QUIET RIOT: A Framework for Prosecuting the Open Carry of Firearms At Elections

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Abstract

Individuals openly toting high-powered firearms are descending upon America's polling places, vote tabulation centers, and even the private residences of election officials. While states are free to ban firearms at election facilities, few have done so. Worse yet, statutes designed to prevent voter intimidation are ineffective, as they require prosecutors to prove intent to intimidate on the part of those who open carry. While that may seem obvious, putative defendants will contend they have no intent to intimidate anyone with their open display of firepower, and instead are merely seeking to "prevent voter fraud" or to defend themselves. Consequently, voter intimidation prosecutions are rarely brought.

This Article identifies an innovative strategy to combat intimidation by armed individuals at elections: the common law offense of riot. At common law, armed groups unauthorized by law were considered riots and punished as such for causing "public terror." All but three states have either codified riot in their criminal codes or judicially adopted the common law offense. Although the statutory formulations of the crime vary, in many states, including those where there is a significant risk of election-related intimidation in upcoming elections, prosecutors could effectively deploy the law of riot against those who open carry at elections.

This Article canvasses the law of riot in the fifty states, provides a roadmap for prosecuting the offense under the various formulations of the law, and arms prosecutors with a much-needed weapon to disarm those who seek to intimidate voters and election officials.

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Introduction

For several days after the November 3, 2020, presidential election, large groups of protestors congregated outside vote tabulation centers in Arizona, Michigan, and Nevada.[2] Some protestors carried shotguns, others handguns, and still others, military-style semiautomatic rifles.[3] "We just want them to know we won't let them get away with anything," said one man toting a rifle outside the Phoenix election center, referring to the election workers inside.[4] A few weeks later, dozens of protesters wielding firearms descended on the suburban home of Michigan Secretary of State, Jocelyn Benson, while she was putting up Christmas decorations with her four-year-old son. They shouted obscenities and chanted into bullhorns well past dark.[5] In Littleton, Colorado, two men, one armed and wearing a tactical vest, filmed voters while they dropped off ballots at a county administrative building during early voting.[6] Similarly, during the 2022 midterm elections, two armed individuals wearing tactical gear were stationed near an outdoor drop box in Maricopa County, Arizona, during early voting.[7] And following the 2022 midterm elections, armed

2. Tim Sullivan & Adam Geller, *Increasingly Normal: Guns Seen Outside Vote-Counting Centers*, AP (Nov. 7, 2020), https://apnews.com/article/protests-vote-count-safety-concerns-653dc8f0787c9258524078548d518992 [https://perma.cc/TP8Y-YKXM].
3. *Id.*
4. *Id.*
5. Bill Chappell, *Michigan Secretary of State Says Armed Protestors Descended on Her Home Saturday*, NPR (Dec. 7, 2020), https://www.npr.org/sections/biden-transition-updates/2020/12/07/943820889/michigan-secretary-of-state-says-armed-protesters-descended-on-her-home-saturday [https://perma.cc/P372-Y68D].
6. *Men Filming Voters in Littleton Were "First Amendment Auditors," Police Say*, Littleton Indep. (Nov. 2, 2020), https://littletonindependent.net/stories/men-filming-voters-in-littleton-were-first-amendment-auditors-police-say,315954 [https://perma.cc/8LJL-AFFG].
7. Ben Giles, *Monitors at Arizona Ballot Drop Boxes Draw Complaints of Voter Intimidation*, NPR (Oct. 26, 2022), https://www.npr.org/2022/10/26/1131474648/arizona-ballot-drop-boxes-mules-voter-intimidation [https://perma.cc/GXW3-B76W].

protesters again congregated outside the Phoenix election center in support of the defeated Republican gubernatorial candidate, Kari Lake.[8]

As many supporters of former President Donald Trump and large segments of the Republican Party embrace the Big Lie that Mr. Trump's loss was occasioned by widespread voter fraud, it appears inevitable that it will become commonplace, particularly in swing states,[9] for individuals suspicious of election results to amass outside polling places, vote tabulation centers, and even the private residences of election officials while openly carrying firearms. Indeed, one study has documented 560 demonstrations from January 2020 through June 2021 where firearms were carried or brandished, with more than one hundred reported at legislative buildings and vote counting centers across twenty-five states and Washington, DC.[10] In January 2022, a Republican state senate candidate in Michigan explicitly encouraged his supporters to show up at the polls armed, telling the audience to be prepared to "lock and load. . . . So you ask, 'what can we do?' Show up armed. . . . Make sure that justice prevails."[11] Even more ominously, in the runup to the 2022 midterm elections, it was reported that a grassroots movement had taken hold across the country to station groups of observers at every ballot drop box to combat so-called "ballot mules"—individuals who supposedly stuff the boxes with fake ballots or otherwise tamper with them—with some participants openly discussing bringing AR-15s and other firearms to the stakeouts and advocating for similar surveillance activities at vote tabulation centers, candidates' offices, and ballot-printing companies.[12] Fortunately, there were only isolated incidents of such conduct during the 2022 midterms. However, the situation

8. Mike McIntire, *At Protests, Guns are Doing the Talking*, N.Y. Times, (Nov. 26, 2022), https://www.nytimes.com/2022/11/26/us/guns-protests-open-carry.html [https://perma.cc/6PRU-J7CA].

9. *See* Press Release, U.S. Dep't of Justice, Readout of Election Threats Task Force Briefing with Election Officials and Workers (Aug. 1, 2022) ("Election officials in states with close elections and postelection contests were more likely to receive threats. 58% of the total of potentially criminal threats were in states that underwent 2020 post-election lawsuits, recounts, and audits, such as Arizona, Georgia, Colorado, Michigan, Pennsylvania, Nevada, and Wisconsin."), https://www.justice.gov/opa/pr/readout-election-threats-task-force-briefing-election-officials-and-workers [https://perma.cc/W26M-4LQX].

10. Armed Conflict Location & Event Data Project and Everytown for Gun Safety Support Fund, Armed Assembly: Guns, Demonstrations, and Political Violence in America 1–2 (2021), https://acleddata.com/acleddatanew/wp-content/uploads/2021/08/Report_Armed-Assembly_ACLED_Everytown_August2021.pdf [*https://perma.cc/6ZDG-3P36]*.

11. *Two Michigan GOP Candidates Encourage Election Interference, Including "Showing Up Armed" at Polls*, Deadline Detroit (Jan. 31, 2022), https://www.deadlinedetroit.com/articles/29810/two_michigan_gop_candidates_encourage_election_interference_including_showing_up_armed_at_polls [https://perma.cc/B2WW-CL3K].

12. Tiffany Hsu & Stuart A. Thompson, *Hunting for Voter Fraud, Conspiracy Theorists Organize "Stakeouts*," N.Y. Times (Aug. 10, 2022), https://www.nytimes.com/2022/08/10/technology/voter-drop-box-conspiracy-theory.html [https://perma.cc/K8NE-5WUR].

could be different for the higher-stakes 2024 presidential election. Indeed, local election officials in Arizona, Colorado, and Oregon have reportedly requested bulletproofing for their offices.[13]

Although the open carry of firearms at election facilities is experienced by many voters and election officials as intimidation and perceived as terrifying, criminal law provides prosecutors with limited recourse to combat the behavior. Only the District of Columbia and four states—California, Florida, Illinois, and New York—prohibit the open carrying of handguns.[14] While an additional seven states—Arizona, Colorado, Georgia, Louisiana, Texas, Virginia, and Washington—have laws that prohibit guns at polling places, the statutes in those states have limited applicability to individuals who openly carry firearms *outside* polling places.[15]

Most states have enacted statutes that prohibit voter intimidation, but these laws generally require prosecutors to establish that a defendant has the specific intent to intimidate.[16] Although it may seem obvious that a person displaying a firearm outside a polling place is doing so to intimidate, in fact "[t]he most important problem in criminal law . . . is whether the actor did or did not *intend* certain consequences to follow from his act."[17] In the elections context, defendants can erect substantial hurdles to prosecution by arguing that they have no intention of intimidating voters by openly carrying a firearm; rather, they are carrying the firearm to help "protect against voter fraud" and/or for self-defense purposes. Consequently, prosecutors are reticent to bring voter intimidation cases, relegating the laws designed to deter such conduct to "languish and draw dust from infrequent use."[18]

Just a handful of states expressly prohibit intimidation of election officials, and some of those require a similar showing of intent as in the voter intimidation context.[19] Further, while many states have statutes prohibiting "interference"[20] with election officials in the performance of their duties, it is not clear that such statutes would apply to armed protestors who simply congregate outside polling places or vote tabulation centers.

Several states prohibit the "brandishing" of firearms, however, most of those statutes, at a minimum, require that the firearm be displayed "in

13. McIntire, *supra* note 8.
14. *See infra* note 31.
15. *See infra* note 32.
16. *See infra* notes 51-55.
17. Walter Wheeler Cook, *Act, Intention, and Motive in the Criminal Law*, 26 Yale L.J. 645, 654 (1917) (emphasis in original) (footnote omitted).
18. James J. Woodruff II, *Where the Wild Things Are: The Polling Place, Voter Intimidation, and the First Amendment*, 50 U. Louisville L. Rev. 253, 253 (2011); *See also id.* at 272 ("In fact, since prosecution is so rare, those who have engaged in [voter intimidation] are probably of the opinion that what they are doing is legal and would be shocked if they were threatened with arrest, or were arrested for, their offenses.").
19. *See infra* note 69.
20. *See infra* note 70.

a threatening manner," a phrase that arguably, without more, does not reach open carry.[21]

There is, however, one criminal statute on the books in nearly every state that could reasonably be enforced against those who openly carry firearms outside of polling places, vote tabulation centers, and the private residences of election officials: riot statutes.

When most people think of a riot, they likely think of the January 6th assault on the U.S. Capitol, or the violence that erupted in Los Angeles in 1992 after the officers charged with beating Rodney King were acquitted. Those events seared violent images of hand-to-hand combat with police officers, vehicles on fire, and widespread property damage into the public consciousness.

However, a "riot" as a legal concept, while certainly encompassing such conduct, can also be something quite different—no voices need be raised, no physical fighting need occur, and no property damage need be sustained. Rather, riots can be quiet.[22] In particular, at common law, "[a]rmed groups unauthorized by law were considered riots and punishable as such,"[23] for causing "public terror." The fact that no physical harm or property damage attended a group's display of weapons was immaterial. As put by a leading jurist in one of the early English riot cases, "[i]f three come out of an ale-house and go armed, it is a riot."[24] Many states have codified this common law understanding of the offense of riot, making it an effective tool for prosecutors today to wield against those who open carry outside election facilities.[25]

Critically, and unlike the voter intimidation and other statutes discussed above, state riot statutes generally do not require a showing that the defendant *intended* to terrorize or alarm anyone; rather, a charge will

21. *See infra* note 99.
22. That riots can be quiet is known to any fan of 1980s hair metal music. *See* https://en.wikipedia.org/wiki/Quiet_Riot [https://perma.cc/W9AT-RRDM] (chronicling the commercial success of the band Quiet Riot, in particular their 1982 album, *Metal Health*).
23. Joseph Blocher & Reva B. Siegel, *When Guns Threaten the Public Sphere: A New Account of Public Safety Regulation Under Heller*, 116 NW. U. L. Rev. 139, 169 (2021).
24. Queen v. Soley, 88 Eng. Rep. 935, 937 (K.B. 1707).
25. Although beyond the scope of this article, the law of riot could also be deployed effectively in the context of armed protests generally, the incidences of which are exploding in the United States. According to one study, there were more than 700 armed demonstrations between January 2020 and mid-November 2022. McIntire, *supra* note 8. *See also* Will Carless, *Armed Protests are Picking Up, and a New Study Says They're More Likely To Turn Violent*, USA Today (Aug. 23, 2021), https://www.usatoday.com/story/news/nation/2021/08/23/guns-protests-increase-likelihood-violence/8188602002 [https://perma.cc/6PRU-J7CA]. Because there is no constitutional right to armed assembly, riot prosecutions for armed assembly would likely pass constitutional muster. *See* Michael C. Dorf, *When Two Rights Make a Wrong: Armed Assembly Under the First and Second Amendments*, 116 NW. U. L. Rev. 111, 137 (2021).

stand if the person acted *recklessly* with regard to whether people would be alarmed by the person's conduct.

A prosecution for riot of individuals openly carrying firearms outside polling locations, vote tabulation centers, or the private residences of election officials would be consistent with the permissible regulation of firearms under the Second Amendment, as recently elaborated by the Supreme Court in *New York State Rifle & Pistol Association v. Bruen*.[26] The Court held in *Bruen* that to survive a challenge under the Second Amendment, "the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation."[27] As discussed in Part II, statutes that criminalize the open carry of firearms in a manner that causes public alarm have deep roots in the common law and antebellum America. Furthermore, the court in *Bruen* expressly endorsed the designation of polling places as "sensitive places" where the regulation of firearms is permissible,[28] as well as the common law rule that "individuals could not carry deadly weapons in a manner likely to terrorize others."[29] In short, the Second Amendment does not protect an individual's right to openly carry a firearm in a manner that causes public alarm—particularly near election facilities.

This Article argues that the law of riot presents a potent and readily available weapon for prosecutors in many states to wield in combatting election intimidation through the open carry of firearms near polling places, vote tabulation centers, and the private residences of election officials. It provides a roadmap for bringing such prosecutions and thereby arms prosecutors with a much-needed weapon to disarm those who seek to sow fear at elections.

The balance of this Article is organized as follows. Part I discusses the statutes commonly associated with combatting voter and election official intimidation and describes their practical shortcomings in the context of open carry. Part II discusses the history of the offense of riot at common law. Part III provides a 50-state survey of modern riot statutes, categorizing them by type and potential efficacy at addressing open carry at elections. Finally, Part IV explains that a riot charge brought against persons who openly carry firearms outside polling places, vote tabulation centers, or the private residences of election officials would not infringe on the right to bear arms under the Second Amendment or the right of free speech under the First Amendment.

I. Prosecutors have Limited Tools to Combat Open Carry in the Context of Elections

It would appear self-evident that firearms should not be permitted anywhere near where election activities are taking place. As stated by

26. N.Y. State Rifle & Pistol Ass'n v. Bruen, 142 S. Ct. 2111 (2022).
27. *Id.* at 2126.
28. *Id.* at 2133.
29. *Id.* at 2150.

the Georgia Supreme Court in 1874, "The practice of carrying arms at . . . elections . . . is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee."[30] The framers didn't—as discussed in Part IV, it is entirely permissible under the Second Amendment for the government to prohibit firearms at elections. However, few states have chosen to do so. Furthermore, as discussed below, the criminal statutes that are designed to prevent intimidation of voters and election officials are ill-equipped to address the open carry of firearms in the election context, as are statues that prohibit the brandishing of firearms.

A. *Statutes Prohibiting Possession or Open Carry of Firearms*

Only the District of Columbia and six states—California, Connecticut, Florida, Illinois, New Jersey, and New York—prohibit the open carry of firearms.[31] An additional ten states—Arizona, Colorado, Delaware, Georgia, Hawaii, Louisiana, Maryland, Texas, Virginia, and Washington—have laws prohibiting the open carry of guns at polling places.[32] However, these laws specific to polling locations are limited in scope. Arizona and Louisiana prohibit the possession of firearms *inside* a polling place,[33]

30. Hill v. State, 53 Ga. 472, 475 (1874).

31. An Act Addressing Gun Violence, Pub. Act No. 23-53, 2023 Conn. Acts ch. 529, https://www.cga.ct.gov/2023/ACT/PA/PDF/2023PA-00053-R00HB-06667-PA.PDF. The District of Columbia restricts the carrying of firearms to specific places that as a practical matter do not allow for open carry, e.g., in the registrant's home or while being used for lawful recreational purposes. D.C. Code § 22–4504.01 (2023). California expressly prohibits the open carry of handguns in most public places. Cal. Penal Code § 26350 (2023). Florida's statute prohibits the open carry of firearms generally. Fla. Stat. Ann. § 790.053(1) (2023). Illinois and New York do not have statutes expressly prohibiting open carry, but solely issue concealed carry licenses, thereby prohibiting open carry by implication. 720 Ill. Comp. Stat. § 5/24(1)(a)(10) (2023), 430 Ill. Comp. Stat § 66/10 (2023); N.J. Stat. Ann. § 2C:58-4(a) (West 2022); N.Y. Penal Law §§ 265.01(1), 265.01-b, and 400.00 (2023). Note that New Jersey and New York prohibit the open carry of handguns only

32. Ariz. Rev. Stat. Ann. § 13–3102 (A)(11) (2023); Colo. Rev. Stat. § 1–13–724(1)(a)(III) (2023); An Act to Amend Title 11 Of The Delaware Code Relating To The Possession Of A Firearm At A Polling Place, 84 Del. Laws 2023 (to be codified at Del. Code Ann. tit. 15, § 1457A), https://legis.delaware.gov/json/BillDetail/GenerateHtmlDocumentEngrossment?engrossmentId=35978&docTypeId=6; Ga. Code Ann. § 21–2-413(i) (2023); Haw. Rev. Stat. Ann § 134-A (West 2023); La. Stat. Ann. § 18:1461.7(C)(3) (2023); Md. Code Ann., Crim. Law §§ 4-111(a)(4) and (d); Tex. Penal Code Ann. § 46.03(a)(2) (2023); Va. Code Ann. §§ 24.2–604 (A)(iv) (2023) (establishing 40-foot buffer for polling places), and 24.2–671 (establishing 40-foot buffer for electoral board meeting places); Wash. Rev. Code § 9.41.284 (2023). In addition to their statutes prohibiting open carry generally, California and Florida have specific statutes prohibiting open carry at polling locations. Cal. Elec. Code §§ 18544–18546 (2023); Fla. Stat. § 790.06(12)(a)(6) (2023).

33. Ariz. Rev. Stat. Ann. § 13–3102(A)(11) (2023) (prohibiting the carry of a deadly weapon when "entering an election polling place"); La. Stat. Ann. § 18:1461.7(C)(3) (2023) (illegal to "carry or possess a firearm while present in a

while Texas prohibits possession of a firearm "on the premises" of a polling location.[34] Washington makes it unlawful for a person to knowingly carry a firearm onto, or to possess a firearm in, a voting center.[35] Georgia and Virginia establish "buffer zones" within which possession of a firearm is not allowed. In Georgia, the buffer zone is "within 150 feet of any polling place,"[36] while in Virginia the buffer zone is "within 40 feet of any building, or part thereof, used as a polling place."[37] Colorado utilizes both types of restrictions, prohibiting open carry "within any polling location, or within one hundred feet of a drop box or any building in which a polling location is located."[38]

Statutes that prohibit the possession of firearms inside a polling location, or that prohibit firearms "on the premises" of a polling location, do not address the issue of armed individuals amassing *outside* of a polling location. Nor is Virginia's buffer zone of forty feet likely to prevent in any significant way individuals from open carrying in close proximity to polling locations. Colorado's 100-foot buffer zone and Georgia's 150-foot buffer zone, though more protective than Virginia's, are still unlikely to prevent individuals from open carrying in close enough proximity to polling locations to intimidate voters.[39] Moreover, only Colorado and Virginia address the possession of firearms outside vote tabulation centers, establishing 100-foot and 40-foot buffer zones, respectively, in that context.[40]

Nearly all states prohibit firearms in K-12 schools, which often serve as polling locations.[41] It is not clear, however, whether those statutes apply when the schools are being used for election activities. While there is certainly a strong argument that, in the absence of any text to the contrary, the broad language of statutes prohibiting firearms on school property apply to non-school related events taking place there, one could imagine counterarguments premised on the underlying rationale for the limitation not being present when students are not present.[42] Further-

polling place").

34. Tex. Penal Code Ann. § 46.03(a)(2) (2023).
35. Wash. Rev. Code § 9.41.284 (2023).
36. Ga. Code Ann. § 21–2-413(i) (2023).
37. Va. Code Ann. § 24.2–604(A)(iv) (2023).
38. Colo. Rev. Stat. § 1–13–724(3)(a)(h) (2023).
39. *See* Woodruff, *supra* note 18, at 281 (noting limitations of buffer zones to prevent voter intimidation).
40. Colo. Rev. Stat. § 1–13–724(3) (2023); Va. Code Ann. § 24.2–671 (2023).
41. *Guns in Public: Guns in School*, Giffords L. Ctr. (Dec. 2, 2021) (citing statutes), https://giffords.org/lawcenter/gun-laws/policy-areas/guns-in-public/guns-in-schools/ [https://perma.cc/23YS-QSWS].
42. Indeed, even in Texas there appears to be some confusion, notwithstanding that state law clearly prohibits possession of firearms at schools *and* polling places, Tex. Penal Code Ann. §§ 46.03(a)(1) and (a)(2) (2023). *See* Texas Association of School Boards, *Schools as Polling Places*, p. 3 (2022), https://www.tasb.org/services/legal-services/tasb-school-law-esource/business/documents/schools-as-polling-places.aspx [https://perma.cc/9ZSM-K7FQ] ("Note that state law restricts school districts from posting a sign prohibiting firearms in a location where firearms are not actually prohibited. Due to the complexity of this issue,

more, state law may provide for exceptions from firearm prohibitions, the scope of which may themselves not be clear.[43]

But perhaps most importantly for purposes of combating open carry at school polling places, state statutes do not generally prohibit the possession of firearms *outside* school property, which is where armed individuals seeking to intimidate voters congregate.[44] Most state statutes prohibit firearms "within the buildings of, on the grounds of, or on the school parking lot of" schools;[45] "in or on the real estate and all improvements erected thereon" of schools;[46] "in or on school property;"[47] or, even more restrictively, "within a school building."[48] Such statutes do not prohibit firearms just beyond the school perimeter.

In summary, only a few states prohibit either open carry generally or the open carry of firearms at polling places and even the latter restrictions generally do not apply to individuals amassed *outside* of, but still close in proximity to, polling locations. Moreover, only Colorado and Virginia expressly prohibit firearms near vote tabulation centers.

B. *Statutes Prohibiting Intimidation of Voters*

It is a federal crime to intimidate voters. The primary federal statute governing voter intimidation, 18 U.S.C. § 594, provides as follows:

> Whoever intimidates, threatens, coerces, or attempts to intimidate, threaten, or coerce, any other person *for the purpose of interfering with the right of such other person to vote or to vote as he may choose*, . . . shall be fined under this title or imprisoned not more than one year, or both.[49]

Thus, to secure a conviction under Section 594, the government must prove the defendant had the specific intent to interfere with a person's right to vote. The Justice Department has interpreted this requirement

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district officials should contact the Secretary of State Elections Division for additional information and assistance before posting a sign in a polling place.").

