halt a more expansive (and more textually plausible) interpretation of the 1955 revised code.

A few years later, the Wisconsin legislature again amended its unlawful assembly statute and added an additional provision that remains in effect today:

An “unlawful assembly” includes an assembly of persons who assemble for the purpose of blocking or obstructing the lawful use by any other person, or persons of any private or public thoroughfares, property or of any positions of access or exit to or from any private or public building, or dwelling place, or any portion thereof and which assembly does in fact so block or obstruct the lawful use by any other person, or persons of any such private or public thoroughfares, property or any position of access or exit to or from any private or public building, or dwelling place, or any portion thereof.¹¹⁸

The current provision thus criminalizes even an assembly that contemplates nonviolent, nondestructive activity like blocking or obstructing a public thoroughfare as long as “it is reasonable to believe that the assembly will cause injury to persons or damage to property unless it is immediately dispersed.”¹¹⁹

In the 1970 case *Cassidy v. Ceci*, a three-judge federal panel upheld this provision of Wisconsin’s unlawful assembly law against a First Amendment challenge.¹²⁰ The plaintiffs in *Cassidy* alleged that they had “marched in an orderly and peaceful manner along a public sidewalk in Milwaukee after having participated in a peaceful assembly at the Milwaukee War Memorial.”¹²¹ The group of approximately two hundred marchers confronted approximately

117. *Id.*

118. WIS. STAT. ANN. § 947.06(2) (2015). Subsections 4 and 5 add additional restrictions for “an unlawful assembly upon any property of a public institution of higher education or upon any highway abutting on such property” *Id.* § 947.06(4). These sections appear to have been added in 1969. Compare WIS. STAT. § 947.06 (1969), with WIS. STAT. § 947.06 (1967).

119. *Id.* § 947.06(1). It seems clear that § 947.06(2) criminalizes the anticipated as well as the actual blocking of public ways. The statute’s structure mirrors other inchoate provisions that specify a purposeful mens rea with respect to the target offense, in this case, those “who assemble for the purpose of blocking or obstructing” *Id.* In other words, the assembly can be declared unlawful prior to the actual blocking or obstructing.

120. *Cassidy v. Ceci*, 320 F. Supp. 223 (E.D. Wis. 1970).

121. *Id.* at 225.

fifteen Milwaukee police officers, who arrested them on charges of unlawful assembly.¹²² The federal panel rejected the plaintiffs' argument that the statute did "not specify the extent of the injury which can trigger an arrest" and "permits an arrest to be made where the amount of damage is insignificant."¹²³ The court reasoned that "[i]f an arrest were bottomed upon a trivial amount of damage, a successful prosecution could not be had under the statute."¹²⁴ But that conclusion ignores the practical consequences to the expressive aims of marchers who can nevertheless be dispersed and arrested based on speculative concerns over insignificant damage. From a First Amendment perspective, a successful prosecution is not the only harm that arises from a dispersal and arrest.¹²⁵

III. THE MISSING ELEMENTS OF UNLAWFUL ASSEMBLY

The statutory and case law developments recounted in the previous Part suggest that some contemporary unlawful assembly statutes lack one or more of three constraints that were present in earlier formulations: (1) a fear of harm that disturbs the peace; (2) the likelihood of severe harm; and (3) the contemplated use of force or violence. Within the broad contours of criminal law theory, we can classify these elements as more objective than subjective. Objective elements generally focus on the potential harm to society from the standpoint of the hypothetical "reasonable observer" instead of on the subjective mental processes of the

122. *Id.*

123. *Id.* at 226.

124. *Id.*

125. Wisconsin is not the only state to have effectively dropped the requirement of force or violence. Minnesota has moved to a broad definition of unlawful assembly that removes the violence element in some instances. Compare MINN. STAT. § 104.1 (1851) (prohibiting the assembly of twelve or more armed persons, or in the alternative, thirty or more unarmed persons gathered "unlawfully, riotously, or tumultuously"), with MINN. STAT. § 609.705 (2015) ("When three or more persons assemble, each participant is guilty of unlawful assembly, which is a misdemeanor, if the assembly is: (1) with intent to commit any unlawful act by force; or (2) with intent to carry out any purpose in such manner as will disturb or threaten the public peace; or (3) without unlawful purpose, but the participants so conduct themselves in a disorderly manner as to disturb or threaten the public peace."). Minnesota revised its unlawful assembly provision in 1963, as part of revisions to its criminal code influenced by Wisconsin's contemporaneous changes and the development of the Model Penal Code. Bradford Colbert & Frances Kern, *A Brief History of the Development of Minnesota's Criminal Code*, 39 WM. MITCHELL L. REV. 1441, 1446 (2013). In *State v. Hipp*, the Minnesota Supreme Court interpreted subsection 3 as "limited to prohibiting three or more assembled persons from conducting themselves in such a disorderly manner as to threaten or disturb the public peace by unreasonably denying or interfering with the rights of others to peacefully use their property or public facilities without obstruction, interference, or disturbance." *State v. Hipp*, 213 N.W.2d 610, 614 (Minn. 1973) (emphasis added). The defendants in *Hipp* disrupted food service at a Red Barn restaurant, damaged Red Barn property, and blocked pedestrian and vehicular traffic. *Id.* at 616.

alleged wrongdoer. Of course, the reasonable observer is never fully objective because the boundaries of reasonableness are informed by and contingent upon community norms and standards.¹²⁶ But an objective lens at least considers those external norms and standards. Subjective approaches, in contrast, look almost entirely at whether the alleged wrongdoer possesses the requisite criminal intent to complete the target offense.

Recent trends in criminal law theory that focus greater attention on mens rea have heightened the significance of subjective inquiries. This change has an important defendant-friendly upshot at trial: It prevents convictions based on honest mistakes by requiring prosecutors to prove a culpable mental state beyond a reasonable doubt. But in unlawful assembly cases, this backend trial protection comes at a cost: The focus on mens rea might tempt law enforcement officials to intervene at an earlier stage than they would be able to if they were required to ground their assessment in more objective criteria like the perception of harm to an outside observer.

The difference between objective and subjective approaches is especially pronounced in inchoate offenses like unlawful assembly. Consider, for example, the portion of Missouri's statute that focuses almost exclusively on the actor's state of mind: whether he "knowingly assembles with six or more other persons and agrees with such persons to violate any of the criminal laws of this state or of the United States with force or violence."¹²⁷ In most cases, the only objective discernible element is the number of people gathered. The other elements (mens rea, the fact of an agreement, and the contemplated use of force or violence) will usually rely on subjective assessments. That approach encourages law enforcement officials to intervene at an earlier stage, even in the absence of a threat of severe harm perceived by a reasonable observer.¹²⁸ A more objectivist approach

126. For this reason, it might be more accurate (or at least less ambiguous) to refer to the difference between "external" and "internal" perspectives. GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 118 (1998) (noting that, in analyzing the tort of negligence, "[t]he terms 'objective' and 'subjective' . . . mean different things to different people. . . . In one sense, then, the conflict between objective and subjective should be restated as between 'external' standards and 'internal' standards"). Nevertheless, this Article adopts the convention used in much criminal law scholarship today.

127. MO. REV. STAT. § 574.040 (2016).

128. See DRESSLER, *supra* note 72, at 390 ("Generally speaking, subjectivists favor an *actus reus* test of attempt that allows for early attachment of guilt. This generalization follows from the underlying premises of the doctrine. For subjectivists, proof of an actor's dangerousness, as evidenced by her *mens rea*, is paramount.").

would look for some manifestation of social harm before intervening with an assembly.¹²⁹

The subjectivist impulse to find culpability prior to the manifestation of social harm points to another reason that the missing elements of unlawful assembly may be problematic today: Modern criminal law has relied on these same subjectivist trends to expand the reach of the law of criminal attempt. In at least some ways, the expanded reach of criminal attempt lessens the need for a broad construction of unlawful assembly. As Jerome Hall noted in a classic 1940 study, “early English law had no doctrine of criminal attempt,” but the law of unlawful assembly, rout, and riot provided “the closest parallel to the later attempt.”¹³⁰ Hall focused on the ways that both rout and unlawful assembly extended culpability well before the accomplishment of an illegal purpose and remarked upon “the conceptual proximity of rout and unlawful assembly to attempt.”¹³¹ The modern expansion of attempt liability might therefore cover much of the enforcement interests originally linked to unlawful assembly.¹³²

This Part explores in greater detail the consequences of the shift toward subjectivity in unlawful assembly statutes through the omission or elision of more objective elements of the offense. It begins with the requirement that bystanders to an unlawful assembly perceive a threat of harm.

