Defiance

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DEFIANCE

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INTRODUCTION

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

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

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

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

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

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

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

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

I. English Antecedents

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

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

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

One of the earliest incidents of mass public defiance of legal authority in England was the celebrated Peasants’ Revolt of 1381. There, a mob marched on London, presumably in revolt against a recently imposed head tax. It should be noted that a frequent characteristic of public defiance of legal authority both in England and in the United States is a complaint about

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


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

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

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

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

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

14. BARKER, supra note 9, at 110.
15. SCHAMA, supra note 13, at 249, 252.
16. Id.
17. Id.
18. BARKER, supra note 9, at 393–94.
20. WILLIAM SHAKESPEARE, HENRY VI, Part 2, act 4, sc. 2–7.
21. See JONES, SUMMER OF BLOOD, supra note 12, at 176 (describing the King’s “show of royal magnanimity at Smithfield” and providing for the security of London).
22. ROYALE, supra note 19, at 197.
23. Id. at 196–99.
24. Id. at 199–200.
25. Id. at 200–01.
once order was restored. This resulted in several more minor rebellions. Although the government had been able to put down the revolt, the very fact of the revolt indicated public dissatisfaction with the status quo, eventually culminating in outright civil war, i.e., the Wars of the Roses of the mid-fifteenth century.

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

26. Id. at 203–05.
27. Id. at 204–05.
30. See generally KENYON, supra note 29 (exploring the causes of the civil war period in England); SPENCER, supra note 29 (discussing the rule and execution of King Charles I).
32. Id. at 23; see generally JOHN MORRILL, A VERY SHORT INTRODUCTION TO STUART BRITAIN (1984) (contextualizing the century long period of English civil wars).
33. MILLER, ENGLISH CIVIL WARS, supra note 31, at 22–23.
34. Id. at 203.
35. KENYON, supra note 29, at 222–23, 228–29.
The final incident from English history of note was the 1780 Lord George Gordon Riots. This incident is extremely significant for at least three reasons. First, it occurred while Britain was fighting the American Revolution and, as such, had an impact on American culture. Second, it was one of the most devastating riots to ever occur in England. Third, it was inspired by religious prejudice and was taken over by a criminal mob with no concern for political ends. The riots began as a protest over a law passed by Parliament which attempted to slightly mitigate official discrimination against Roman Catholics. Lord George Gordon, an eccentric Scot, circulated a petition protesting the recent Act. He assembled a crowd to march with him to Parliament where the petition would be presented. Along the way, the crowd swelled into a mob composed, to a large extent, of criminals and hooligans who did not care at all about the petition’s substance but were primarily interested in rioting and looting. The mob arrived at Parliament and made an unsuccessful attempt to invade the Commons chamber. Gordon was permitted to present the petition which was overwhelmingly rejected by Parliament. Meanwhile, outside of Parliament, the mob turned violent, attacking members of the House of Lords who were arriving. The crowd continued to riot and loot for the next several nights, burning the house of Justice Mansfield and destroying the Newgate prison. Eventually, troops were called in and the riot was quelled.

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

36. See generally HIBBERT, supra note 29 (chronicling the riot and its inception).
37. Id. at 38–39, 63.
38. Id. at 34.
39. Id. at 1, 52.
40. Id. at 53–54.
41. Id. at 60–64.
42. Id. at 54.
43. Id. at 69–72.
44. Id. at 64–65.
45. Id. at 76, 91–92, 112–20.
46. Id. at 129–30.
and riot. Third, once the leaders lose control of the event, it is likely impossible to regain control. Fourth, once an event turns into a full-fledged riot, it may be impossible to allow it to simply die out on its own. Rather, the application of force may be necessary. Finally, if the purpose of the protest/riot is in itself disreputable, such as continuing religious discrimination, the purpose will eventually be rejected no matter how sincere and committed the protestors might be. The colonists fighting for their independence were well aware of the Gordon Riots and filed away the lessons learned for future reference.

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

II. THE AMERICAN REVOLUTION

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

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

48. John C. Miller, Origins of the American Revolution 180 (1943) [hereinafter Miller, American Revolution].
50. Miller, American Revolution, supra note 48, at 44–45; Draper, supra note 49, at 181–182.
51. Miller, American Revolution, supra note 48, at 181, 212.
John Otis’s famous case against the use of Writs of Assistance by the British against colonists also added to the defiant spirit. However, the incidents directly leading to the Revolution involved a series of taxes imposed by Parliament between 1764 and 1774. Initially, some colonists conceded that England had the right to impose taxes and regulation on external trade of the colonies, but maintained that internal taxes were forbidden. The English rejected this distinction between external and internal and between taxation and regulation. Rather, they asserted that concerning the colonies, Parliament had the right to impose taxation and regulation on the colonies to any extent. That was the very essence of the relation between the mother country and the colonies.

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

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

52. See DRAPER, supra note 49, at 186 (discussing John Adams’s opinion on what started the first spark of rebellion).
53. Id. at 218.
54. MILLER, AMERICAN REVOLUTION, supra note 48, at 180.
55. Id. at 181.
56. Id.
57. See id. (describing how colonists initially insisted American provinces were the “King’s colonies”).
58. Id.
60. MILLER, AMERICAN REVOLUTION, supra note 48, at 212.
61. Id.
62. Id.
63. DRAPER, supra note 49, at 244–45.
protests turned violent as the mob took over. The Stamp Act was promptly repealed, but it was replaced by the equally unpopular Townsend Acts, which placed new taxes on the imports of various necessary commodities. Enforcement of the Acts led to public protest, resulting in the Boston Massacre where British troops opened fire and killed several unarmed civilians. Tarring and feathering customs officials also became a prominent practice of the mob. Most of the taxes were repealed however the tax on imported tea remained in place. This led to the event which came to be known as the Boston Tea Party. A group of colonists disguised as Native Americans boarded a British ship and tossed the tea overboard. This famous and celebrated incident was clearly an act in defiance of law and destruction of property.

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

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

64. Id., Gilje, supra note 47, at 38–40.
65. Draper, supra note 49, at 249; Gilje, supra note 47, at 39, 41, 44.
66. Gilje, supra note 47, at 38.
67. Id. at 47.
68. Id.
69. Id.
71. Id., supra note 47, at 38.
72. Id.
73. Id.
Declaration of Independence. All thirteen colonies signed it. Jefferson and the Continental Congress knew that a declaration of independence was a defiance of established legal authority, so they thought carefully as to why they considered their actions justified. Sometimes “in the course of human events” to use Jefferson’s famous phrase, it is permissible, if not obligatory, for one people to disengage from the rule of another. Essentially, the Declaration argued that the purpose of government is to protect inalienable rights including “Life, Liberty and the pursuit of Happiness.” To justly pursue these ends, a government must derive its power and authority from the “consent of the governed.” In the event that a government fails to protect these inalienable rights and instead behaves in a tyrannical manner, the people have a right “to alter or to abolish it, and to institute [a] new Government.” Jefferson was explaining why at least in extreme circumstances there was a right not only to defiance but to revolution. Given that revolution should not occur “for light and transient causes,” Jefferson felt the need to detail the abuses of King George III, which led the colonists to declare independence. There followed a lengthy bill of particulars detailing the arbitrary abuse of power, the denial of self-government to the colonies, and of course, the imposition of taxes without consent.

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

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

76. MORGAN, supra note 59, at 76; see generally WILLARD STERNE RANDALL, THOMAS JEFFERSON: A LIFE (1995) (explaining Thomas Jefferson’s writing process); GARRY WILLS, INVENTING AMERICA (1979) (describing Thomas Jefferson’s environment while drafting the Declaration of Independence).
77. THE DECLARATION OF INDEPENDENCE (U.S. 1776).
78. Id. para. 1.
79. Id. para. 2.
80. Id.
81. Id.
82. Id.
83. Id. para. 2–29.
84. MILLER, AMERICAN REVOLUTION, supra note 48, at 44–45.
celebrated if the revolutionists prevail through violent action? Certainly, the Declaration and the Revolution illustrate that the rule of law has limits. The colonists were well aware that the peaceful settlement of grievances was preferable. The Declaration asserts that “We have Petitioned for Redress in the most humble terms.”\(^85\) Perhaps there was simply too great of a gulf of understanding between the two sides. The colonists wished to be treated as equals. The Crown thought of them and could only think of them as subjects and colonial subjects. As such, there was little, if any, common ground. For peaceful resolution of differences to be a possibility, there must be a common bond or at least certain shared understandings. That was arguably lacking at the time of the American Revolution. Is a lack of shared understanding a prerequisite for defiance of legal authority that fails to reach revolutionary proportions? Or contrary to the Revolution, is most subsequent defiance simply a result of impatience with established procedures?

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

III. SHAY’S REBELLION

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

\(^{85}\) THE DECLARATION OF INDEPENDENCE para. 30 (U.S. 1776).

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

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

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

87. See id. at 16–17 (explaining how the Massachusetts legislature sought to ease the burden on taxpayers); Paul De Valle, Massachusetts Troublemakers: Rebels, Reformers, and Radicals from the Bay State 44 (2009) (“Many good men, neighbors of the regulators, were being jailed for nonpayment of taxes and for other debts, and farms were being foreclosed on.”).
88. Richards, supra note 86, at 7–10, 43.
89. Id. at 58–59.
90. Gilje, supra note 47, at 44; Richards, supra note 86, at 16–17.
91. Richards, supra note 86, at 23, 34–35.
93. Richards, supra note 86, at 16.
96. Richards, supra note 86, at 127, 132.
97. Id. at 132–34.
IV. DEFIANCE OF THE MARSHALL COURT

A. M`Culloch v. Maryland

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

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

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

100. Id.
104. Id. at 870–71 (1824).
105. Id.
107. Id.
Marshal’s opinion in *McCulloch*, he wrote that the president must make his own interpretation of the Constitution and is not bound by prior Supreme Court precedent. Only the Secretary of the Treasury was authorized to remove federal funds from the Bank. The Secretary refused Jackson’s order to remove the funds from the Bank. Jackson dismissed the Secretary and appointed a replacement. Jackson made the same request of the replacement and was met with the same response. Once again, Jackson dismissed the Secretary and replaced him with future Chief Justice Roger Taney. Unlike his predecessors, Taney withdrew the funds, and the Bank of the United States collapsed. Because of his actions, the Senate refused to confirm Taney as permanent Secretary of the Treasury. Congress considered holding Jackson in contempt but declined when it became obvious that the public largely supported the President’s action. The President clearly defied the law that Congress had passed, but he did so as part of an early separation of powers struggle over the respective roles of the branches of government. Jackson was a strong-willed individual and was not easily bullied even by Congress.

