

Making a Rioter

Social Media's Role in Planning and Inciting Civil Unrest and Violent Protests

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I. Introduction

Violent protests and riots are as old as their causes. And yet, the violent protests of today's world have evolved and adapted to new technologies: boundaries between the public and private are elastic, distance is relative, hierarchy can be established quickly and movements coordinated effectively. Contagion is the fuel. In my presentation, I will investigate whether the criminal law and human rights protections are appropriately equipped to deal with mob violence. I focus especially on those who encourage mob violence or coordinate it, by answering two questions: First, whether the laws in three selected jurisdictions – the USA (both on the federal and the state level), England and Wales, and Germany – are suitable *de lege lata* to address violent riots that are incited, supported and organised through social media. It will become apparent that the freedom of speech and assembly – constitutionally protected in all three jurisdictions – pose very noticeable restraints on every attempt by legislators to regulate speech acts that lead to rioting and other collective violence. The second question concerns the organisation and planning of riots and examines whether a person who does not take part in the riot but provides detailed instructions as to its planning and organisation can be criminally liable. In essence, I will argue that criminal laws regulating speech that encourages or even directs mob violence must be tailored to the peculiarities of group violence.

1. Case Scenarios

This is Alexander Schubart. Alexander Schubart was a civil servant in the legal department of the administration of Frankfurt. Schubart was also the ombudsman of a consortium that vehemently opposed the expansion of the Frankfurt International Airport.¹ He spoke to protesters during a campaign and told them to block the airport on the following day. He called the protesters to block the airport on the following day at exact 12:30pm. His exact words were:

¹ BGH, *Neue Juristische Wochenschrift* (1984), 931.

‘The blockade should be absolutely peaceful and non-violent! However, between 12:30 and 10pm Rhein-Main [the airport] must be fully closed. [...] Our goal is: From 12:30 will the airport be leak-proof.’² Schubart made the same call on air during the news-show ‘Heute’. As a result, several thousand protesters gathered in front of Frankfurt Airport the following day, which resulted in violent clashes with the police. Schubart himself was never present during the riot, however somehow expected the protests to turn violent.

This is a picture from the London riots 2011. We know today that the London riots in 2011 were planned and coordinated through the so-called BlackBerry Messenger (BBM).³ One protester sent out a message via BBM that reached hundreds of BBM users across London, reading: ‘Everyone in edmonton enfield wood green everywhere in north link up at enfield town station at 4 o clock sharp!!!! Start leaving ur yards n linking up with your niggas. Fuck da feds, bring your ballys and your bags trollys, cars vans, hammers the lot!!’⁴

This is then-presidential candidate and former US-president Donald Trump during a campaign speech in Fayetteville. When protesters in Fayetteville interrupted the speech, Trump called on security officers to ‘get ’em out’, praising the ‘good old days’, where ‘this doesn’t happen because they used to treat [protesters] very, very rough’, which resulted in several members of the audience assaulting the protesters.

This is former US-president Donald Trump. Trump told his supporters in the Jan. 6 speech that the election had been stolen, and they should march to the Capitol. “If you don’t fight like hell, you’re not going to have a country anymore,” he said. He told his supporters to “show strength” “be there, be wild” and to “fight much harder.” But he also stated, “I know that everyone here will soon be marching over to the Capitol building to peacefully and patriotically make your voices heard.”⁵ More than 400 people have been charged with federal crimes in the Jan. 6 attack on the Capitol.⁶ 100 are facing only lower-level crimes such as disorderly conduct and entering

² ‘Das Ziel unserer morgigen Aktion ist: Es muss vollständig gewaltfrei ablaufen, vollständig gewaltfrei! Aber ab 12.30 - 22 Uhr muss Rhein-Main zu sein ... Das Ziel unserer Aktion ist: Ab 12.30 Uhr ist der Flughafen dicht.’, BGH, *Neue Juristische Wochenschrift* (1984), 931 (translation A. Heinze).

³ The Guardian and London School of Economics and Political Science, *Reading the Riots - Investigating England’s summer of disorder* (2011) 4. For an overview of secondary sources see Ruchika Parmarth Ganar and Shrikant B. Ardhapurkar, ‘Exploiting Social Network for Forensic Analysis to Predict Civil Unrest’ (2016) 5 *IJISC* 59, 61-2.

⁴ Baker (n 1) 41; Kostaras (n **Error! Bookmark not defined.**3) 49.

⁴ The Guardian and London School of Economics and Political Science, *Reading the Riots - Investigating England’s summer of disorder* (2011), 30.

⁵ https://www.abajournal.com/news/article/could-trump-face-charges-for-speech-before-capitol-riot-experts-differ-on-brandenburg-impact?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories#When:18:06:00Z

⁶ <https://apnews.com/article/politics-prisons-capitol-siege-government-and-politics-6a8c5849a733bb20d02633d2a74636c5>

a restricted area that do not typically result in time behind bars for first-time offenders. Hundreds more were also charged with more serious offenses — like conspiracy, assault or obstruction of an official proceeding — that carry hefty prison time of years behind bars, but these defendants could take pleas that would wipe those charges from their cases.⁷

2. Premises of this Presentation

It goes without saying that incitement to or the planning/coordination of group violence is a topic whose path is flocked by small and large fires. Fires such as normative questions about speech protection and empirical questions about the impact of incendiary speech. I cannot put out all those fires, even though the temptation is there. Thus, this presentation is based on the following six premises – premises that in themselves deserve a separate paper. The controversies around these premises shall be reserved for another day. They are

1. Speech is regulated and should be regulated in certain circumstances.
2. Violent protests cause harm and/or endanger certain legal goods or interests.
3. It is morally permissible for the state to suppress expression to prevent the harms it risks inspiring.
4. Between a speech act and violence (harm) lies the element of causation.
5. Free Speech Protections Have the Purpose of Ensuring Free Discourse
6. Mobs are not responsible as a group but by their individuals.