A. Perception of Harm

Early unlawful assembly laws specified that an assembly must affect the peace and well-being of others by causing them to perceive a threat of harm. As an 1844 article in the *American Law Magazine* explained, unlawful assembly in England required that “the character of the meeting must be such as to cause

129. *See id.* (“For objectivists, the *actus reus* element has independent significance, because adherents to this theory do not believe that society should use its coercive power against inchoate conduct unless the actor has caused some social harm, at least in the form of societal apprehension of criminal activity.”).

130. Jerome Hall, *Criminal Attempt—A Study of Foundations of Criminal Liability*, 49 *YALE L.J.* 789, 793 (1940); *cf.* BISHOP, *supra* note 53, at 609 (“[O]ut of a particular form of attempted riot, the law has created a separate offence, known as an unlawful assembly.”).

131. Hall, *supra* note 130, at 794.

132. The expansion of attempt liability has also been aided by the Model Penal Code’s shift away from common law tests like “last act” and “dangerous proximity” in favor of the “substantial step” analysis that focuses on the actions already undertaken rather than those left to be completed. *See generally* George P. Fletcher, *The Case for Treason*, 41 *MD. L. REV.* 193, 206 (1982) (discussing tensions between the Model Penal Code’s subjective approach and those that look to the act requirement as “the primary source of incriminating evidence” in attempt liability).

alarm to firm men, not merely such as may produce fear in timid persons.”¹³³ In the 1928 decision *State v. Butterworth*, New Jersey embraced something akin to this requirement by reading into its unlawful assembly statute the common law requirement that the assembly “give firm and courageous persons in the neighborhood reasonable grounds to apprehend a breach of the peace as a result thereof”¹³⁴ A handful of other states have included a perception of harm element. Virginia requires that “the assembly actually tends to inspire persons of ordinary courage with well-grounded fear of serious and immediate breaches of public safety.”¹³⁵ Florida specifies that the assembly be “in such a manner as to give rational, firm, and courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace.”¹³⁶ Alabama and Oklahoma impose similar requirements.¹³⁷

These states emphasize that those nearby the assembly must actually experience fear of serious and immediate breaches of the peace. The phrase “persons of ordinary courage” that appears in some statutory formulations further narrows an otherwise subjective standard: The law will not impose criminal liability based upon the fears of “eggshell bystanders” who unreasonably fear a breach of safety

133. *Riots, Routs, and Unlawful Assemblies*, 3 AM. L. MAG. 350, 355 (P.J. Bacon ed., 1844). The article posited: “[I]t is difficult to perceive on what ground the English ought not in its fullest extent to be adopted, as the American definition of an unlawful assembly.” *Id.*

134. *State v. Butterworth*, 143 A. 57, 59 (N.J. 1928). *Butterworth* quoted the 1845 edition of William Russell’s *Treatise on Crimes and Misdemeanours*, which specified that juries should “consider whether firm and rational men, having their families and property there would have reasonable ground to fear breach of the peace.” *Id.* (“[I]n viewing this question the jury should take into their consideration the way in which the meetings were held, the hour at which they met and the language used by the persons assembled, by those who addressed them; and then consider whether firm and rational men, having their families and property there would have reasonable ground to fear breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage.”). *Butterworth* itself involved an incident arising out of the famous Paterson silk strike. The strike had commenced in August 1924. On October 5th, between two hundred and three hundred people (many of them striking workers) had gathered in a public square. According to the court, “[s]ome of those assembled were sitting upon benches and others walking about,” and “there were about twelve police officers stationed in and about the plaza.” *Id.* at 60.

135. VA. CODE ANN. § 18.2-406 (2014).

136. *State v. Simpson*, 347 So. 2d 414, 414 (Fla. 1977) (upholding constitutionality of Florida’s unlawful assembly provision, Section 870.02).

137. *Abernathy v. State*, 155 So. 2d 586, 591 (Ala. Ct. App. 1962), *cert. denied*, 155 So. 2d 592 (Ala. Ct. App. 1963), *rev’d on other grounds*, 380 U.S. 447 (1965) (assembly must “cause persons in neighborhood of such assembly to fear on reasonable grounds that the persons so assembled would commit a breach of the peace or provoke others to do so”); *Lair v. State*, 316 P.2d 225, 225 (Okla. Crim. App. 1957) (“in such a manner as to give firm and courageous persons in the neighborhood of such assembly ground to apprehend a breach of peace in consequence of it”).

upon witnessing the assembly. But jurisdictions such as Missouri and Wisconsin include no such limitation.¹³⁸

B. Likelihood of Severe Harm

The second element missing from some contemporary statutes is the likelihood of severe harm. Earlier approaches to unlawful assembly required a reasonable observer to believe that the disturbance would “cause injury to persons or damage to property” and would “interfere with the rights of others.”¹³⁹ A small number of states have codified a version of this requirement. Virginia’s unlawful assembly statute, for example, adds the material element that the intended acts must be “likely to jeopardize seriously public safety, peace or order.”¹⁴⁰ But most jurisdictions omit the requirement.

The importance of requiring a likelihood of severe harm is particularly relevant to unlawful assembly, which is both an inchoate offense and an offense that constrains expressive conduct. Consider, by way of contrast, offenses that either are inchoate or constrain expressive conduct, but not both. Most attempt crimes involving target offenses like murder, arson, or kidnapping fall into the first category. They are inchoate offenses that sometimes require early intervention by law enforcement. These interventions can raise serious Fourth and Fifth Amendment concerns, but they do not usually implicate the First Amendment.¹⁴¹ On the other hand, offenses that implicate expressive interests, like incitement to commit violence or riot, usually require at least a verbal threat. Restricting that expression may or may not violate First Amendment rights, but the expression has fully manifested at the time of its suppression.¹⁴²

Unlawful assembly combines the concerns raised by inchoate offenses with those raised by offenses implicating expressive interests. The same is true for conspiracy; in fact, conspiracy prosecutions, and related prosecutions for “criminal syndicalism,” have shaped much of our contemporary First Amendment doctrine.¹⁴³ But unlawful assembly is even more worrisome than conspiracy because

138. As discussed earlier, Missouri’s *Mast* decision appears to read this requirement into the state’s unlawful assembly provision, but the statutory text does not reflect this element.

139. *State v. Mast*, 713 S.W.2d 601, 603–04 (Mo. Ct. App. 1986).

140. VA. CODE ANN. § 18.2-406 (2014).

141. *See, e.g., Rice v. Paladin Enters.*, 128 F.3d 233 (4th Cir. 1997) (rejecting First Amendment defense to civil suit against the publisher of the instruction manual, *How to Be a Hitman*).

142. This would not be the case for an injunctive remedy that amounted to a prior restraint.

143. *See, e.g., Whitney v. California*, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring) (“Fear of serious injury cannot alone justify suppression of free speech and assembly. . . . There must be reasonable ground to believe that the danger apprehended is imminent.”), *overruled by* *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Abrams v. United States*, 250 U.S. 616, 627 (1919)

it always occurs in an actual gathering that requires a real-time decision by law enforcement officials either to allow the gathering to continue or to order its dispersal. A conspiracy, in contrast, may hatch at a much earlier point in time that sometimes allows for law enforcement to assess its danger outside of an expressive moment.