B. *Cherokee Nation Decisions*

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

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110. Killenbeck, supra note 102, at 173.
111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
116. Id. at 174.
117. Id.
118. See generally *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831) (holding Native American tribes are not foreign nations subject to original jurisdiction under Article III of the Constitution).
the Cherokee Nation sued to prevent their removal from Georgia pursuant to the federal Indian Removal Act, as well as Georgia acts endorsing and requiring such removal.\footnote{121} The Supreme Court, in an opinion by Chief Justice Marshall, rejected the challenge for lack of standing on behalf of the Cherokee Nation on the ground that it was a domestic dependent nation rather than a foreign nation.\footnote{122} Consequently, the removal of the Cherokee Nation from Oklahoma, known as the Trail of Tears occurred.\footnote{123}

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

\begin{footnotes}
\footnotetext[121]{See generally id. (discussing the United States Supreme Court’s 1831 opinion regarding the Cherokee Nation’s lawsuit seeking an injunction against the state of Georgia from enforcing laws to remove the tribe from area lands).}
\footnotetext[122]{Id. at 19–20.}
\footnotetext[123]{BROGAN, supra note 119, at 68.}
\footnotetext[124]{See generally Worcester v. Georgia, 31 U.S. 515 (1832) (discussing the United States Supreme Court’s 1832 opinion invalidating Samuel A. Worcester’s conviction for trespass).}
\footnotetext[125]{Id. at 528–29.}
\footnotetext[126]{Id. at 529–31.}
\footnotetext[127]{LEONARD BAKER & JOHN MARSHALL, A LIFE IN LAW 746 (1974).}
\footnotetext[128]{Id.}
\footnotetext[129]{CHRISTOPHER L. TOMLIN, THE UNITED STATES SUPREME COURT: THE PURSUIT OF JUSTICE 63 (2005).}
\footnotetext[130]{Id.}
\end{footnotes}
so was Andrew Jackson. Jackson was not afraid to battle with Marshall and defy him if necessary.

V. THE NULLIFICATION CRISIS

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

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

133. Id. at 164.
134. Id. at 164–66.
136. JOHNSON, supra note 131, at 346.
137. Id.
138. Id.
139. See id. at 347 (noting Jackson’s issuance of a Nullification Proclamation, which expressed his disagreement with the ability of a state to annul any law of the Union).
140. Id.
famous debate in the Senate about the nature of the Union and the legitimacy of nullification.\textsuperscript{141} The Nullification Crisis was defused when Congress passed a law reducing tariffs.\textsuperscript{142} South Carolina repealed its Nullification Resolution.\textsuperscript{143}

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

VI. RELIGIOUS AND ETHNIC INCIDENTS PRIOR TO THE CIVIL WAR

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

\textsuperscript{142} Id. at 133.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 212–13.
\textsuperscript{145} GILJE, supra note 47, at 60, 65–67.
\textsuperscript{146} Id. at 65.
\textsuperscript{147} Id. at 66–67.
\textsuperscript{148} Id. at 69–70.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 71.
\textsuperscript{151} Id. at 73. This was dramatized in the motion picture \textit{THE GANGS OF NEW YORK} (Miramax Films 2002).
\textsuperscript{152} Id. at 72.
VII. THE ABOLITIONIST MOVEMENT

The Abolitionist Movement began in the colonies prior to the revolution led primarily by the Quakers of Pennsylvania. The abolitionists demanded an immediate end to slavery and must be distinguished from the Republicans like Lincoln, who supported a gradual end to slavery and the end to the spread of slavery into new states and territories. The abolitionists were propelled by moral fervor often religiously inspired. The Abolitionist Movement reached a fever pitch in the 1830s with the publication of The Liberator newspaper by William Lloyd Garrison. For the most part, the abolitionists proceeded by legal means, including petitioning Congress and mass mailings of pamphlets. Abolitionists were often met with violent counter-reaction as with the murder of abolitionist publisher Elijah Lovejoy by a mob in Alton, Illinois in 1837. However, on occasion, abolitionists turned to defiance of law. Perhaps the most well-known incident is the Kansas murders by crazed abolitionist John Brown and his subsequent unsuccessful seizure of the armory in Harpers Ferry, West Virginia.

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

153. Anti-Slavery in North America, QUAKERS IN THE WORLD
155. Id.
156. JOHNSON, supra note 131, at 447.
158. BROGAN, supra note 119, at 302.
159. JOHNSON, supra note 131, at 448–49.
160. Id. at 448.
captured and imprisoned in Wisconsin.\textsuperscript{162} His master, Bennami Garland, attempted to retrieve him pursuant to the Fugitive Slave Act.\textsuperscript{163} A mob led by Sherman Booth broke into the jail and set Glover free. Booth was successfully prosecuted by the United States.\textsuperscript{164} However, a Wisconsin court granted a writ of habeas corpus releasing Booth.\textsuperscript{165} This was yet another example of the doctrine of nullification in which the state interposed itself between a citizen and the enforcement of federal law. The United States appealed to the United States Supreme Court in \textit{Ableman v. Booth},\textsuperscript{166} which unanimously reversed the decision of the Wisconsin court.\textsuperscript{167} The Supreme Court was heavily criticized by anti-slavery advocates, however as a matter of federal law, it was clearly correct.\textsuperscript{168}

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

A. \textit{The Dorr Rebellion in Rhode Island}

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

\begin{itemize}
\item[162] BAKER, supra note 161, at 2.
\item[163] Id. at 1–2.
\item[164] Id. at 6, 8, 23, 109.
\item[165] \textit{Ableman}, 62 U.S. at 510–11.
\item[166] \textit{Ableman v. Booth}, 62 U.S. 506 (1858).
\item[167] Id. at 511, 526.
\item[168] See BERNARD SCHWARTZ, A HISTORY OF THE SUPREME COURT 93 (1993) (stating the Court had to reverse due to federal supremacy, otherwise they would have been authorizing state courts to suspend the operation of the federal judicial power).
\item[170] Id.; Anti-Slavery in North America, supra note 153.
\item[171] SCHWARTZ, supra note 168, at 95.
\item[172] Id.
\end{itemize}
ignored the Charter, held a People’s Convention, and drafted a new constitution which enfranchised a much larger constituency, held an election, and voted in the new constitution. Dorr was elected governor under the new constitution and demanded that the Charter government relinquish power. The Charter government passed a new constitution broadening the franchise, though not as much as the Dorr Constitution. The Dorr rebels declined to recognize the reformed constitution. Consequently, the established government declared martial law and attempted to arrest Dorr, who had fled the state. Although the Dorr Rebellion had been peaceable, it was still an attempt to overthrow the existing government. President Tyler recognized the Charter government as the legitimate government of Rhode Island, effectively ending the Dorr Rebellion. The Charter government attempted to arrest Martin Luther, a supporter of the Dorr Rebellion who, like Dorr, had also fled. The established government searched Luther’s house resulting in a trespass action being filed against Luther Borden, a member of the search party. Martin Luther argued that the Charter government lacked legitimate authority to act because it did not constitute a republican government within Article IV of the Constitution. This resulted in the great constitutional case of Luther v. Borden, in which the Supreme Court held that the question of who was the legitimate government of Rhode Island (at the heart of the case) and whether the Guarantee Clause of Article IV of the Constitution provided the means of providing an answer to that question was a political question beyond the competence of the federal judiciary. The existing establishment managed to defeat the Dorr Rebellion with military force. Dorr returned to the state, was convicted of treason, sentenced to hard labor, and died not long after his

173. Luther v. Borden, 48 U.S. 1, 36 (1849).
174. Id. at 37.
175. Id.; SCHWARTZ, supra note 168, at 95.
176. Luther, 48 U.S. at 37.
177. Id.
178. Id. at 34.
179. Id. at 44.
180. Id. at 34.
182. Luther, 48 U.S. at 38, 52.
184. Id. at 42.
185. SCHWARTZ, supra note 168, at 95.
release from prison.186 The Dorr Rebellion is an instance of populists frustrated with the impossibility of legal change turning to peaceful though extra-legal methods to change the existing system. Although the rebellion was forcibly put down, it did cause the state establishment to produce a new Constitution that enfranchised more people, though not as many as they had hoped for.187

B. The Dred Scott Decision and Lincoln’s Response

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

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

187. Id.
188. Id. at 418.
189. Id. at 427; see DON FEHRENBACHER, THE DRED SCOTT CASE 6 (1978) (expounding on Chief Justice Taney’s distinct positions on the rights of private property, the relationship between the Constitution and the Articles of Confederation, the privileges-and-immunities clause, and the meaning of due process).
191. Id. at 96, 105, 108.
192. Id. at 38–39. Lincoln mocked Douglas’s position by characterizing it as the Supreme Court opinions are equivalent to “Thus saith the Lord.” Id. at 114.
However, regarding the larger constitutional question, whether Congress could prohibit slavery in the territories, Lincoln argued that the Court lacked the final authority to resolve such an important issue in litigation between two private parties. At least until the Court reaffirmed that holding in subsequent cases, public officials had the right to attempt to change it. As usual, Lincoln walked a fine line. He did not attempt to justify outright defiance of the Court, however, unlike Douglas, he did not argue for automatic obedience either.