43. *See, e.g.*, 18 Pa. Cons. Stat. § 912 (2023) (prohibiting possession of firearms at schools but establishing defense if firearm "possessed for other lawful purpose"). *See also* Commonwealth v. Goslin, 156 A.3d 314, 318 n. 4 (Pa. Super. Ct. 2017) ("Although we are concerned about individuals possessing weapons on school property, we are bound by the broad defense that the legislature has provided defendants in such cases.").
44. Although federal law prohibits the possession of a firearm in a "school zone," which is defined to include "within a distance of 1,000 feet from the grounds of a public, parochial or private school," 18 U.S.C. § 921(a)(26), the statute does not apply to individuals licensed by a state or locality to possess a firearm. 18 U.S.C. §§ 922(q)(2)(A) and (B)(ii).
45. *See, e.g.*, Alaska Stat. §§ 11.61.210(a)(7), (a)(8) (2022), and 18.65.755(a)(2) (2022).
46. *See, e.g.*, Colo. Rev. Stat. § 18–12–105.5(1) (2023).
47. *See, e.g.*, Ind. Code § 35–47–9-2 (2022).
48. *See, e.g.*, Vt. Stat. Ann. tit. 13 § 4004 (2022).
49. 18 U.S.C. § 594 (emphasis added). Other federal criminal statutes addressing voter intimidation include 52 U.S.C. § 20511 and 18 U.S.C. §§ 241, 245(b)(1)(A).

to mean that the defendant must have intended to force the voter to act against her will.[50]

Most states have enacted their own statutes prohibiting voter intimidation, the vast majority of which require a *mens rea* similar to that found in Section 594. Specifically, the state statutes require the government to prove that a defendant engaged in intimidating conduct (1) "for the purpose of" interfering with the right of such other person to vote;[51] (2) "to induce or compel" that person to refrain from voting;[52] (3) "with intent to disenfranchise" a voter;[53] (4) willfully, knowingly or intentionally;[54] or (5) some similar formulation,[55] all of which amount to a required showing that the defendant intended to intimidate voters or knowingly did so.

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50. *See* David C. Rothschild & Benjamin J. Wolinsky, *Election Law Violations*, 46 Am. Crim. L. Rev. 391, 404 (2009) ("Establishing § 594's mens rea requirement to prove 'intimidation,' 'threat,' or 'coercion' requires proving that 'the actor intended to force voters to act against their will by placing them in fear of losing something of value. The feared loss might be something tangible, such as money or economic benefits, or intangible, such as liberty or safety'") (citing U.S. Dep't of Justice, Federal Prosecution of Election Offenses 15–16 (May 2007), http://www.usdoj.gov/criminal/pin/docs/electbook-0507.pdf [https://perma.cc/9HC8-BSKG]).
51. Alaska Stat. § 15.56.030(a) (2022); Fla. Stat. § 104.0515(3) (2022); Kan. Stat. Ann § 25–2415(a) (2022); N.M. Stat. Ann. § 1–20–14 (2019); R.I. Gen. Laws § 17–23–5 (2022); S.D. Codified Laws § 12–26–12 (1939); Wyo. Stat. Ann. § 22–26–111(a) (1999).
52. Alaska Stat. § 15.56.030(a) (2006); Ariz. Rev. Stat. Ann. § 104.0615(2) (2022); Haw. Rev. Stat. Ann. § 19–3 (2014); Mo. Rev. Stat. § 115.635(2) (1999); Mont. Code Ann. § 13–35–218(1) (2013); N.H. Rev. Stat. Ann. § 659:40.II (2015); N.J. Rev. Stat. § 19:34–28 (2013); N.Y. Elec. Law § 17–150 (LexisNexis 1977); Or. Rev. Stat. § 260.665(2) (2019); 25 Pa. Cons. Stat. Ann. § 3547 (1998); Tenn. Code Ann. § 2–19–115 (1999); Wis. Stat. § 12.09(1) (2017).
53. Conn. Gen. Stat. § 9–364 (2013).
54. Ark. Code Ann. § 7–1-104(a)(5) (2021); Ga. Code Ann. § 21–2-567 (2010); Idaho Code § 18–2305 (1972); 10 Ill. Comp. Stat. Ann 5/29–4 1973); Ind. Code § 3–14–3-21.5 (2014); Iowa Code § 39A.2.1 (2021); Kan. Stat. Ann. § 25–2413 (1974); La. Rev. Stat. Ann. § 1461.4.A (2019); Md. Code Ann., Adv. Legis. Serv. § 16–201(a) (LexisNexis 2015); Mich. Comp. Laws § 168.932(a) (1997); Mo. Rev. Stat. § 115.631(25) (2018); N.D. Cent. Code § 12.1–14–02 (2015); Okla. Stat. tit. 26 § 16–113 (2004); Tex. Elec. Code Ann. § 276.013(a) (2017); Vt. Stat. Ann. tit. 17 § 2017 (2013). Note that statutes prohibiting the "attempt" to intimidate are also included in this group. *See, e.g.*, Cal. Penal Code § 21A (1986) ("An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission"); Model Penal Code § 2.02, cmt. 2 (Am. L. Inst., 1985) (noting that with attempt crimes, "a true purpose to effect the criminal result is a requisite for liability").
55. Colo. Rev. Stat. § 1–13–713 (2022); Del. Const., art. 5, § 7; Ga. Code Ann. § 21–2-566 (2020); Ky. Rev. Stat. Ann. § 119.155(1) (West 1990); Me. Stat. tit. 21-A, § 674 (2022); Mass. Gen. Law ch. 56, § 29 (2020); Minn. Stat. § 211B.07 (1988); Neb. Rev. Stat. § 32–1536(2) (2020); Nev. Rev. Stat. § 293.710 (2013); N.C. Gen. Stat. §§ 163–273, 274(a)(7) (2018); 25 Pa. Cons. Stat. § 3527 (2018); S.C. Code Ann. § 7–25–80 (1994); Tex. Penal Code Ann. § 36.03(a) (1994); Utah Code Ann. § 20A-3a-502(1) (LexisNexis 2020); Va. Code Ann. § 24.2–1005.A (2021); Wash. Rev. Code § 29A.84.620 (2003); W. Va. Code § 3–9-10 (1963).

Thus, to secure convictions for voter intimidation, prosecutors must overcome defenses that negate these various formulations of the requisite *mens rea*. Defenses certain to be raised in the context of armed individuals standing outside election facilities include that the defendant carried the firearm not to intimidate voters in an effort to prevent them from voting, but rather (1) to deter "voter fraud";[56] (2) to promote open carry;[57] or (3) for self-defense.

While prosecutors, in certain cases, might be able to overcome such defenses and show an actual intent to deter voters from voting, the *mens rea* requirement of the voter intimidation statutes presents a formidable hurdle. As one scholar has noted, "[c]riminal laws, in general, are ill-suited for prevention of modern voter intimidation,"[58] in large part because the laws "require a robust showing of a defendant's intent to intimidate, the existence of a conspiracy, or both."[59] Indeed, the Supreme Court in rejecting the argument that buffer zones at polling places are unconstitutionally overinclusive because states could simply enact

56. *See, e.g.*, Ben Cady & Tom Glazer, *Voters Strike Back: Litigating Against Modern Voter Intimidation*, 39 N.Y.U. Rev. L. & Soc. Change 173, 209 (2015) ("one of the defining characteristics of modern voter intimidation is the pretext that the aggressor is simply upholding the voting laws"); Danny Hakim, Stephanie Saul, Nick Corasaniti & Michael Wines, *Trump Renews Fears of Voter Intimidation as G.O.P. Poll Watchers Mobilize*, N.Y. Times (Sept. 30, 2020), https://www.nytimes.com/2020/09/30/us/trump-election-poll-watchers.html [https://perma.cc/8J42-JDHA] (noting that President Trump during debate claimed that "'bad things happen in Philadelphia' and urg[ed] his supporters everywhere to 'go into the polls and watch very carefully'").

57. *See, e.g.*, Baker v. Schwarb, 40 F. Supp. 3d 881, 888, 894 (E.D. Mich. 2014) (individuals walking down street carrying long guns slung over their shoulders and pistols in holsters sued police officers who briefly detained and disarmed them for violating their First Amendment right to "promot[e] open carry"; arguing their purpose for open carrying was to "desensitize the public to open carry"); Chesney v. City of Jackson, 171 F. Supp. 3d 605, 616 (E.D. Mich. 2016) (individual carrying pistol into a Michigan Secretary of State office sued arresting officers for violating his First Amendment rights; arguing act was "intended, in part, to increase awareness that open carry is lawful in Michigan and to rally public support" for this lawful activity); Northrup v. City of Toledo Police Div., 58 F. Supp. 3d 842, 847 (N.D. Ohio 2014), *aff'd in part*, *rev'd in part and remanded sub nom;* Northrup v. City of Toledo Police Dep't, 785 F.3d 1128 (6th Cir. 2015) (Plaintiff in § 1983 suit "contends he 'was engaged in symbolic speech by openly carrying a firearm in a holster' and that this 'expressed his opinion that Ohioans should exercise their fundamental right to bear arms and educate[d] the public that open carry is permissible in Ohio'").

58. Christopher Conrad, Note, *The Pernicious Problem of Platform-Enabled Voter Intimidation*, 4 Geo. L. Tech. Rev. 463, 472 (2020) (citing Pub. Integrity Section, U.S. Dep't of Just., Fed. Prosecution of Election Offenses 50 (Richard C. Pilger ed., 8th ed. 2017), https://www.justice.gov/criminal/file/1029066/download [https://perma.cc/CLV2-MDNN]).

59. *Id. See also*, Woodruff, *supra* note 18, at 253 (observing that "there are remarkably few successful voter intimidation prosecutions. A better method of deterring voter intimidation must be promulgated as the current laws languish and draw dust from infrequent use").

criminal statutes prohibiting voter intimidation, reasoned that "[i]ntimidation and interference laws fall short of serving a State's compelling interests because they deal with only the most blatant and specific attempts to impede elections."[60]

The history of enforcement of the civil federal voter intimidation statute—Section 11(b) of the Voting Rights Act of 1965—illustrates the difficulties inherent in voter intimidation prosecutions. That statute provides in relevant part as follows: "No person, whether acting under color of law or otherwise, shall intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person for voting or attempting to vote."[61] Although this language on its face does not require a plaintiff to prove anything about the defendant's intent,[62] courts have nonetheless interposed an intent requirement similar to the one found in Section 594's criminal prohibition. For example, in *Olagues v. Russoniello*, the Ninth Circuit affirmed the dismissal of plaintiffs' section 11(b) claims, notwithstanding evidence of their actual intimidation by defendants, because the plaintiffs "failed to raise a material issue of fact as to whether the [defendants] did in fact *intend* to intimidate them."[63] More recently, a federal district court held that "intimidation" under section 11(b) "includes messages that a reasonable recipient, familiar with the context of the message, would interpret as a threat of injury—whether physical or nonviolent—*intended to deter individuals from exercising their voting rights*."[64]

In light of this stringent intent requirement—which mirrors the intent requirement of criminal voter intimidation statutes—it is perhaps not surprising that section 11(b) is rarely enforced,[65] and successfully so even less.[66]

In short, given their stringent *mens rea* requirements, both criminal and civil voter intimidation statutes are largely ineffective at deterring voter intimidation effectuated through the open carry of firearms near election facilities.[67]

60. Burson v. Freeman, 504 U.S. 191, 206–07 (1992) (internal quotation omitted).
61. 52 U.S.C. § 10307(b).
62. *See generally* Cady & Glazer, *supra* note 56, at 204–06. *See also* Gilda R. Daniels, *Voter Deception*, 43 Ind. L. Rev. 343, 361 (2010) ("Congress's passage of the VRA, and in particular Section 11(b) of that legislation, made it clear that the government was not required to prove that the acts were purposefully discriminatory").
63. Olagues v. Russoniello, 797 F.2d 1511, 1522 (9th Cir. 1986).
64. Nat'l Coal. on Black Civic Participation v. Wohl, 512 F. Supp. 3d 500, 509 (S.D.N.Y. 2021) (emphasis added).
65. Daniels, *supra* note 62, at 364–65 ("The Department of Justice has brought only four lawsuits under Section 11(b) in the history of the VRA"); Cady & Glazer, *supra* note 56, at 238–43 (listing only fourteen cases brought under section 11(b) between 1966 and 2012); Woodruff, *supra* note 18, at 285 ("The lack of federal prosecutions alone speaks volumes about the effectiveness of federal laws covering voter intimidation").
66. Daniels, *supra* note 62, at 361 ("attempts to use [section 11(b)] as a means to prevent and deter voter intimidation have been largely unsuccessful").
67. Indeed, only Nevada's voter intimidation statute arguably establishes broad

C. *Statutes Prohibiting Intimidation of Election Officials*

Federal law prohibits the intimidation of election officials.[68] While the majority of states prohibit certain conduct directed towards government officials, including election officials, just a handful have enacted statutes that expressly prohibit intimidation of election officials. Rather, as discussed below, most state statutes designed to protect government officials in the performance of their duties simply prohibit "interference" with those duties. It is not clear that those non-interference statutes would apply to armed protestors who simply congregate outside of vote tabulation centers.

There are essentially four different types of state statutes that potentially address the intimidation of, or interference with, election officials: (1) statutes that prohibit the intimidation of election officials;[69] (2) statutes that prohibit interference with election officials;[70] (3) statutes that prohibit interference with elections generally;[71] and (4) statutes that prohibit interference with government officials generally.[72]

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enough liability to comfortably reach such conduct. That statute, which does not contain an express *mens rea* requirement, provides that it is unlawful "for any person, in connection with any election, . . . to: (a) Use or threaten to use any force, intimidation, coercion, violence, restraint or undue influence." Nev. Rev. Stat. § 293.710(1) (2013). Note that in Busefink v. State, 128 Nev. 525 (2012), the Nevada Supreme Court upheld a challenge to a different election-related statute that also did not contain an intent element. The court interpreted that statute as "having a general intent requirement," and based its decision on the fact that the statute at issue, which made it unlawful to compensate persons for registering voters based upon the number of voters registered, "provides a person of ordinary intelligence sufficient notice of what conduct the statute prohibits and is not standardless as to encourage discriminatory enforcement." *Id.* at 536.

68. *See* 18 U.S.C. § 245(b)(1)(A).

69. Ky. Rev. Stat. Ann. § 119.255 (West 1990); La. Stat. Ann. § 14:122 (2019); N.M. Stat. Ann. § 1–20–14 2014); N.C. Gen. Stat. § 163–275 (2018); N.D. Cent. Code § 12.1–14–02 (2015); Ohio Rev. Code Ann. § 3599.24(LexisNexis 2006); 25 Pa. Cons. Stat. § 3527 (2018); Wyo. Stat. Ann. § 22–26–111(a) (2021).

70. Alaska Stat. § 15.56.060(a)(1) (1980); Ariz. Rev. Stat. Ann. § 16–1004.A (2018); Ark. Code Ann. § 7–1-103(a)(19)(G) (2021); Cal. Elec. Code § 18502 (West 2011); Colo. Rev. Stat. § 1–13–701(1) (2022); Del. Code Ann. tit. 15 § 5139(1) (2020); Ga. Code Ann. § 21–2-597 (2020);); Idaho Code § 18–2306 (2022); Ind. Code. § 3–14–3-4(a)(1) (2014); Ky. Rev. Stat. Ann. § 119.155(1) (West 1990); Md. Code Ann., Elec. Law § 16–205(a)(1) (West 2021); Mass. Gen. Laws Ann. ch. 56, § 48 (2018); Mont. Code Ann. § 13–35–203 (2022); Nevada Senate Bill 406 (2023) N.J. Stat. Ann. § 19:34–11 (West 2013); S.D. Codified Laws § 12–26–22 (2023); W. Va. Code § 3–9-10 (2022); Nevada Senate Bill 406 (2023). Note that a violation of Idaho Code § 18–2306 constitutes a felony, while a violation of Idaho Code § 18–2313 (2022), for disturbing or interfering with the canvassing of the votes or with the making of the returns, is a misdemeanor. *See* Idaho Code §§ 18–2306, 18–2313 (2022).

71. Idaho Code § 18–2313 (2022); Mo. Ann. Stat. § 115.637(17) (2018); N.D. Cent. Code § 12.1–14–03 (2021); Okla. Stat. tit. 26, § 16–113 (2021); R.I. Gen. Laws § 17–23–17(a) (2020); Wis. Stat. § 12.13(3) (2018).

72. Ala. Code § 13A-10–2(a) (2021); Haw. Rev. Stat. § 710–1010(1) (2016); Iowa Code § 718.4 (2011); Kan. Stat. Ann. § 21–5922(a) (2011); Me. Stat. tit. 17-A,

The statutes prohibiting intimidation of election officials are discussed next, followed by the several types of interference statutes, which are discussed together.

1. Statutes Prohibiting Intimidation of Election Officials

Federal law forbids using "force or threat of force [to] willfully injure[], intimidate[], or interfere[] with . . . any legally authorized election official."[73] Although the conduct must be "willful," the statute constitutes a broad prohibition. Unlike the voter intimidation statutes discussed above, there is no limiting language requiring prosecutors to demonstrate that the intimidation was "for the purpose of" achieving some end or "to compel or induce" a specific behavior.

A few state statutes are equally broad,[74] although they vary in the requisite level of intent necessary for conviction. North Dakota prohibits a person by force or threat of force from *intentionally* intimidating someone because that individual is an election official.[75] North Carolina makes it unlawful for any person "by threats, menaces *or in any other manner*, to intimidate or attempt to intimidate any chief judge, judge of election or other election officer in the discharge of duties."[76] The statute does not include a *mens rea* element for its broad proscription. However, a "willful" standard appears to have been imposed as a matter of practice.[77] Ohio's statute provides that "[n]o person shall attempt to intimidate an election officer."[78] Although the statute does not contain a *mens rea* element, the offense of attempt is generally understood to include as an element the intent to affect the prohibited result.[79]

The broad statutes in Pennsylvania and Kentucky do not contain *mens rea* elements either. In Pennsylvania, which makes it a felony to "use or threaten any violence" against any election officer,[80] if a criminal statute does not contain an express *mens rea* element, "such element is

§ 751 (2022); N.H. Rev. Stat. Ann § 642:1.I (2018); N.Y. Penal Law § 195.05 (McKinney 1998); Or. Rev. Stat. § 162.235(1) (2011); Tex. Penal Code Ann. § 38.13 (1993).

73. 18 U.S.C. § 245(b)(1)(A).
74. *See supra* note 69.
75. N.D. Cent. Code § 12.1–14–02 (2015).
76. N.C. Gen. Stat. § 163–275(11) (2022) (emphasis added).
77. *See, e.g.*, State v. Hines, 122 N.C. App. 545 (N.C. Ct. App. 1996), *review allowed*, 344 N.C. 634 (1996), *review improvidently allowed* 345 N.C. 627 (1997) (stating that defendant was convicted of "*willfully* intimidating or attempting to intimidate an election official in the discharge of his duties") (emphasis added). Note that to act "willfully" is to act "knowingly." *See* Model Penal Code § 2.02(8) (Am. L. Inst. 1962).
78. Ohio Rev. Code Ann. § 3599.24(a)(3) (West 2020).
79. *See, e.g.*, Model Penal Code § 2.02, cmt. 2 (Am. L. Inst. 1985) (noting that with attempt crimes, "a true purpose to effect the criminal result is a requisite for liability"); Cal. Penal Code § 21A (West 1986) ("An attempt to commit a crime consists of two elements: a specific intent to commit the crime, and a direct but ineffectual act done toward its commission").
80. 25 Pa. Cons. Stat. Ann. § 3527 (1998).

established if a person acts intentionally, knowingly or recklessly with respect thereto."[81] Similarly in Kentucky, which makes it a felony "by threat of violence or in any other manner" to intimidate or attempt to intimidate election officials in the performance of their duties,"[82] separate statutes fill the *mens rea* gap by providing that for felony offenses where the statute is silent,[83] the government must establish that a defendant engaged in prohibited conduct "intentionally, knowingly, wantonly or recklessly as the law may require, with respect to each element of the offense."[84] Thus, in Pennsylvania, and likely in Kentucky, a person may be convicted of intimidating an election official even if the person did not intend to intimidate, but rather acted recklessly with regard to the risk that the official would be intimidated by the person's conduct.

The other state statutes that expressly prohibit intimidation of election officials are more narrowly drawn. New Mexico's law states that "[i]ntimidation consists of inducing or attempting to induce fear in the secretary of state, a county clerk, a municipal clerk or any employee or agent of the secretary of state, employee or agent of a county clerk, employee or agent of a municipal clerk, member of an election board, voter, challenger or watcher, by use of or threatened use of force, [or] violence, . . . *for the purpose of impeding or preventing . . . the impartial administration of the election or Election Code*."[85] Wyoming's statute contains identical limiting language.[86] Louisiana prohibits the intimidation of election officials if done to "influence" the official with regard to her office.[87]

In summary, the broader statutes in effect in Pennsylvania and Kentucky that do not require a showing of specific intent to intimidate could be applied most readily to the conduct of armed individuals who congregate outside vote tabulation centers and canvassing boards. However, the other statutes prohibiting intimidation of election officials are less effective tools for reaching such conduct given their heightened *mens rea* requirements.

2. Interference Statutes

As noted above, most state statutes designed to protect election officials in the performance of their duties prohibit "interference" with those duties or with elections generally.[88] For example, in Arizona, "[a]

81. 18 Pa. Cons. Stat. § 302(c) (1973).
82. Ky. Rev. Stat. Ann. § 119.255 (West 1990). The statute also makes it a felony for individuals to "conspire together and go forth armed for the purpose of intimidating said officers." *Id.*
83. Ky. Rev. Stat. Ann. § 501.050 (West 2023).
84. Ky. Rev. Stat. Ann. § 501.050 (West 2023). The "as the law may require" language is ambiguous as to which mental state is required for conviction under any given statute.
85. N.M. Stat. Ann. § 1-20-14 (West 2023) (emphasis added).
86. Wyo. Stat. Ann. § 22–26–111(a)(1) (West 1999).
87. La. Rev. Stat. Ann. § 14:122(A)(4) (2019); La. Rev. Stat. Ann. § 18:1461.5(A)(3) (2018)
88. *See supra* note 70 and note 71.

person who at any election knowingly interferes in any manner with an officer of such election in the discharge of the officer's duty, . . . is guilty of a class 5 felony."[89]

It is not clear whether these non-interference statutes would reach the conduct of armed individuals who simply congregate outside vote tabulation centers or canvassing boards. The common definition of "interfere" is "to interpose in a way that hinders or impedes: come into collision or be in opposition."[90] Does a group of people, by virtue of being armed and amassing outside a building, "hinder" or "impede" the work going on inside that building, assuming the work continues unabated? Reasonable prosecutors might answer those questions differently, particularly given that several of the statutes at issue, including the Arizona statute cited above, contain stringent *mens rea* requirements[91] or additional elements that must be proven.[92]

Even more problematic are statutes in Montana, New Jersey, and Idaho that require the interference with election officials to be of such a degree as to "prevent such election or canvass from being fairly held and lawfully conducted."[93] To similar effect is West Virginia's statute which establishes a misdemeanor offense for any person who by force or intimidation, "prevent[s] or attempt[s] to prevent any officer whose duty it is by law to assist in holding an election, or in counting the votes cast thereat, and certifying and returning the result thereof, from discharging his duties according to law."[94] Another high bar for prosecutors is

89. Ariz. Rev. Stat. § 16–1004.A (2022).
90. *Interfere*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/interfere [https://perma.cc/6NPA-EPJ4].
91. *See, e.g.*, Ariz. Rev. Stat.§ 16–1004.A (2022) ("*knowingly* interferes in any manner") (emphasis added); Del. Code Ann. tit. 15 § 5139(1) (West 2023) ("*willfully* obstructs, hinders, assaults or by bribery, solicitation or otherwise interferes with") (emphasis added); Ga. Code § 21–2–597 (2023) ("*intentionally* interferes with, hinders, or delays or attempts to interfere with, hinder, or delay") (emphasis added); Ind. Stat. Ann. § 3–14–3–4(a)(1) (West 2021); R.I. Gen. Laws § 17–23–17(a)(7) (2022) ("*Willfully* hinders the orderly conduct of any election") (emphasis added).
92. *See, e.g.*, Ky. Rev. Stat. § 119.155(1) (2023) ("Any person who . . . *unlawfully* interferes with the election officers in the discharge of their duties, shall be guilty of a Class D felony") (emphasis supplied); Ga. Code Ann. § 21–2–566(2) (West 2023) (Any person who "[u]ses or threatens violence in a manner that . . . *materially* interrupts *or improperly and materially* interferes with the execution of a poll officer's duties . . . shall be guilty of a felony") (emphasis supplied). Note that a violation of Ga. Code § 21–2–566(2) (2020) constitutes a felony, while a violation of Ga. Code Ann. § 21–2–597 (2020) for attempting to interfere with, hinder or delay an election official in the performance of her duties is a misdemeanor.
93. Mont. Code Ann § 13–35–203 (2022); N.J. Rev. Stat. § 19:34–11 (2013); Idaho Code § 18–2306 (1972). Note that a violation of Idaho Code § 18–2306 constitutes a felony, while a violation of Idaho Code § 18–2313 (1972) for disturbing or interfering with the canvassing of the votes or with the making of the returns is a misdemeanor.
94. W. Va. Code § 3–9–10 (2023).

established in Alaska, where to be convicted of interference with an election official, a person must induce or attempt to induce the official, by force or intimidation, "to fail in the official's duty."[95]

As noted, several states have statutes that while not directly prohibiting interference with elections officials or elections generally, do prohibit interference with government officials or operations,[96] which presumably apply to election officials and election-related activities. However, not only do prosecutors in enforcing these statutes have to prove actual "interference," "obstruction," "impairment," or some similar unlawful conduct with respect to the election officials' duties, but nearly every one of these general non-interference statutes has a heightened *mens rea* requirement. For example, the Alabama interference statute states:

> A person commits the crime of obstructing governmental operations if, by means of intimidation, physical force or interference or by any other independently unlawful act, he: (1) *Intentionally* obstructs, impairs or hinders the administration of law or other governmental function; or (2) *Intentionally* prevents a public servant from performing a governmental function.[97]

Under this statute, even if the government can show that governmental functions were obstructed, hindered, or impaired by the open carry of firearms, defendants will likely argue that far from trying to obstruct election officials in the performance of their duties, they were instead trying to do the opposite: to ensure that the vote counting goes smoothly, and that no fraud is committed.