The exigency of an unlawful assembly means that the social control resulting from dispersals and arrests may often be more important to authorities than a successful prosecution. This concern is plausibly heightened when the purpose of the assembly is to protest the very authorities who have the power to order its dispersal. In this sense, a protest by African Americans against allegedly discriminatory or abusive police tactics differs from a crowd of teenagers gathered on Halloween.¹⁴⁴ In the former case, those charged with policing the assembly may be incentivized to diminish its expressive function because the core of that expression challenges the legitimacy of their authority or their own individual actions. Celebratory crowds can also threaten public order, but their expressive purpose has nothing to do with the legitimacy of local authority.¹⁴⁵

C. Force or Violence

The final element missing from a number of today's unlawful assembly statutes may be the most important: the requirement that the anticipated lawbreaking be committed with force or violence.¹⁴⁶ This omission manifests in two ways. The first is in statutes like Wisconsin's that explicitly eliminate the force or violence element.¹⁴⁷ That omission expressly and dramatically extends the scope of the criminal prohibition to include nonviolent lawbreaking.

The second omission of force or violence occurs in a less obvious manner: Some jurisdictions retain the element in their statutory restrictions but ignore it in their enforcement and charging practices. One of the clearest examples is

(Holmes, J., dissenting) (“[T]he United States constitutionally may punish speech that produces or is intended to produce a clear and imminent danger that it will bring about forthwith certain substantive evils that the United States constitutionally may seek to prevent.”); *Schenck v. United States*, 249 U.S. 47, 52 (1919) (“The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.”).

144. Compare *Rollins v. Shannon*, 292 F. Supp. 580 (E.D. Mo., 1968) (civil rights protest), *with Mast*, 713 S.W.2d at 601 (Halloween unrest).

145. That is also the case with modern private sector labor protests, or even most social issues protests on hot-button issues like abortion and gay rights, which usually raise challenges to broad questions of authority of national scope rather than challenges to local authority.

146. Cf. El-Haj, *supra* note 20, at 967 (“[T]he stickiest question today is whether engaging in illegal but nonviolent acts should render an assembly *unpeaceable*?”).

147. See WIS. STAT. ANN. § 947.06(1), (2) (2015).

when law enforcement disperses a crowd as an unlawful assembly based on nonviolent forms of the target offense of peace disturbance. Those dispersed (or arrested and charged) will likely be released or acquitted at trial because the prosecution will be unable to prove the material element of force or violence. But by the time of an arraignment or trial, much of the damage has been done. The state will have successfully controlled or suppressed the assembly.

Consider how this concern unfolds under Missouri law. The first part of Missouri's peace disturbance statute criminalizes disturbing others through loud noise, offensive language likely to produce a violent response, felonious threats, fighting, or "[c]reating a noxious and offensive odor."¹⁴⁸ Presumably, fighting and some forms of threats are usually accomplished through the use of force or violence. But loud noise or "noxious and offensive odors" can easily be effectuated through nonviolent means.

The second part of Missouri's peace disturbance statute criminalizes obstructing vehicular or pedestrian traffic or blocking "the free ingress or egress to or from a public or private place."¹⁴⁹ The prohibition reaches actions like blocking roads or entrances to facilities—actions that are among some of the most well-known forms of civil disobedience. Even though the state has the authority to criminalize these actions when they occur, these are not actions that require force or violence.

An approach to unlawful assembly that effectively neglects the element of force or violence also stands in tension with core First Amendment principles. Consider the memorable words of Justice Brandeis, concurring in *Whitney v. California*:

Even imminent danger cannot justify resort to prohibition of . . . functions essential to effective democracy unless the evil apprehended is relatively serious. Prohibition of free speech and assembly is a measure so stringent that it would be inappropriate as the means for averting a relatively trivial harm to society.¹⁵⁰

Brandeis turned to the law of trespass to illustrate his point:

[A] State might, in the exercise of its police power, make any trespass upon the land of another a crime, regardless of the results of or of the intent or purpose of the trespasser. It might, also, punish an attempt, a conspiracy, or an incitement to commit the trespass. But it is hardly conceivable that this Court would hold constitutional a statute which punished as a felony the mere voluntary assembly with a society

148. MO. REV. STAT. § 574.010(1)(e) (2016).

149. *Id.* § 574.010.2(b).

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

formed to teach that pedestrians had the moral right to cross unenclosed, unposted, wastelands and to advocate their doing so, even if there was imminent danger that advocacy would lead to a trespass.¹⁵¹

There is a lot going on in this trespass example, and it is worth unpacking it a bit. If Brandeis is correct that even imminent danger cannot trigger restrictions absent the threat of force or violence, then it seems odd to suggest that the state could punish “an incitement to commit the trespass.” In fact, Brandeis suggests greater latitude for incitement later in his opinion. Reaching even further than most First Amendment advocates, he argues that “[t]he fact that speech is likely to result in *some violence* or in *destruction of property* is not enough to justify its suppression.”¹⁵² The thrust of Brandeis’s broader argument suggests that imminent likelihood of a nonviolent offense like trespass (undertaken in a nonviolent manner) falls short of justifying suppression of speech and assembly.

The Supreme Court overruled *Whitney* in its 1969 decision, *Brandenburg v. Ohio*, noting that the majority’s opinion in *Whitney* had “been thoroughly discredited by later decisions.”¹⁵³ Those intervening decisions had made clear that the First Amendment does “not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁵⁴ But in overruling *Whitney*, the Court seems to have overlooked Brandeis’s argument that only imminent *violent* action justifies suppression of free speech and assembly. In *Brandenburg*, incitement to “imminent lawless action” does not appear to require violence—the incitement could be toward either “the use of force” or “law violation.”¹⁵⁵ Nor does the rest of the opinion shed any light on the question of violence.

Some courts and commentators have interpreted *Brandenburg*’s imminence requirement to mean that the state may not restrict advocacy (or, presumably, unlawful assembly) in furtherance of nonviolent lawbreaking.¹⁵⁶ But *Brandenburg* itself is far from clear on this point. As Maria Marcus has suggested, “*Brandenburg*’s salutary emphasis on intent to incite is marred by its failure to distinguish

151. *Id.* at 377–78.

152. *Id.* at 378 (emphasis added). Brandeis’s normative claim finds some support in early American practices. See El-Haj, *supra* note 20, at 969 (“While early American crowds generally avoided violence against persons, it was not uncommon for them to destroy property or engage in activities that would make the public wary today—for example, burning officials in effigy.”).

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

154. *Id.*

155. *Id.*

156. See, e.g., *White v. Lee*, 227 F.3d 1214, 1228 (9th Cir. 2000) (“‘Imminent lawless action,’ as used in *Brandenburg*, means violence or physical disorder in the nature of a riot. Peaceful speech, even speech that urges civil disobedience, is fully protected by the First Amendment.”).

between publicly urging non-violent peaceful action and precipitating the commission of sabotage, assault, or murder.”¹⁵⁷ And the distinction matters a great deal when it comes to law enforcement’s ability to control crowds and protests through unlawful assembly restrictions.

IV. THE FIRST AMENDMENT’S IMMINENCE REQUIREMENT

Part III examined how modern approaches to unlawful assembly have partially or entirely jettisoned earlier requirements of the perception of harm, the likelihood of severe harm, and the contemplated use of force or violence. Each of these requirements reinforced an objective component of assessing culpability for unlawful assembly under a standard of reasonableness.