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

**VIII. SECESSION AND THE CIVIL WAR**

At least in retrospect, secession from the Union might seem like the ultimate act of defiance of law. And yet that may depend on who won the war. Theoretically, at least, the Civil War developed out of a longstanding disagreement over the nature of the nation’s origin. Abraham Lincoln fought the Civil War under the banner of popular sovereignty, that is, the people, through their ratifying conventions in 1788, formed the Union and the states did not have the power to dissolve it. The states, however, believed in a different theory of national origin. They believed that the Constitution, and the nation were created by a compact between the states, and if the United States government violated that compact, then the states, or at least some states, could dissolve it and go their own way. This disagreement went back to the founding of the nation. Chief Justice Marshall resolved the matter in favor of the popular sovereignty theory in *M’Culloch v. Maryland* in 1819. Given contemporary

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194. *Id.* at 119–20.
195. *Id.*
197. *Id.*
198. *Id.*
respect for the Court, that would presumably resolve the matter, and hence, secession would be defiance of the law as pronounced by the Supreme Court. However, that was not the case in the mid-nineteenth century. Perhaps the issue was simply too large and essential to be resolved in one Supreme Court opinion. Indeed, a decade after M’Culloch was decided, Webster and Hayne debated the matter in the Senate. Or perhaps the Court had not yet established sufficient respect with the public to have the final word on a constitutional issue of this magnitude. In any event, at least as a political matter, the question of the origin of the Constitution was still alive in 1861 and perhaps could only be resolved through bloodshed. Had Lincoln decided not to fight or had the Confederacy won the war, then perhaps the compact theory would have prevailed. Thus, at the time of secession, it was unclear whether the seceding states were acting in defiance of the law. They certainly believed that they were not. Following the war in Texas v. White, the Supreme Court reaffirmed the popular sovereignty theory concluding that secession was indeed illegal.

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

202. Id. at 725–26.
203. SCHWARTZ, supra note 168, at 127; see generally MARK H NEELY, JR., THE FATE OF LIBERTY (1991) (explaining Lincoln’s willingness to suspend civil liberties once he saw there would be no political consequence).
204. SCHWARTZ, supra note 168, at 128.
205. See generally NEELY, supra note 203 (describing Justice Taney’s disagreement with Lincoln).
206. Id. at 10.
207. Ex Parte Merryman, 17 F. Cas. 144 (C.C.Md. 1861) (No. 9,487).
Merryman should be set free. It has been argued that Lincoln defied the Chief Justice; however, that is not necessarily the case. Merryman was remanded to civil authorities, eventually released, and never tried for treason.

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

Regardless of whether secession and the Civil War constitutes defiance of law, certain incidents which occurred during the war, such as the New York Draft Riots of 1863, certainly qualify. The draft was instituted in New York City in 1863. The population of the city was heavily Irish, most employed as laborers. The Irish working class engaged in violent rioting which soon turned into a race riot. Several African Americans were lynched and an African American orphanage was burned down. There is a dispute over how many were killed during the riots, with estimates ranging from 120 to 2000. President Lincoln sent federal troops to quell the riots from the forces assembled at Gettysburg, where the battle occurred almost contemporaneously with the riots. To some extent, the New York City Draft Riots were a protest against the new Republican government in Washington, D.C., which was perceived as overreaching and unduly coercive. The draft riots were an example of a common occurrence: a protest or riot started with one object (the draft) which is then turned to a different subject (racial animus). The New York Draft Riots were a shameful incident in American history.

208. Id. at 152.
211. Id. at 357.
212. GILJE, supra note 47, at 123.
214. MCFHERSON, supra note 210, at 357.
215. Compare id. at 358 (explaining estimates have scaled between 120 and 1,200 killed), with HERBERT ASHBURY, THE GANGS OF NEW YORK 169 (1928) (providing 2,000 casualties as a “conservative” estimate).
217. Id. at 10–11.
IX. RESISTANCE TO RECONSTRUCTION

Following the end of the Civil War, the Republican Congress embarked on Reconstruction—an effort to put the nation back together and to protect the rights of recently freed slaves in the South.\textsuperscript{218} Reconstruction was extraordinarily unpopular in the South and provoked significant defiance, including violent resistance.\textsuperscript{219} In response to efforts to accord former slaves legal protection and civil rights, the Ku Klux Klan was formed to resist these changes.\textsuperscript{220} Less violently, southern states enacted Black Codes to deprive recently freed slaves of virtually all civil rights.\textsuperscript{221} In response, the Reconstruction Congress passed several laws and ultimately drafted the Fourteenth Amendment.\textsuperscript{222} Most of the activities of the Klan were clearly in defiance of law. Intimidation, terrorism, and murder\textsuperscript{223} can scarcely be defended as legitimate means of protest in a law-abiding society. Nevertheless, the Klan’s activities are an example of what can occur when a significant segment of the public loses confidence and respect for the law. The Reconstruction Congress drafted the Fifteenth Amendment, guaranteeing the right to vote without racial discrimination.\textsuperscript{224} However, this was readily evaded by various devices such as the poll tax, literacy tests, grandfather clauses, and White primaries.\textsuperscript{225}

The most infamous incident of White resistance to Reconstruction was the Colfax Massacre of 1873.\textsuperscript{226} Following a disputed election in Grant Parish, Louisiana, in which charges of election fraud circulated, Black Republicans surrounded the Colfax courthouse to protect the newly elected Republican officials.\textsuperscript{227} A mob of paramilitary White men gathered


\textsuperscript{219} Id.

\textsuperscript{220} BROGAN, supra note 119, at 362, 378.

\textsuperscript{221} Id.

\textsuperscript{222} Foner, supra note 218.

\textsuperscript{223} BROGAN, supra note 119, at 378.


\textsuperscript{225} Id.


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

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

X. PERSECUTION OF THE MORMONS

The basic beliefs of the Mormon religion, established in the early part of the nineteenth century, seemed strange and alien to many in the public, especially the belief in polygamy.239 From the outset, the Mormons and their founder and prophet Joseph Smith were met with violence.240 In 1844,
a mob in Illinois lynched Smith.\textsuperscript{241} The Mormons faced violent attacks and responded in kind.\textsuperscript{242} Thus, both the persecutors and the Mormons defied the law. Following Smith’s death, Brigham Young, the new leader of the Mormons, decided that the church needed to move farther West. They left Illinois and traveled to Utah to escape persecution, which indeed they did.\textsuperscript{243} The church grew in the Utah territory, which the Mormons called Deseret.\textsuperscript{244} With Young’s blessing, the Mormons continued to respond violently to both insiders and outsiders.\textsuperscript{245} Utah had filed petitions for statehood four times.\textsuperscript{246} The obstacle was the church’s endorsement of polygamy.\textsuperscript{247} In \textit{Reynolds v. United States},\textsuperscript{248} the Supreme Court held that the Free Exercise Clause of the First Amendment did not protect polygamy.\textsuperscript{249} To attain statehood for Utah, the Mormon Church was forced to alter its belief that God required polygamy, which it did.\textsuperscript{250} The fact that the Federal Government coerced the Mormon Church into changing its beliefs stands as one of the greatest affronts to freedom of religion in American history.

XI. LABOR WARS

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

\textsuperscript{242} BROGAN, supra note 119, at 241; GILJE, supra note 47, at 77–79.
\textsuperscript{243} Timeline, supra note 241.
\textsuperscript{244} Id.
\textsuperscript{245} Id.
\textsuperscript{247} Timeline, supra note 241.
\textsuperscript{248} Reynolds v. United States, 98 U.S. 145 (1878).
\textsuperscript{249} Id. at 168.
\textsuperscript{250} Arrington & McNamee, supra note 246.
\textsuperscript{251} GILJE, supra note 47, at 117.
\textsuperscript{252} Id. at 113–20.
both. The workers would leave the employer’s premise. The employer would then lock the workers out and replace them with strikebreakers, often African Americans. The striking workers would attack the strikebreakers, and the employers would call in security, usually Pinkerton detectives, to protect the strikebreakers. At that point, a gun battle would break out between the strikers and the Pinkertons. Many would be killed on both sides. Then, either the Governor would send in the National Guard, or the President would send in federal troops to stop the violence. The workers would return to work having accomplished little or nothing. Initially, the public tended to sympathize with the employers over the strikers. This shifted over time, and the employees eventually became objects of public sympathy, as their complaints were perceived as valid. Initially, the strikers were considered unsympathetic because they destroyed property and engaged in violence to achieve their ends. The fact that most workers tended to be eastern or southern European immigrants or Irish did not increase their popularity with the public. Also, the fact that their strikes were influenced or endorsed by well-known and despised radical groups, including socialists, communists, anarchists, and the International Workers of the World (IWW), known as the Wobblies, didn’t help the public perception of the labor movement.

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

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

253. Id. at 117–18.
254. Id.
255. Id. at 117.
256. Id. at 122–23.
257. Id. at 123.
258. Id. at 123–30.
259. Id. at 130–38.
A. The Molly Maguires

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

B. The Railroad Strike of 1877

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

263. KENNY, supra note 262, at 3.
264. Id.
265. Id. at 4.
266. BROGAN, supra note 119, at 429.
267. KENNY, supra note 262, at 3.
268. Id.
270. BROGAN, supra note 119, at 429.
Albany, New York, Philadelphia, Reading, Scranton, and St. Louis. The company brought in Pinkerton detectives to protect replacement workers. The striking workers attacked the Pinkerton detectives and a gun battle erupted. The Pennsylvania militia was brought in to suppress the strike. It was a violent strike resulting in great destruction of railroad property. It has been characterized as “the most spectacular and widespread strike in American history.” It was spontaneous, unorganized, and driven by desperation. As it unfolded, it involved defiance of law by both the workers and the companies.

C. The Haymarket Affair

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

274. Id.
275. GILJI, supra note 47, at 117.
276. See id. at 118 (describing the fights that occurred between the strikers and the militia).
277. Id. at 117.
278. ADAMIC, supra note 262, at 35.
279. See generally PAUL AVRICH, THE HAYMARKET TRAGEDY (1984) (detailing the pivotal Haymarket Affair which was spurred by a police officer firing into a crowd); JAMES GREEN, DEATH IN THE HAYMARKET (2006) (presenting analysis on the Haymarket strike).
280. See generally AVRICH, supra note 279 (describing the focus put on Chicago).
281. ADAMIC, supra note 262, at 68.
282. GREEN, supra note 279, at 170.
283. AVRICH, supra note 279, at xi.
284. Id.
285. Id.
officers were killed in the ensuing gunfight. Eight anarchists were arrested, tried, and sentenced to death for having delivered speeches that may have encouraged the bomb thrower (who was never identified). Subsequent investigations have shown that none of the men arrested, convicted, and executed had anything to do with the bomb. The Haymarket Affair became a rallying cry for the labor movement but a very polarizing incident in the struggle between capital and labor.