In short, state statutes that prohibit "interference" with election officials, government officials and elections in general, are not effective tools to combat the open carry of firearms outside vote tabulation centers and canvassing boards.

D. *Statutes Prohibiting the Brandishing of Firearms*

Twelve states prohibit the exhibition, display or "brandishing"[98] of a firearm.[99] However, it is not always clear what specific conduct these statutes prohibit. As several scholars recently observed,

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95. Alaska Stat. § 15.56.060(a)(1) (2022).
96. *See supra* note 72.
97. Ala. Code § 13A-10–2(a) (1977) (emphasis added).
98. "Brandish" means "to exhibit in an ostentatious or aggressive manner." *Brandish*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/brandish[https://perma.cc/8MDY-Y9ER]. The term is defined under the Federal Sentencing Guidelines as "that all or part of the weapon was displayed, or the presence of the weapon was otherwise made known to another person, in order to intimidate that person, regardless of whether the weapon was directly visible to that person." U.S. Sent'g Guidelines Manual § 1B1.1, note 1(C) (U.S. Sent'g Comm'n 2018).
99. Cal. Penal Code § 417(a)(2) (2011); Fla. Stat. § 790.10 (1991); Idaho Code § 18–3303 (2016); Me. Stat. tit. 25 § 2001-A (2012); Mich. Comp. Laws §§ 750.234e(1) (2015), 750.222(c) (2015); Miss. Code Ann. § 97–37–19 (2013); Mo. Rev. Stat. § 571.030 (2021); Nev. Rev. Stat § 202.320 (1989); Utah Code

> the traditional machinery of criminal law falls woefully short of effectively regulating gun displays in a society as saturated with firearms as the United States. It delivers neither clear rules of conduct to inform people what they are allowed to do, nor clear rules of decision to instruct police and prosecutors what to permit and when to intervene.[100]

Indeed, in nine of the twelve states with brandishing statutes, prosecutors must demonstrate that the defendant displayed the firearm "in a threatening manner,"[101] a phrase that is not defined in the statutes and could pose challenges to prosecutions of individuals who simply have firearms visible on their person.

Only Utah's statute addresses what is meant by "in a threatening manner"—or more precisely, what is *not* meant. That statute provides that "'threatening manner' does not include the possession of a dangerous weapon, whether visible or concealed, without additional behavior which is threatening."[102] That the Utah legislature felt compelled to clarify the language in this way suggests that the mere possession of a dangerous weapon, including a firearm, can be experienced by others as threatening. Indeed, the common dictionary understanding of the word "threaten" is "to cause to feel insecure or anxious,"[103] while "threatening" is defined to include, "a threatening manner: indicating or suggesting the approach of possible trouble or danger."[104] Given that "the display of a gun instills fear in the average citizen,"[105] it is reasonable to conclude that the display of a firearm by itself is "threatening."

However, if the mere display of a firearm constituted an offense under these statutes—because such a display is inherently threatening—then presumably there would have been no need to add the language "in a threatening manner." The better reading of these brandishing statutes is, as the Utah legislature expressly required, that the display of the firearm be coupled with some additional conduct that is itself threatening. Of course, displaying a firearm outside a polling place or vote tabulation center could reasonably be interpreted as "additional behavior which is

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Ann. § 76–10–506(2) (2019); Va. Code Ann. § 18.2–282 (2005); Wash. Rev. Code § 9.41.270(1) (1994); W. Va. Code § 61–7-11 (1994).

100. Joseph Blocher et al., *Pointing Guns*, 99 Tex. L. Rev. 1173, 1175 (2021). "Existing criminal law is not up to the challenge of regulating gun displays as they are increasingly practiced in public spaces in the United States." *Id.* at 1198.

101. *See, e.g.*, Me. Rev. Stat. Ann. tit. 25 § 2001-A (2012) ("A person may not, unless excepted by a provision of law: . . . Display in a threatening manner a firearm, slungshot, knuckles, bowie knife, dirk, stiletto or other dangerous or deadly weapon usually employed in the attack on or defense of a person").

102. Utah Code Ann. § 76–10–506(1)(b)(i) (West 2010).

103. *Threaten*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/threaten [https://perma.cc/PSY5-Q6D6].

104. *Threatening*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/threatening https://[perma.cc/S3ZM-6DHX].

105. McLaughlin v. United States, 476 U.S. 16, 17–18 (1986).

threatening,"[106] given the specific context. After all, a person openly displaying a long gun outside a polling location is likely to be perceived as significantly more threatening than a person carrying a handgun in a holster while walking down the street. Why, one might reasonably wonder, would a person loitering outside a polling place be toting a firearm?[107]

Ultimately, though, because "threatening" defines "manner," and because the "manner" in which the person outside the polling place openly carries a firearm is similarly and arguably as "non-threatening" as the "manner" in which the person walking down the street openly carries a holstered handgun, i.e., without any indication of immediate intent to use the weapon, a reasonable prosecutor could conclude that the person openly carrying outside a polling place is not doing so "in a threatening manner," even if the display itself is deemed profoundly threatening by those who witness it.

Michigan interposes an additional and significant hurdle for conviction under its brandishing statute, requiring that the defendant not only display the firearm in a threatening manner, but also "with the intent to induce fear in another person."[108] As one gun safety advocacy group has observed in arguing for the passage of legislation that expressly bars firearms at polling places and other places of political participation, "[i]t can be exceptionally difficult to discern when the pointing or display of firearms rises to the level of intentional intimidation."[109]

The brandishing statutes in Virginia, Washington, and West Virginia do not employ the "in a threatening manner" formulation of the offense.[110] Of these three, Washington's statute comes closest to reaching the conduct of those who open carry near where election activities are taking place. That statute prohibits a person from exhibiting or displaying a firearm "in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons."[111] In this way, Washington's statute expressly acknowledges

106. Utah Code Ann. § 76–10–506(1)(b)(i) (West 2010).

107. *Cf.* Cap. Area Dist. Libr. v. Mich. Open Carry, Inc., 298 Mich. App. 220, 226–27 (2012) (while mere open carrying may not necessarily constitute brandishing, doing so in a library has "an aspect of an intent to make someone feel threatened or intimidated") (quoting trial court).

108. Mich. Comp. Laws § 750.222(c) (2002). *See also* Tex. Educ. Code Ann. § 37.125 (West 2017) (creating an offense for exhibition or use, or threat of exhibition or use, of a firearm on school property "in a manner intended to cause alarm or personal injury to another person or to damage school property").

109. Educ. Fund to Stop Gun Violence, Defending Democracy: Addressing the Dangers of Armed Insurrection 16 (2022), https://efsgv.org/press/insurrection-report/ [https://perma.cc/DRR2–5LEH]. *See also* Timothy Zick, *Arming Public Protests*, 104 Iowa L. Rev. 223, 254 (2018) ("distinguishing the menacing or angry display of firearms from the non-threatening sort may be difficult in the context of a crowded and contentious protest").

110. *See* Va. Code Ann. § 18.2–282 (2005); Wash. Rev. Code § 9.41.270(1) (1994); W. Va. Code § 61–7-11 (1994).

111. Wash. Rev. Code § 9.41.270 (1) (1994).

that the context of the open carry can change its character from innocent to nefarious. However, as discussed, it is not clear that the other states' brandishing statutes take account of context in the same way.[112]

There are statutes in a few states that address the display of firearms under criminal formulations other than brandishing, but most suffer from similar shortcomings to those discussed in this section.[113] Of these statutes, the disorderly conduct statutes in Alabama, Arizona, and Colorado are potentially the most useful at reaching the open carry of firearms near election facilities.

In Alabama, brandishing a pistol is considered disorderly conduct, with "brandishing" recently defined by the legislature to mean "the waving, flourishing, displaying, or holding of an item in a manner that is threatening or *would appear threatening to a reasonable person*, with or without explicit verbal threat, or in a wanton or reckless manner."[114] Thus, in Alabama, the display of a pistol,[115] if deemed threatening to an objective, reasonable observer, can be prosecuted as disorderly conduct.

Similarly, in Colorado, a person commits disorderly conduct if he or she "intentionally, knowingly, or recklessly: . . . [n]ot being a peace officer, displays a . . . firearm, . . . in a public place in a manner calculated to alarm and does alarm another person."[116]

A charge could reasonably lie as well in Arizona, where "[a] person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person: . . . [r]ecklessly handles, displays or discharges a deadly weapon or dangerous instrument."[117]

112. Virginia's statute renders irrelevant a person's intent by adopting an objective standard. It states that "[i]t shall be unlawful for any person to point, hold or brandish any firearm . . . in such manner as to reasonably induce fear in the mind of another. Va. Code Ann. § 18.2–282 (2005). West Virginia's statute prohibits carrying or brandishing a weapon "in a way or manner to cause, or threaten, a breach of the peace." W. Va. Code § 61–7-11 (1994).

113. *See, e.g* Iowa Code § 708.1(2)(c) (2021) ("A person commits an assault when, without justification, the person . . . displays *in a threatening manner* any dangerous weapon toward another (emphasis supplied); N.H. Rev. Stat. Ann. § 631:3 (2021) ("The act of displaying a firearm shall not, in and of itself and without additional circumstances, constitute reckless conduct under this section."); N.Y. Penal Law § 120.14 (McKinney 1998) ("A person is guilty of menacing in the second degree when: 1. He or she *intentionally* places or attempts to place another person in reasonable fear of physical injury, serious physical injury or death by displaying a deadly weapon") (emphasis added); Or. Rev. Stat. § 166.220(1) (2010) ("A person commits the crime of unlawful use of a weapon if the person: (a) Attempts to use unlawfully against another, or carries or possesses *with intent to use unlawfully* against another, any dangerous or deadly weapon") (emphasis added).

114. Ala. Code § 13A-11–7 (2022) (emphasis added).

115. Alabama defines "pistol" as "[a]ny firearm with a barrel less than 12 inches in length." Ala. Code § 13A-11–70(6) (2012).

116. Colo. Rev. Stat. § 18–9–106 (2021).

117. Ariz. Rev. Stat. Ann. § 13–2904(A) (1994). Arizona's disorderly conduct statute is discussed further in Part III.B, *infra*.

Given how few states have brandishing statutes, and how those that do typically only reach firearms displayed "in a threatening manner," such statutes do not provide prosecutors much recourse against those who open carry outside polling places, vote tabulation centers, or election officials' residences. Of the other state statutes bearing on the public display of firearms, the disorderly conduct statutes in Alabama, Arizona, and Colorado offer the most viable pathways to address the conduct.

In short, statutes designed to combat voter intimidation, the intimidation of election officials, and the public display of weapons are generally not effective mechanisms for combating the open carry of firearms outside election facilities.[118] However, as discussed immediately below, the law of riot has for centuries served as an effective tool to address the open carry of firearms.

II. The Offense of Riot at Common Law

The offense of riot is firmly rooted in the common law, which categorized the offense as a misdemeanor.[119] In his 1769 *Commentaries*, William Blackstone defined the crime of riot as "where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel . . . or even do a lawful act, as removing a nuisance, in a violent and tumultuous manner."[120] William Hawkins, in his widely read treatise originally published in 1716, defined a riot as follows:

> A riot seems to be a tumultuous disturbance of the peace, by three persons or more, assembling together of their own authority, with an intent mutually to assist one another, against any who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful.[121]

Hawkins further elaborated on the last point, emphasizing that a lawful act, if performed in a violent and tumultuous manner, could constitute a riot, writing as follows:

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118. State statutes prohibiting private militias and paramilitary groups are also of limited efficacy at combatting open carry. *See generally Zick*, *supra* note 109, at 254–57 (noting, among other limitations, that such laws do not apply to unaffiliated individuals, and that some require a showing that a person has the purpose or intent of furthering civil disorder).

119. *See* Model Penal Code § 250.1, cmt. 1 (Am. L. Inst., 1985) and sources cited therein. The etymology of the iconic expression, "being read the riot act," stems from the 1714 incarnation of the felony English riot act, which prohibited twelve or more persons who "being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the publick peace" remained together for one hour after having had read to them a specific proclamation commanding their dispersal—i.e., after having been read the Riot Act. 1 Geo. 1, ch. 5, § 2 (1714).

120. William Blackstone, Commentaries On The Laws Of England Book 4 146 (1769), https://avalon.law.yale.edu/18th_century/blackstone_bk4ch11.asp [https://perma.cc/95LU-2GUG].

121. William Hawkins, A Treatise on The Pleas Of The Crown 293 (6th ed. 1788).

> [I]t is in no way material whether the act intended to be done by such an assembly, be of itself lawful or unlawful; . . . . If more than three persons . . . in a violent and tumultuous manner join together in removing a nuisance, which may be lawfully done in a peaceful manner, they are properly rioters, as if the act intended to be done by them were never to be unlawful; for the law will not suffer persons to seek redress of their private grievances, by such dangerous disturbances of the public peace.[122]

Taking these two leading common law treatises together, then, the touchstones of riot at common law were a group of three or more people engaged in some act—either lawful or unlawful—done in a violent and tumultuous manner to the terror of the people. How violent and tumultuous the manner of performing the act needed to be to constitute a riot revolved largely around the concept referenced by Hawkins of *in terrorem populi*, or to the terror of the people.

For many commentators and jurists, the mere act of being armed, with no attendant physical violence, was sufficient to cause a terror to the people. For example, Blackstone, in commenting upon the 1328 Statute of Northampton, which stated that no person may "go nor ride armed by night nor by day, in Fairs, Markets . . . nor in no part elsewhere,"[123] wrote that "riding or going armed, with dangerous or unusual weapons, is a crime against the public peace, by terrifying the good people of the land."[124] For Blackstone, no overt act of physical violence attendant to going armed was necessary to cause such terror. Rather, as the Ninth Circuit summarized, "[a]ccording to Blackstone, going armed with dangerous or unusual weapons was all that was required to terrify the people of the land, and thus the law required neither proof of intent to terrify nor proof that actual terror resulted from the carrying of arms."[125]

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122. *Id.* at 296.
123. 2 Edw. III c. 3 (1328). Note that the Statute of Northampton is viewed as an underpinning of common law riot. *See, e.g.*, Schlamp v. State, 390 Md. 724, 729 n. 5 (2006) (discussing the historical development of common law riot and citing, *inter alia*, the Statute of Northampton).
124. Blackstone, *supra* note 120, at 148.
125. Young v. Hawaii, 992 F.3d 765, 792 (9th Cir. 2021) (en banc), *cert. granted, vacated and remanded*, 2022 WL 2347578, (U.S., June 30, 2022). The court further noted that "royal edicts suggest that merely carrying firearms caused terror even absent an intent to cause terror." *Id.* at n. 13, *citing* Elizabeth I, Queen of England, A Proclamation Against the Carriage of Dags, and for Reformation of Some Other Great Disorders (1533–1603) (the public carry of arms caused "terrour [to] all people professing to travel and live peaceably"). *See also* Mark Anthony Frasesetto, *To the Terror of the People: Public Disorder Crimes and the Original Public Understanding of the Second Amendment*, 43 S. Ill. Univ. L.J. 61, 65 (2018) (arguing that "carrying weapons in populated public places was intrinsically terrifying" and that, consequently, the "discussion of public terror in judicial opinions and legal treatises was an explanation for the prohibition, rather than a separate element of the crime").

Hawkins similarly suggested, in the context of affrays, which also had as an element causing terror to the people,[126] that going about armed, by itself, could cause terror to the people, writing that "in some cases there may be an affray where there is no actual violence, as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause terror to the people."[127]

Hawkins' take on whether going armed by itself could support a conviction for riot, as opposed to an affray, is somewhat disjointed. On the one hand, Hawkins writes that "persons riding together on the road with unusual weapons, or otherwise assembling together in such a manner as is apt to raise a terror in the people, without any offer of violence to any one in respect either of his person or possessions, are not properly guilty of a riot, but only of an unlawful assembly."[128] This suggests that in Hawkins' view, some positive act of violence was necessary to constitute a riot and that simply going armed in a way "apt to raise a terror in the people," was insufficient. However, Hawkins also wrote that "[i]n every riot there must be some circumstances either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people; as the show of armour, threatening speeches, or turbulent gestures."[129] Thus, for Hawkins, the mere showing of armor, with nothing more, constituted sufficient violence, or tendency thereto, to justify prosecution for riot.

In a treatise that pre-dates both Blackstone and Hawkins, William Shepherd wrote in 1652 that a group riding around armed constituted a riot, even where the group formed to combat a threat to one of its members' lives: "And albeit one be threatened, and in danger of his life, and to defend himself he gathers a force, and they ride about armed, this is a Riot. Yet if they did abide in his house; happily, it may be justified."[130] This distinction between an armed group that assembles at a person's

126. Hawkins, *supra* note 121, at 265 (noting that "the word affray is derived from the French word *Effraier*, to terrify, and that in a legal sense it is taken for a public offense, to the terror of the people"). Blackstone, *supra* note 120, at 145 (defining affrays more specifically as "the fighting of two or more persons in some public place, to the terror of his majesty's subjects.")

127. Hawkins, *supra* note 121, at 266.

128. *Id.* at 295.

129. *Id.*

130. Mark Anthony Frassetto, *supra* note 125, at 78 (citing William Shepherd, The Whole Office Of The Country Justice Of The Peace 55 (1652)). To similar effect is Lord Edward Coke's commentary on the Statute of Northampton that a person "cannot assemble force, though he be extremely threatened, to go with him to church, or market, or any other place, but that is prohibited by this [a]ct." Edward Coke, The Third Part of the Institutes Of the Laws Of England 161 (E. and R. Brooke ed., 1797). *See also* Hawkins, *supra* note 121, at 516. ("[A]n assembly of a man's friends for the defense of his person against those who threaten to beat him, if he go to . . . a market, [etc.] is unlawful . . . . Yet an assembly of a man's friends in his own house, for the defense of the possession thereof . . . is indulged by law . . . ").

home (lawful) and one that goes forth into public (riot) was recognized in some early American riot cases.[131]

Also pre-dating both Blackstone and Hawkins, Joseph Keble, wrote in 1683 that being armed, by itself, could give rise to an affray by causing a terror to the people, stating, "[y]et may an Affray be, without word or blow given; as if a man shall shew himself furnished with Armour or Weapon which is not usually worn, it will strike fear upon others that be not armed as he is; and therefore both the Statutes of Northampton . . . made against wearing Armour, do speak of it . . . ."[132]

Some early English cases similarly concluded that going armed by itself caused terror to the people, without the need to show an overt physical act of violence by the armed individuals. In *Chune v. Piott*, a 1615 case involving a claim not of riot but of false arrest by a local sheriff, it was stated that "[w]ithout all question, the sheriff hath power to commit, . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, *in terrorem populi Regis*; he ought to take him, and arrest him, *notwithstanding he doth not break the peace in his presence*."[133]

The following year, in 1616, the Court of King's Bench in the riot case of *Howard v. Bell*[134] upheld fines imposed against the defendants who had assembled a crowd of 200 people in an open field "weaponed with swords and daggers," in a land dispute with the landlord, notwithstanding that "nothing was proved done there by any of the defendants, but conference concerning the defence of their title by promise and writing, and contribution of money to that purpose."[135] As one commentator has noted, "[t]he court made clear that weapon possession could turn a lawful assembly into a riot, without other threatening conduct"[136] due to the public terror created.

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131. *See, e.g.*, Commonwealth v. Dupuy, 1 Brightly 44, 46 (Pa. Ct. of Nisi Prius 1831) ("It is laid down as law, and I have no doubt it is so, that a man may call in his friends completely armed to defend and protect himself against a threatened assault in his own house, but if he go abroad thus attended by two or more, with a view to defend himself against a threatened attack, unless indeed it should be to go to the magistrate to make his complaint, it would be considered a riot. The place, in this case then, becomes of the essence of the crime.")
132. Jos. Keble, An Assistance To Justices Of The Peace, For Easier Performance Of Their Duty 147 (London et al. eds., 1683). *Accord* Michael Dalton, The Country Justice 282–83 (1690) ("[T]o wear Armor, or Weapons not usually worn, . . . seems also to be a breach, or means of breach of the Peace . . . ; for they strike a fear and terror in the People").
133. Chune v. Piott, 80 Eng. Rep. 1161, 1162 (K.B. 1615) (emphasis added).
134. Howard v. Bell, 80 Eng. Rep. 241 (1616).
135. *Id.*
136. Frassetto, *supra* note 125, at 77. Frassetto cautions that the size of the crowd and the location of the assembly in a field where a prior battle had been fought by a different group against the Queen's forces "made the armed crowd inherently more threatening, so it would be inappropriate to read too much into the decision, but *Howard v. Bell* clearly stands for the concept that no action beyond public assembly with weapons was required to create public terror." *Id.*

In another of the leading early common law riot cases, *Queen v. Soley*, decided in 1707,[137] Chief Justice Holt adopted the understanding that a group of people armed in public, though engaged in no attendant act of physical violence, sufficiently terrorized the people to support a riot conviction. He wrote that "[i]f a number of men assemble with arms, *in terrorem populi*, though no act is done, it is a riot."[138] He then gave the following illustrative example: "If three come out of an ale-house and go armed, it is a riot."[139] In this way, a person could be convicted of riot without a showing of intent to terrorize anyone or the commission of an overt act of physical violence—being part of an armed group of three or more in public was sufficient.[140]

Chief Justice Holt then discussed the pleading requirements for riot, since the defendant claimed that the information in the case failed by not including the term "*in terrorem populi*."[141] Chief Justice Holt rejected the argument, noting that there are two types of riots: riots that involve overt acts and riots that do not. He concluded that the information at issue did not require the "*in terrorem populi*" language, writing that "in this information it is well without it; for in those riots which are riots without any act done, as going armed, &c. it must be said *in terrorem populi*; but when an act is done, it is otherwise."[142] Thus, indictments for riots that involved no overt acts, such as going armed, needed to contain the "*in terrorem populi*" verbiage, while indictments for riots that involved an affirmative act did not need to contain such language. This distinction in charging the offense of riot makes even more plain that at common law, a group of three or more individuals going about armed in public constituted a riot, notwithstanding the absence of any overt act of physical violence by members of the group.