The turn away from an objective standard is consistent with modern trends in criminal law that focus instead on the subjective intent of the alleged wrongdoer.¹⁵⁸ As discussed earlier, rather than assessing the harm to public order through the eyes of a reasonable observer, the subjective view focuses on the actor’s mental state.¹⁵⁹ In some cases, the subjective approach pushes the potential for liability to

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157. Maria L. Marcus, *Policing Speech on the Airwaves: Granting Rights, Preventing Wrongs*, 15 YALE L. & POLY REV. 447, 463 (1997). Marcus argues that “[t]his overinclusiveness stems from the Court’s use of the term ‘lawless action,’ as well as its grouping of the terms ‘use of force or law violation,’ as though these should be treated as equivalent under the First Amendment.” *Id.*; see also Erika J. Pitzel, Note, *Bay Area Rapid Transit Actions of August 11, 2011: How Emerging Digital Technologies Intersect With First Amendment Rights*, 29 GA. ST. U. L. REV. 783, 802 (2013) (“It is unclear whether *Brandenburg*’s ‘lawless action’ standard includes non-violent misdemeanor conduct. In *Terminiello v. City of Chicago*, a fighting words case, the Court stated that ‘freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises *far above public inconvenience, annoyance, or unrest.*’ In *Hess v. Indiana*, the Court stated that words could not be punished by the State on the ground that they had ‘a tendency to *lead to violence.*’ However, because *Terminiello* concerned fighting words while *Hess* focused on imminence, the nature of ‘lawless activity’ remains unclear.” (footnotes omitted)). Thanks to Will Baude and Chad Flanders for conversation along these lines.
158. See JOHN DARLEY ET AL., *TAKING PSYCHOLOGY AND LAW INTO THE TWENTY-FIRST CENTURY* 47 (James R.P. Ogloff ed., 2002) (“The model penal code (1962) holds that a person deserves punishment when the person has ‘formed a settled intent’ to commit a crime, a subjectivist standard that focuses on the person’s criminal intent.”); DRESSLER, *supra* note 72, at 406 (“The Model Code’s approach to criminal attempts—indeed, to all of the inchoate offenses—is subjectivist nearly throughout.”); Paul H. Robinson & John M. Darley, *Objectivist vs. Subjectivist Views of Criminality: A Study in the Role of Social Science in Criminal Law Theory* 6 (Mar. 17, 1997) (unpublished manuscript), <https://www.law.upenn.edu/fac/phrobins/Obj-sbj.pdf> [<https://perma.cc/W7SX-DK8B>] (“[T]he Model Penal Code generally takes a subjectivist view of criminality in grading.”).
159. See Stephen P. Garvey, *Are Attempts Like Treason?*, 14 NEW CRIM. L. REV. 173, 179 (2011) (“[O]bjectivism cares first about the world; subjectivism cares first about the mind.”).

a much earlier point in time. The latter consequence is particularly pronounced with inchoate offenses.¹⁶⁰

This trend toward subjectivism, however, stands in some tension with core First Amendment doctrine. Whatever *Brandenburg* means regarding violent versus nonviolent lawbreaking, the decision makes clear that the threatened harm must be imminent.¹⁶¹ That is, government officials must exercise restraint in their regulation of expressive freedoms unless the exercise of those freedoms threatens imminent harm.

The *Brandenburg* Court made clear that its standard covered assembly as well as speech: “Statutes affecting the right of assembly, like those touching on freedom of speech, must observe the established distinctions between mere advocacy and incitement to imminent lawless action.”¹⁶² This First Amendment imminence standard is reinforced by decisions involving protests from the civil rights era. For example, in *Cox v. Louisiana*, the Court addressed claims arising out of a protest of segregated lunch counters by between 1,500 and 2,000 students.¹⁶³ The gathering also drew between seventy-five and eighty police officers and a crowd of several hundred “curious white people.”¹⁶⁴ The demonstrators sang and applauded loudly, but the Court made clear that these peaceful activities were protected under the First Amendment.¹⁶⁵ That was true even though the protesters had expressed their intent to violate existing law by sitting at segregated lunch counters in private establishments.¹⁶⁶

160. Cf. DRESSLER, *supra* note 72, at 379 (“In a subjectivist system, . . . any act—no matter how innocuous—that verifies the actor’s commitment to carry out a criminal plan, or which corroborates her confession or other incriminating evidence, is sufficient to justify punishment for an inchoate offense.”).

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

162. *Id.* at 449 n.4; see also *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (“These rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed.”). For discussions about the peaceability requirement in the assembly right, see Ashutosh Bhagwat, *Liberty’s Refuge, or the Refuge of Scoundrels?: The Limits of the Right of Assembly*, 89 WASH. U. L. REV. 1381, 1388–99 (2012); Ashutosh Bhagwat, *Terrorism and Associations*, 63 EMORY L.J. 581, 624 (2014); John D. Inazu, *Factions for the Rest of Us*, 89 WASH. U. L. REV. 1435, 1438–40 (2012); Timothy Zick, *Recovering the Assembly Clause*, 91 TEX. L. REV. 375, 385–89 (2012).

163. *Cox v. Louisiana*, 379 U.S. 536, 538–39 (1965).

164. *Id.* at 541.

165. *Id.* at 548, 558.

166. *Id.* at 546. As the Court noted, “constitutional rights may not be denied simply because of hostility to their assertion or exercise.” *Id.* at 551 (quoting *Watson v. City of Memphis*, 373 U.S. 526, 535 (1963)).

More recent First Amendment cases have confined *Brandenburg* almost entirely to a free speech context while ignoring its implications for assembly.¹⁶⁷ The Court's 1988 opinion in *Boos v. Barry* exemplifies this change.¹⁶⁸ The case involved a challenge to a District of Columbia law that prohibited, among other things, congregating "within 500 feet of any building or premises within the District of Columbia used or occupied by any foreign government or its representative or representatives as an embassy, legation, consulate, or for other official purposes."¹⁶⁹ The petitioner challenged the "deprivation of First Amendment speech and assembly rights" and argued that "the right to congregate is a component part of the 'right of the people peaceably to assemble' guaranteed by the First Amendment."¹⁷⁰ Justice O'Connor's opinion for the Court resolved the case under a free speech analysis without mentioning the freedom of assembly.¹⁷¹ The Court, in fact, has not addressed a freedom of assembly claim for over thirty years.¹⁷²

Part of the reason for the focus on speech to the detriment of assembly may stem from an elision of the inchoate nature of unlawful assembly with the manifestly observable "clear and present danger" of a riot. In the seminal First Amendment case *Cantwell v. Connecticut*, the Supreme Court observed that "[w]hen clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious."¹⁷³ Nine years later, the Court was equally clear in *Terminiello v. Chicago* that the danger must be imminent, and the First Amendment protected even "provocative and challenging" speech:

[A] function of free speech under our system of government is to invite dispute. . . . Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected

167. See e.g., *Bible Believers v. Wayne County*, 805 F.3d 228 (6th Cir. 2015) (applying the *Brandenburg* test in determining that free speech rights of religious protestors were violated when police arrested protestors for incitement at a city festival).

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

169. *Id.* at 316 (quoting S. J. Res. 191, ch. 29, § 1, 52 Stat. 30 § 22-1115 (1938), which has since been repealed).

170. Brief for Petitioners, *Boos v. Barry*, 485 U.S. 312 (1988) (No. 86-803), 1987 WL 881333, at *36, *43 (quoting U.S. CONST. amend. I).

171. *Boos*, 485 U.S. at 312.

172. *INAZU*, *supra* note 21, at 62; see also *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982) (discussing the right of assembly).

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

against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. There is no room under our Constitution for a more restrictive view.¹⁷⁴

Taken together, *Cantwell* and *Terminiello* draw what seems to be a clear distinction between “mere words” of incendiary speech and the “clear and present danger” of a riot. But that distinction ignores the reality that both speech and assembly run along a spectrum that ranges from entirely peaceful expression and activity to that which threatens imminent violence. As Justice Holmes famously wrote, “[e]very idea is an incitement.”¹⁷⁵ Similarly, every assembly short of a riot is just a gathering. Like speech, assembly can peacefully express “unpopular views,” “invite dispute,” and “stir[] people to anger” without lapsing into violence.¹⁷⁶

The Court’s failure to recognize these similarities between speech and assembly calls to mind Harry Kalven’s classic critique of First Amendment doctrine.¹⁷⁷ Lamenting the Court’s move away from the aspirational rhetoric in its 1939 decision in *Hague v. Committee for Industrial Organization*,¹⁷⁸ Kalven hinted at “subtle but definite transformations” in subsequent decisions.¹⁷⁹ He criticized “[t]he Court’s neat dichotomy of ‘speech pure’ and ‘speech plus,’” which protected expression that was reducible to verbal or written speech but disfavored “parades, pickets, and protest[s]” that were deemed to be “speech plus.”¹⁸⁰ Kalven took particular aim at two of the Court’s recent decisions pertaining to civil rights protests in public places, noting that the opinions “bristled with cautions and with a lack of sympathy for such forms of protest.”¹⁸¹

Few courts have recognized that the First Amendment’s imminence requirement applies to both speech and assembly. One of the rare examples is the Supreme Court of Virginia, which invalidated the state’s unlawful assembly

174. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949) (citations omitted). In *Terminiello*, the Court reviewed a jury instruction that specified that “misbehavior may constitute a breach of the peace if it stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance, or if it molests the inhabitants in the enjoyment of peace and quiet by arousing alarm.” *Id.* at 3. Rejecting this broad interpretation, the Court struck down the underlying ordinance. *Id.* at 5.