D. The Homestead Steel Strike

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

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

286. ADAMIC, supra note 262, at 74.
287. Id. at 76–77.
288. AVRICH, supra note 279, at xi.
289. Id. at xi–xii.
290. KRAUSE, supra note 273, at 3.
291. ADAMIC, supra note 262, at 104.
292. KRAUSE, supra note 273, at 3.
293. Id.
294. Id.
295. Id.
296. ADAMIC, supra note 262, at 105.
298. Id. at 3.
299. ADAMIC, supra note 262, at 105.
300. KRAUSE, supra note 273, at 4–5.
Both sides acted in defiance of law by resorting to a gun battle, which was clearly an unacceptable method of settling the dispute.

E. The Pullman Strike

In 1894, a strike was called in the Pullman plant in Chicago. Pullman owned a company town where many of the workers lived. When business declined, Pullman changed salaries for workers to a piecework system. The workers went on strike, disabling rail transportation nationwide. President Cleveland sent in federal troops to break up the strike. The strikers called for a boycott of any train carrying a Pullman car, which stunted rail traffic nationwide. With the arrival of federal troops, a mob assembled, destroying Pullman and railroad property. The violence and destruction spread throughout the Midwest and West. In view of the violence, a federal judge in Chicago entered an injunction ordering the union to cease interfering with rail traffic and to cease urging workers to strike. Eugene V. Debs, a leader of the union, was charged with contempt for violating the injunction, was convicted, and sent to prison for six months. The equitable authority to issue the injunction and the contempt conviction of Debs for violating it were upheld by a unanimous Supreme Court in 1895. Following the Debs case, the labor injunction became ubiquitous until Congress prohibited it in 1932 in the Norris-LaGuardia Act. At least thirty people were killed in the violence accompanying the Pullman Strike. This strike was the largest and most violent labor strike in United States history at the time, but certainly not the last.

301. DAVID RAY PAPKE, THE PULLMAN CASE 2 (1999); see generally ADAMIC, supra note 262 (explaining the events of the Pullman strike).
302. ADAMIC, supra note 262, at 116.
303. PAPKE, supra note 301, at 16.
304. ADAMIC, supra note 262, at 118.
305. PAPKE, supra note 301, at 20.
306. Id. at 24.
307. Id. at 33.
308. Id. at 34.
309. Id. at 41.
310. Id. at 38–50.
313. PAPKE, supra note 301, at 98.
314. Id. at 33, 35.
F. Idaho Mine Wars

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

G. Ludlow

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

316. LUKAS, supra note 315, at 132.
317. Id. at 134.
318. Id.
319. Id. at 135.
320. Id. at 111.
322. THOMAS G. ANDREWS, KILLING FOR COAL: AMERICA’S DEADLIEST LABOR WAR 1 (2010).
323. ADAMIC, supra note 262, at 158.
324. ANDREWS, supra note 322, at 9.
325. Id. at 7.
326. Id. at 1.
mine guards employed by the mine owners. 327 The guard brought in Gatling guns and opened fire. 328 Twenty were killed, including women and children who were huddled in depressions beneath the tents. 329 Following the massacre, the miners destroyed company property and engaged in violence in retaliation. 330 The massacre spoiled the reputation of mine owner, John D. Rockefeller, Jr. 331 President Wilson sent in federal troops to end the strike. 332 The Ludlow massacre became an iconic incident in the labor movement. 333 The site of the massacre is now a national historic site. 334 The defiance of law was initially by the company and the government, but eventually, the miners in retaliation.

H. Eastern Coal Wars

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

327. Id.
328. Id. at 12.
329. ADAMIC, supra note 262, at 185–87 (2008); see generally ANDREWS, supra note 322 (describing the Ludlow massacre); see also Colorado Experience: Ludlow Massacre (PBS television broadcast Apr. 18, 2013) (explaining many of the facts in the Ludlow massacre come from the documentary film Colorado Experience-The Ludlow Massacre).
331. ANDREWS, supra note 322, at 9.
333. Id.
334. Id.
336. Id.
337. Id.
338. Id.
339. Id.
340. Id.
341. Id.
The following year, when the Chicago-Virden Coal Company attempted to replace striking workers with African Americans, the striking workers opened fire on the train carrying the replacements. Many on both sides were shot. Twelve persons were killed. The Governor called in the National Guard. The incident became known as The Battle of Virden.

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

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

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343. Id. at 218.
344. Id.
345. Id. at 221.
346. See ROBERT J. CORNELL, THE ANTHRACITE COAL STRIKE OF 1902, at 110 (1957) (describing Roosevelt’s brief foray into becoming involved in the continued difficulties laborers faced with low wages, irregular employment, and hazardous working conditions).
347. Id. at 153.
349. Id.
350. Id.
351. Id.
352. Id.
353. Id.
354. Boissoneault, supra note 348. The marchers also intended to seek retribution for the murder of Sheriff Sid Hatfield. LON SAVAGE, THUNDER IN THE MOUNTAINS 73, 97 (1990).
where the local sheriff and armed men awaited their arrival. President Harding issued a proclamation ordering both sides to disperse. Both sides ignored the proclamation and fighting commenced. The Army arrived and dispersed the combatants. It is believed that as many as sixteen were killed.

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

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

I. The Bombing Campaign

Over a five-year period beginning in 1906, a bombing campaign sponsored by the International Association of Bridge Structural and Iron
Workers focused on construction sites which hired non-union workers.367 At least one hundred structures were destroyed in different states.368 Perhaps the most extreme event connected with the bombing campaign involved the bombing of the offices of the Los Angeles Times.369 Harrison Gray-Otis, the publisher of the Times, was a vigorous opponent of labor unions.370 On October 1, 1910, a bomb was detonated at the office of the Times killing twenty-one people and injuring many others.371 It was alleged that there was no bomb at all and that the explosion was attributable to a gas leak.372 The McNamara brothers, officers of the Iron Workers Union, were charged with the bombing.373 The McNamara, in somewhat of a shock, pled guilty to the bombing.374 Their attorney, Clarence Darrow, declared that a guilty plea was the only way to save the McNamara from execution.375 However, it was rumored at the time that the real reason for the surprising guilty pleas was to protect Darrow from conviction for jury tampering.376 Several more bombs were set off over the next several months.377 This may be partially attributable by the infiltration of the labor movement by organized crime.378 Many—including labor leader Samuel Gompers—condemned the bombing.379 The guilty pleas and convictions in the bombing cases went a long way towards domesticating the labor movement. Only the IWW remained committed to violence.380

367. ADAMIC, supra note 262, at 188–189, 196, 200.
368. See id. at 196–97 (“[T]he Iron Workers’ international union dynamited about 150 buildings and bridges . . . .”)
369. Id. at 206.
370. Id. at 203.
371. See id. at 212 (characterizing the damage caused by the bombing); Los Angeles Times Bombing (1910): Topics in Chronicling America, LIBR. OF CONG., https://guides.loc.gov/chronicling-america-los-angeles-times-bombing [https://perma.cc/Y7NM-ZSB8].
372. See ADAMIC, supra note 262, at 209, 212 (identifying the gas-explosion theory).
373. Id. at 214–15.
374. Id. at 229.
375. Id. at 232.
376. Id. at 233, 239.
377. See id. at 244–46, 253 (describing “a nationwide dynamite conspiracy”).
378. See id. at 253, 349 (explaining how “organized labor and organized crime” were intertwined).
379. See id. at 252 (“So Gompers pleaded with the ‘gorillas’ to refrain from dynamite in the future, and for a few years he was heeded.”).
380. Id. at 164.
J. Bread and Roses Strike

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

K. Steel Strike of 1919

In 1919, steelworkers in Gary, Indiana went on strike for higher wages leading to a nationwide steel strike. Martial law was declared in Gary, and the United States Army took control of the city. The strike was broken.
with a “crushing defeat” for the labor movement. Concerns that the strike was a product of foreign Bolshevism as well as racial prejudice against Black strikebreakers contributed to the failure of the strike.

L. Republic Steel Strike of 1937

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

M. Flint Sit-Down Strike

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

393. Id.
395. Id. at 102.
396. Id. at 3–4.
397. Id. at 134, 136; Carol Quirke, Reframing Chicago’s Memorial Day Massacre, May 30, 1937, 60 AM. Q. 129, 134 (2008).
398. See Quirke, supra note 397, at 132–33 (“Most in the crowd were peaceful . . . .”).
399. WHITE, supra note 394, at 272.
402. Id.
403. Id.
guards. Eventually, Governor Murphy sent the National Guard in as a peacekeeping force, leading to a settlement favoring labor by recognizing the union, agreeing not to punish the striking workers and to raise wages. This was seen as a significant victory for labor, more attributable to the depression and the New Deal than a response to violent labor confrontations which had occurred for a sixty-year period with slight victories for the labor movement.

N. Labor Violence

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

404. Id.
405. Id.
406. See id. (“And labor would never be the same”).
408. See id. (claiming the workers sought “safety regulations, better wages, fewer hours, and freedom of speech and assembly”).
411. See id. at 222 (characterizing some labor violence as unavoidable).
Even after workers and unions obtained legal protection, labor violence continued. A well-known example of this was the 1968 African American sanitation workers strike in Memphis. The labor dispute began when two sanitation workers were crushed to death by defective machinery and the city refused to pay compensation to their families. The workers went on strike bearing signs which read “I Am a Man.” The mayor ordered the strikers to return to work. The police used tear gas to disperse peaceful protestors. Dr. Martin Luther King, Jr. came to Memphis to support the strikers and later was assassinated there. After the King assassination, a settlement with the strikers was reached with the intervention of President Johnson.