The distinction drawn by Lord Holt in charging the offense of riot, together with his formulation of the offense as including a group of three or more individuals going about armed in public, notwithstanding the absence of any overt act of physical violence by members of the group, was broadly adopted in the United States.[143] For example, in the 1813

137. Queen v. Soley, 88 Eng. Rep. 935 (K.B. 1707).
138. *Id.* at 936–37.
139. *Id.* at 937.
140. *See also* Respublica v. Montgomery, 1 Yeates 419 (Pa. 1795). This case involved a group of armed protesters who sought to erect a "liberty pole" to symbolize their opposition to a tax. The Pennsylvania Supreme Court stated that "[t]he setting up a pole at any time, in a tumultuous manner, *with arms*, is a riot." *Id.* at 422 (emphasis added). In considering whether these "armed protesters acting civilly rather than tumultuously have had their rights recognized," one scholar asserts that "[t]he Pennsylvania Supreme Court opinion indicates that it was the fact of armed assembly for purposes of expression that rendered the group riotous." *See* Dorf, *supra* note 25
141. *Soley*, *supra* note 137.
142. *Id.*
143. Frassetto, *supra* note 125, at 79 ("This distinction in riot indictments would be adopted as the standard for common-law riot in the United States") (citations omitted).

case of *Commonwealth v. Runnels*,[144] a case that would be widely cited in subsequent riot cases in the United States,[145] the Supreme Judicial Court of Massachusetts noted as follows:

> The phrase *in terrorem populi* is used by *Hawkins* as descriptive of the offence denominated a *riot;* but it is clear that there may be a riot without terrifying any one. Lord *Holt* has given a distinction, founded in good sense, between those indictments, in which the words *in terrorem populi* are essential, and those wherein they may be omitted. He says that, in indictments for that species of riots which consist in going about armed, &c., without committing any act, the words aforesaid are necessary, because the offence consists in terrifying the public; but in those riots in which an unlawful act is *committed* the words are useless.[146]

Similarly, in 1851, the Tennessee Supreme Court stated in *State v. Whitesides*[147] that:

> In some cases of riot the gist of the offence consists alone in the terror to the public, inspired by the conduct of the parties; but not so in other cases. The discrimination of Lord Holt upon this subject rests upon sound reason. He lays it down that in indictments for riots, which consists in going about armed, etc., the words *in terrorem populi* are essential; but that in those riots in which an unlawful act has been committed these words are unnecessary.[148]

This understanding that the terror requirement could be satisfied simply by going about armed, without any overt act of physical violence, made its way into numerous American treatises. For example, notes to the 1824 American edition of William Russell's *A Treatise on Crimes and Misdemeanors* states, "if a number of men assemble with arms, *in terrorem populi*, though no act is done, it is a riot."[149] Other treatises were to similar effect.[150] Several additional nineteenth century treatise writ-

144. Commonwealth v. Runnels, 10 Mass. 518 (1813).
145. *See* Frassetto, *supra* note 125, at 85 ("The *Runnels* standard was widely cited in riot cases across the country")
146. *Runnels*, 10 Mass. at 520 (emphasis in original).
147. State v. Whitesides, 31 Tenn. 88 (1851).
148. *Id.* at 89 (italics added).
149. William Russell, A Treatise on Crimes and Misdemeanors 350–51 (Daniel Davis et al eds., 1st American ed. 1824) *quoted in* Frassetto, *supra* note 125, at 82.
150. *See, e.g.*, Frassetto, *supra* note 125, at 82 n.134, *quoting* Thomas Tomlins & George Granger, The Law Dictionary Explaining The Rise, Progress, and Present State Of The British Law clv (1st American ed. 1836) ("[I]f a number of men assemble with arms, in terrorem populi, though no act is done; so if three come out of an alehouse and go armed . . . . In every riot there must be some such circumstances, either of actual force or violence, or at least of an apparent tendency thereto, as are naturally apt to strike a terror into the people, as the show of armour, threatening speeches, or turbulent gestures; for every such offence must be laid to be done in terror of the people. [citing Hawkins c. 65 § 5] But it is not necessary, in order to constitute this crime, that personal violence should have been committed.")); *id.* at 82 (quoting J.A.G. Davis, A Treatise On Criminal Law With An Exposition Of The Office and Authority Of Justices Of The Peace Of Virginia 252 (1838) ("in every riot there must be some such

ers similarly noted, in the context of affrays, that physical violence was not a prerequisite to a finding that an act caused terror to the people; instead, merely arming oneself with a dangerous and unusual weapon could suffice.[151]

Likewise, the common law understanding that the terror requirement of the offense of riot could be satisfied simply by going about armed, without any overt act of physical violence, is manifested in several colonial-era statutes that tied together restrictions on going armed in public with public disorder offenses, including riot. For example, in 1692, Massachusetts authorized the arrest of "all Affayers, Rioters, Disturbers or Breakers of the Peace, and such as shall ride or go armed

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circumstances . . . as are naturally apt to strike a terror into the people," such requirement being satisfied by the "show of arms")); *id.*at 83 (quoting Francis Wharton, Precedents Of Indictments And Pleas Adapted To The Use Both Of The Courts Of The United States And Those Of All The Several States 488–89 (1849) ("persons riding together on the road with unusual weapons . . . in such a manner as is apt to raise a terror in the people, without any offer of violence to any one in respect to either his person or possession, are not properly guilty of a riot, but only of an unlawful assembly"; but noting that "circumstances . . . apt to strike a terror into the people" included both the passive "show of arms" and the active "threatening speeches or turbulent gestures")); *id.* (quoting Oliver Lorenzo Barber, A Treatise On The Criminal Law Of The State Of New York; And Upon The Jurisdiction, Duty, And Authority Of Justices Of The Peace, And Incidentally Of The Power And Duty Of Sheriffs, Constables, & In Criminal Cases 224 (2d ed. 1852)(noting the issue of whether an armed group would constitute a riot or an unlawful assembly, but affirming that a "show of arms" was "naturally apt to strike a terror into the people"). *See also id.* at 83 n. 143, (quoting Constantine Molloy, The Justice Of The Peace Of Ireland 102–03 (1890) ("If a number of persons assemble with arms, to the terror of the people, though no act is done, it is a riot")).

151. *See* Blocher & Siegel, *supra* note 23, at 174 n.180 (noting in context of common law regulation of weapons that such regulation was permissible to prevent conduct that would terrify the people and that no actual violence needed to be shown) (citing Ellis Lewis, An Abridgment Of The Criminal Law Of The United States 64 (Philadelphia, Thomas, Cowperthwait & Co. ed., 1847) ("[W]here persons openly arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law, an affray may be committed without actual violence."); William Oldnall Russell, A Treatise on Crimes And Indictable Misdemeanors 271 (Philadelphia, P.B. Nicklin & T. Johnson 1831) ("[I]t seems certain that in some cases there may be an affray where there is no actual violence; as where persons arm themselves with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people . . . ."); Bird Wilson, The Works Of The Honourable James Wilson, L.L.D. 79 (Philadelphia, Lorenzo Press 1804) ("In some cases, there may be an affray, where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner, as will naturally diffuse a terrour among the people."); Francis Wharton, Treatise On The Criminal Law Of The United States 727 (2d ed. 1852) ("It has been said generally, that the public and open exhibition of dangerous weapons by an armed man, to the terror of good citizens, is a misdemeanor at common law.")).

Offensively."[152] New Hampshire did the same in 1699, enacting a statute stating that "[E]very justice of the peace within this province may cause to be stayed and arrested, all affrayers, rioters, disturbers or breakers of the peace, or any other who shall go armed offensively . . . ."[153] More such statutes followed.[154]

In short, at common law and in the earliest days of the American republic, if three or more persons went about in public while carrying dangerous and unusual weapons, it constituted a riot.[155] As discussed in Part III, many modern American riot statutes draw in large part on these antecedents, prohibiting groups of individuals from engaging in conduct that is apt to cause public terror or alarm or otherwise disturb the peace. Prosecutions of individuals who openly carry firearms outside polling locations, vote tabulation centers, or election officials' residences would fall comfortably within the common law tradition of riot.

III. Modern American Riot Statutes

Nearly every state and the District of Columbia has either enacted a riot statute or judicially adopted the common law crime of riot. Only three states—Nebraska, Wisconsin, and Wyoming—have not enacted a riot statute while also abrogating the common law.

Modern riot statutes generally prohibit individuals in groups ranging in size from two to seven persons from engaging in one of the following courses of conduct:

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152. 1692 Mass. Laws 10, no. 6.

153. 1699 N.H. Laws 1.

154. *See, e.g.*, 1801 Tenn. Laws 259, 260–61, ("Be it enacted, That if any person or persons shall publicly ride or go armed to the terror of the people, . . . it shall be the duty of any judge or justice, . . . to bind such person or persons to their good behavior"); 1821 Me. Laws 285 ("That it shall be within the power, and be the duty of every Justice of the Peace within this county, . . . to cause to be staid and arrested, all affrayers, rioters, disturbers or breakers of the peace, and such as shall ride or go armed offensively, to the fear or terror of the good citizens of this State"); 1852 Del. Stat. 333 (making subject to arrest "all affrayers, rioters, breakers and disturbers of the peace, and all who go armed offensively to the terror of the people.").

155. *See* Blocher & Siegel, *supra* note 23, at 169 ("Armed groups unauthorized by law were considered riots and punishable as such"); Frassetto, *supra* note 125, at 81 ("Summarizing the English sources, neither intent to terrorize nor actual public terror was necessary for a public gathering to be considered an affray, unlawful assembly, rout, or riot, and simply carrying weapons was sufficient to satisfy the terror requirement of public disorder crimes, even if no one was placed in particular fear"); *id.* at 65 ("The public disorder cases and treatises discussed in this article show that these crimes sometimes involved the carrying of weapons, and when they did, they were deemed to automatically incite public terror"); *cf.* Darrell A.H. Miller, *Guns as Smut: Defending the Home-Bound Second Amendment*, 109 Colum. L. Rev. 1278, 1318 (2009) ("In eighteenth century common law tradition, therefore, the right to assemble in public did not include a right to assemble armed.").

- Engaging in violent or tumultuous conduct and thereby recklessly causing, or creating a grave, substantial or serious risk of causing, public terror, alarm, inconvenience, or annoyance;[156]
- Using force or violence, or a threat thereof, without authority of law (and additionally in some states, disturbing the public peace);[157]
- Doing an unlawful act of violence or a lawful act in a violent, boisterous, or tumultuous manner;[158] or
- Causing, or creating a substantial risk of causing, property damage or physical injury (or additionally in some states, substantially obstructing the performance of governmental functions).[159, 160]

156. Ala. Code § 13A-11–3(a) (1975); Ark. Code Ann. § 5–71–201(a) (2021); Conn. Gen. Stat. § 53a-175(a) (2019); Del. Code Ann. tit. 11, §§ 1302 and 1301(2022); Haw. Rev. Stat. §§ 711–1103(1) and 711–1101(1) (West 2023); Me. Rev. Stat. Ann. tit. 17-A, §§ 503 and 501-A (2023); Mich. Comp. Laws Ann. § 752.541 (West 2023); N.H. Rev. Stat. Ann. § 644:1(I) (2023); N.J. Stat. Ann. §§ 2C:33–1(a) and 2C:33–2(a) (West 2023); N.Y. Penal Law § 240.05 (McKinney 2023); Ohio Rev. Code §§ 2917.02(A) (Aggravated Riot); and 2917.11(A) (2022); Or. Rev. Stat. Ann. § 166.015(1) (West, Westlaw through 2022 Legis. Sess.); Pa. Gen. Assembly, PA Consolidated Statutes, 18 PA. Cons. Stat. §§ 5501 and 5503(a) (1972), https://www.legis.state.pa.us/cfdocs/legis/LI/consCheck.cfm?txtType=HTM&ttl=18&div=0&chpt=55 [*https://perma.cc/2ZF5–3GKF]*; Utah Code Ann. § 76–9–101(1) (West, Westlaw through 2022 Spec. Sess.). *See also* Statutory Appendix, sec. I.A. and I.B.

157. Ariz. Rev. Stat. Ann. § 13–2903 (1977); Cal. Penal Code § 404(a) (West 2023); Idaho Code Ann. § 18–6401 (LEXIS through 2023 Ch. 26); 720 Ill. Comp. Stat. 5/25–1(a) (Mob action) (2013); Iowa Code Ann. § 723.1 (West 2021); Kan. Stat. Ann. § 21–6201(a) (West 2022); Minn. Stat. Ann. § 609.71 Subd. 2 (Riot second degree) (West 2022); Okla. Stat. Ann. tit. 21, § 1311 (West 2023); Va. Code Ann. § 18.2–405 (LEXIS through 2022 Ch. 2); Wash. Rev. Code Ann. § 9A.84.010(1) (Criminal Mischief) (West 2023). *See also* Statutory Appendix, sec. II.A and II.B.

158. Ga. Code Ann. § 16–11–30(a) (1968); Nev. Rev. Stat. Ann. § 203.070(2) (West 2023); Ohio Rev. Code Ann. § 2917.03(B) (Riot) (West, Westlaw through 2023–2023 Legis. Sess. File 1). *See also* Statutory Appendix, sec. III.

159. Alaska Stat. Ann. § 11.61.100(a) (West 2022); Colo. Rev. Stat. Ann. § 18–9–101 (2) (LEXIS through 2023 Ch. 18); D.C. Code § 22–1322(a) (2023); Fla. Stat. Ann. §§ 870.01(2) (riot) and § 870.01(3) (aggravated riot) (West 2022); Idaho Code Ann. § 18–6401 (LEXIS through 2023 legislation Ch. 26); Ind. Code Ann. §§ 35–45–1-2 and 35–45–1-1 (West 2021); Ky. Rev. Stat. Ann. § 525.010(5) (West 2023); La. Rev. Stat. Ann. § 14:329.1 (West 2023); Mont. Code Ann. § 45–8–103(1) (West 2023); N.C. Gen. Stat. § 14–288.2(a) (2022); N.D. Cent. Code § 12.1–25–01 (2) (2023); S.D. Codified Laws § 22–10–01 (2023); Tenn. Code Ann. § 39–17–301(3) (2023); Tex. Penal Code Ann. § 42.02(a)(1) and (2) (West 2021). *But see id.* at § 42.02(a)(3) (West 2021) (riot if assemblage "by force, threat of force, or physical action deprives any person of a legal right or disturbs any person in the enjoyment of a legal right.") *See also* Statutory Appendix, sec. IV.A and IV.B.

160. The riot statutes in Missouri and Vermont fall outside these general categories. *See* Mo. Ann. Stat. § 574.050 (West 2022) and Vt. Stat. Ann. tit. 13 § 902 (LEXIS through 2021–2022 Legis. Sess.). *See also* Statutory Appendix, sec. V.

In several states, engaging in the prohibited conduct while armed constitutes aggravated riot and subjects offenders to enhanced terms of incarceration and penalties.[161]

As discussed below, some statutory formulations of the offense of riot are better suited than others for addressing the open carry of firearms outside polling places, vote tabulation centers, and election officials' residences. However, in many states, including several where the risk of election intimidation in upcoming elections is significant, such as Arizona, Georgia, Michigan, Nevada, Ohio, Pennsylvania, and Texas, the riot statutes, and, in the case of North Carolina, the judicially-recognized common law crime of going armed in public to the terror of the people, could be utilized by prosecutors against groups of individuals who openly carry firearms in proximity to where election activities are taking place.[162]

A. *Public Terror or Alarm Statutes*

1. In General

Fourteen states[163] incorporate in their riot statutes the common law concept of *in terrorem populi* or causing "terror to the people." However, each of these states has weakened the common law language by no longer requiring that a person cause, or create a substantial risk of causing, public "terror." Instead, a showing of public "alarm," or, in some states, just public "inconvenience" or "annoyance," is sufficient.

Oregon's statute, which is somewhat typical of the *in terrorem populi* flavor of riot statute, states as follows:

> A person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm.[164]

The riot statutes in Connecticut and New York are nearly identical to Oregon's,[165] while the statutes in Arkansas and New Hampshire

161. *See, e.g.*, Ark. Code Ann. § 5–71–202 (LEXIS through 2023 Act 160); N.H. Rev. Stat. Ann. § 644:1 (West, Westlaw through 2023 Ch. 1); Ohio Rev. Code Ann. § 2917.02 (2023).

162. Note that local prosecutors often have broad discretion to make charging decisions without interference from state elected officials. *See generally* Zachary S. Price, *Faithful Execution in the Fifty States*, 57 Ga. L. Rev. 603, 651 (2023). For example, in Texas, local elected county and district attorneys "hold near-total autonomy in exercising their charging discretion." *Id.* at 62. Thus, if the Harris County district attorney chose to enforce Texas' riot statute against those who open carry firearms near election facilities in Houston, she could do so without interference from the Texas Attorney General.

163. Alabama, Arkansas, Connecticut, Delaware, Hawaii, Maine, Michigan, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, and Utah.

164. Or. Rev. Stat. Ann. § 166.015(1) (West 2022).

165. *See* Conn. Gen. Stat. Ann. § 53a-176 (West 2023) (riot in the second degree); N.Y. Penal Law § 240.05 (McKinney, Westlaw through 2023 Ch. 9) (riot in the second degree). Unlike Oregon, which requires participation by a group of six or more persons to constitute riot, both Connecticut and New York require

use the disjunctive to require a showing that the defendant engaged in "tumultuous *or* violent conduct."[166] Utah requires a showing that the defendant engaged solely in "violent" conduct.[167] The riot statutes in Alabama[168] and Michigan[169] are slightly different from those above in that they require a person to "wrongfully" engage in the violent and/or tumultuous conduct, with Michigan additionally requiring that the individuals "act in concert."

Delaware, Hawaii, Maine, New Jersey, and Pennsylvania track the Model Penal Code's riot statute which references the *in terrorem populi* element through incorporation of the offense of disorderly conduct, which itself has an *in terrorem populi* element.[170] Ohio does the same with respect to its aggravated riot statute.[171] The Model Penal Code's riot statute provides as follows:

> A person is guilty of riot, a felony of the third degree, if he participates with [two] or more others in a course of disorderly conduct:
> (1) with purpose to commit or facilitate the commission of a felony or misdemeanor;
> (2) with purpose to prevent or coerce official action; or
> (3) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.[172]

The Model Penal Code, in turn, defines disorderly conduct as follows:

> A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
> (1) engages in fighting or threatening, or in violent or tumultuous behavior;

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participation by a group of five or more persons to constitute riot in the second degree.

166. *See* Ark. Code Ann. § 5–71–201 (2023); N.H. Rev. Stat. Ann. § 644:1 (2023).
167. *See* Utah Code Ann. § 76–9–101 (West 2022).
168. Ala. Code § 13A-11–3 (2022).
169. Mich. Comp. Laws Ann. § 752.541 (West 2023).
170. *See* Model Penal Code §§ 250.1 (riot) and 250.2 (disorderly conduct) (Am. L. Int., 1962); Del. Code Ann. tit. 11 §§ 1302 (riot) and 1301 (disorderly conduct) (West, Westlaw through 2023–2024 Legis. Sess. Ch. 5); Haw. Rev. Stat. §§ 711–1103(1) and 711–1101(1) (West 2023)); Me. Rev. Stat. Ann. tit. 17-A, §§ 503 and 501-A (2023); N.J. Stat. Ann. §§ 2C:33–1 (riot) and 2C:33–2 (disorderly conduct) (West 2023); 18 Pa. Cons. Stat. Ann. §§ 5501 (riot) and 5503 (disorderly conduct) (West 2022).
171. *See* Ohio Rev. Code Ann. §§ 2917.02 (riot) and 2917.11 (disorderly conduct) (West, 2023). As discussed in Part III.C, *supra.*, Ohio's misdemeanor riot statute incorporates a different framework. *See* Ohio Rev. Code Ann. § 2917.03 (West 2023).
172. Model Penal Code §§ 250.1 (Am. L. Inst., 1962). Note that the Model Penal Code "places the number of required participants in brackets in order to indicate the possibility of reasonable alternatives." *Id.*, cmt. 3, p. 318.

(2) makes unreasonable noise or offensively coarse utterances, gesture or display, or addresses abusive language to any person present; or
(3) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.[173]

Note that under the Model Penal Code, a person need not create a risk of public "alarm" to be guilty of disorderly conduct and, therefore, riot—rather, creating a risk of public "inconvenience" or "annoyance" is sufficient. Delaware, Hawaii, New Jersey, Ohio, and Pennsylvania, which as noted, have also adopted the Model Penal Code's incorporation of disorderly conduct within the offense of riot, define "disorderly conduct" similarly.[174]

Importantly, unlike the voter intimidation statutes discussed in Part I which require the government to prove that the defendant acted with the specific intent to intimidate the voter, the *in terrorem populi* riot statutes do not require a showing that the person acted *intentionally* to cause public alarm or a risk thereof. Rather, a prosecutor need only show that the person acted *recklessly* in causing such alarm or risk.

The Model Penal Code defines "recklessly" as follows:

> A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.[175]

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173. Model Penal Code § 250.2 (Am. L. Inst., 1962).

174. Del. Code Ann. tit. 11, § 1301 (West, Westlaw through 2023–2024 Legis. Sess. Ch. 5); Haw. Rev. Stat. Ann. § 711–1101 (West 2023); N.J. Stat. Ann. § 2C:33–2 (West 2023); Ohio Rev. Code Ann. § 2917.11 (West, Westlaw through 2023–2024 Legis. Sess. File 1); 18 Pa. Cons. Stat. Ann. § 5503(a) (West 2022). Note that while Maine's riot statute also tracks the Model Penal Code formulation by defining riot in terms of engaging in disorderly conduct, *see* Me. Rev. Stat. Ann. tit. 17-A, § 503 (2023), it defines disorderly conduct solely in terms of intentionally or recklessly causing "annoyance" to others without reference to public "inconvenience" or "alarm." Me. Rev. Stat. Ann. Tit. 17-A, § 501-A (2023). More critically, it severely circumscribes the types of conduct that may give rise to "annoyance," including "[m]aking loud and unreasonable noises," *id.*, none of which, without more, would appear applicable to persons openly, but silently, carrying firearms near election facilities. Thus, Maine's riot statute, unlike the others in this category, would not appear to be an effective tool for combatting open carry at elections.