175. *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

176. See *Cox v. Louisiana*, 379 U.S. 536, 551–52 (1965) (quoting *Terminiello*, 337 U.S. at 4–5).

177. Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 14 (1965).

178. *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 514–16 (1939).

179. Kalven, *supra* note 177, at 14.

180. *Id.* at 22, 23.

181. *Id.* at 8 (referring to *Cox v. Louisiana*, 379 U.S. 536 (1965), and *Edwards v. South Carolina*, 372 U.S. 229 (1963)). For an elaboration of Kalven’s critique, see Inazu, *supra* note 19.

statute on overbreadth grounds in *Owens v. Commonwealth*.¹⁸² The two petitioners had been arrested, tried, and convicted for “remaining at the place of an unlawful assembly after having been lawfully warned to disperse.”¹⁸³ The statute governing unlawful assembly specified:

Whenever three or more persons assemble with the common intent or with means and preparations to do an unlawful act which would be riot if actually committed, but do not act toward the commission thereof, or whenever three or more persons assemble without authority of law and for the purpose of disturbing the peace or exciting public alarm or disorder, such assembly is an unlawful assembly.¹⁸⁴

The court concluded that the statute “makes unlawful a peaceable assembly that poses no clear and present danger.”¹⁸⁵ Recognizing the inchoate nature of unlawful assembly, the court observed, “[a]n assembly is made unlawful by the mere intent or purpose of the persons who gather together.”¹⁸⁶

A greater awareness of the objective measures of unlawful assembly does not mean jettisoning any attention to subjective measures of culpability. The mens rea component of an unlawful assembly provision properly requires law enforcement officials and prosecutors to focus on the subjective culpability of individual defendants. But these assessments should be made alongside external perceptions of harm and its imminence based on community standards of reasonableness. Mens rea alone should not support a charge of unlawful assembly when, as in *Owens*, “the assembly is peaceable and the persons gathered together have done nothing and said nothing.”¹⁸⁷

V. ADDITIONAL COMPLICATIONS

This Part examines three factors that further complicate contemporary approaches to unlawful assembly. The first is the role of social media in modern protests and the ways in which unlawful assembly intersects with “virtual assembly.”¹⁸⁸ The second is the professionalization of local policing. The third is the increase in resources available to local law enforcement.

182. *Owens v. Commonwealth*, 179 S.E.2d 477 (Va. 1971).

183. *Id.* at 478.

184. *Id.* at 478 n.2 (quoting VA. CODE ANN. §§ 18.1–254.1(c) (Supp.1970)).

185. *Id.* at 479.

186. *Id.*

187. *Id.*

188. See Inazu, *supra* note 29.

A. Virtual Assembly

Protests increasingly bridge physical and virtual spaces. The introduction of virtual space may amplify concerns about imminence, inchoacy, and subjectivity, particularly given the close relationship between unlawful assembly and conspiracy to commit a riot. Consider first an offline example. Suppose that Jim and six of his friends are gathered in front of the Ferguson QuikTrip and they agree to burn down the building. At that moment, they have satisfied the elements of unlawful assembly. If any of them takes a further step, they have engaged in conspiracy to commit riot.¹⁸⁹

The situation becomes more complex when we consider online scenarios. Suppose Jim sends a Facebook message to a group of six friends that reads: “Let’s meet in front of the Ferguson QuikTrip on Sunday night and burn the place down,” and one of Jim’s friends responds “We’ll see you there.” Taken together, those messages might plausibly form the basis of a charge of conspiracy to commit riot.¹⁹⁰

Whether the same facts could sustain a charge of unlawful assembly (as distinct from conspiracy) depends on whether the verb “assembles” in Missouri’s statute refers exclusively to physical, in-person gatherings. One understanding of an assembly is a coming together for a common purpose. But nothing inherently limits that assembly to a *physical* gathering. In fact, we can plausibly conceive of an expanded understanding of “assembly” that is similar to the ways that we have acknowledged changes to the constitutional understanding of “speech,” “press,” and “religion.”¹⁹¹

189. For related thought experiments, see generally Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CINCINNATI L. REV. 1 (2012).

190. To see why this is the case, recall that Missouri’s conspiracy statute requires an agreement to engage in conduct constituting an offense. The elements of the offense of riot are: (1) knowingly assembling with six or more other persons; (2) agreeing with such persons to violate any of the criminal laws of Missouri or of the United States with force or violence; and (3) while still so assembled, violating any of those laws. MO. REV. STAT. § 574.050 (2016). The first two elements absent the third constitute an unlawful assembly. There is nothing within conspiracy doctrine that would require the culpable agreement to occur during the actual physical assembly. For this reason, Jim’s reciprocated Facebook message could provide the basis for a charge not only of conspiracy to commit riot but alternatively, conspiracy to form an unlawful assembly.

191. Inazu, *supra* note 29, at 1122; *see also* District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (“Just as the First Amendment protects modern forms of communications . . . the Second Amendment extends, *prima facie*, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.” (citations omitted)); Religious Tech. Ctr. v. Lerma, 908 F. Supp. 1353, 1359 (E.D. Va. 1995) (“Rather than publishing in a newspaper, Lerma has used the Internet, which is rapidly evolving into both a universal newspaper and public forum. And although the law has not yet decided how to deal with the Internet, it is certain that this form of communication will retain First Amendment protections.”); Inazu, *supra* note 29, at 1122 n.145

Nor can we fully resolve this question by assuming that the legislature was focusing on the social harm of physical assemblies. It is plausible that the legislature was concerned with the criminal agreement between seven or more people rather than the physical presence of those people. And even though the historical concerns with this collective action had more to do with the threat of physical harm, we can imagine situations in which a virtual assembly of seven or more people today poses different and sometimes more serious social harms than a smaller physical assembly. Think, for example, of illegal virtual point-of-service attacks that could be employed with greater effect by simultaneous action than by an individual actor.¹⁹²

The thought experiment gains traction once we consider that contemporary protests often commingle virtual and physical communication. Consider once again the protests in Ferguson. Many of the protesters on the ground were communicating in real time through the use of social media. Their online communications could have constituted an agreement or even an overt act.

We can also envision the act of agreement occurring across a broader physical space. Offline, the communication between seven or more people in an unlawful assembly would usually have to be within earshot or in otherwise close proximity. But online we can contemplate Jim and the six other members of his Facebook group “hearing” one another through social media despite being spread out across greater distances.¹⁹³ Conceivably, Jim and his friends might even agree

(citing *Citizens United v. FEC*, 558 U.S. 310, 352 (2010)) (“With the advent of the Internet and the decline of print and broadcast media, moreover, the line between the media and others who wish to comment on political and social issues becomes far more blurred.”); Lee J. Strang, *The Meaning of “Religion” in the First Amendment*, 40 DUQ. L. REV. 181, 203 (2002) (“If one holds beliefs that are admittedly not religious in the traditional sense, in the sense the word religion was used by the Ratifiers and Framers of the First Amendment, the Court will still entitle those beliefs to the same protection as admittedly religious (or traditional) beliefs.”).