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

413. See The Right to Strike, NLRB, https://www.nlrb.gov/strikes (outlining legal protections for employees).
416. Id.
418. Memphis Sanitation Workers’ Strike, supra note 414.
Similar incidents occurred over the next four decades in which strikebreakers and non-union workers were beaten or shot and company property was vandalized.\textsuperscript{423} Sometimes, when the criminals have been identified, they have been charged, convicted, and imprisoned.\textsuperscript{424} It would seem that with some frequency, unions and workers cannot resist violent action to achieve their ends. The employers as well as law enforcement often responded in kind.\textsuperscript{425} As such, a cycle of violence has been perpetuated over decades.\textsuperscript{426} Eventually, the violence to persons declined, however, the destruction of property remained.\textsuperscript{427} There may be several explanations for this. Over time, society may have placed a greater value on life and bodily integrity. Correspondingly, the civil and criminal penalties for taking the life of a human being may have increased, providing a disincentive to murder. Alternatively, with victories through the legislative process protecting the right to organize as well as many of the substantive goals of prior labor conflicts, perhaps the labor movement mellowed somewhat.

\section*{XII. WORLD WAR I PROTESTS}

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

\begin{itemize}
\item 423. See Taft & Ross, supra note 410, at 221 (describing the likely causes of labor violence in America).
\item 424. See, e.g., id. at 243 (recalling the arrest of violent strikers).
\item 425. See, e.g., id. ("The pickets, on the other hand, complained that they were victims of repeated assaults by the police and hired sluggers of the employers.").
\item 426. See generally id. (explaining the violent history of the labor movement).
\item 427. GILJE, supra note 47, at 170, 174.
\item 428. See GEOFFREY STONE, PERILOUS TIMES 137 (2003) (describing political unrest at home and abroad).
\item 429. See id. at 136–37 (acknowledging the different sentiments expressed by Americans toward the war).
\item 430. See id. at 137 (explaining Wilson’s detestation of disloyalty and criticism concerning America’s involvement in the war).
\end{itemize}
First Amendment guarantee of freedom of speech as it has evolved; however, free speech jurisprudence was in its infancy and the courts generally upheld the convictions. Given how the First Amendment has developed, most of these convictions are now seen as unjust and unconstitutional, however at the time they were certainly legally legitimate. Some of the defendants sincerely believed in a more expansive conception of freedom of speech than the contemporary judiciary was prepared to recognize. As such they did not believe that they were violating the law. Rather, they believed, if anything, the government was violating their constitutional rights by harassing, arresting, and prosecuting them. Others were radical ideologues who did not respect the system and simply did not care that they were defying its laws. Indeed, their ultimate purpose was to destroy the system and its laws.

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

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432. See, e.g., id. at 49 (raising the issue of free speech).
433. See, e.g., id. at 51–52 (denying relief based on the First Amendment).
constitutionally protected but was not then.\textsuperscript{438} As such, members of these organizations were ultimately defying the law. Arguably, some were unsuccessfully simply testing the limits of the law. These and others, through their conduct, were paving the way to a more expansive and better understanding of First Amendment protection. As such, since they were defying the law, perhaps by doing so, they were helping to create a better understanding of constitutional rights. And yet others were dangerous radicals, intent on violently destroying the system who the government had the right to prosecute and imprison.

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

XIII. Tulsa Massacre of 1921

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

\footnotesize{\textsuperscript{438} See Rohr, \textit{supra} note 436, at 1–3 (celebrating the evolution of First Amendment jurisprudence and the freedom to associate).}

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

\footnotesize{\textsuperscript{440} JAMES S. HIRSCH, \textit{RIOT AND REMEMBRANCE: THE TULSA RACE WAR AND ITS LEGACY} 78 (2002); SCOTT ELLSWORTH, \textit{THE GROUND BREAKING: AN AMERICAN CITY AND ITS SEARCH FOR JUSTICE} 18 (2021).}
local jail.441 A lynch mob gathered outside of the jail.442 A group of armed African Americans gathered to prevent a lynching.443 There was an attempt to disarm one of the African Americans.444 A gun battle broke out and twelve were killed.445 That evening, a White mob burned thirty-five blocks of Greenwood to the ground killing at least 100 African Americans.446 It was alleged that airplanes were used to drop bombs on Black owned structures and to shoot fleeing Black citizens.447 The remaining, now homeless, African Americans were placed in internment camps.448 The Oklahoma National Guard arrived and martial law was declared.449 This tragic event was covered up and ignored for decades.450 Eighty years later, the Oklahoma Commission to Study the Tulsa Race Riots of 1921 recommended that reparations be paid to survivors and their descendants.451 The Tulsa Riot of 1921 was an instance in which the government and various private White citizens of Tulsa were clearly defying the law by engaging in violent terroristic and murderous activity.452 The African American community of Tulsa was free from blame.

XIV. Prohibition and the Defiance of Prohibition

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

442. HIRSCH, supra note 440, at 81.
443. Id. at 82–83.
444. Id. at 89.
445. Id. at 89–90.
446. ELLSWORTH, supra note 440, at 31–33.
447. Id. at 32–33.
448. HIRSCH, supra note 440, at 142–43.
450. HIRSCH, supra note 440, at 168–169; ELLSWORTH, supra note 440.
451. ELLSWORTH, supra note 440, at 248–49.
452. Id.
founding of the Women’s Temperance Union in 1873.\textsuperscript{454} The temperance supporters, or “drys” as they were known believed that public consumption of alcohol resulted in moral decay, economic waste, family violence and crime.\textsuperscript{455} The movement was inspired by certain Protestant denominations which were spiritually opposed to drinking as well as a rural sensibility that urban saloons were dens of corruption.\textsuperscript{456} To at least some extent, the battle between drys and wets became a battle between different Christian denominations, between nativists and European immigrants and between rural and urban America.\textsuperscript{457} Eventually, the Women’s Temperance Union was displaced at the head of the movement by the Anti-Saloon League.\textsuperscript{458}

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

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

\textsuperscript{454} Id. at 36–38.
\textsuperscript{455} Id.
\textsuperscript{456} Id. at 26–27.
\textsuperscript{457} Id. at 47–49.
\textsuperscript{458} Id. at 52.
\textsuperscript{459} Id. at 35.
\textsuperscript{460} Id. at 40–44.
\textsuperscript{461} Id.
right to vote, the Anti-Saloon League accomplished at least two things: expanding the coalition supporting the Prohibition Amendment as well as enfranchising a group, who on the whole, were likely to favor Prohibition.\footnote{464} A number of state legislatures enacted prohibition laws followed by the ratification of the Eighteenth Amendment banning “the manufacture, sale and transportation” of alcoholic beverages.\footnote{465} The Volstead Act was passed by Congress as Enabling legislation for the Eighteenth Amendment.\footnote{466} Prohibition lasted for thirteen years until 1933 when the Eighteenth Amendment was repealed by the Twenty-First Amendment.\footnote{467} During that period there was widespread defiance of the law especially by organized crime which imported and distributed alcoholic beverages and by “speakeasies” which served them.\footnote{468} The response to Prohibition, especially in urban areas, was perhaps the most extreme instance of defiance of legal authority in United States history. Unlike the Civil Rights Movement of the 1950s and 1960s, the defiance was private rather than public.\footnote{469} And it was not part of a protest movement to change the law. Rather, it was simply to make money, or to have a good time.\footnote{470} The defiance of the law during prohibition stemmed mostly from a difference in rural and urban values.\footnote{471} To use modern terminology, it was part of a “culture war.” The Eighteenth Amendment and the Volstead Act gave rise to massive bootlegging.\footnote{472} This was criminal activity to be sure. However, the public demand which made bootlegging a profitable business rendered it something more than ordinary criminal activity. It became widespread defiance of the law. Prohibition may have led to the large-scale creation of organized crime.\footnote{473} Moon shining operations developed

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\begin{footnotes}
\item{465.} BEDH, supra note 453, at 77–80.
\item{466.} Id.
\item{467.} Id. at 235–36.
\item{468.} Id. at 87–89.
\item{469.} Prohibition: A Case Study of Progressive Reform, supra note 462.
\item{470.} Mark Thornton, Alcohol Prohibition Was a Failure, CATO INST. POLICY ANALYSIS NO. 157, https://www.cato.org/policy-analysis/alcohol-prohibition-was-failure [https://perma.cc/JY8Y-6VGM].
\item{471.} Hicks and Slicks: The Urban-Rural Confrontation of the Twenties, AUSTIN CMTY. COLL., https://www.austintx.edu/lpatrick/his1302/hicks.html [https://perma.cc/7SEM-EUKK].
\item{472.} Thornton, supra note 470.
\item{473.} OKRENT, supra note 463, at 320, 365–67.
\end{footnotes}
throughout the South to provide illegal alcohol.\textsuperscript{474} Illegal stills were often operated by otherwise law-abiding people to profit from defiance of a particularly unpopular law.\textsuperscript{475} Speakeasies proliferated in urban areas to serve the thirsty public.\textsuperscript{476} This was not open defiance of law to be sure that in some sense, the defiance took place privately, but it was often semi-open in that enforcement officials were often paid off to look away.\textsuperscript{477} The case for the enforcement of prohibition laws was not helped by the fact that high federal officials, including presidents and congressmen, fairly openly defied it.\textsuperscript{478}

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

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

\begin{itemize}
\item \textsuperscript{474} BEHR, supra note 453, at 172.
\item \textsuperscript{475} Id.
\item \textsuperscript{476} OKRENT, supra note 463, at 207–09.
\item \textsuperscript{477} Id. at 208, 319–20.
\item \textsuperscript{478} BEHR, supra note 453, at 85, 115.
\item \textsuperscript{479} OKRENT, supra note 463, at 373–76.
\item \textsuperscript{480} Id. at 351–54; ADAMIC, supra note 262, at 235.
\end{itemize}
XV. DEFIANCE BY THE JEHOVAH’S WITNESSES AND THEIR OPPONENTS

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

Perhaps the most celebrated cases of defiance involved the refusal of Jehovah’s Witness children to recite the Pledge of Allegiance or salute the flag since, according to their religious beliefs, that would amount to worshiping a graven idol. In 1935, William and Lillian Gobitis were expelled from the Minersville, Pennsylvania public school for refusing to salute the American flag in violation of state law. The Supreme Court upheld the expulsions.\textsuperscript{486} The \textit{Gobitis} decision was issued in the earliest days of World War II, a time of intense patriotic fervor. Following the \textit{Gobitis} decision, Jehovah’s Witnesses were subjected to extreme legal harassment and physical brutality nationwide.\textsuperscript{488} Three years later, two Jehovah’s Witness children were sent home from school in West Virginia for refusal to salute the flag.\textsuperscript{489} In \textit{West Virginia Bd. of Education v. Barnette}, 319 U.S. 624 (1943), the Supreme Court held that the state law requiring students to salute the flag violated the First Amendment by compelling religious practice.