175. Model Penal Code § 2.02(2)(c) (Am. L. Inst., 1962). Nearly all the states with *in terrorem populi* riot statutes have adopted the Model Penal Code's definition of "recklessly." *See* Ala. Code § 13A-2–2 (2022); Ark. Code Ann. § 5–2–202 (2023); Conn. Gen. Stat. Ann. § 53A-3 (West 2023); Haw. Rev. Stat. Ann. § 702–206 (West, 2023); Me. Rev. Stat. Ann. tit. 17-A, § 35 (West 2023) (but not requiring that the risk consciously disregarded be substantial and unjustifiable); N.H. Rev.

The drafters of the Model Penal Code elaborated on the requirement that the consciously disregarded risk be both substantial and unjustified. They note that while some substantial risks may be created without recklessness when done "to serve a proper purpose," such as where a surgeon performs a potentially fatal operation because it is the best course of treatment for the patient,[176] "[o]n the other hand, less substantial risks might suffice for liability if there is no pretense of any justification for running the risk."[177] In this way, the drafters contemplated a type of sliding scale, where the more substantial the risk, the greater the justification required for taking it.

Ultimately, it is up to a jury to first "examine the risk and the factors that are relevant to how substantial it was and to the justification for taking it," and second, "to make the culpability judgment in terms of whether the defendant's conscious disregard of the risk justifies condemnation."[178]

The risk of public alarm created by a person wielding a firearm near election facilities is substantial both in the sense of the likelihood that persons witnessing the conduct will be alarmed by it, as well as in the degree of alarm caused by the conduct.[179] On the other hand, the justification for taking the risk would not appear compelling, if there is any pretense of a justification at all. The likely justification offered in this context would be that the display of firearms is necessary to "prevent voter fraud." Importantly, it is not clear how the presence of armed individuals at election facilities furthers that objective. As one election expert has observed, "[t]here are ways to secure the system, but having vigilantes standing around . . . is not the way to do it. . . . [I]t's just a misdirection of energy."[180]

What all these *in terrorem populi* riot statutes have in common, then, is a prohibition on engaging in "violent" and/or "tumultuous" conduct[181]

Stat. Ann. § 626:2(II)(C) (West 2023); N.J. Stat. Ann. § 2C:2–2 (West 2023); N.Y. Penal Law § 15.05 (McKinney, Westlaw through 2023 Ch. 49); Or. Rev. Stat. Ann. § 161.085 (West 2022); 18 Pa. Cons. Stat. Ann. § 302 (West 2022); Utah Code Ann. § 76–2–103 (West 2022). The exceptions are Michigan, *see* Mich. Comp. Laws § 8.9(10)(f) (2023), and Ohio, *see* Ohio Rev. Code Ann. § 2901.22(c) (West 2023).

176. Model Penal Code § 2.02, cmt. 3, p. 237 (Am. L. Inst., 1962).

177. Model Penal Code § 2.02, cmt. 3, n. 14, p. 237 (Am. L. Inst., 1962).

178. Model Penal Code § 2.02, cmt. 3, p. 238 (Am. L. Inst., 1962) (explaining portion of "recklessness" definition requiring that the risk be of such a nature and degree that its disregard "involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation").

179. *Cf.* Diana Palmer & Timothy Zick, *The Second Amendment Has Become a Threat to the First*, The Atlantic, Oct. 27, 2021 (discussing results of study indicating that people are less likely to attend a protest or engage in other expressive behaviors when firearms were present, with some study participants explaining that "[n]othing is important enough to be shot over" and "I'll let the people with the guns do the talking") [https://perma.cc/K8NE-5WUR]

180. Hsu & Thompson, *supra* note 12, (quoting Paul Gronke, Director of the Elections and Voting Information Center at Reed College).

181. The states that have adopted the Model Penal Code's riot formulation

with a stated number of others that recklessly causes or creates a grave, serious, or substantial risk of causing either public terror, alarm, inconvenience, or annoyance.

This Article next analyzes two *in terrorem populi* riot statutes—one that does not incorporate the offense of disorderly conduct (Michigan) and one that does (Pennsylvania)—as vehicles for discussing the legal issues presented by the potential enforcement of all the *in terrorem populi* riot statutes against persons who openly carry firearms in proximity to where election-related activities are taking place.

2. Michigan's Riot Statute

An analysis of Michigan's riot statute is presented here because, as noted above, the statute, in addition to containing elements common to the other *in terrorem populi* riot statutes that do not incorporate the offense of disorderly conduct, also requires a person to "wrongfully" engage in the violent and/or tumultuous conduct, and to "act in concert" with others. In this way, an analysis of Michigan's statute will address the majority of the issues presented by enforcement of the other statutes in this category.[182]

Michigan's riot statute provides as follows:

> It is unlawful and constitutes the crime of riot for 5 or more persons, acting in concert, to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm.[183]

A person convicted under the statute may be imprisoned for up to ten years, fined up to $10,000.00, or both.[184]

The primary questions presented by the text of the statute are whether persons who hold, carry or otherwise display firearms outside a polling location, vote tabulation center, or election officials' private residences are (1) "wrongfully engag[ing] in violent conduct"; and (2) "intentionally or recklessly caus[ing] or create[ing] a serious risk of causing public terror or alarm." A subsidiary question is what the statute means by "acting in concert."

a. Wrongfully Engaging in Violent Conduct

The below analysis examines the "wrongful" and "violent" elements separately, taking the "violent" element first.

i. Violent Conduct

For conduct to be deemed "violent" under Michigan law, it need not encompass an actual physical assault. Rather, conduct that merely threatens the use of force is appropriately deemed "violent." The Michigan

additionally prohibit, *inter alia*, fighting or threatening.

182. Note that unlike several of the other state riot statutes in this category, Michigan's statute does not define riot in terms of "tumultuous" conduct. A discussion of that term is presented in Part III.A.3.b.ii, *infra.*

183. Mich. Comp. Laws Ann. § 752.541 (West 2023).

184. Mich. Comp. Laws Ann. § 752.544 (West 2023).

Supreme Court has held that "[i]n law, the term 'violence' means the unlawful exercise of physical force, *or intimidation by its exhibition and threat of employment*."[185] That the mere threat of the use of force is itself "violent" conduct is well understood. For example, in Michigan, "violent felony" is defined as "a felony in which an element is the use, attempted use, *or threatened use* of physical force against an individual, ..."[186] Federal law is to the same effect. The U.S. Code defines "crime of violence" as "an offense that has as an element the use, attempted use, *or threatened use* of physical force against the person or property of another, ..."[187] Of course, "'physical force' can be exerted indirectly by and through concrete bodies, such as a dangerous weapon."[188]

Thus, in Michigan, a conviction for felonious assault, which is properly understood as a crime of violence, "can be sustained without proof of the use of or attempt to utilize any force at all"[189]—a threat of force is sufficient.[190] Similarly, a conviction for robbery, which in Michigan requires a showing that a defendant "uses force or violence against any person who is present, or who assaults or puts the person in fear,"[191] can be sustained where the defendant simply implies that he possesses a weapon. In *People v. Horacek*,[192] a case involving a conviction for robbery of a store, the Michigan Court of Appeals explained that the defendant "kept his left hand in his pocket throughout his interaction with the store clerk, thus implying that he possessed a weapon,"[193] which he did not. He made no overt threats—he simply directed the clerk to open the cash register and give him money—and did not brandish a weapon.[194] In affirming the conviction, the court concluded that the defendant's actions were "threatening and of a violent nature."[195]

Thus, for conduct to be deemed "violent" under Michigan law, it need not encompass an actual physical assault. In this way, Michigan law is consistent with the common law, where merely showing a weapon or riding in public with dangerous and unusual weapons have long been

185. People v. Ruthenberg, 229 Mich. 315, 326 (1924) (citation omitted) (emphasis added).
186. Mich. Comp. Laws § 750.543b(h) (1931) (emphasis added).
187. 18 U.S.C. § 16 (emphasis added).
188. United States v. Rogers, 179 F. Supp. 3d 881, 891 (E.D. Wis. 2016) (citing United States v. Castleman, 572 U.S. 157, 170 (2014)).
189. People v. Pace, 302 N.W.2d 216, 221 (Mich. Ct. App. 1980). *See also* People v. Carlson, 125 N.W. 361, 361(Mich. 1910) ("That an assault may be committed without actually touching the person of the one assaulted is not disputed, and no authorities are required in support of the proposition").
190. *Pace*, 302 N.W.2d at 221 (affirming felonious assault conviction, in part, because "[m]erely displaying a knife implies a threat of violence").
191. Mich. Comp. Laws Ann. § 750.530(1) (2023).
192. People v. Horacek, No. 317527, 2015 WL 5442778 (Mich. Ct. App. Sept. 15, 2015).
193. *Id.* at *2.
194. *Id.* at *1–2.
195. *Id.* at *2.

considered acts of sufficient violence to constitute an affray or, if done in sufficient numbers, a riot.[196]

The act of an armed group in openly holding, carrying, or otherwise displaying their firearms outside a polling location, vote tabulation center or election official's residence is readily understood as an act of intimidation by the exhibition and threat of the use of force[197]—therefore, under Michigan law, such behavior constitutes "violence."[198] Such a group is clearly distinguishable from, for example, a single individual with a holstered handgun walking down a public street. Context is critical, a principle long understood in prosecuting the crime of riot. In the 1831 Pennsylvania case of *Commonwealth v. Dupuy*,[199] the court observed as follows:

> [Defense counsel] admitted that the manner of doing the act which is charged as riot is everything, and may make that criminal and amount to a riot, which, when done in a different manner, may be laudable. This is certainly so; but then I understood him to contend that although the time and place might aggravate the offence, they can never make that an indictable offence which otherwise would not be so. To the truth of this proposition, I cannot give my assent. I consider that the place in which a thing is done may be of as much importance in making the act a public offence or otherwise, as the manner of doing it. It is laid down as law, and I have no doubt it is so, that a man may call in his friends completely armed to defend and protect himself against a threatened assault in his own house, but if he go abroad thus attended by two or more, with a view to defend himself against a threatened attack, unless indeed it should be to go to the magistrate to make his complaint, it would be considered a riot. The place, in this case then, becomes of the essence of the crime.[200]

Here too, the place of the armed assembly—near where election-related activities are taking place—is "the essence of the crime."[201] For just like the store robber in *Horacek* with a hand in his pocket, a group of armed individuals "standing guard" outside a polling place or vote tabulation center can be understood to be making

196. *See supra* Part II.

197. *See Democratic Nat'l. Comm. v. Republican Nat'l. Comm.*, 671 F. Supp. 2d 575, 579 (D.N.J. 2009), *aff'd*, 673 F.3d 192 (3d Cir. 2012) (denying Republican National Committee's motion to vacate consent decree in lawsuit alleging RNC intimidated voters on Election Day by posting armed off-duty sheriffs and policemen at polling places in minority precincts). *See also* State v. Hines, 471 S.E.2d 109, 114 (N.C. Ct. App. 1996), *review allowed*, 477 S.E.2d 47 (N.C. 1996), *review improvidently* 481 S.E.2d 85 (N.C. 1997) (concluding that by prohibiting "intimidation," "[c]learly, [. . .] the legislature intended to prohibit anyone from frightening an individual").

198. People v. Ruthenberg, 201 N.W. 358 (Mich. 1924) ("[i]n law, the term 'violence' means the unlawful exercise of physical force, *or intimidation by its exhibition and threat of employment.*") (emphasis added).

199. Commonwealth v. Dupuy, 1 Brightly 44 (Pa. Ct. of Nisi Prius 1831).

200. Commonwealth v. Dupuy, 1 Brightly at 45–46.

201. *Id.* at 46.

an implicit threat of violence. But unlike the robber in *Horacek*, such individuals are not simply "implying" that they possess weapons; they are openly declaring it. Michigan courts have held that "[m]erely displaying a knife implies a threat of violence."[202] It is, therefore, reasonable to conclude that a group of individuals "merely displaying" firearms outside election facilities are similarly implying a threat of violence, in no small measure because of the charged context in which the display takes place.

In short, a trier-of-fact could reasonably conclude that a group of five or more persons holding, carrying, or otherwise displaying firearms near where election-related activities are taking place are engaging in "violent" conduct under the Michigan riot statute.

ii. Wrongful

As noted above, to be convicted under Michigan's riot statute, a person must "*wrongfully* engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm."[203] As an initial matter, it is not clear in this context how to interpret the meaning of "wrongfully,"which is perhaps why it appears in only two state riot statutes—Michigan's and Alabama's.

It is of course likely that a person charged under Michigan's riot statute for openly carrying a firearm outside a polling place, vote tabulation center, or election official's residence, would argue that because open carry is legal in Michigan,[204] her violent conduct in openly carrying the firearm is not "wrongful." However, while there are contexts in which legal rights can act as a shield against criminal prosecution,[205] the "right" to engage in violent conduct where such conduct terrorizes others would not appear to be one of them.

In any event, the term "wrongful" is not synonymous with "unlawful"—it is broader. Michigan courts have noted that "wrongful" includes acts that are "[i]njurious, heedless, unjust, reckless, unfair," or an "[i]nfringement of some right."[206] These terms connote much more than strict illegality. Indeed, "heedless" means "inconsiderate" or "thoughtless."[207] Other authorities define "wrongful" in terms of "anti-social"

202. People v. Pace, 302 N.W.2d 216, 221 (Mich. Ct. App. 1980).
203. Mich. Comp. Laws Ann. § 752.541 (West 2023) (emphasis added).
204. There is no statute in Michigan expressly permitting open carry, but neither is there one prohibiting it. *See* Michigan State Police, *Legal Update No. 86*, 1 (2010) ("You will not find a law that states it is legal to openly carry a firearm. It is legal because there is no Michigan law that prohibits it"), https://www.michigan.gov/-/media/Project/Websites/msp/legal2/msp_legal_update_no_86_2.pdf?rev=385c3b75701f42659d7ce38716c049c3. [https://perma.cc/N2YX-KDMQ]
205. *See, e.g., United States v. Matthews*, 505 F.3d 698, 706 (7th Cir. 2007) (observing in prosecution for corruptly obstructing justice that "under limited circumstances, a defendant is privileged to obstruct the prosecution of a crime. That privilege flows from the defendant's enjoyment of a legal right—such as the right to avoid self-incrimination.").
206. Matter of Estate of Prichard, 425 N.W.2d 744 (Mich. Ct. App. 1988).
207. *Heedless*, Merriam-Webster Dictionary, https://www.merriam-webster.com/

acts.[208] Openly holding, carrying, or otherwise displaying firearms outside a polling place or vote tabulation center could readily be viewed as, at best, "inconsiderate," "thoughtless," or "anti-social." Of course, at worst it could be considered deliberate intimidation which is itself illegal and therefore "wrongful." It also reasonably could be construed as an "infringement" on the right to vote.[209]

Whatever the import of the term "wrongfully" in Michigan's riot statute, it is worth reiterating that of the fourteen states' *in terrorem populi* riot statutes, only those in Michigan and Alabama include it.

b. Intentionally or Recklessly Cause or Create a Serious Risk of Causing Public Terror or Alarm

Under Michigan's riot statute, a defendant must "intentionally or recklessly cause or create a serious risk of causing public terror or alarm."[210] The Michigan Court of Appeals, in interpreting this language, has explained that:

> [A] defendant causes public terror or alarm "any time a segment of the public is put in fear of injury either to their persons or their property." *People v. Garcia,* 31 Mich. App. 447, 456, 187 N.W.2d 711 (1971). However, the statute also applies to violent conduct that creates a *serious risk of causing* public alarm. Thus, prohibited conduct includes violent acts that intentionally alarm the public or show a conscious disregard of the risk of alarming the public.[211]

Note that the court equated "recklessly" with "show[ing] a conscious disregard of the risk." Indeed, in overturning the trial's court's quashing of an information charging riot, the appellate court stated that "evidence showed that the defendants engaged in conduct with at least a conscious disregard that their conduct created a serious risk of causing the public to be alarmed."[212]

A group of individuals who hold, carry, or otherwise display firearms outside a polling location, vote tabulation center, or election official's residence are almost by definition exhibiting "a conscious disregard of the

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dictionary/heedless [https://perma.cc/XP86-VYQG]

208. *See* Barron's Law Dictionary 535 (3d ed. 1991) ("[t]he scope of the term is not limited to acts that are 'illegal,' but comprehends as well acts that are deemed immoral, anti-social, tortious, etc.") (defining "wrongful act").

209. *See Infringement*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/infringement (defining "infringement" as "an encroachment [. . .] on a right or privilege."). [https://perma.cc/BEQ5–6424]

210. Mich. Comp. Laws Ann. § 752.541 (West 2023).

211. People v. Kim, 630 N.W.2d 627, 631(Mich. Ct. App. 2001) (emphasis in original).

212. *Id.* Note that under Michigan law, "recklessness" is defined as "an act or failure to act that demonstrates a deliberate, willful, or wanton disregard of a substantial and unjustifiable risk without reasonable caution for the rights, safety, and property of others." Mich. Comp. Laws § 8.9(10)(f) (2015). The court appears to have short-handed this definition to mean "show[ing] a conscious disregard of the risk."

risk of alarming the public."[213] That is because, as the U.S. Supreme Court has observed, "the display of a gun instills fear in the average citizen."[214]

The open carry movement is attempting to change that perception through efforts to de-sensitize the public to the sight of firearms in public. Michigan Open Carry, for example, which self-identifies as "the premier organization in Michigan promoting the lawful open carry of a holstered handgun,"[215] states on its website that among its objectives are to "educate and desensitize the public and members of the law enforcement community about the legality of the open carry of a handgun in public,"[216] and to "demonstrate to the public at large that gun owners are one of the most lawful segments of society and they have nothing to fear from the lawful carry of a firearm."[217] The organization further states that one of its "methods to accomplish [its] objectives" is to "have periodic and informal gatherings in public places throughout the state while open carrying our handguns."[218]

In 1843, Justice William Gaston of the North Carolina Supreme Court observed that "[n]o man amongst us carries [a gun] about with him, as one of his every day accoutrements—as a part of his dress—and never we trust will the day come when any deadly weapon will be worn or wielded in our peace loving and law-abiding State, as an appendage of manly equipment."[219] Michigan Open Carry is attempting to hasten the arrival of that day. Whether their efforts ultimately will be successful cannot be known. But at least for now, in the eyes of Michigan's riot statute, it would appear clear that groups of individuals going about armed in public are exhibiting "a conscious disregard of the risk of alarming the public."[220]

Of course, it is not simply the act of openly carrying firearms in public that is alarming. It is the specific context of the carry near where election activities are taking place. The importance of context as a legal concept has been understood since at least the eighteenth century, when Hawkins, in his commentary on the Statute of Northampton, wrote that "no wearing of arms is within the meaning of this statute, *unless it be accompanied*

213. *Kim*, 630 N.W.2d at 631. Note that the fact that a public official is the target of the terrifying or alarming conduct rather than the public at large is of no consequence under the Michigan riot statute. *See id.* at 631–32.
214. McLaughlin v. United States, 476 U.S. 16, 17–18 (1986).
215. Mich. Open Carry, Inc., http://miopencarry.org/about. [https://perma.cc/TAF6-C29R]
216. *Id.*
217. *Id.*
218. *Id.*
219. State v. Huntly, 25 N.C. 418, 422 (1843).
220. People v. Kim, 630 N.W.2d 627, 631 (Mich. Ct. App. 2001). It may be possible to demonstrate through social media posts or other evidence that a group of individuals who hold, carry, or otherwise display firearms outside of a polling location or vote tabulation center "intend" thereby to "cause" public terror or alarm. However, under the statute, the state need only show that the individuals exhibited "a conscious disregard of the risk of alarming the public."

with such circumstances as are apt to terrify the people."[221] As one modern court has observed, "a dozen men openly carrying weapons may not raise so much as an eyebrow at an NRA convention; however, reasonable suspicion may be present were they to enter a Sunday church service."[222] The same is certainly true of individuals openly carrying firearms at elections, particularly given that polling places and vote tabulation centers have been assessed by the U.S. Department of Homeland Security as "flash points for potential violence."[223] Given the current political climate, the presence of individuals openly displaying firearms near election facilities certainly creates a risk of alarming the public.

Another critical factor in the context of a group of individuals amassed with firearms near election facilities is the very fact of there being a *group of individuals*. Indeed, the jurisprudential basis for the offense of riot is premised, in large part, on the fact that group activity is "more dangerous and frightening" than individual behavior.[224] As the Ohio's Legislative Service Commission expressed it, "[t]he significant element of riot, of whatever degree, is the corporate nature of the offense, i.e., it is committed by a group of 5 or more persons, thus giving the intended mischief a higher potential for harm."[225]

In short, the open display of firearms by a group of people outside an election facility is of a completely different character than, for example, the display of a holstered handgun by a single individual walking down the street.

It is also important to note in this regard that in Michigan, "evidence regarding the 'serious risk' element does not require the prosecutor to present testimony of uninvolved, lay witnesses who testify to a feeling of alarm or fear. . . . Rather, conduct may indicate an intent to cause public alarm or a reckless disregard for whether a serious risk of public alarm will result."[226] As discussed, the conduct of openly displaying firearms

221. Hawkins, *supra* note 121, at 267 (emphasis added).

222. Baker v. Schwarb, 40 F. Supp. 3d 881, 891 (E.D. Mich. 2014)(quoting Banks v. Gallagher, No. 3:08–CV–1110, 2011 WL 718632, at 4 (M.D.Pa. Feb. 22, 2011)). *See also* Capital Area Dist. Library v. Michigan Open Carry, Inc., 298 Mich. App. 220, 226–27 (2012) (while mere open carry may not constitute brandishing, doing so in a library has "an aspect of an intent to make someone feel threatened or intimidated") (quoting trial court).

223. *Homeland Threat Assessment*, U.S. Dept. of Homeland Security, 18 (2020) (describing threat to "[o]pen air, publicly accessible parts of physical election infrastructure"), https://www.dhs.gov/sites/default/files/publications/2020_10_06_homeland-threat-assessment.pdf. [https://perma.cc/7MKM-FK72]

224. Model Penal Code § 250.1, cmt. 3, p. 317.

225. Ohio Rev. Code Ann. § 2917.02 (West 2023). The Legislative Service Commission is a nonpartisan agency that, among other things, provides the Ohio General Assembly with analyses of bills. The LSC is comprised of fourteen members of the General Assembly, including the Speaker of the House of Representatives and the President of the Senate. *See generally* Ohio Legislative Service Commission, *About Us*, https://www.lsc.ohio.gov/pages/general/aboutus.aspx?active=idA. [https://perma.cc/LB9K-9P7G].

226. People v. Kim, 630 N.W.2d 627, 631 (Mich. App 2001). *See also* Briscoe v. State,

outside election facilities indicates—at a minimum—a reckless disregard for whether a serious risk of public alarm will result.[227]

c. Acting in Concert

The Michigan riot statute prohibits five or more persons, "acting in concert," from engaging in the conduct proscribed by the statute.[228] However, "acting in concert" is not defined.