192. Social media also accelerates the speed with which groups are able to form. As Kaminski notes, “[t]he most significant claim about internet exceptionalism concerns the speed of communication. This might impact *Brandenburg’s* imminence requirement. . . . If groups can form so quickly that police cannot react, there might be an argument for ignoring the imminence requirement and allowing regulation before the call to arms happens. This, however, is exactly why *Brandenburg* has an imminence standard: the further back from actual harm regulation gets, the more it impinges on free expression.” Kaminski, *supra* note 189, at 80.
193. It seems unlikely that there is a threshold beyond which the lack of physical proximity categorically excludes liability for unlawful assembly. If the legislature had meant to limit its social harm to physical proximity, we might have expected an additional material element, such as a requirement that the seven or more persons be within a specified distance of one another. It is more probable that physical proximity to one another is not meant to be a constraint of the offense, which is another reason that a virtual unlawful assembly fits conceptually within the statute.

to engage in unlawful activity with force or violence in physically separate places.¹⁹⁴

The question becomes even more difficult, and more real-world, when we shift from Facebook to Twitter—where “friends” become “followers.” We know from the Ferguson protests and others like them that Twitter has become a popular mode of communication by protesters.¹⁹⁵ Ferguson protesters relied on social media to keep activists and journalists apprised of local developments. As “Black Lives Matter” protests spread nationwide, protest organizers in other cities made similar use of Twitter.¹⁹⁶

The intriguing difference between Twitter and Facebook is that the latter is typically a private closed network. In my earlier example, we can identify and count the members of Jim’s Facebook group.¹⁹⁷ With Twitter, the author of the message has far less control over its eventual audience. Suppose that Jim tweeted his message instead of posting it to a Facebook group.¹⁹⁸ At what point does the

194. For example, Jim and Claire might plan on burning the Ferguson QuikTrip while Sally and Bryan hit the Tower Grove Walgreens, and Frank and Paige show up at the Chipotle in University City. Suppose the seven of them agree to engage in unlawful activity with force or violence but only Jim and Claire actually engage in that activity. Are Jim’s friends still liable for unlawful assembly? Are others who join them at the nonviolent locations liable? Thanks to Jackie Carleton for this example.

195. See Kaminski, *supra* note 189, at 5 (citing Daniel Tovrov, *Flash Mobs: 5 Biggest Flash Mobs of All Time*, INT’L BUS. TIMES (Aug. 24, 2011, 8:30 AM), <http://www.ibtimes.com/articles/203118/20110824/flash-mob-biggest-flash-mobs-ever.htm> [<https://perma.cc/RVB2-AGZ9>]) (“Thousands of Iranians organized via Twitter in 2009 to protest the elections, and more than 50,000 people gathered in Tahrir Square in Egypt in 2010. Many of those who appeared were informed of the gatherings through social media tools such as Twitter or Facebook.”).

196. Local law enforcement took notice. In November 2014, Massachusetts officials monitored Facebook and Twitter for “critical intelligence about protesters’ plans to try to disrupt traffic on state highways.” Antonio Planas, *As Evans Lauds Boston Cops, Some Protesters Cry Foul*, BOS. HERALD (Nov. 27, 2014), http://www.bostonherald.com/news_opinion/local_coverage/2014/11/as_evans_lauds_boston_cops_some_protesters_cry_foul [<https://perma.cc/LQ2P-VBRJ>]. In December 2014, an internal email to California Highway Patrol commanders was captioned: “Do Not Advise Protesters That We Are Following Them on Social Media.” The email elaborated: “Please have your personnel refrain from such comments; we want to continue tracking the protesters as much as possible. If they believe we are tracking them, they will go silent.” Darwin BondGraham, *Counter-Terrorism Officials Helped Track Black Lives Matter Protesters*, E. BAY EXPRESS (Apr. 15, 2015), <http://www.eastbayexpress.com/oakland/counter-terrorism-officials-helped-track-black-lives-matter-protesters/Content?oid=4247605> [<https://perma.cc/D65Z-B4UX>].

197. *Protecting Your Privacy on 9 Popular Social Networks*, WEBWISE, <http://www.webwise.ie/teachers/protecting-your-privacy-on-9-popular-social-networks> [<https://perma.cc/97EZ-RAH2>] (“Open networks, such as Twitter, Instagram and Pinterest, are designed for you to communicate with the whole world. . . . Closed networks like WhatsApp, Snapchat and to some degree Facebook are used by groups of friends or connections to share updates, photos, thoughts etc. with each other.”).

198. The example is not as far-fetched as it sounds. See, e.g., Conor Friedersdorf, *Should Mom-and-Pops That Forgo Gay Weddings Be Destroyed?*, ATLANTIC (Apr. 3, 2015), <http://www.theatlantic.com/politics/archive/2015/04/should-businesses-that-quietly-oppose-gay-marriage-be->

tweet form the basis for a charge of unlawful assembly or conspiracy to commit riot? Does it depend on the number of Jim's Twitter followers? Suppose Jim has only one follower, who immediately tweets back her agreement to join him in burning down the QuikTrip. We may now plausibly have conspiracy to commit arson, but we lack sufficient evidence of an unlawful assembly or conspiracy to engage in riot. But suppose that instead of one follower, Jim has ten thousand followers. It might be that Jim's increased audience increases the threat of social harm, which may also depend on how many of Jim's followers are physically proximate to the QuikTrip. We could ask similar questions about the potential liability of a person who retweets Jim's initial tweet.¹⁹⁹ Each of these online scenarios raises questions about the scope of liability.²⁰⁰

B. Changes in Policing

The second evolving circumstance that affects the current law of unlawful assembly involves changes in local policing. One of the most important developments is the professionalization of policing, and the contrast between informal and ad hoc policing of an earlier era and more professional departments today. David Sklansky notes that early police reformers focused on "shifting control from precincts to headquarters and adopting quasi-military lines of command."²⁰¹ These strategies initially sought "to get officers out of the hands of ward bosses and into the front lines in the fight against crime."²⁰² But they eventually supported different objectives during what Robert Fogelson has called the "second wave" of police reform in the 1950s and 1960s.²⁰³ These new reformers focused on "streamlining operations, strengthening lines of command, raising the quality of personnel, leveraging personnel with technology, clarifying the organizational

destroyed/389489 [https://perma.cc/ZH9V-PVZ5] (noting that after media reported that the owners of Memories Pizza would not cater a gay wedding, a high school girls' golf coach in Indiana tweeted, "Who's going to Walkerton, IN to burn down #memoriespizza w me?").

199. Could the retweeter count as the seventh person to meet the threshold of an unlawful assembly (in other words, would the retweet be part of the same agreement)? Could the retweeter be charged as an accomplice? Does it matter if the retweeter is physically present at the protest?

200. Although it is unclear if and when Jim would be guilty of unlawful assembly or conspiracy, he is likely culpable for incitement to riot for his tweet. See Kaminski, *supra* note 189, at 8–9 ("If a person tweets, 'Let's meet all 70 of us in Times Square in 5 minutes to rob a bank,' . . . the author of the tweet could . . . constitutionally be punished for incitement to riot if the tweet calls for a large number of people to gather together to commit an unlawful act of force or violence, is likely to be understood as calling for riot, and that riot is imminent and likely to occur.")

201. David Alan Sklansky, *Police and Democracy*, 103 MICH. L. REV. 1699, 1742 (2005).

202. *Id.*

203. *Id.* (quoting ROBERT M. FOGELSON, *BIG-CITY POLICE* 167–92 (1977)).

mission, and building public support.”²⁰⁴ In turn, police departments shifted from community-oriented institutions committed to local civic order to independent organizations “not all that different from military or industrial units . . . [which] viewed the public . . . as a market that needed to be cultivated and directed.”²⁰⁵

Professionalization has sometimes been accompanied by changing demographics in law enforcement. In some departments and precincts, the responsibility for maintaining social order falls on police officers who are not themselves “from the neighborhood” and who may also be racially dissimilar from residents of the neighborhood. As William Stuntz has documented in his important book, *The Collapse of American Criminal Justice*, police officers in an earlier era lived in the neighborhoods they patrolled.²⁰⁶ They knew the streets, the homes, and the people. In other words, they knew the local context. They knew, for example, the kinds of disturbances that would actually cause “terror” to people in the neighborhood of an assembly, as well as those that would not. The connections between police officers and the local population were not without their problems—local relationships more easily facilitated corruption, personal animus, and extortion. But for purposes of informing the context and enforcement of unlawful assembly, those connections might have facilitated greater breathing space for public unrest and discontent.²⁰⁷

The downside of demographic changes and other changes to policing is reflected in the Department of Justice investigation into the Ferguson Police Department following the death of Michael Brown. The DOJ report concluded that “Ferguson’s law enforcement practices are shaped by the City’s focus on revenue rather than by public safety needs.”²⁰⁸ Those cost-driven motives are bad enough on their own, but they became even worse in light of “substantial evidence of racial bias among police and court staff in Ferguson.”²⁰⁹ As many commentators have noted, Ferguson’s overwhelmingly white police force did not reflect the city’s population demographics,²¹⁰ and

204. *Id.* at 1743.