\textsuperscript{481} Shane Francis Peters, \textit{Judging Jehovah’s Witnesses} 33 (2000).

\textsuperscript{482} Among the major cases that the Witnesses won before the Supreme Court were West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Marsh v. Alabama, 326 U.S. 501 (1946); Cantwell v. Connecticut, 310 U.S. 296 (1940); Martin v. City of Struthers, 319 U.S. 141 (1943); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Jamison v. Texas, 318 U.S. 413 (1943); Largent v. Texas, 318 U.S. 418 (1943); Lovell v. City of Griffin, 303 U.S. 444 (1938); Schneider v. New Jersey, 308 U.S. 147 (1939). Even cases in which the Witnesses did not prevail they established significant principles of First Amendment doctrine in Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Cox v. New Hampshire, 312 U.S. 569 (1941); Jones v. Opelika, 516 U.S. 584 (1942).

\textsuperscript{483} Peters, supra note 481, at 34.

\textsuperscript{484} Id. at 12.

\textsuperscript{485} Id.

\textsuperscript{486} Minersville Sch. Dist. v. Gobitis, 310 U.S. 586, 600 (1940).

\textsuperscript{487} Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940).

\textsuperscript{488} Peters, supra note 481, at 95.

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

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

XVI. Brown v. Board of Education, School Desegregation and Resistance

In 1954, in Brown v. Board of Education, the Supreme Court unanimously declared that legally enforced racial segregation in public schools violated the Fourteenth Amendment of the Constitution. Racial segregation in the South and in many border states had been practiced for decades, at least in partial reliance on the Court’s 1896 decision in Plessy v. Ferguson. Many states and individual school districts, including the Topeka School District, the defendant in Brown, complied with the decision readily, but some did not. In oral arguments focusing on the remedy, the state’s attorney for South Carolina would not commit to compliance by the state. The
justices assumed that there would be resistance to school integration but probably underestimated the breadth and intensity of that resistance.\footnote{Id. at 14.}

The crucial case with respect to defiance of judicial desegregation mandates came with respect to Central High School in Little Rock, Arkansas. In an attempt to resist integration of Central High, Governor Orville Faubus attempted to resurrect the long-discredited doctrine of interposition.\footnote{\textit{Id.} at 99.} He argued that in order to protect the citizens of Arkansas from overreaching by the federal government, he would interpose Arkansas law enforcement officers between the federal government and the high school.\footnote{Id. at 102–03.} In negotiations with President Eisenhower, Faubus backed down, but he declined to order Arkansas law enforcement to protect the nine African American students assigned to Central High.\footnote{\textit{Id.} at 102–03.} As a result, defiance by a state official was replaced by defiance by an angry mob.\footnote{\textit{Id.} at 102–03.} Eventually, President Eisenhower sent in National Guard troops and Central High was desegregated.\footnote{\textit{Id.} at 102–03.} In response to Governor Faubus’s resistance to a federal district court order, the Supreme Court published its opinion in \textit{Cooper v. Aaron},\footnote{\textit{Id.} at 14.} signed, as if co-authored, by all nine justices.\footnote{\textit{Id.} at 14.} The Court obviously viewed this as a severe challenge to its authority, as ultimate constitutional interpreter as well it was. Perhaps, the Court may have overstated its role as ultimate and exclusive interpreter of the Constitution, however it saw itself as backed into a corner as had not been the case since the early days of the republic.

Despite the strong language employed by the Court in \textit{Cooper v. Aaron}, resistance to desegregation decrees did not cease in 1958 but continued for the better part of another decade.\footnote{\textit{Id.} at 14.} The Court has been criticized for not standing behind lower federal courts who were bearing most of the brunt of resistance to desegregation.\footnote{\textit{Id.} at 14.} Indeed, some school districts resisted desegregation with vigor.\footnote{\textit{Id.} at 14.} Prince Edward County, Virginia closed its...
public schools rather than desegregate. The Court invalidated this tactic as inconsistent with the district court’s mandate.

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

XVII. THE CIVIL RIGHTS MOVEMENT

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

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

511. See id. at 225 (acknowledging the school district had been one of the parties in the five cases decided in Brown v. Bd. of Educ., 347 U.S. 483 (1954)).
513. GARROW, BEARING THE CROSS, supra note 419, at 619.
514. Id. at 609–24.
515. Id.
516. Id. It may be with the decline of lynching in the South, African Americans became more assertive. GHJE, supra note 47, at 152.
517. GARROW, BEARING THE CROSS, supra note 419, at 11–14.
518. Id. at 12.
519. Id. at 13.
520. Id. at 14.
over segregation and mistreatment.\textsuperscript{521} There had been a boycott of local bus segregation a few years earlier in Baton Rouge, Louisiana.\textsuperscript{522} A Black teenager, Emmet Till, had been murdered by White men in Mississippi earlier in the year.\textsuperscript{523} There was a lengthy history of Montgomery bus drivers abusing African American passengers.\textsuperscript{524}

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

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

\textsuperscript{521} \textit{Id.} at 12–13.
\textsuperscript{522} K\textsc{larman}, \textit{supra} note 503, at 371.
\textsuperscript{523} \textit{Id.} at 424–25.
\textsuperscript{524} G\textsc{arrow}, \textit{BEARING THE CROSS}, \textit{supra} note 419, at 11–13.
\textsuperscript{525} \textit{Id.} at 12.
\textsuperscript{526} \textit{Id.} at 82. The boycott was not intended to end racial segregation on the busses but merely to modify it so that an African American would not need to relinquish his or her seat to a White person. \textit{Id.} at 24. Under Dr. King’s proposal, African Americans would still be required to sit in the back of the bus.
\textsuperscript{527} G\textsc{arrow}, \textit{BEARING THE CROSS}, \textit{supra} note 419, at 14.
\textsuperscript{528} Gayle v. Browder, 352 U.S. 903 (1956).
\textsuperscript{529} G\textsc{arrow}, \textit{BEARING THE CROSS}, \textit{supra} note 419, at 83.
\textsuperscript{530} \textit{Id.}
\textsuperscript{531} K\textsc{larman}, \textit{supra} note 503, at 373.
\textsuperscript{532} \textit{Id.}
\textsuperscript{533} D\textsc{avid} H\textsc{alberstam}, \textit{THE CHILDREN} 234 (1998).
over 300 in the next few days. The sit-ins spread throughout the South. The sit-ins transformed into a boycott of stores operating segregated lunch counters. The loss of business pursuant to the boycotts prompted the stores to desegregate their lunch counters.

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

The Civil Rights Movement scored a major victory with Dr. King’s direct action protest movement in Birmingham, Alabama in spring 1963. Protest marches were scheduled to attempt to reach the city center. The organizers of the marches expected that hard-core segregationist Commissioner of Public Safety, Bull Connor, would overreact to the challenge to his authority and use force which the national media would cover and bring national publicity to the violence directed against African Americans in the South. He did just that turning police dogs and water hoses against the protestors, many of whom were children. Pictures of this violent reaction were featured in the national media. This one event was probably the point at which the civil rights non-violence movement and Dr. King began to achieve victory. It was recognized in Birmingham and later in Selma, that it was not the peaceful protest march

534. Id. at 93; Greensboro Sit-In, HIST. (Jan 25, 2022), https://www.history.com/topics/black-history/the-greensboro-sit-in [https://perma.cc/E78C-S93P].
535. Id. at 234.
536. Id.
537. Id.
539. Id.
540. Id.
541. GARROW, BEARING THE CROSS, supra note 419, at 231–86 (describing the events of the Birmingham march and the aftermath).
542. Id. at 248–49.
543. Id. at 248–49. Wyatt Walker who directed the protest for the Southern Christian Leadership Conference later explained, “We did with design precipitate crises, crucial crises in order to expose what the black community was up against.” Id. at 248.
544. KLAHRMAN, supra note 503, at 434.
545. Id. at 434–35.
546. Id. at 435–36.
that achieved results, but rather the violent overreaction of law enforcement
officials covered in detail by the national media that made the difference.547
It was Bull Connor’s police dogs and fire hoses instead of Dr. King’s
peaceful march that achieved the ends of the movement.

The cases of Walker v. City of Birmingham548 and Shuttlesworth v. City of
Birmingham549 illustrate the Supreme Court’s approach to defiance of legal
authority. Birmingham, Alabama had been a hotbed of civil rights protest
throughout the Spring of 1963.550 Dr. Martin Luther King, Jr. had been
arrested and wrote his famous letter from the Birmingham jail.551
Commissioner Bull Connor had inadvertently evoked strong national
sympathy for the civil rights movement by turning police dogs and fire hoses
on peaceful protestors.552 The controversial Children’s Crusade had taken
place.553

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

547. Id. at 436.
550. KLARMAN, supra note 503, at 434–35.
552. KLARMAN, supra note 503, at 434–35.
553. HALBERSTAM, supra note 533, at 439–43.
555. Id. at 309.
556. Id.
557. Id. at 311.
558. Id. at 312.
challenge it is through the legal process. In other words, a party could march now and challenge a legislative act later, but not so with a judicial order. Even if illegal, the judicial order could only be challenged through the appropriate legal process. Defiance and subsequent challenge were impermissible.