In *DePriest v. McKee*,[229] a defendant convicted under Michigan's riot statute filed a federal *habeas corpus* petition arguing that it was error for the trial court not to define the term "acting in concert" for the jury.[230] Although the trial court offered to give the jury a dictionary definition of the term, no such definition was ultimately provided.[231] In rejecting the *habeas* petition, the federal district judge stated that "[g]iven that the words in issue are in common usage, it is not clear that a dictionary definition would have been helpful to the jury."[232]

The common meaning of "acting in concert" is to act together.[233] Although individuals who act pursuant to a prior agreement or understanding can be said to act in concert, such a showing is not necessary to demonstrate that individuals, in the legal sense of the phrase, are acting in concert. A leading riot case from Maryland, which has judicially adopted the common law offense of riot, explains this element as follows:

> It has been said that a mutual intent to assist one another against any who shall oppose them is an element of the offense of riot, but it seems that, while this specific intention may be held by rioters, it is not in general essential to the offense and a previous agreement or conspiracy need not be shown. The intention which is generally an element of the offense is the intent to join in or encourage the acts which constitute the riot, namely, the assembly, violence, turbulence, and the act violently and turbulently performed.[234]

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3 Md. App. 462, 468–69 (1968) ("Moreover, there may be a riot, even though no person or persons are actually terrified, if the violent and turbulent execution of any unlawful act committed by a sufficient number of persons tends to alarm and terrify law-abiding citizens in the peaceful exercise of their constitutional rights and privileges.") (citations omitted).

227. Indeed, actual intent to cause public alarm could potentially be demonstrated on such facts.

228. Mich. Comp. Laws Ann. § 752.541 (West 2023). [https://perma.cc/AKZ9-MWXK]

229. No. 1:07-CV-1290, 2010 WL 5677024, at 23 (W.D. Mich. June 30, 2010), *report and recommendation adopted*, No. 1:07-CV-1290, 2011 WL 332534 (W.D. Mich. Jan. 31, 2011).

230. *Id.*

231. *Id.*

232. *Id. Cf.* People v. Phillips, No. 245142, 2004 WL 345485, at *1–2 (Mich. Ct. App. Feb. 24, 2004) (affirming conviction for various firearms offenses and finding no error in jury consulting a dictionary to define "acting in concert" where no definition was provided in the jury instructions).

233. Merriam-Webster's Collegiate Dictionary 257 (11th ed. 2005).

234. *Briscoe*, 3 Md. App. at 467–68 (internal quotations and citation omitted).

Thus, in California, which defines riot in terms of "two or more persons acting together,"[235] it is "not necessary that a previous agreement between the aggressors should have been alleged, or have existed, to bring such offenses within the inhibitions of [the riot statute.]"[236] Similarly in Kansas, which defines riot as "five or more persons acting together,"[237] the state Supreme Court has held that "[a]lthough some shared intent would be intrinsic in the element of acting in a group, the statute does not require the State [to] prove an agreement among the group members."[238]

Indeed, many riots are spontaneous events. All that is necessary is that the individuals act for the same purpose.[239] Given that persons who congregate with firearms near election facilities are there for the shared purpose of observing election activities while armed, the requirement of "acting in concert" is readily met.[240]

In summary, where five or more persons hold, carry, or otherwise display firearms outside a polling location, vote tabulation center, or election official's residence, each person engaging in such conduct could reasonably be charged with riot in Michigan. Such conduct is undertaken "in concert" with others, and is "violent," "wrongful," and "recklessly ... create[s] a serious risk of causing public terror or alarm."[241] Given the additional requirements under the Michigan riot statute of "wrongfulness" and "acting in concert," to the extent such conduct may be prosecuted as riot in

235. Cal. Penal Code. § 404(a) (2023).
236. People v. Abelino, 62 Cal. App. 5th 563, 578 (2021), *as modified on denial of reh'g* (Apr. 19, 2021), *review denied* (June 9, 2021) (internal quotation and citation omitted).
237. Kan. Stat. Ann. § 21–6201(a) (2021).
238. State v. Stewart, 281 Kan. 594, 598–99 (2006). *See also* Ohio Rev. Code. Ann § 2917.031 (West 2023) (For the purposes of prosecuting violations of the riot statute, "the state is not required to allege or prove that the offender expressly agreed with four or more others to commit any act that constitutes a violation of either section prior to or while committing those acts."); People v. Martinez, 705 P.2d 9, 11 (Colo. Ct. of App. 1985)("Engaging in a 'riot' requires an 'assemblage' which implies only a 'collection' of persons and not a concert of action, or a common purpose, an agreement or a conspiracy.")
239. *See, e.g.*, DePriest v. Mckee, No. 1:07-cv-1290, 2010 WL 5677024, at *15 (W.D. Mich. June 30, 2010) (finding that "evidence that defendant was part of th[e] crowd" throwing rocks and projectiles and himself engaged in violent conduct "supports an inference that he was acting in concert with the larger, hostile group and shared that group's purpose"). *See also Briscoe*, 3 Md. App. at 467–68. The legal concept of "acting in concert" is also found in tort law and similarly requires that the individuals act for the same purpose with or without an express agreement. *See, e.g.*, Restatement (Second) of Torts § 876 (1979), cmt. Clause (a) ("Parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood to exist from the conduct itself.").
240. Again, Michigan is the only state with an *in terrorem populi* riot statute that has an "acting in concert" requirement.
241. Mich. Comp. Laws § 752.541 (1968).

Michigan, it could almost certainly be prosecuted as such in the other states that have *in terrorem populi* riot statutes similar to Michigan's.[242]

3. Pennsylvania's Riot Statute

Pennsylvania's riot statute, which closely tracks the Model Penal Code, provides as follows:

> A person is guilty of riot, a felony of the third degree, if he participates with two or more others in a course of disorderly conduct:
> (1) with intent to commit or facilitate the commission of a felony or misdemeanor;
> (2) with intent to prevent or coerce official action; or
> (3) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.[243]

Pennsylvania, in turn, defines disorderly conduct as follows:

> A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:
> (1) engages in fighting or threatening, or in violent or tumultuous behavior;
> (2) makes unreasonable noise;
> (3) uses obscene language, or makes an obscene gesture; or
> (4) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.[244]

A person convicted under Pennsylvania's riot statute may be imprisoned for up to seven years, fined up to $15,000, or both.[245]

a. Riot Component

Looking first at the riot statute, it defines the offense as participating with two or more persons in a course of disorderly conduct, under specified circumstances. Two of the three listed circumstances are of particular relevance in the context of individuals who openly carry firearms in proximity to where election-related activities are taking place. First, and most obviously, subsection (3) lists where "the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon."[246]

In *Bailey v. United States*,[247] the United States Supreme Court examined what it means to "use" a firearm during and in relation to a drug trafficking offense.[248] The Court unanimously held that to sustain a con-

242. *See supra* note 156.
243. 18 Pa. Cons. Stat. § 5501 (1972).
244. 18 Pa. Cons. Stat. § at § 5503 (1972)
245. 30 Pa. Cons. Stat. § 923(a)(8) (1980).
246. 18 Pa. Cons. Stat. § 5501(3) (1972).
247. Bailey v. United States, 516 U.S. 137 (1995).
248. The federal statute at issue in *Bailey*, 18 U.S.C. § 924(c)(1), imposes a 5–year minimum term of imprisonment upon a person who "during and in relation to any crime of violence or drug trafficking crime . . . uses or carries a firearm."

viction, the government was required to show more than mere possession of a firearm by the defendant, and instead that the defendant "actively employed the firearm during and in relation to the predicate crime."[249] The Court then gave some illustrative examples of conduct that would meet its standard of "active employment":

> The active-employment understanding of "use" certainly includes brandishing, *displaying*, bartering, striking with, and, most obviously, firing or attempting to fire a firearm. We note that this reading compels the conclusion that even an offender's reference to a firearm in his possession could satisfy § 924(c)(1).[250]

The Court further advised that "[i]f the gun is not disclosed or mentioned by the offender, it is not actively employed, and it is not "used."[251]

Given the Supreme Court's guidance in *Bailey* that to "use" a firearm includes displaying it, any person who openly carries a firearm near where election-related activities are taking place is properly understood to be "using" such firearm under Pennsylvania's riot statute.[252] This interpretation comports with the intent of the drafters of the Model Penal Code who advised that the effect of the firearms provision is "to include within the riot offense public disorder of an exceedingly dangerous and alarming sort without regard to the actor's purpose" in engaging in disorderly conduct.[253]

The other potentially relevant circumstance in which a person who engages in a course of disorderly conduct will commit the offense of riot under Pennsylvania's statute is where the person engages in the disorderly conduct "with intent to prevent or coerce official action."[254] This circumstance could readily arise in the specific context of armed individuals congregating outside vote tabulation centers or the offices or private residences of election officials. As the drafters of the Model Penal Code note:

> This provision reaches the classic case of mob agitation against the lawful workings of government. Of course, mere picketing, silent vigil, or other protest not involving a "course of disorderly conduct" is not covered. Where, however, an effort is made to influence official action by public disorder, the riot offense becomes applicable.[255]

Of course, in any prosecution brought under this provision, the government would need to prove that the armed individuals had the requisite *mens rea* of intending to prevent or coerce government action. While such a showing might be possible on any given set of facts, no similar

249. *Bailey*, 516 U.S. at 150.
250. *Id.* at 148 (emphasis added).
251. *Id.* at 149.
252. *See also* Kan. Stat. Ann. § 21–5221(a)(1)(B) (2010) ("Use of force" means any or all of the following directed at or upon another person or thing: . . . the presentation or display of the means of force.").
253. Model Penal Code § 250.1 cmt. 3 (Am. L. Inst., 1985).
254. 18 Pa. Cons. Stat. § 5501(2) (1972).
255. Model Penal Code § 250.1 cmt. 3 (Am. L. Inst., 1985).

mens rea is required to prosecute the same individuals under the subsection addressing the use of a firearm, since, as noted above, such conduct falls within the riot statute "without regard to the actor's purpose."[256]

b. Disorderly Conduct Component

Turning to the disorderly conduct component of riot, Pennsylvania's statute, again in lockstep with the Model Penal Code, provides that a person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, she *inter alia*, "engages in fighting or threatening, or in violent or tumultuous behavior."[257] Unlike Michigan's riot statute, Pennsylvania's does not require the risk of creating public inconvenience, annoyance, or alarm be grave, serious, or substantial—it need merely exist.

Thus, the legal issues presented by Pennsylvania's disorderly conduct statute are: what constitutes (1) "threatening," (2) "violent behavior," and (3) "tumultuous behavior." As discussed above in the context of Michigan's riot statute, displaying a firearm in close proximity to election facilities is properly understood as "violent" conduct that—at a minimum—creates a risk of causing public alarm. Whether it also constitutes "threatening" or "tumultuous behavior" is discussed below.

i. Threatening

With respect to the term "threatening" as used in the Pennsylvania statute, the drafters of the Model Penal Code state as follows:

> Because the concept of threatening is not otherwise defined, this aspect of the offense reaches any kind of threat, whether verbal or physical, that creates risk of public inconvenience, annoyance, or alarm. This coverage is broader than that of Section 211.1(1)(c) of the Model Code, which proscribes as a form of assault attempting "by physical menace to put another in fear of imminent serious bodily injury." The disorderly conduct provision contains no such limitation on the kinds of threats covered, but that breadth is balanced by the requirement of purpose or recklessness with respect to creation of a public nuisance.[258]

From this discussion, it is clear that the concept of "threatening" is a broad one, and that to fall within it, a threat need not put another "in fear of imminent serious bodily injury." Rather, any kind of threat, including physical threats, that creates a risk of public inconvenience, annoyance, or alarm is covered. As discussed above with respect to Michigan's riot statute, openly displaying a firearm in the specific context of elections is properly understood as threatening conduct, particularly if done as part of a larger group of armed individuals. Such a threat also creates risk of public alarm and annoyance, as well as inconvenience if concerned

256. *Id.*
257. 18 Pa. Cons. Stat. § 5503(1) (1972).
258. Model Penal Code § 250.2 cmt. 3 (Am. L. Inst., 1985).

voters or election officials must adjust their own behavior to avoid, or seek escorts through, a phalanx of armed individuals.

ii. Tumultuous Behavior

The phrase "violent or tumultuous behavior" is not defined in the Model Penal Code. However, the drafters make clear in commentary that it is not limited to behavior that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property.[259] Rather, the concept is much broader and "should be interpreted to include such behavior as disorderly conduct whenever it is engaged in with purpose to create a public nuisance or in reckless disregard of the risk of doing so."[260] The commentary further states that the phrase "would cover acts such as running up and down the corridors of an office building."[261]

The common meaning of "tumultuous" is "marked by tumult," or "tending or disposed to cause or incite a tumult."[262] "Tumult," in turn, is defined as "a disorderly agitation or milling about of a crowd usually with uproar and confusion of voices."[263] It is also defined as "violent agitation of mind or feelings."[264] Significantly, the definition of "tumultuous" does not connote solely a completed act of tumult, but rather an act that is also "tending" or "disposing" to cause tumult.

The presence of armed individuals outside a polling place or vote tabulation center could readily be understood as tending to cause or incite a disorderly agitation or milling about on the part of unarmed citizens who are waiting in line to vote. It reasonably could tend as well to cause or incite a violent agitation of mind or feelings among the same crowd of voters. Further, it certainly exhibits a "reckless disregard of the risk" of creating public alarm.[265]

Thus, a prosecution for riot of those who openly carry firearms outside polling places, vote tabulation centers, or election officials' residences would be viable in Pennsylvania as well as in Delaware, Hawaii, New Jersey, and, for aggravated riot, in Ohio, given that those states

259. *See id.* (noting that Indiana limits the definition of "violent or tumultuous behavior" to conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property, and stating that "[b]y failing to include intentionally disruptive behavior that causes public inconvenience and alarm but that does not carry risk of serious harm to persons or property, the Indiana formulation achieves narrower coverage than does the Model Code").
260. *Id.* "Public nuisance" in this context refers to "public inconvenience, annoyance or alarm." *See* Model Penal Code § 250.2 (Am. L. Inst., 1985).
261. Model Penal Code § 250.2 cmt. 3 (Am. L. Inst., 1985).
262. *Tumultuous*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/tumultuous [https://perma.cc/L6U2–8YJ4].
263. *Tumult*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/tumult [https://perma.cc/Q4QY-HVX2].
264. *Id.*
265. Model Penal Code § 250.2, cmt. 3 (Am. L. Inst., 1985).

have established a similar statutory framework to Pennsylvania's for the offense of riot.[266]

Taken together, the various *in terrorem populi* riot statutes in effect in thirteen states,[267] including in Michigan, Ohio, and Pennsylvania, could serve as effective prosecutorial tools to combat the open carry of firearms in proximity to where election-related activities are taking place.

B. *Use of Force or Violence/Disturbing the Public Peace Statutes*

1. In General

Ten states[268] generally define riot in terms of the use of force or violence, or the threat thereof, by a certain number of individuals acting together and without authority of law. For example, Oklahoma's riot statute provides as follows:

> Any use of force or violence, or any threat to use force or violence if accompanied by immediate power of execution, by three or more persons acting together and without authority of law, is riot.[269]

Washington has a very similar statute, which it terms "criminal mischief."[270] Iowa's formulation is slightly different, defining riot as "three or more persons assembled together in a violent and disturbing manner, and with any use of unlawful force or violence by them or any of them against another person, or causing property damage."[271]

Arizona, Idaho, Illinois, Minnesota, and Virginia include the concept of "disturbing the public peace" in their riot statutes, explicitly tying together the use of force or violence and public disturbance. For example, Arizona's riot statute provides as follows:

> A person commits riot if, with two or more other persons acting together, such person recklessly uses force or violence or threatens to use force or violence, if such threat is accompanied by immediate power of execution, *which disturbs the public peace*.[272]

266. *See supra* notes 170 and 171. *But see* Me. Rev. Stat. Ann. tit. 17-A § 501-A (2007) and *supra* note 174, (discussing the shortcomings of Maine's riot/disorderly conduct statutes).
267. *See supra* note 156, (listing fourteen states). As noted, a riot prosecution in Maine would face additional hurdles. *See supra* note 174.
268. Arizona, California, Idaho, Illinois, Iowa, Kansas, Minnesota, Oklahoma, Virginia, and Washington. *See supra* note 157.
269. Okla. Stat. tit. 21 § 1311 (1910).
270. *See* Wash. Rev. Code § 9A.84.010 (2014). Note that Washington's statute does not require that the threat of force be accompanied by immediate power of execution.
271. Iowa Code § 723.1 (2021).
272. Ariz. Rev. Stat. Ann. § 13–2903 (1977) (emphasis added).

The riot statutes in California[273] and Kansas[274] both reference a disturbance, or breach, of the public peace.

What all these statutes have in common is (1) the actual use of force or violence; or (2) the threat of the use of force or violence if accompanied by immediate power of execution; (3) acting together with a specified number of others; and (4) acting "without authority of law."[275] An additional requirement in some of these states is that the use of force or violence disturb the public peace.

2. Analysis

As discussed at length, *supra*, openly carrying a firearm in proximity to where election-related activities are taking place is properly understood as, at a minimum, a threat to use force or violence, if not the actual use of force or violence. That threat is also accompanied "by immediate power of execution." Furthermore, as discussed in the context of Michigan's riot statute, "acting together" is not the same concept as conspiracy and does not require proof of a prior agreement.[276] It is enough if the individuals are part of the same crowd and engaged in the same prohibited conduct.[277]

Under these statutes, the participants' use or threatened use of force or violence must be "without authority of law." Putative defendants in open carry states might argue that their open carry of firearms at elections is not "without authority of law" by virtue of their states' status as an open carry state. However, the issue is not whether open carry is lawful, but rather whether the use or threatened use of force or violence is *affirmatively authorized* by law—for instance in the case of law enforcement officers or, where justified, those acting in self-defense.

However, even if the "without authority of law" language is read to exclude from its reach otherwise "lawful" open carry, prosecutors could still likely bring riot charges in several of these states. For example, because the open carry of firearms is prohibited in California and Illinois, the open carry near election-related sites by two or more persons in those states would not only be unlawful in its own right, but would also constitute a riot.

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273. Cal. Penal Code § 404(a) (West 1978) ("Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot").
274. *See* Kan. Stat. Ann. § 21–6201(a) (2021) ("Riot is five or more persons acting together and without lawful authority engaging in any: (1) Use of force or violence which produces a breach of the public peace; or (2) threat to use such force or violence against any person or property if accompanied by power or apparent power of immediate execution").
275. Note that unlike the other riot statutes discussed in this Subpart, Arizona's does not require that the participants act "without authority of law."
276. *See supra* Part III.A.2.c.
277. *Id.*

As noted in Part II, Virginia and Washington have specific firearms-related restrictions that could render unlawful the otherwise lawful open carry of firearms if done near election facilities in those states. Virginia prohibits the possession of firearms within forty feet of any polling place or vote tabulation center,[278] while Washington prohibits, *inter alia*, the "display" of any firearm "in a manner, under circumstances, and at a time and place that either manifests an intent to intimidate another or that warrants alarm for the safety of other persons."[279] Thus, persons who open carry at election facilities in those states could potentially be prosecuted for riot as well as for the underlying offense.[280]

Certain elections-related statutes might also render open carry at elections unlawful in other states. For example, Idaho broadly prohibits "attempts by any means whatever, to awe, restrain, hinder or disturb any elector in the free exercise of the right of suffrage."[281] It is also a crime in Idaho to interfere, "in any manner, with the free exercise of the election franchise of the voters, or any voter there assembled, or disturb[] or interfere[] with the canvassing of the votes, or with the making of the returns."[282] Kansas prohibits "[d]isturbing the peace in or about any voting place on election day,"[283] while Oklahoma prohibits "interfer[ing] with the orderly and lawful conduct of an election."[284] Because the open carry of firearms at elections in these states might run afoul of these other criminal statutes, thereby rendering the open carry "without authority of law," it could also constitute a riot.[285]

It is worth noting as well that both Arizona and Virginia prohibit residential picketing,[286] which has occurred outside the homes of election officials in Michigan[287] and Arizona.[288] These statutes, which prohibit efforts to alarm or disrupt a person's right to tranquility, similarly render unlawful, and thus potentially bring within the riot statutes, the open carry of firearms in the residential picketing context since the firearm is itself the instrument of alarm and the threat to domestic tranquility.

278. *See* Va. Code Ann. § 24.2–604 (2021); Va. Code Ann. § 24.2–671 (2021).
279. Wash. Rev. Code § 9.41.270(1) (1994).
280. This, of course, assumes the other elements of riot, such as the requisite number of individuals, are met.
281. Idaho Code Ann. § 18–2305 (West 1972).
282. Idaho Code Ann. § 18–2313 (West 1972).
283. Kan. Stat. Code Ann. § 25–2413 (West 1974).
284. Okla. Stat. Ann. tit. 26 § 16–113 (West 2004).
285. Again, this assumes the other elements of riot, such as the requisite number of individuals, are met.
286. Ariz. Rev. Stat. Ann. § 13–2909 (1978); Va. Code Ann. § 18.2–419 (West 1975).
287. Chappell, *supra* note 5.
288. Brahm Resnik, *Group Chants 'We are Watching You' Outside Arizona Secretary of State Katie Hobbs' Home*, 12News (Nov. 18, 2020, 5:22 PM), https://www.12news.com/article/news/politics/video-group-chants-we-are-watching-you-outside-arizona-secretary-of-state-katie-hobbs-home/75-a569ae35–3b62–424e-88f8-f03ca8b89458 [https://perma.cc/S6ZF-HKW3].

The riot statutes in Arizona, Idaho, Illinois, and Minnesota, additionally require that the force or violence, or threat thereof, "disturb the public peace," or, in Virginia, that it "seriously jeopardize[] the public safety, peace or order."[289]

In Arizona, "[a] 'disturbance of the peace' is a disturbance of public tranquility or order and may be created by any act which molests inhabitants in the enjoyment of peace and quiet or excites disquietude or fear."[290] In general, the disturbance of the peace requirement is similar to the public inconvenience, annoyance, or alarm element stated in the *in terrorem populi* formulations—either directly in the riot statutes themselves or through their incorporation of the offense of disorderly conduct. Indeed, "breach of the peace" is defined in Black's Law Dictionary to include "engaging in disorderly conduct."[291] One significant difference is that these "public disturbance" riot statutes require that the public peace actually be disturbed, whereas the *in terrorem populi* statutes capture conduct that recklessly creates a risk of causing public inconvenience, annoyance, or alarm.

Whether openly carrying a firearm near election facilities constitutes disorderly conduct depends on the operative statutory text of the various state statutes. As discussed above, such conduct would appear to constitute disorderly conduct in states that have adopted the Model Penal Code's formulation of the offense.[292]

Notably, Arizona's disorderly conduct statute does not directly track the Model Penal Code's formulation. Instead, in Arizona:

> A person commits disorderly conduct if, with intent to disturb the peace or quiet of a neighborhood, family or person, or with knowledge of doing so, such person: . . . [e]ngages in fighting, violent or seriously disruptive behavior; or . . . [r]ecklessly handles, displays or discharges a deadly weapon or dangerous instrument.[293]

As discussed, *supra*, displaying a firearm in close proximity to election facilities is properly deemed violent behavior. It may also be "seriously disruptive," depending on the circumstances. And given the context of such a display, it is likely reckless in that it is done with "conscious[] disregard[] of a substantial and unjustifiable risk" that the conduct will cause public alarm.[294]

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289. *See supra* note 157.