205. *Id.*

206. WILLIAM J. STUNTZ, *THE COLLAPSE OF AMERICAN CRIMINAL JUSTICE* 294, 306–07 (2011).

207. *Cf.* NAACP v. Button, 371 U.S. 415, 433 (1963) (“First Amendment freedoms need breathing space to survive.”); *see also* Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 587 (2006) (discussing importance of ample protections for expressive protests in public spaces).

208. U.S. DEPT OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 2 (2015).

209. *Id.* at 5.

210. *See, e.g.*, Jeremy Ashkenas & Haeyoun Park, *The Race Gap in America’s Police Departments*, N.Y. TIMES (Apr. 8, 2015), http://www.nytimes.com/interactive/2014/09/03/us/the-race-gap-in-americas-police-departments.html?_r=0 [<https://perma.cc/88S2-GMDV>] (“Disparities in the

many of its officers did not reside in the areas that they policed.²¹¹ Those factors would plausibly weigh into real-time assessments of when a local assembly crossed the threshold from “peaceable” to “unlawful.” The risk of misjudging a situation based on a lack of familiarity with the local population might increase even further when those gathered are protesting against the actions or authority of law enforcement.

C. Increased Resources for Law Enforcement

The professionalization of police forces emerged alongside important technological innovations that have allowed officers in many jurisdictions to be more aware, more responsive, and more lethal in their engagements. From surveillance equipment to communications systems to weaponry, many of today’s police are better able to detect, monitor, and suppress violent mass uprisings than law enforcement officials of an earlier era. These developments are aided by the ability of local officials to call upon state and federal reinforcements. In some ways, this relationship is nothing new; in fact, Part I noted the role of federal authorities in quelling local insurrections under the Calling Forth Act and related laws from the earliest days of the country. But even if the possibility of state and federal reinforcements has long existed, the responsiveness and effectiveness of those resources has increased in modern times. In many jurisdictions, today’s reinforcements arrive by helicopter, not horseback.

Those developments may have a particular effect on the policy concerns underlying unlawful assembly. The desire of local officials to quell or contain local

racial makeup of police departments and their communities are most pronounced in smaller Midwestern cities, like Ferguson, where minorities make up at least two-thirds of the population. Ferguson went from majority white to majority black in the last two decades, but the police department is still predominantly white.”); *see also* U.S. DEPT OF JUSTICE, *supra* note 208, at 6–7 (“According to the 2010 Census, the black population in Ferguson has grown to 67% . . . [but o]f the 54 sworn officers currently serving in FPD, four are African American.”).

211. *See* Nate Silver, *Most Police Don’t Live in the Cities They Serve*, FIVETHIRTYEIGHT (Aug. 20, 2014, 4:14 PM), <http://fivethirtyeight.com/datalab/most-police-dont-live-in-the-cities-they-serve> [<https://perma.cc/ED6M-MYSH>] (noting that, while the population of Ferguson is not large enough to be required to report such statistics to the EEOC, according to EEOC reports only 59 percent of officers in the St. Louis Police Department live within the city limits of St. Louis); Andrew Stelzer, *Commuting Cops*, LIFE OF THE LAW (Sept. 8, 2015), <http://www.lifeofthelaw.org/2015/09/commuting-cops> [<https://perma.cc/ZPK4-P82E>] (stating that only about six percent of officers employed by the Ferguson police department live within the city limits of Ferguson); *see also* Ryan Gorman, *Many Cops Do Not Live in the Cities They Police, Should They?*, AOL (Aug. 23, 2014, 9:04 AM), <http://www.aol.com/article/2014/08/23/many-cops-do-not-live-in-the-cities-they-police-should-they/20951467> [<https://perma.cc/VRB4-LM3J>] (“U.S. Census data shows that many urban police do not live where they work, and a majority of those opting for the suburbs are white cops.”).

instability prior to actual violence is at least in part a desire to protect against the possibility that those officials could be overwhelmed by or otherwise lose control of an assembly. But today's reinforcements can be anywhere in the country in a matter of hours. And they bring not only increased numbers but also highly lethal weaponry and sophisticated command and control platforms.²¹² On the other hand, the response time of law enforcement reinforcements is not uniformly guaranteed in all jurisdictions. And some of the same technological advances that aid police (like surveillance, weaponry, and social media) also enable unlawful and violent action to unfold much more quickly and more lethally.²¹³

The events in Ferguson, Missouri, highlighted another dimension of the increased effectiveness in the relationship between local and federal authorities: the repurposing of federal equipment for use by local law enforcement officials.²¹⁴ Although a number of federal agencies offer these programs, the most well-known is the Department of Defense's 1033 program.²¹⁵ The vast majority of property conveyed to local law enforcement agencies consists of fairly mundane articles like office furniture and computers.²¹⁶ But the program also transfers "controlled property," which includes high-powered weapons and tactical vehicles.²¹⁷ At present, the Defense Department has transferred roughly 460,000 pieces of controlled property to local law enforcement agencies.²¹⁸ Some of this equipment is being appropriated for uses perhaps unanticipated by

212. When state or federal officials arrive on-scene, they also have even less familiarity with local citizenry and community norms than local law enforcement officials.

213. These concerns may also be exacerbated in states with more permissive open carry or concealed carry laws. Indeed, the interaction of First Amendment claims with Second Amendment claims warrants further study, particular in the public spaces in which assemblies confront expressive regulations. For some preliminary considerations along these lines, see generally Gregory P. Magarian, *Speaking Truth to Firepower: How the First Amendment Destabilizes the Second*, 91 TEX. L. REV. 49 (2012).

214. See Samuel P. Jordan, *Federalism, Democracy, and the Challenge of Ferguson*, 59 ST. LOUIS U. L.J. 1103, 1107 (2015) ("Ferguson has also highlighted ways in which the federal government routinely interacts with the states in the name of pursuing law enforcement goals.").

215. The program is named after its statutory authority, section 1033 of the National Defense Authorization Act for Fiscal Year 1997, Pub. L. 104-201, 110 Stat. 2639 (codified as 10 U.S.C. § 2576a (1996)); see DANIEL H. ELSE, CONG. RESEARCH SERV., THE "1033 PROGRAM," DEPARTMENT OF DEFENSE SUPPORT TO LAW ENFORCEMENT 2 (2014).

216. See EXEC. OFFICE OF THE PRESIDENT, REVIEW: FEDERAL SUPPORT FOR LOCAL LAW ENFORCEMENT EQUIPMENT ACQUISITION 3 (2014), http://www.whitehouse.gov/sites/default/files/docs/federal_support_for_local_law_enforcement_equipment_acquisition.pdf [<https://perma.cc/S65T-TSTS>].

217. *Id.* at 2 n.2.

218. *Id.* at 2.

its designers—combat vehicles built to withstand IEDs in the streets of Iraq are now patrolling Main Street in small towns across America.²¹⁹

For purposes of situating and interpreting restrictions on unlawful assembly, it is not hard to see how federally provided military-grade weapons and equipment, combined with faster response times from state and federal officials, augment the capacity of local law enforcement to maintain social order. And that increased capacity should cause us to revisit any existing premises that may have justified criminal restrictions on inchoate activity in an effort to prevent local resources from being overrun.