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

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

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561. Id. at 320.
562. See generally DAVID GARROW, PROTEST AT SELMA (1978) [hereinafter GARROW, PROTEST] (detailing the planning and outcomes of various marches advancing voting rights in Selma, Alabama).
563. Id. at 39.
564. Id. at 66.
565. Id. at 76.
566. Id.
567. Id.
568. Id. at 115.
569. Id.
570. Id. at 116.
571. Id. at 133.
The organizers of the protests anticipated the violent reaction and deliberately provoked it through peaceful protest.\footnote{Id. at 228.} The organizers of the protests anticipated the violent reaction and deliberately provoked it through peaceful protest.\footnote{Id. at 135.}

Civil rights protestors defied many other laws as well. In some instances, the laws were either passed or administered for the purpose of targeting and quashing civil rights protests.\footnote{Id. at 87, 132.} Such laws were regularly invalidated.\footnote{Id. at 132.} Other laws were deemed to have legitimate purposes and were upheld in the face of defiance.\footnote{Adderley v. Florida, 385 U.S. 39, 48 (1966).} These included conducting a protest in a near jail for instance.\footnote{Id. at 40.}

The defiance of law by the Civil Rights Movement is celebrated today as historic activity.\footnote{Garrow, Protest, supra note 562, at 133.} There are several explanations for this. Perhaps it is because the segregation laws which the protest was aimed at were so unjust. Perhaps it is also because the defenders of segregation used such violence in defense of the laws. Perhaps, another reason is because under Dr. King’s stewardship, the protests, though defiant of existing laws, proceeded non-violently. It is also significant that the protests were successful in ending legal segregation in the South.\footnote{Id.} Nothing succeeds like success. Defiance of law which leads to a significant change in legal and social norms tends to be accepted, at least in retrospect.

XVIII. RESISTANCE TO SCHOOL PRAYER DECISIONS

In 1962, in Engel v. Vitale,\footnote{Engel v. Vitale, 370 U.S. 421 (1962).} the Supreme Court held that it was a violation of the Establishment Clause of the First Amendment for a public school to require the recitation of a prayer.\footnote{Id. at 436.} The following year, the Court held that the reading of the Bible over the intercom at the beginning of the school day also violated the Establishment Clause.\footnote{Sch. Dist. of Abington v. Shempp, 374 U.S. 203, 227 (1963).} There is a consensus that the school prayer decisions are among the most defied decisions of the United States Supreme Court.\footnote{Lucas Powe, The Warren Court and American Politics 363 (2000); Bruce DiIerenfield, The Battle Over School Prayer 147, 183 (2007).} In many school districts, mandatory prayer
had been a part of public education as long as public education had existed.584 Given this tradition as well as the importance that many attached to prayer in public schools, the decisions were frequently seen as a secular mandate imposed by a distant, arrogant, and unresponsive institution.585 As such, for many, the decisions lacked legitimacy and should be ignored.586 A reason why defiance was successful, was due to lack of effective enforcement capability.587 If a community believed that regardless of what the Court in Washington, D.C. said, prayer in schools mattered and was appropriate, there were limits to what federal authorities could do to enforce the decisions in Engel and Schempp. Prayer would occur in local schools far removed from media limelight.588 If the community supported school prayer, it would take a principled and courageous parent to challenge the practice recognizing that his child and family would be ostracized or worse. For most objectors, the best course was simply to ignore the defiance of the schools. The defiance generally was not reduced to an easily challengeable written policy. Rather, it simply happened and almost certainly still happens.

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

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

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

584. Powe, supra note 583, at 363; Dierienfield, supra note 583, at 183.
585. Powe, supra note 583, at 363; Dierienfield, supra note 583, at 147.
586. Dierienfield, supra note 583, at 147.
587. Powe, supra note 583, at 363; Dierienfield, supra note 583, at 147, 183.
588. Dierienfield, supra note 583, at 183.
Some of the protest arose from genuine disagreement with the war. However, the war was personalized by the draft. Many who paid slight interest to politics and foreign affairs became involved in widespread protest movements when they were placed in danger of being drafted and sent to Southeast Asia where they might well be killed or seriously maimed. One at least must wonder whether the 1960s as a decade of protest and defiance would have looked different, absent the draft. Still, there was a legitimate call for change in social norms and various institutions. Perhaps protest movements would have materialized anyway though it is likely that the different protest movements fed off and inspired each other. In other words, the 1960s may have been “the perfect storm.”

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

A prominent example of defiance of law involved the sometimes-violent protests outside of the Democratic Convention in Chicago in 1968. Seven leaders of the demonstrations, “the Chicago Seven,” were arrested and prosecuted in what turned out to be a show trial and media circus. The defendants, mostly hard-core activists, refused to cooperate with the court and obey its rules. One of the defendants, Black Panther Bobby Seale, was bound and gagged to prevent outbursts. The situation was complicated by the arbitrary approach of Judge Julius Hoffman. The guilty verdicts were reversed by the Seventh Circuit Court of Appeals. Though the trial of the Chicago Seven was an extreme case, it came to represent the chaos and defiance of the 1960s. Shooting by the

589. GILJE, supra note 47, at 175.
592. The Court so confirmed in O’Brien, 391 U.S. at 367.
593. NORMAN MAILER, MIAMI AND THE SIEGE OF CHICAGO 22 (1968).
595. Id. at 3.
596. Id. at 33.
597. Id. at 15.
598. United States v. Dellinger, 472 F.2d 340, 409 (7th Cir. 1972).
National Guard of student protestors at Kent State University in May 1970 had an extreme effect.599

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

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

XX. URBAN RIOTS (THE 1960S-ESPECIALLY)

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

599. Gilje, supra note 47, at 168.
601. Id.
602. Id.
604. Id. at 1.
605. Id. at 82, 161.
606. Id. at 138, 141.
607. Id. at 137, 184.
608. See id. at 79–82, 161 (describing the hostile relationship between patrons of the Stonewall and local police).
609. See supra notes 210–17 and accompanying text.
Gettysburg further south. Over the decades, race riots broke out in several big cities including Chicago in 1919, Tulsa in 1921, and Harlem in 1948. These riots were usually provoked by incidents relating to segregation and police brutality. African Americans generally suffered most of the violence.

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

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

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

610. BERNSTEIN, supra note 216, at 3.
612. Id. at 114; see supra notes 439–52 and accompanying text.
614. Id. at 158.
615. Id. at 159.
616. Id. at 158–59.
617. Id.
618. Id. at 158; see generally JERRY COHEN & WILLIAM S. MURPHEY, BURN BABY BURN (1967) (providing a detailed account of the Watts riots of 1965).
619. COHEN & MURPHEY, supra note 618, at 286.
620. Id.
621. Id. at 257.
624. Gilje, supra note 47, at 160.
625. Id. at 159–60.
White motorists were pulled from their cars and beaten.\textsuperscript{626} Thirty-four people were killed, mostly residents of Watts, and forty million dollars of property damage was done.\textsuperscript{627}

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

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

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

638. Id.
639. Gilje, supra note 47, at 159.
640. Id.
641. 1967 Detroit Riot, supra note 635.
642. Gilje, supra note 47, at 159.
643. Id. at 156, 159.
644. Id. at 158.
645. Id. at 158.
647. Id.
The African American economy of the city was devastated.

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

XXI. DEFIANCE OF ROE V. WADE AND ABORTION LAW

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

650. Id. at 212–14.
652. Id.
653. See id. (describing the turbulence and uprisings immediately preceding Dr. King’s assassination).
655. Id. at 165–66.
relatively easy under a rule of law approach. Preventive action proved to be more difficult. The states attempting to assure access to abortion clinics created “buffer zones” around clinic entrances and adjoining sidewalks prohibiting pro-life advocates from approaching persons within the buffer zone. The idea made sense as an attempt to ensure access to abortion clinics. At some point, however, the “buffer zone” concept would invade the First Amendment rights of the pro-life advocates. This produced a clash of constitutional rights and a delicate balance needed to be struck. It was argued that the Court gave preference to the abortion right in resolving the conflict. Whether or not that was true, the states certainly had a valid interest in protecting the constitutional right to obtain an abortion. Under a rule of law approach, pro-life advocates must accept the legal consequences of their actions, including fines and jail sentences.

XXII. 1992 LOS ANGELES RIOTS

As noted above, most of the severe urban riots occurred in the 1960s, particularly 1967 and 1968. However, the most devastating riot, at least in terms of loss of life and property damage, took place in Los Angeles in 1992. This riot was provoked by the acquittal of four police officers by a jury charged with the brutal beating of motorist Rodney King. King led the police on a chase of speeds up to 115 miles per hour. When he was finally arrested, he was brutally beaten by the officers. The incident was captured on videotape and shown frequently on television. The officers who inflicted the beating were charged, tried, and acquitted by a jury. The acquittals were met with outrage and rioting. During the six days of rioting, sixty-three people were killed, over 12,000 were arrested, and over

658. See Schenk, 519 U.S. at 380 (upholding a fixed buffer zone but invalidating a floating buffer zone during protests); Hill, 530 U.S. at 734–35 (upholding a buffer zone).
659. Hill, 530 U.S. at 765 (Kennedy, J., dissenting); id. at 741 (Scalia, J., dissenting).
661. Id.
662. Id.
663. Id.
664. Id.
665. Id.
666. Id.
one billion dollars in property damages resulted.\textsuperscript{667} Prior to the riots, there was distress in the African American community over excessive use of force by the police.\textsuperscript{668} This pent-up rage at the police contributed to the violent reaction to the verdict.\textsuperscript{669} There was simmering resentment and violence between the African American and Korean communities in South Central Los Angeles.\textsuperscript{670} There was extensive looting by African Americans of stores owned by Asian Americans.\textsuperscript{671} The police failed to protect Korean businesses from looting.\textsuperscript{672} In condemning the jury verdict, Mayor Bradley may have inspired the ensuing riot.\textsuperscript{673} Rioters pulled White and Hispanic men from their vehicles and beat them severely.\textsuperscript{674} National Guard and federal troops were deployed to quell the riots. An assertion of superior force by law enforcement and the military brought the riots to an end.\textsuperscript{675}

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

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

XXIII. \textbf{George Floyd Protests and Riots}

In May 2020, George Floyd, an African American, was killed when a Minneapolis police officer placed his knee on Floyd’s neck for almost nine
minutes. Protests broke out in Minneapolis and across the nation. The immediate subject of the protests was the death of George Floyd, however, the deaths of several other African Americans at the hands of the police in recent years were in the background. Most of the protests were peaceful but some turned violent with the burning of buildings and vehicles and the throwing of bricks and bottles at the police. The corner where Floyd was killed was renamed George Floyd Square after being turned into an “autonomous zone” by protestors. Protestors also seized several city blocks in Seattle and Portland and declared them autonomous zones. A mob destroyed many businesses along the “Magnificent Mile” in Chicago. Several monuments, including those to George Washington, Thomas Jefferson, Andrew Jackson, and Gandhi, were vandalized or

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

679. Id.


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

The George Floyd protests and riots provide an excellent case study for establishing a line dividing lawful constitutionally protected protest from unlawful defiance. Peacefully marching and chanting in public is activity firmly protected by the First Amendment.