290. State *ex rel.* Williams v. Superior Court, 512 P.2d 45, 283 (Ariz. Ct. App. 1973).

291. *See Breach of the Peace*, *Black's Law Dictionary* (11th ed. 2019), https://www.westlaw.com/Document/Ife452437808411e4b391a0bc737b01f9/View/FullText.html?transitionType=Default&contextData=(sc.Default)&VR=3.0&RS=cblt1.0 [https://perma.cc/Y7KZ-UZS5] (last visited Mar. 21, 2023) ("The criminal offense of creating a public disturbance or engaging in disorderly conduct, particularly by making an unnecessary or distracting noise").

292. *See* discussion *supra* Part III.A.3.b.

293. Ariz. Rev. Stat. Ann. § 13–2904 (1994).

294. Ariz. Rev. Stat. Ann. § 13–105(10)(c) (1994) (defining "Recklessly"); Displaying a firearm in close proximity to election facilities is also likely to "excite[] disquietude or fear." *State ex rel. Williams*, 512 P.2d at 283 (defining "disturbance

C. *"Lawful Act Done in a Violent and Tumultuous Manner" Statutes*

Georgia, Nevada, and Ohio generally define riot to include committing, together with a specified number of others, an unlawful act of violence or a lawful act done in a violent and tumultuous manner.[295] This Subpart briefly discusses the language of these three statutes.

1. Georgia

Georgia's riot statute provides that "[a]ny two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner commit the offense of riot."[296] In most states, standing outside a polling place or vote tabulation center for any purpose is a lawful act.[297] However, as discussed above in the context of Michigan's riot statute, one could be construed as engaging in that lawful act "in a violent manner" if doing so while openly displaying a firearm.

To fall within Georgia's statute, the act must also be done in a "tumultuous" manner. As discussed above in the context of Pennsylvania's riot statute, there is a compelling argument that the lawful act of congregating outside a polling place or vote tabulation center is done "in a tumultuous manner" by virtue of openly carrying firearms.

2. Nevada

Nevada's formulation of riot is as follows: "If two or more persons shall actually do an unlawful act of violence, either with or without a common cause of quarrel or even do a lawful act, in a violent, tumultuous and illegal manner, they commit a riot."[298] Thus, in Nevada, in addition to showing that the lawful act is done in a violent and tumultuous manner, the government would also need to show that the act is done in an illegal manner.

As noted above,[299] the Nevada voter intimidation statute states:

> It is unlawful for any person, in connection with any election, petition or preregistration or registration of voters, whether acting himself or herself or through another person in his or her behalf, to:
> (a) Use or threaten to use any force, intimidation, coercion, violence, restraint or undue influence; . . . .[300]

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of the peace").

295. *See infra* notes 296, 298 and 301. Note that California prohibits the same conduct pursuant to its unlawful assembly statute. *See* Cal. Penal Code § 407 (West 1969).
296. Ga. Code Ann. § 16–11–30(a) (West 1968).
297. *But see* Ala. Code § 17–17–17 (2006) (prohibiting loitering around polling places); Iowa Code Ann. § 39A.4 (West 2021) (prohibiting loitering on and nearby polling places on election day).
298. Nev. Rev. Stat. Ann. § 203.070(2) (West 1967).
299. *See supra* note 67.
300. Nev. Rev. Stat. Ann. § 293.710 (West 2018).

The reach of Nevada's election intimidation statute is extremely broad and would appear to prohibit the open carry of firearms at elections. Thus, the lawful act of congregating with others in proximity to where election-related activities are taking place is likely done in an "illegal manner," thus falling within the riot statute, if the person is openly carrying a firearm.

3. Ohio

Ohio's misdemeanor riot statute provides in part, "[n]o person shall participate with four or more others with purpose to do an act with unlawful force or violence, even though such act might otherwise be lawful."[301]

The question raised by Ohio's statute is what is meant by doing a lawful act "with unlawful force or violence." One authoritative interpretation is that the phrase refers to "excessive force." In notes to the statutory provision, Ohio's Legislative Service Commission explains as follows:

> [T]he section prohibits five or more persons from doing an otherwise lawful act *with excessive force*, which is somewhat analogous to one species of riot at common law. Unlike the common law, however, this section does not require that the lawful act be done with unlawful violence "to the terror of the people."[302]

Again, while congregating with others outside a polling place or vote tabulation center may be a lawful act, doing so while openly displaying a firearm could be construed as engaging in that lawful act "with excessive force." After all, there is no apparent reason someone would need to openly display a firearm to engage in the lawful act of observing election-related activities.

In addition, congregating near where election-related activities are taking place while openly carrying a firearm could be construed as engaging in a lawful act "with unlawful force or violence" since the use of the firearm could turn the otherwise lawful act into disorderly conduct. Ohio's disorderly conduct statute provides that "[n]o person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following: (1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior."[303] As discussed *supra*, given that openly carrying a firearm outside a polling place or vote tabulation center may reasonably be deemed an act "threatening harm to persons" and/or "violent or turbulent behavior" that recklessly causes inconvenience, annoyance, or alarm to others, the use of a firearm in that context, being an act of disorderly conduct, would constitute "*unlawful* force or violence."[304]

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301. Ohio Rev. Code Ann. § 2917.03(B) (West 1972); *See also* discussion on Ohio's aggravated riot statute *supra* Part A.
302. Ohio Rev. Code Ann. § 2917.03 (West 1973) (Legislative Service Commission note) (emphasis added).
303. Ohio Rev. Code Ann. § 2917.11(A)(1) (West 2019).
304. To the extent openly carrying a firearm near an election facility is deemed an act

D. *Property Damage, Physical Injury or Obstruction of Governmental Functions Statutes*

In a departure from the common law, the District of Columbia and thirteen states[305] define riot, at least in part, in terms of violent conduct that causes, or creates a significant risk of causing, damage to property, or physical injury to a person. For example, Alaska's riot statute, the wording of which is typical of these statutes, provides as follows:

> A person commits the crime of riot if, while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing, damage to property or physical injury to a person.[306]

While this formulation of the offense of riot does not lend itself as readily to enforcement against persons who openly carry firearms outside election facilities, at least without additional facts, statutes in Colorado, Kentucky, North Dakota, Tennessee, and Texas also define riot to include violent conduct that substantially obstructs law enforcement or other governmental function.[307] Depending on the factual circumstances of a given assembly, it may be possible to demonstrate that the congregation of openly armed persons outside an election facility substantially obstructs the governmental function of conducting an election.

Three states with riot statutes in this more restrictive category, Florida, Texas, and North Carolina, warrant additional mention. As noted in Part III.A, Florida prohibits the open carry of firearms.[308] Thus, there is no need for prosecutors there to invoke the state's riot statute to combat the open carry of firearms at elections.

Texas, in addition to defining riot in terms of conduct involving damage to property, injury to persons, or obstruction of governmental functions, further defines it as conduct that "by force, threat of force, or physical action . . . disturbs any person in the enjoyment of a legal right."[309] One could reasonably conclude that a person forced to confront a phalanx of armed individuals in order to exercise the franchise is "disturbed" in the enjoyment of her legal right to vote.[310]

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engaged in "with unlawful force or violence," it would seem clear that the person had the "purpose" to so act. *See* Ohio Rev. Code Ann. § 2917.03(B) (West 1972).

305. *See supra* note 159; Statutory Appendix A.4.b.
306. Alaska Stat. Ann. § 11.61.100(a) (West 1978).
307. *See* Colo. Rev. Stat. § 18–9–101(2) (West 2021); Ky. Rev. Stat. Ann. § 525.010(5) (West 2002); N.D. Cent. Code Ann. § 12.1–25–01(2) (West 2017); Tenn. Code Ann. § 39–17–301(3) (West 2020); Tex. Penal Code Ann. § 42.02(a)(2) (West 1994).
308. *See* Fla. Stat. Ann. § 790.053(1) (West 2011).
309. Tex. Penal Code Ann. § 42.02(a)(3) (West 1994).
310. Indeed, one common definition of "disturb" is "alarm." *Disturb*, Merriam-Webster, https://www.merriam-webster.com/dictionary/disturb (last visited Aug. 15, 2022) [https://perma.cc/Y6BY-65XG]; Note that to be convicted under the Texas statute, a person must "knowingly participate[] in a riot." Tex. Penal Code Ann.§ 42.02(b) (West 1994).

Finally, in North Carolina, the common law offense of going armed with unusual and dangerous weapons to the terror of the people is a judicially-recognized crime.[311] In *State v. Dawson*, the court explained that to secure a conviction for the offense, the government must show that the defendant "(1) armed himself with unusual and dangerous weapons, to wit, pistols and rifles (2) for the unlawful purpose of terrorizing the people of [the] County, and, (3) thus armed, he went about the public highways of the county (4) in a manner to cause terror to the people."[312] Importantly, the court added that "[w]hile it would have been proper . . . to enumerate acts or threats of violence committed by defendant while thus going armed, such specific averments are not required."[313] In this way, the court adopted the common law understanding that the act of going armed in public terrorizes people without the need to show any specific act of physical violence or verbal threats.[314, 315]

In summary, a riot prosecution against persons who congregate with firearms near election facilities, absent any other facts, might not be viable under statutes that require the conduct to cause, or create a significant risk of causing, damage to property or physical injury to a person. However, in Florida, Texas, and North Carolina, prosecutions could well lie under other theories.

E. *Common Law*

Maryland, Mississippi, New Mexico, and Rhode Island have not enacted riot statutes but have judicially adopted the common law of riot.[316] Massachusetts, South Carolina, and West Virginia have enacted

311. State v. Dawson, 272 N.C. 535, 549 (1968).
312. *Id.* at 549.
313. *Id.*
314. Note that the North Carolina Court of Appeals recently observed that the third element listed in *Dawson*—that the defendant must go about the public highways—does not accurately state the common law element of the offense. *See* State v. Lancaster, 284 N.C. App. 465, 468 (2022) ("For at least six and a half centuries, courts (including our Supreme Court) understood that a defendant could commit the crime of 'going armed to the terror of the public' in any location that the public is likely to be exposed to his acts, even if committed on privately-owned property").
315. *See also*, Chapel Hill, N.C., Code of Ordinances § 11–132(a) (1971) (prohibiting display of firearms at polling places); Durham, N.C., Code of Ordinances § 46–22(a) (2008) (prohibiting display of firearms on or in city property).
316. *See* Schlamp v. State, 390 Md. 724, 737 (2006) (adopting the English law conception of riot—"three or more persons unlawfully assembled to carry out a common purpose in such violent or turbulent manner as to terrify others"); Blackledge v. Omega Ins. Co., 740 So.2d 295, 298–99 (Miss. 1999) (referencing English common law in formulating definition of riot); N.M. Stat. Ann. § 30–1–3 (West 1963) (preserving common law in criminal cases where no provision of criminal code is applicable); R.I. Gen. Laws Ann. § 11–1–1 (West 1956) (an act for which no punishment is prescribed by the general laws may be prosecuted and punished as an offense at common law).

statutes that criminalize riot, but do not define the term, leaving the definition to the common law.[317]

Each state has its own formulation of the offense, but they all generally follow the common law concepts discussed in Part II. For example, the South Carolina Supreme Court has defined riot as "a tumultuous disturbance of the peace by three or more persons assembled together of their own authority, with the intent mutually to assist each other against anyone who shall oppose them, and putting their design into execution in a terrific and violent manner, whether the object was lawful or not."[318] Consistent with the common law rule, the court elaborated that "[p]ersonal injury or violence to any individual or damage to property are not essential ingredients of the offense of riot."[319]

For the reasons discussed throughout this Article, a riot prosecution against persons who congregate with firearms near election facilities would likely be viable in states that have adopted the common law of riot.[320]

In summary, a riot prosecution brought against individuals who open carry at elections would be most viable in states that have adopted some version of an *in terrorem populi* riot statute such as Michigan, Ohio (for felonies), and Pennsylvania; a "use of force or violence" statute such as Arizona and Virginia; or a "lawful act done in a violent manner" formulation like Georgia, Nevada, and Ohio (for misdemeanors). It would also be viable in states like New Mexico that have adopted the common law offense of riot, as well as in Texas under its unique formulation. The related charge of going armed in public to the terror of the people could be brought in North Carolina.

317. *See* Mass. Gen. Laws Ann. ch. 269, § 1 (West 2004); Commonwealth v. Gibney., 2 Allen 150, 152 (Mass. 1861) (referencing criminal treatises to define a riot as an unlawful assembly that accomplishes a common cause with violence); S.C. Code Ann. § 16–5–130 (1993); State v. Albert, 257 S.C. 131, 138 (1971) (incorporating common law understanding of riot as acts of violence that do not necessarily involve personal injury or damage to property); W. Va. Code Ann. § 61–6-2 (West 1969); State v. Wooldridge, 129 W. Va. 448, 471 (1946) (looking to Blackstone for definition of "unlawful assembly").

318. *Albert*, 257 S.C. at 134 (internal quotation and citation omitted).

319. *Id.* at 138. Note that South Carolina has also codified the common law offense of going armed offensively to the terror of the people. S.C. Code Ann. § 22–5–150 (1962).

320. Note that Nebraska, Wisconsin and Wyoming have not enacted statutes prohibiting riot and have also expressly abrogated the common law. *See* State v. DeWolfe, 67 Neb 321 (1903); Wis. Stat. Ann. § 939.10 (West 2008); Wyo. Stat. Ann. § 6–1-102 (West 1983). Thus, the crime cannot be charged in those states.

IV. A Riot Prosecution for Open Carry at Elections Would Not Violate the Constitution

As discussed below, a riot charge brought against persons who openly carry firearms outside polling places, vote tabulation centers, or the private residences of election officials would not infringe on the right to bear arms under the Second Amendment or the right of free speech under the First Amendment.

A. *Second Amendment*

In its recent decision in *New York State Rifle & Pistol Association, Inc. v. Bruen*, the Supreme Court held that "the Second and Fourteenth Amendments protect an individual's right to carry a handgun for self-defense outside the home."[321] The court reiterated its prior statement in *District of Columbia v. Heller*[322] that the right secured by the Second Amendment is "not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose,"[323] and elaborated the test for determining whether a given firearm regulation was permissible "when the Second Amendment's plain text covers an individual's conduct."[324] The court explained its test as follows:

> To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this Nation's historical tradition of firearm regulation. Only if a firearm regulation is consistent with this Nation's historical tradition may a court conclude that the individual's conduct falls outside the Second Amendment's 'unqualified command.'[325]

In *Bruen*, New York's handgun licensing scheme required that an applicant who wished to carry a firearm outside his home for self-defense prove that "proper cause" existed for a license to issue, defined as "a special need for self-protection distinguishable from that of the general community."[326] The court held that the scheme ran afoul of the Second Amendment because New York failed to "identify an American tradition justifying the State's proper-cause requirement."[327]

As discussed below, a riot charge brought against persons who openly carry firearms outside polling places, vote tabulation centers, or the private residences of election officials would stand on firm constitutional ground. The Second Amendment does not protect an individual's right to bear arms at polling locations or to display weapons in a manner likely to terrorize others.

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321. N.Y. State Rifle & Pistol Ass'n, Inc., v. Bruen, 142 S. Ct. 2111, 2122 (2022).
322. D.C. v. Heller, 554 U.S. 570, 626 (2008).
323. *Bruen*, 142 S. Ct. at 2128 (quoting *Heller*, 554 U.S. at 626).
324. *Bruen*, 142 S. Ct. at 2128 . at 2126.
325. *Id.* (quoting Konigsberg v. State Bar of Cal., 366 U.S. 36, 50, n. 10 (1961)).
326. *Id.* at 2123.
327. *Id.* at 2156.

1. Firearms at Polling Places

Unlike New York's requirement that individuals prove "proper cause" for carrying a firearm outside the home for self-defense, there is an American tradition of prohibiting the possession of firearms at elections. In 1776, Delaware enshrined such a prohibition in its constitution, stating as its purpose "[t]o prevent any violence or force being used at the said elections."[328] The Supreme Court has itself long recognized that "there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."[329] As one scholar has observed, "[p]art of that history of keeping order is curtailing weapons in polling places and during elections. The tradition goes back to the founding of the nation."[330]

The court in *Bruen* recognized as much, noting that

> Although the historical record yields relatively few 18th- and 19th-century "sensitive places" where weapons were altogether prohibited—*e.g.*, legislative assemblies, *polling places*, and courthouses—we are also aware of no disputes regarding the lawfulness of such prohibitions. . . . We therefore can assume it settled that these locations were "sensitive places" where arms carrying could be prohibited consistent with the Second Amendment.[331]

Thus, it is plain there is no Second Amendment right to possess firearms in or around polling places. Nor is there a Second Amendment right to possess firearms in or around vote tabulation centers. It would be perverse indeed if to "prevent any violence or force being used at . . . elections,"[332] firearms could be prohibited at polling places but not where the actual votes are tabulated. Indeed, the court in *Bruen* expressly contemplated that firearms prohibitions could be enforced, consistent with the Second Amendment, in "analogous sensitive places."[333]

2. Firearms May Not be Carried in a Manner Likely to Terrorize Others

The Second Amendment, as interpreted by the Supreme Court, protects "the inherent right of self-defense."[334] It does not protect the right to carry weapons in a manner that terrorizes the public. The court in *Bruen*

328. *See* Del. Const. art. XXVIII (1776) ("To prevent any violence or force being used at the said elections, no person shall come armed to any of them, and no muster of the militia shall be made on that day").
329. Storer v. Brown, 415 U.S. 724, 730 (1974).
330. Darrell A. H. Miller, *Constitutional Conflict and Sensitive Places*, 28 Wm. & Mary Bill Rts. J. 459, 473 (2019); *See also* Hill v. State, 53 Ga. 472, 475 (1874) ("The practice of carrying arms at courts, elections and places of worship, etc., is a thing so improper in itself, so shocking to all sense of propriety, so wholly useless and full of evil, that it would be strange if the framers of the constitution have used words broad enough to give it a constitutional guarantee").
331. *Bruen*, 142 S. Ct. at 2133 (emphasis added).
332. Del. Const. art. XXVIII (1776).
333. *Bruen*, 142 S. Ct. at 2133.
334. *Heller*, 554 U.S. at 628.

reiterated these two basic and related concepts. It firmly grounded its analysis of the New York licensing statute in the rubric of self-defense,[335] and, after canvassing the historical record of public carry, from the Statute of Northampton in 1328 to state statutes enacted in the nineteenth century, concluded as to colonial enactments, "A by-now-familiar thread runs through [them]: They prohibit bearing arms in a way that spreads 'fear' or 'terror' among the people."[336] Similarly, as to post-ratification enactments, the court concluded as follows:

> To summarize: The historical evidence from antebellum America does demonstrate that *the manner* of public carry was subject to reasonable regulation. Under the common law, individuals could not carry deadly weapons in a manner likely to terrorize others.[337]

Thus, in addition to reiterating that "individual self-defense is the *central component* of the Second Amendment right,"[338] the court recognized as "consistent with this Nation's historical tradition of firearm regulation,"[339] the principle that the government may prohibit the public carry of weapons likely to cause terror or alarm.

To state the obvious, the Republican state senate candidate in Michigan who in January of 2022 explicitly encouraged his supporters to show up at the polls armed, did not do so because he feared for their personal safety.[340] Rather, he did so in order to "[m]ake sure that justice prevails."[341] Similarly, the individuals who contemplated banding together to surveil drop boxes across the country did not discuss bringing their AR-15s with them for self-defense purposes.

As recent commentators have noted, "[p]recisely what actions are terrifying may be a factual and contextual question with debatable answers, but the government interest in regulating weapons to prevent terror and preserve public order has ancient common law antecedents recognized by advocates on all sides of the modern gun debate."[342]

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335. *See, e.g.*, *Bruen*, 142 S. Ct. at 2133 ("individual self-defense is 'the *central component*' of the Second Amendment right"); *id.* at 2150 ("we think a short review of the public discourse surrounding Reconstruction is useful in demonstrating how public carry *for self-defense* remained a central component of the protection that the Fourteenth Amendment secured for all citizens") (emphasis added).
336. *Bruen*, 142 S. Ct. at 2145; *see also id.* at 2143 ("Respondents, their *amici*, and the dissent all misunderstand these statutes. Far from banning the carrying of any class of firearms, they merely codified the existing common-law offense of bearing arms to terrorize the people, as had the Statute of Northampton itself").
337. *Id.* at 2150.
338. *Id.* at 2133 (internal quotations and citations omitted).
339. *Bruen*, 142 S. Ct. at 2145 at 2126.
340. *Two Michigan GOP Candidates Encourage Election Interference, Including 'Showing Up Armed' at Polls*, Deadline Detroit (Jan. 31, 2022, 9:16 AM), https://www.deadlinedetroit.com/articles/29810/two_michigan_gop_candidates_encourage_election_interference_including_showing_up_armed_at_polls [https://perma.cc/P8J6-MCUP].
341. *Id.*
342. Blocher & Siegel, *supra* note 23, at 166–67.

In *Bruen*, the court stated that "something more than merely carrying a firearm in public" was required to meet the *in terrorem populi* element,[343] and that there was no record evidence in the case before it "showing that, in the early 18th century or after, the mere public carrying of a handgun would terrify people."[344]

As discussed *supra*, the open display of firearms *by a group of people*—particularly outside an election facility—is not "merely carrying a firearm in public."[345] It is of a completely different character than, for example, the display of a holstered handgun by a single individual walking down the street. As recognized since at least 1831, the context within which the display of firearms takes place is critical and can become "the essence of the crime" of riot.[346] While there may be an argument that a person walking down the street with a gun in a holster will not cause or create a serious risk of causing public terror or alarm, no such argument is credible with respect to a group of armed individuals stationed outside a polling place, which is why the *Bruen* court itself recognized that firearms could be prohibited at elections. Moreover, and as noted *supra*, the jurisprudential basis for the offense of riot is premised, in large part, on the fact that group activity is "more dangerous and frightening" than individual behavior.[347]

In short, the open display of firearms by a group of individuals "standing guard" outside an election facility is readily perceived by others as threatening and alarming[348]—and not as "merely carrying a firearm in public."[349] Indeed, it is for precisely this reason that there is a tradition in the United States, dating to the founding, of banning firearms at elections.

Bruen held that the Second Amendment protects an individual's right "to carry a handgun *for self-defense* outside the home."[350] In doing so, it affirmed the longstanding American tradition of prohibiting the possession of firearms at elections and the display of weapons in a manner likely to terrorize others.[351] Consequently, the Second Amend-

343. *Bruen*, 142 S. Ct. at 2145.
344. *Id.* at 2142.
345. *Id.* at 2145.
346. Commonwealth v. Dupuy, 1 Brightly 44, 46 (Pa. Ct. of Nisi Prius 1831).
347. Model Penal Code § 250.1 note on status of section (Am. L. Inst. 1962) ("The objectives of this offense are to provide penalties . . . where the number of participants makes the behavior especially alarming or dangerous"); *see also* Ohio Rev. Code Ann. § 2917.02 (West 1995) (Legislative Service Commission) ("The significant element of riot, of whatever degree, is the corporate nature of the offense, i.e., it is committed by a group of 5 or more persons, thus giving the intended mischief a higher potential for harm").
348. *See Democratic Nat'l. Comm.*, 671 F. Supp. 2d at 579 (denying Republican National Committee's motion to vacate consent decree in lawsuit where "RNC allegedly intimidated voters on Election Day by posting armed off-duty sheriffs and policemen at polling places in minority precincts").
349. *Bruen*, 142 S. Ct. at 2145.
350. *Id.* at 2122 (emphasis added).
351. Note as well one subsequent court's interpretation of *Bruen* that "nothing in the opinion implies that a State must allow open carry." Abed v. United States, 278

ment provides no defense to a charge of riot for openly carrying firearms at elections.