VI. REHABILITATING UNLAWFUL ASSEMBLY

In December 2014, protesters in Ferguson, Missouri sued to enjoin local law enforcement officials from arbitrarily enforcing unlawful assembly restrictions against them. A hearing for a temporary restraining order included testimony from officials charged with enforcing Missouri’s laws in Ferguson. One of the lawyers for the protesters asked a lieutenant with the St. Louis Metropolitan Police Department: “What makes an assembly unlawful under Missouri state law? . . . Isn’t it true that the crime must be accompanied by force or violence?”²²⁰ Tellingly, the officer responded: “No, I’m not aware of that.”²²¹

Other testimony established that some police officers in Ferguson had been given cards with the First Amendment printed on one side and Missouri’s unlawful assembly statute printed on the other side.²²² In granting the temporary restraining order, Judge Carol Jackson commented:

I guess that’s a start, but I think that it might be helpful for the officers to be instructed on exactly what they are and are not allowed to do in the context of those laws, and what those laws actually mean in a practical way. I don’t think it helps them to know what the words are if they don’t know how to implement the law.²²³

219. Seth Kershner, *If You Thought Obama Was Giving Less Military Gear to Local Police Departments, You Were Wrong*, IN THESE TIMES (Sept. 16, 2016), http://inthesetimes.com/features/obama_police_military_equipment_ban.html [<https://perma.cc/8MQW-EDRN>] (noting that in the previous nine months “cops have acquired more than 80 mine-resistant ambush protected vehicles (MRAPs)—15-ton vehicles that were originally designed to withstand roadside bombs in war zones”).

220. Transcript of Temporary Restraining Order Hearing at 132, *Templeton v. Dotson*, No. 4:14-C-2019 (E.D. Mo. Dec. 11, 2014) (indicating the testimony of Stephen Dodge).

221. *Id.*

222. *Id.* at 276.

223. *Id.*

Judge Jackson is right that proper training is crucial, and it appears to be lacking. But the problems with unlawful assembly go beyond training and extend to the substance of the law itself.

In fact, in some jurisdictions, contemporary approaches to unlawful assembly have neglected important constraints on liability.²²⁴ Recovering these constraints would not lead to an unbounded right to protest. In fact, the state would maintain its ability to control disorder and protect against violence in two important ways. First, a more carefully drafted unlawful assembly provision would still permit law enforcement to arrest actors who attempt or engage in violent or forceful lawbreaking. Second, law enforcement would properly retain the ability to arrest and prosecute nonviolent and non-forcible violations of the law once protesters have actually engaged in that conduct.

The most obvious way that law enforcement rightly limits unlawful assembly is when those assembled engage in violent conduct (at which point the conduct will also meet the definition of a riot). When conduct becomes violent, authorities are also justified in issuing a dispersal order. Under these circumstances, even otherwise law-abiding individuals can be convicted of unlawful assembly if they ignore such an order.²²⁵ Even here, though, law enforcement officials should address important boundary questions about the geographic scope and duration of a dispersal order (as well as reasonable measures to accommodate journalists and civilian observers). Once the imminent danger of violent activity has subsided, officials should allow peaceful protests to resume. Law enforcement can also properly declare an assembly unlawful when those assembled move toward imminent violence.²²⁶

224. *See supra* Part II.

225. *See State v. Mast*, 713 S.W.2d 601, 604 (Mo. Ct. App. 1986) (“Even though a person does not individually commit a violent act which poses a clear and present danger of violence, . . . every person who is present and cognizant of the unlawful acts being committed . . . can be found guilty of being unlawfully assembled.”); *State v. Mower*, 225 A.2d 627 (N.H. 1967) (affirming unlawful assembly conviction where defendant ran towards a violent unlawful assembly after police instructed defendant to turn around and disperse from area).

226. *See United Steelworkers of Am. v. Dalton*, 544 F. Supp. 282, 289 (E.D. Va. 1982) (discussing Virginia’s unlawful assembly statute, which requires “the existence of circumstances evidencing a present threat of violence or breach of public order”); *People v. Uptgraft*, 87 Cal. Rptr. 459, 464 (Cal. App. Dep’t Super. Ct. 1970) (affirming convictions for unlawful assembly where students stated their intention to burn down a school building); *Edwards v. State ex rel. Kimbrough*, 250 S.W.2d 19, 21, 23 (Tenn. 1952) (affirming trial court’s determination that assembly was unlawful where assembled persons preventing entry into courthouse were armed, had “full intent to use violence to accomplish their purpose,” and told individuals attempting to enter the courthouse that entry would be “at your own risk”); *State v. Stephanus*, 99 P. 428, 429 (Or. 1909) (“Any use of force or violence, or any threat to use force or violence, . . . which would be riot if actually committed, . . . is an unlawful assembly.”).

Separate and distinct from limitations that fall within the four corners of unlawful assembly are actions that constitute independent violations of the law once undertaken. Take the example of criminal trespass.²²⁷ Under a better conceived doctrine of unlawful assembly, protesters could be held liable for criminal trespass or conspiracy to commit criminal trespass (assuming the requisite proof). But they should not be liable or dispersible for an unlawful assembly contemplating criminal trespass unless law enforcement can establish that the target offense of criminal trespass would be undertaken with force or violence.²²⁸

In addition to criminal trespass, other nonviolent but unlawful actions that are properly restricted but whose mere contemplation should not constitute liability for unlawful assembly include some forms of peace disturbance, blocking a public way, or assembling to view an illegal event. A better approach would eliminate liability under the inchoate offense of unlawful assembly but retain liability for the attempted or completed target offense: Arrest the protesters once they have engaged in or started toward the nonviolent illegal conduct, not in anticipation of it.

Short of requiring a stronger showing of the force or violence requirement, we might consider practical ways to increase the protections for those assembled in public spaces. One possibility would be to introduce a two-tiered approach to the offense, retaining criminal liability for unlawful assembly that contemplated violent actions but assigning only civil liability (a modest fine and no criminal record) to unlawful assembly that contemplated only nonviolent actions. By decreasing the stigma and the sanction resulting from a nonviolent violation, the state could provide greater breathing space for those assembled. Another option would be to introduce a civil remedy against law enforcement officials who disperse or arrest protesters without the requisite level of reasonable suspicion that all material elements of the offense had been met.

227. See *Morgan v. District of Columbia*, 476 A.2d 1128, 1129 (D.C. 1984) (affirming convictions for unlawful assembly where a previously lawful assembly protesting on a public sidewalk entered the driveway of a private hotel and refused to leave after being told to do so by police); *State v. Davenport*, 72 S.E. 7, 15 (N.C. 1911) (affirming convictions for trespass where seventeen men entered rival logging camps and destroyed their lodges, noting that “defendants could have been properly indicted and convicted either of a forcible trespass, a riot, or rout or an unlawful assembly” (citations omitted)).

228. For examples of assemblies that appear to fall short of the force or violence threshold, see, for example, *Morgan*, 476 A.2d at 1128 (affirming convictions for unlawful assembly where previously lawful assembly protesting on public sidewalk entered driveway of private hotel and refused to leave after being told to do so by police); *Higgins v. Minaghan*, 47 N.W. 941, 942 (Wis. 1891) (“The [assembly] consisting of the crowd in front of or upon the defendant’s premises constituted an unlawful assembly.”).

CONCLUSION

Let us return to Antonio French in Ferguson on the evening of August 13, 2014. Suppose that Missouri law specified a narrower version of unlawful assembly. And suppose that local law enforcement officials had been adequately trained on the requirements of that law. How likely is it that French would have been arrested and charged with a criminal offense? What serious offense would law enforcement have contemplated that he was about to commit, and what reasonable resident in Ferguson would have feared that this offense was imminent? What evidence would officials have produced to suggest that French possessed the culpable mental state for anticipated violent lawbreaking? Of course, we will never know. And the unknowable counterfactual reminds us of the importance of what is at stake: the First Amendment moments that can never be replicated.

There is another counterfactual—the protest that turns violent and leads to the harm of people and the destruction of property. These competing scenarios point to the need for balance and judgment. They point to an appropriate delegation of authority to law enforcement that is considered alongside First Amendment interests. They point to the need for careful training, and a recognition that inherent in discretion is the likelihood that different authorities will reach different conclusions in any given situation. But perhaps most of all, these scenarios, and the real-life circumstances that actually unfolded, point to the imperative of structuring our statutory language as carefully as possible and asking difficult questions about the justifications for criminalizing certain activity in the first place. These inquiries are particularly needed with inchoate offenses that implicate First Amendment interests—offenses like unlawful assembly.