689. Kingson, supra note 686.


691. The doctrine is known as the public forum doctrine. See United States v. Grace, 461 U.S. 171, 177 (1983) (explaining the public forum doctrine limits the government’s ability to restrict expressive conduct in public places); see also Perry Educ. Ass’n v. Perry Loc. Educators Ass’n, 460 U.S. 37, 55 (1983) (“In a public forum, by definition, all parties have a constitutional right of access and the State must demonstrate compelling reasons for restricting access to a single class of speakers, a single viewpoint, or a single subject”).
reasonable time, place, and manner restrictions.\(^{692}\) In addition, the police can impose reasonable restrictions on protest activity to protect life and property.\(^{693}\) On the other hand, destruction of property, violence against law enforcement, and looting are unlawful and unprotected regardless of how just the underlying cause or how great the anger fueling the protest. This seems like an easy enough line to draw and yet enforcement may be difficult in the event of a mass peaceful demonstration which poses the likelihood of becoming violent and destructive in a moment. As with many previous demonstrations, some have used the mass movement and the righteous anger that provoked it as an excuse for looting.\(^{694}\) The inability to enforce the distinction between peaceful protest and violence may be blurred by official sympathy with the goals of the protest engendering a hesitancy to enforce the law against looting and burning. Moreover, when the subject of the protest is excessive use of force by the police, law enforcement may be hesitant to respond to violence, especially violence directed at them, with the force necessary to contain a riot. In addition, the theory exists that using force, especially military force to put down riots can be counterproductive increasing the likelihood of violence by protestors.\(^{695}\) As a result the police may be required to stand helplessly by and simply watch burning and looting instead of attempting to quell it. Thus, in the context of recent mass demonstrations, looting and violence seems inevitable.

**XXIV. CAPITOL INVASION OF JANUARY 6**

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

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

\(^{693}\) Clark, 468 U.S. at 294; Grayned, 408 U.S. at 116; Heffron, 452 U.S. at 648.

\(^{694}\) Perez & Shortell, supra note 690.


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

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


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


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


707. Swann et al., supra note 706.


attempted to climb through a broken glass door inside of the building.\textsuperscript{712} By late afternoon, order was restored and the vote counting proceeded.\textsuperscript{713} President Trump was impeached by the Democrat controlled House of Representatives for inciting an insurrection, however he was acquitted by the Republican controlled Senate.\textsuperscript{714} Over a thousand were arrested, many based on video taken during the invasion.\textsuperscript{715} Although White supremacist and insurrectionist groups were involved in planning and participated in the event, a study in the Atlantic found that 89% of those arrested had no ties to these militant groups.\textsuperscript{716} Approximately 20% of the participants had been in the military, many were business owners, twenty-eight law enforcement officers, at least fifty elected officials, and one former congressional candidate participated.\textsuperscript{717} In other words, this was not an ordinary mob.

\begin{itemize}
\item \textsuperscript{713} Carol Leonnig & Philip Rucker, I Alone Can Fix It, Donald J. Trump’s Catastrophic Final Year 481–484 (2021).
\end{itemize}
The mob was upset by the belief that the election had been stolen. As with the George Floyd rioters, their righteous anger did not excuse their violent behavior. A peaceful march and protest outside of the Capitol were certainly protected conduct. Breaking and entering the building, acting violently toward the police and destroying property was criminal behavior which could and should be punished. Insurrection is a federal crime. Although politicians characterize the Capitol invasion as insurrectionary activity, the leaders were charged with seditious conspiracy. Individuals that deliberately defy the law and engage in violent and destructive behavior on behalf of a partisan cause must be prepared to accept the legal consequences without excuse.

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


718. Blake, supra note 702.


720. Id.


722. Alanna Durkin Richer et al., Records Rebut Claims of Unequal Treatment of Jan. 6 Rioters, AP NEWS (Aug. 30, 2021, 4:59 AM), https://apnews.com/article/records-rebut-claims-jan-6-rioters-55af4d46aff57b91af2fidd3354da6e8 [https://perma.cc/1AH2-JKQ6]. Although the article argued that there was no significant disparity, the facts that the article relied on suggested the opposite.
rule of law values may depend on whose ox is being gored. It may well be
that the George Floyd Riots and the January 6 Capitol invasion were too
recent and too controversial from a partisan standpoint to obtain sufficiently
objective information.

CONCLUSION

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

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

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

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

\textsuperscript{725} Miller, American Revolution, supra note 48, at 181.

\textsuperscript{726} Id. at 212.
democratic principle. Nevertheless, the colonists knew that by revolting, they were defying the existing governing law and that there would be consequences. The very attempt to justify such defiance in the Declaration of Independence illustrates that the colonists well understood that they were acting in defiance of the governing law despite considering that law oppressive and tyrannical.

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

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

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

727. McPherson, supra note 196.
728. Id.
729. See *McCulloch v. Maryland*, 17 U.S. 316, 322–30 (1819) (“Congress, by the constitution, is invested with certain powers; and as to the objects, and within the scope of these powers, it is sovereign.”).
730. See id. at 433–37 (upholding the supremacy of the federal government).
732. See *Plessy v. Ferguson*, 163 U.S. 537, 551–52 (1896) (holding that it was not the duty of the legislature to force comingling of the races—it only had to ensure races had “equal rights before the law”), *overruled by Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).
advocated that the south’s conception of the Constitution was flawed. \footnote{See generally Garrow, Bearing the Cross, supra note 419 (discussing the Civil Rights Movement’s consistent goal of equality).} Although federalism was an important constitutional principle, with respect to racial segregation, it was overridden by the Equal Protection Clause of the Fourteenth Amendment. \footnote{U.S. Const. amend. XIV, § 1.} As to protest marches and activities, the Civil Rights Movement argued that the First Amendment, properly understood, prohibited localities from effectively banning such protests. \footnote{See United States v. Grace, 461 U.S. 171, 177 (1983) (holding peaceful picketing and passing out pamphlets are protected speech); Perry Educ. Ass’n v. Perry Local Educators Ass’n, 460 U.S. 37, 46, 55 (1983) (holding, in a public forum, the State must “demonstrate compelling reasons for restricting access to a single class of speakers,” but the same standard does not apply when dealing with “government property that has not been made a public forum”).} So from this perspective, there was no defiance of law by the civil rights activists. It was merely a difference of opinion as to the proper understanding of the Constitution. Still like the American Revolution, the civil rights demonstrators understood that the southern states had laws on the books which would be enforced against them. One of the purposes of the marches and demonstrations was to obtain the invalidation of such laws. \footnote{Garrow, Bearing the Cross, supra note 419, at 176.}

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

Defiance of Supreme Court rulings may be attributable to two explanations. First, it may reflect a good faith disagreement with the Court’s understanding of the law. This may explain resistance to the Court’s decisions in M’Culloch v. Maryland, the Dred Scott case, and Brown v. Board of Education. Second, some of the resistance to earlier decisions of the Court,
such as *M’Culloch*, the Cherokee territory decisions and perhaps even *Dred Scott*, may reflect the fact that the Court had not yet achieved the respect, which it now has, as the ultimate interpreter of the law. In other words, resistance to these decisions would have been less or non-existent if they occurred today.

Violence became a tool that defiers of the law could utilize. Most of the violence in labor demonstrations was attributable to overreaction by employers and law enforcement. Still, it was recognized that the media had slight interest in covering labor disputes until violence emerged.\footnote{737} The same is true of the Civil Rights Movement. It was the violent overreaction of law enforcement in Birmingham and Selma which gave power to the movement and not the protest marches themselves. The organizers of the protests knew this and deliberately provoked a violent response.

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

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

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

Ideally, the rule of law should prevail. In a democracy, there are legal methods of changing the law if it is outmoded or unjust. Peaceful protest,
as a means of calling attention to such change, is protected by the First Amendment. As such, there is no need for violent defiance of law. Injury to others as well as the destruction of property are criminal acts which should be punished.

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

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

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

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

742. 1992 RIOTS, supra note 660.
743. Id.
744. Id.
745. Id.
746. See generally Garrow, Bearing the Cross, supra note 419 (detailing the facts of the Albany protests).
747. Id. at 175
seemed to say no, however other leaders of the Movement disagreed and deliberately provoked the police to respond violently.  

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

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

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

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748. Id. at 248.
749. Id. at 481; Franklin, supra note 646.
750. Garrow, Bearing the Cross, supra note 419, at 495, 524–25, 611.
751. See Cohen & Murphey, supra note 618, at 257 (exploring the systemic problems that precipitated the race riots).
Law enforcement is justified taking whatever steps may be warranted to protect the public against bodily harm and to protect private property against injury or destruction. That is the very essence of the rule law in a civilized society. In the process of enforcing the rule of law, innocent people may be injured or killed as happened in most of the urban riots. That is tragic but largely unavoidable. On the other hand, law enforcement must respect people’s rights to the extent possible under the circumstances including the right to assemble and peacefully protest guaranteed by the First Amendment. This will cause law enforcement to make difficult decisions as to what is necessary to preserve peace and law and order. Deference should be accorded to decisions that are made in time of crisis so long as they take serious account of the rights of the people.

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

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

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

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

752. Kingson, supra note 686.
753. See Blake, supra note 702 (describing Trump’s speech as urging a peaceful demonstration to preserve democracy).