B. *First Amendment*

An armed individual standing outside a polling location, vote tabulation center or election official's residence may contend that the act of openly carrying a firearm is "symbolic speech" protected by the First Amendment and, therefore, serves as a defense to prosecution for riot. However, the Supreme Court has rejected "the view that an apparently limitless variety of conduct can be labeled as 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[352] More specifically, the Supreme Court has held that conduct is only considered "symbolic speech," and therefore eligible for First Amendment protections, when (i) there is an "intent to convey a particularized message," and (ii) the surrounding circumstances give rise to a great "likelihood . . . that the message would be understood by those who viewed it."[353]

The "particularized message" that those who openly display firearms at election facilities might be attempting to communicate is not likely to be obvious to those observing the conduct. While it could be a generalized message that the person supports open carry, it could just as easily be interpreted as the communication of a threat of violence, or that the person supports a certain candidate, or intends to harm those who vote for a particular candidate, or that she believes there is election fraud occurring, or that certain people shouldn't be allowed to vote—or a myriad of other messages. As the Supreme Court has advised, to the extent "explanatory speech is necessary" to effectively convey what is being expressed, that "is strong evidence that the conduct at issue . . . is not so inherently expressive that it warrants protection."[354]

Courts have concluded as much, holding that the open display of firearms does not warrant First Amendment protection. The Ninth Circuit has observed that "[t]ypically a person possessing a gun has no intent to convey a particular message, nor is any particular message likely to be understood by those who view it."[355] In a Michigan case brought by two individuals against the police officers who briefly detained them while they walked down a public street with long guns slung over their shoulders, the district court rejected the individuals' assertion that the officers violated their free speech rights, stating that "[i]nstead of perceiving Plaintiffs as open carry activists demonstrating their First or Second Amendment rights, passer-byes were simply alarmed and concerned for their safety and that of their community."[356] Similarly, a district court in Ohio rejected the argument that the open carry of firearms consti-

A.3d 114, 130 n. 27 (D.C. 2022) (discussing *Bruen*).

352. United States v. O'Brien, 391 U.S. 367, 376 (1968).
353. Spence v. Washington, 418 U.S. 405, 410–11 (1974).
354. Rumsfeld v. F. for Acad. & Institutional Rts., Inc., 547 U.S. 47, 66 (2006).
355. Nordyke v. King, 319 F.3d 1185, 1190 (9th Cir. 2003).
356. Baker v. Schwarb, 40 F. Supp. 3d at 895.

tuted protected symbolic speech, remarking that a person "[having] to explain the message he intended to convey undermines the argument that observers would likely understand the message."[357]

Even if the open display of firearms at election facilities is considered protected speech, it is still subject to reasonable regulation by the government. It is well-established that "even in a public forum the government may impose reasonable restrictions on the time, place, or manner of protected speech."[358] Such restrictions must be (i) content neutral, (ii) narrowly tailored to serve a significant governmental interest, and (iii) leave open ample alternative channels for communication of the information.[359]

The Supreme Court has recognized that protected speech may be regulated by the government in the specific context of elections. In *Burson v. Freeman*, a plurality of the Supreme Court upheld a Tennessee law imposing a 100-foot campaign-free zone around the entrances of polling places.[360] The Court stated that the case presented it "with a particularly difficult reconciliation: the accommodation of the right to engage in political discourse with the right to vote—a right at the heart of our democracy."[361] Ultimately, however, the Court upheld the regulation. Drawing on the history of efforts to prevent voter intimidation and election fraud, the Court determined that the government's interests were compelling and that the restricted zone around polling places was "necessary to protect the fundamental right to cast a ballot in an election free from the taint of intimidation and fraud."[362]

Similarly in the context of open carry, a court would likely conclude that the government's interest in protecting "the fundamental right to cast a ballot in an election free from the taint of intimidation" substantially outweighs any individual's right to express support for the carrying of firearms in public.[363] Consequently, a riot prosecution brought against persons who openly carry firearms at elections would not violate the individuals' free speech rights. Nor would it violate the individuals' First Amendment right to peaceful assembly because they would not be barred from assembling at election facilities—they would only be barred from doing so while armed.

In short, neither the First Amendment nor Second Amendment would act as a bar to riot prosecutions of individuals who openly carry

357. *Northrup*, 58 F. Supp. 3d at 848. *See also* Burgess v. Wallingford, No. 11-CV-112, 2013 WL 4494481, at *9 (D. Conn. May 15, 2013), *aff'd sub nom.* Burgess v. Town of Wallingford, 569 F. App'x 21 (2d Cir. 2014) ("Carrying a weapon alone is generally not associated with expression").
358. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).
359. Clark v. Cmty. for Creative Non–Violence, 468 U.S. 288, 293 (1984).
360. 504 U.S. 191 (1992).
361. *Id.* at 198.
362. *Id.* at 211.
363. It is important to note that such support can be conveyed without the actual public display of firearms. *See* Kendall Burchard, *Your 'Little Friend' Doesn't Say 'Hello': Putting the First Amendment Before the Second in Public Protests*, 104 VA. L. Rev. Online 30, 36 (2018).

firearms in the vicinity of polling places, vote tabulation centers or the private residences of election officials.

Conclusion

The open display of firearms outside polling places, vote tabulation centers, and the private residences of election officials is becoming more commonplace. Although couched in purported concerns about the integrity of elections, in reality the conduct, which is as corrosive of democracy as it is chilling, is a not-so-subtle attempt to intimidate voters and election officials. While there are numerous criminal statutes ostensibly prohibiting such intimidation, as well as some state statutes prohibiting the brandishing of firearms, such laws are generally ill-equipped to combat the behavior given their stringent *mens rea* requirements and other structural limitations. Consequently, prosecutors rarely bring charges under them.

Rather than effectively sanction the open carry of firearms at elections through the non-prosecution of intimidation and brandishing statutes, prosecutors should look to the common law offense of riot for a model of enforcement. At common law, "[a]rmed groups unauthorized by law were considered riots and punishable as such,"[364] for causing "public terror." All but three states have either codified riot in their criminal codes or judicially adopted the common law offense. Although the statutory formulations of the crime vary, in many states, including those where voter intimidation and intimidation of election officials are most likely to occur in upcoming elections, prosecutors could effectively deploy the law of riot against those who open carry at elections. Because a charge of riot will generally lie where a person, acting with others, consciously disregards a risk of alarming the public, it is a much more effective prosecutorial tool than the intimidation statutes which generally require the government to prove a specific intent to intimidate on the part of the defendant. This approach arms prosecutors with a much-needed weapon to disarm those who seek to sow fear at elections.

Statutory Appendix

State Riot Statutes

I. "PUBLIC TERROR OR ALARM" STATUTES

A. "Public Terror or Alarm" Referenced in Riot Statute

Ala. Code § 13A-11-3(a) ("A person commits the crime of riot if, with five or more other persons, he wrongfully engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of public terror or alarm").

364. *See* Blocher & Siegel, *supra* note 23.

Ark. Code Ann. § 5-71-201(a) ("A person commits the offense of riot if, with two (2) or more other persons, he or she knowingly engages in tumultuous or violent conduct that creates a substantial risk of: (1) Causing public alarm; (2) Disrupting the performance of a governmental function; or (3) Damaging or injuring property or a person"); Ark. Code Ann. § 5-71-202(a) ("A person commits the offense of aggravated riot if he or she commits the offense of riot when: (1) The person knowingly possesses a deadly weapon; or (2) The person knows that another person with whom he or she is acting possesses a deadly weapon.").

Conn. Gen. Stat. § 53a-175(a) ("A person is guilty of riot in the first degree when simultaneously with six or more other persons he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs"); Conn. Gen. Stat. § 53a-176(a) ("A person is guilty of riot in the second degree when, simultaneously with two or more other persons, he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm").

Mich. Comp. Laws § 752.541 ("It is unlawful and constitutes the crime of riot for 5 or more persons, acting in concert, to wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm").

N.H. Rev. Stat. Ann. § 644:1(I) ("A person is guilty of riot if: (a) Simultaneously with 2 or more other persons, he engages in tumultuous or violent conduct and thereby purposely or recklessly creates a substantial risk of causing public alarm").

N.y. Penal Law § 240.05 ("A person is guilty of riot in the second degree when, simultaneously with four or more other persons, he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm"); N.Y. Penal Law § 240.06 ("A person is guilty of riot in the first degree when he: 1. Simultaneously with ten or more other persons, engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm, and in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs").

Or. Rev. Stat. § 166:015(1) ("A person commits the crime of riot if while participating with five or more other persons the person engages in tumultuous and violent conduct and thereby intentionally or recklessly creates a grave risk of causing public alarm").

Utah Code Ann. § 76-9-101(1) ("An individual is guilty of riot if the individual: (a) simultaneously with two or more other individuals

engages in violent conduct, knowingly or recklessly creating a substantial risk of causing public alarm").

B. "Public Alarm" Referenced in Disorderly Conduct Statute

Del. Code Ann. tit. 11 § 1302 (Riot) ("A person is guilty of riot when the person participates with 2 or more persons in a course of disorderly conduct: (1) With intent to commit or facilitate the commission of a felony or misdemeanor; or (2) With intent to prevent or coerce official action; or (3) When the accused or any other participant to the knowledge of the accused uses or plans to use a firearm or other deadly weapon"); Del. Code Ann. tit. 11 § 1301 (Disorderly Conduct) ("A person is guilty of disorderly conduct when: (1) The person intentionally causes public inconvenience, annoyance or alarm to any other person, or creates a risk thereof by: a. Engaging in fighting or in violent, tumultuous or threatening behavior").

Haw. Rev. Stat. § 711-1103(1) (Riot) ("A person commits the offense of riot if the person participates with five or more other persons in a course of disorderly conduct: (a) With intent to commit or facilitate the commission of a felony; or (b) When the person or any other participant to the person's knowledge uses or intends to use a firearm or other dangerous instrument in the course of the disorderly conduct."); Haw. Rev. Stat. § 711-1101(1) (Disorderly Conduct)("A person commits the offense of disorderly conduct if, with intent to cause physical inconvenience or alarm by a member or members of the public, or recklessly creating a risk thereof, the person: (a) Engages in fighting or threatening, or in violent or tumultuous behavior").

Me. Rev. Stat. Ann. tit. 17-A § 503 (Riot) ("A person is guilty of riot if, together with 5 or more other persons, he engages in disorderly conduct; … B. When he or any other participant to his knowledge uses or intends to use a firearm or other dangerous weapon in the course of the disorderly conduct."); Me. Rev. Stat. Ann. tit. 17-A § 501-A (Disorderly Conduct)("A person is guilty of disorderly conduct if: A. In a public place, the person intentionally or recklessly causes annoyance to others by intentionally: (1) Making loud and unreasonable noises").

N.J. Stat. Ann. § 2C:33-1(a) (Riot) ("A person is guilty of riot if he participates with four or more others in a course of disorderly conduct as defined in section 2C:33-2a: (1) With purpose to commit or facilitate the commission of a crime; (2) With purpose to prevent or coerce official action; or (3) When he or any other participant, known to him, uses or plans to use a firearm or other deadly weapon"); N.J. Stat. Ann. § 2C:33-2(a) (Disorderly Conduct)("A person is guilty of a petty disorderly persons offense, if with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof he (1) Engages in fighting or threatening, or in violent or tumultuous behavior").

Ohio Rev. Code Ann. § 2917.02(A) (Aggravated Riot) ("No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of the Revised Code: (1) With purpose to commit or facilitate the commission of a felony; (2) With purpose to commit or facilitate the commission of any offense of violence; (3) When the offender or any participant to the knowledge of the offender has on or about the offender's or participant's person or under the offender's or participant's control, uses, or intends to use a deadly weapon or dangerous ordnance, as defined in section 2923.11 of the Revised Code."); Ohio Rev. Code Ann. § 2917.03(A) (Riot) ("No person shall participate with four or more others in a course of disorderly conduct in violation of section 2917.11 of the Revised Code: (1) With purpose to commit or facilitate the commission of a misdemeanor, other than disorderly conduct; (2) With purpose to intimidate a public official or employee into taking or refraining from official action, or with purpose to hinder, impede, or obstruct a function of government; (3) With purpose to hinder, impede, or obstruct the orderly process of administration or instruction at an educational institution, or to interfere with or disrupt lawful activities carried on at such institution. (B) No person shall participate with four or more others with purpose to do an act with unlawful force or violence, even though such act might otherwise be lawful."); Ohio Rev. Code Ann. § 2917.11 (A) (Disorderly Conduct) ("No person shall recklessly cause inconvenience, annoyance, or alarm to another by doing any of the following: (1) Engaging in fighting, in threatening harm to persons or property, or in violent or turbulent behavior")

18 Pa. Cons. Stat. § 5501 (Riot) ("A person is guilty of riot, a felony of the third degree, if he participates with two or more others in a course of disorderly conduct: (1) with intent to commit or facilitate the commission of a felony or misdemeanor; (2) with intent to prevent or coerce official action; or (3) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon."); 18 Pa. Cons. Stat. § 5503(a) (Disorderly Conduct)("A person is guilty of disorderly conduct if, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he: (1) engages in fighting or threatening, or in violent or tumultuous behavior").

II. "USE OF FORCE OR VIOLENCE" STATUTES

A. Without Reference to "Disturbing the Peace"

Iowa Code § 723.1 ("A riot is three or more persons assembled together in a violent and disturbing manner, and with any use of unlawful force or violence by them or any of them against another person, or causing property damage").

Okla. Stat. tit. 21 § 1311 ("Any use of force or violence, or any threat to use force or violence if accompanied by immediate power of

execution, by three or more persons acting together and without authority of law, is riot").

Wash. Rev. Code § 9A.84.010(1) (Criminal Mischief) ("A person is guilty of the crime of criminal mischief if, acting with three or more other persons, he or she knowingly and unlawfully uses or threatens to use force, or in any way participates in the use of such force, against any other person or against property").

B. With Reference to "Disturbing the Peace"

Ariz. Rev. Stat. Ann. §13-2903(A) ("A person commits riot if, with two or more other persons acting together, such person recklessly uses force or violence or threatens to use force or violence, if such threat is accompanied by immediate power of execution, which disturbs the public peace").

Cal. Penal Code § 404 (a) ("Any use of force or violence, disturbing the public peace, or any threat to use force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot").

Idaho Code Ann. § 18-6401 ("Any action, use of force or violence, or threat thereof, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two (2) or more persons acting together, and without authority of law, which results in: (a) physical injury to any person; or (b) damage or destruction to public or private property; or (c) a disturbance of the public peace; is a riot").

720 Ill. Comp. Stat. 5/25-1(a) (Mob action) ("A person commits mob action when he or she engages in any of the following: (1) the knowing or reckless use of force or violence disturbing the public peace by 2 or more persons acting together and without authority of law").

Kan. Stat. Ann. § 21-6201(a) ("Riot is five or more persons acting together and without lawful authority engaging in any: (1) Use of force or violence which produces a breach of the public peace; or (2) threat to use such force or violence against any person or property if accompanied by power or apparent power of immediate execution"); Kan. Stat. Ann. § 21-5221(a)(1) ("'Use of force' means any or all of the following directed at or upon another person or thing: (A) Words or actions that reasonably convey the threat of force, including threats to cause death or great bodily harm to a person; (B) the presentation or display of the means of force; or (C) the application of physical force, including by a weapon or through the actions of another").

Minn. Stat. § 609.71 Subd. 2 (Riot second degree) ("When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each

participant who is armed with a dangerous weapon or knows that any other participant is armed with a dangerous weapon is guilty of riot second degree and may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both").

Va. Code Ann. § 18.2-405 ("Any unlawful use, by three or more persons acting together, of force or violence which seriously jeopardizes the public safety, peace or order is riot").

III. "Lawful Act Done in a Violent Manner" Statutes

Ga. Code Ann. § 16-11-30(a) ("Any two or more persons who shall do an unlawful act of violence or any other act in a violent and tumultuous manner commit the offense of riot").

Nev. Rev. Stat. § 203.070(2) ("If two or more persons shall actually do an unlawful act of violence, either with or without a common cause of quarrel or even do a lawful act, in a violent, tumultuous and illegal manner, they commit a riot, and are guilty of a misdemeanor").

Ohio Rev. Code Ann. § 2917.03(B) (Riot) ("No person shall participate with four or more others with purpose to do an act with unlawful force or violence, even though such act might otherwise be lawful").

IV. Injury to Persons or Property Damage Statutes

A. Without Reference to Governmental Function

Alaska Stat. § 11.61.100(a) ("A person commits the crime of riot if, while participating with five or more others, the person engages in tumultuous and violent conduct in a public place and thereby causes, or creates a substantial risk of causing, damage to property or physical injury to a person").

D.C. Code § 22–1322(a) ("A riot in the District of Columbia is a public disturbance involving an assemblage of 5 or more persons which by tumultuous and violent conduct or the threat thereof creates grave danger of damage or injury to property or persons").

Fla. Stat. § 870.01(2) ("A person commits a riot if he or she willfully participates in a violent public disturbance involving an assembly of three or more persons, acting with a common intent to assist each other in violent and disorderly conduct, resulting in: (a) Injury to another person; (b) Damage to property; or (c) Imminent danger of injury to another person or damage to property"); Fla. Stat. § 870.01(3) ("A person commits aggravated rioting if, in the course of committing a riot, he or she: (a) Participates with 25 or more other persons; (b) Causes great bodily harm to a person not participating in the riot; (c) Causes property damage in excess of $5,000; (d) Displays, uses, threatens to use, or attempts to use

a deadly weapon; or (e) By force, or threat of force, endangers the safe movement of a vehicle traveling on a public street, highway, or road").

Idaho Code Ann. § 18-6401 ("Any action, use of force or violence, or threat thereof, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two (2) or more persons acting together, and without authority of law, which results in: (a) physical injury to any person; or (b) damage or destruction to public or private property; or (c) a disturbance of the public peace; is a riot").

Ind. Code § 35-45-1-2 ("A person who, being a member of an unlawful assembly, recklessly, knowingly, or intentionally engages in tumultuous conduct commits rioting, a Class A misdemeanor. However, the offense is a Level 6 felony if it is committed while armed with a deadly weapon."); Ind. Code § 35-45-1-1 ("As used in this chapter: 'Tumultuous conduct' means conduct that results in, or is likely to result in, serious bodily injury to a person or substantial damage to property. 'Unlawful assembly' means an assembly of five (5) or more persons whose common object is to commit an unlawful act, or a lawful act by unlawful means. Prior concert is not necessary to form an unlawful assembly.").

La. Rev. Stat. Ann. § 14:329.1 ("A riot is a public disturbance involving an assemblage of three or more persons acting together or in concert which by tumultuous and violent conduct, or the imminent threat of tumultuous and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property").

Mont. Code Ann. § 45-8-103(1) ("A person commits the offense of riot if the person purposely and knowingly disturbs the peace by engaging in an act of violence or threat to commit an act of violence as part of an assemblage of five or more persons and the act or threat presents a clear and present danger of or results in damage to property or injury to persons").

N.c. Gen. Stat. § 14-288.2(a) ("A riot is a public disturbance involving an assemblage of three or more persons which by disorderly and violent conduct, or the imminent threat of disorderly and violent conduct, results in injury or damage to persons or property or creates a clear and present danger of injury or damage to persons or property"). *But see State v. Dawson*, 272 N.C. 535 (1968) (common law offense of going armed with unusual and dangerous weapons to the terror of the people is a crime in North Carolina).

S.D. Codified Laws § 22-10-01 ("As used in this chapter, any intentional use of force or violence by three or more persons, acting together and without authority of law, to cause any injury to any person or any damage to property is riot. A violation of this section is a Class 4 felony").

B. With Reference to Governmental Function

Colo. Rev. Stat. § 18-9-101 (2) ("'Riot' means a public disturbance involving an assemblage of three or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs the performance of any governmental function").

Ky. Rev. Stat. Ann. § 525.010(5) ("'Riot' means a public disturbance involving an assemblage of five (5) or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function").

N.D. Cent. Code § 12.1-25-01 (2) ("'Riot' means a public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct creates grave danger of damage or injury to property or persons or substantially obstructs law enforcement or other government function").

Tenn. Code Ann. § 39-17-301(3) (" 'Riot' means a disturbance in a public place or penal institution as defined in § 39-16-601(4) involving an assemblage of three (3) or more persons which, by tumultuous and violent conduct, creates grave danger of substantial damage to property or serious bodily injury to persons or substantially obstructs law enforcement or other governmental function").

Tex. Penal Code Ann. § 42.02 ("(a) For the purpose of this section, "riot" means the assemblage of seven or more persons resulting in conduct which: (1) creates an immediate danger of damage to property or injury to persons; (2) substantially obstructs law enforcement or other governmental functions or services;or (3) by force, threat of force, or physical action deprives any person of a legal right or disturbs any person in the enjoyment of a legal right. (b) A person commits an offense if he knowingly participates in a riot").

V. Other Formulations of Riot

Mo. Rev. Stat. § 574-050 ("A person commits the offense of rioting if he or she knowingly assembles with six or more other persons and agrees with such persons to violate any of the criminal laws of this state or of the United States with force or violence, and thereafter, while still so assembled, does violate any of said laws with force or violence").

Vt. Stat. Ann. tit. 13 § 902 ("Persons so unlawfully and riotously assembled who, after proclamation made, do not immediately disperse, and persons unlawfully and riotously assembled to the number of three or more who do an unlawful act against a man's person or property or against the public interest, and persons present at the place of an unlawful

or riotous assemblage who, when commanded by a magistrate or officer to assist him or her or to leave the place of such riotous assemblage, fails so to do, shall each be imprisoned not more than six months or fined not more than $100.00, or both").

VI. Common Law Riot States

Maryland (*Schlamp v. State*, 390 Md. 724 (2006))

Massachusetts (Mass. Gen. Laws ch. 269, § 1; *Commonwealth v. Gibney.*, 84 Mass. 150, 152 (1861))

Mississippi (*Blackledge v. Omega Ins. Co.*, 740 So. 2d 295, 298–99 (Miss. 1999))

New Mexico (N.M. Stat. § 30-1-3 ("In criminal cases where no provision of this code is applicable, the common law, as recognized by the United States and the several states of the Union, shall govern."))

Rhode Island (R.I. Gen. Laws § 11-1-1 ("Every act and omission which is an offense at common law, and for which no punishment is prescribed by the general laws, may be prosecuted and punished as an offense at common law"))

South Carolina (S.C. Code Ann. § 16-5-130 (Penalties for instigating, aiding or participating in riot); S.C. Code Ann. § 16-5-120 (Penalty for engaging in riot when weapon not used); S.C. Code Ann. § 22-5-150 ("Magistrates may cause to be arrested (a) all affrayers, rioters, disturbers and breakers of the peace, (b) all who go armed offensively, to the terror of the people, (c) such as utter menaces or threatening speeches and (d) otherwise dangerous and disorderly persons"); *State v. Albert*, 257 S.C. 131 (1971))

West Virginia (W. VA. Code § 61-6-2 (Commitment and recognizance of rioters); riot not defined)