While I will let those fires burn (in a controlled environment of course), other fires will be simply ignored. I cannot provide an in-depth-analysis of the secondary participation scheme in all three legal systems previously mentioned. That would go far beyond the scope of this presentation and probably need a multi-volume book to be addressed. I will therefore provide a very narrow – almost cut out – picture of secondary liability provisions that address rioting through social media. It is no question that this picture would benefit from a portrayal of case scenarios where protesters engage in spontaneous multi-handed violence, where violence escalates and a participant goes further than the others do, or where protesters on the scene implement a common plan through co-ordinated action. Albeit, this must be reserved for a broader project. Furthermore, the state can suppress speech in several ways. Punishment is only one of those ways. Generally, there are three categories of laws that regulate digital communication and demonstrations: media laws, public order laws and laws regulating targeted communications.⁸ These laws, which are not exhaustive, apply to digital communications,

⁷ <https://apnews.com/article/politics-prisons-capitol-siege-government-and-politics-6a8c5849a733bb20d02633d2a74636c5>

⁸ Jacob Rowbottom, 'To rant, vent and converse: protecting low level digital speech' (2012), 71 CLJ 355, 357.

although they were supposed to regulate different settings and activities in the first place.⁹ In this paper, I will ignore those laws but only focus on ‘traditional’ criminal laws governing riots and incitement thereto. And among those criminal law, it is only rioting or violent protest that shall be our concern. Other criminal conduct will only be mentioned in passing or not be mentioned at all. For instance, a possible prosecution of former president Trump under the Insurrection Act, 18 U.S.C. § 2383 is irrelevant for this presentation.¹⁰

II. The Design of Violent Protest – What Makes Mob Violence Special?

I identify three main elements of protest that impact the criminalisation of speech: Distance, Contagion, and Hierarchy.

1. Distance

Protesters challenge distance by bridging distance.

Protesters challenges the distance between themselves and the state. In the more elaborate words of Hatuka: “protests challenge the sociospatial order by defying and disrupting agreed-upon practices of political, social, and spacial distance”.¹¹ This distance challenging has two elements: First, the highlighting of social distance; second, the bridging of spatial distance. Hutaka caegorises “distance” in the following way:

“(1) Perceptual – distance as a means to understand reality and how we think about events and places, which has an impact on whether we view it in abstract or concrete terms;
(2) Political – distance is the condition of being at variance with, disagreeing with, dissenting from, and disputing those in power [...];
(3) Social – distance refers to an individual’s position (high or low) with respect to others. During protests, the people express their grievances together and thereby challenge agreed-upon or accepted social distance, particularly among participants;
(4) Spatial – distance refers to the degree of remoteness in any relationship to which spatial terms are transferred or figuratively applied. Spatial distance also refers to the space that lies between any two objects, a condition that defines the order of place and influences daily communication and interactions.”¹²

⁹ *ibid.*

¹⁰ See in detail Blackman, Josh and Tillman, Seth Barrett, 'What Happens if the Biden Administration Prosecutes and Convicts Donald Trump of Violating 18 U.S.C. § 2383' (2021) University of Illinois Law Review Online 190-215

¹¹ Tali Hatuka, *The Design of Protest* (2018), p. 7.

¹² Tali Hatuka, *The Design of Protest* (2018), pp. 14-15.

a. Highlighting Social Distance: Us Against Them

Highlighting existing difference means the demonstration of fundamental differing views and situations.¹³ This distance is reason of the protest. New forms of communication, especially social media, provide the platform for the demonstration of this distance in the form of: it is us against them. And we are not alike. Indeed, in a recent empirical study Kirkizh and Koltsova show “a positive and robust relationship between online news consumption and protest activity across a variety of nations”.¹⁴ They suggest that “exposure to online news contributes to the likelihood of protest participation of an individual because, compared to traditional news sources, this medium is more likely to provide alternative and perhaps even subversive information about the society”.¹⁵ “Us vs them” defines both the “us” and the “them”. Social media brings certain groups together;¹⁶ at the same time, it increases so-called “co-radicalisation”, that is “a two-way process where different groups reciprocally construct increasingly radicalized worldviews (also referred to as cumulative extremism or mutual radicalization). Often coradicalizing groups use actions of the other group to justify their own behaviors or prejudices”.¹⁷

Those who express distance “arise from civil society”, can be merely “general interest groups” and “religious communities” but also “social movements”.¹⁸ Social movements refer to ‘forms of collective action that can be motivated by political, economic or cultural goals. Such movements typically operate outside of grounded state branches, but often aim to act upon it’.¹⁹ Those social movements ‘may be a means of communicating an explicit desired course of action’ and can appear in different forms: firstly, as riots or protests. A clear distinction between the two – from a sociological perspective at least – can hardly be made. Trottier and Fuchs opine that it depends on several factors such as ‘(1) an explicitly desired political, economic or cultural outcome, (2) association with an explicit social movement organization and (3) the

¹³ Tali Hatuka, *The Design of Protest* (2018), p. 13.

¹⁴ Kirkizh, Nora and Koltsova, Olessia, 'Online News and Protest Participation in a Political Context: Evidence from Self-Reported Cross-Sectional Data' (2021) 7 *Social Media + Society* 1 (advance article).

¹⁵ Kirkizh, Nora and Koltsova, Olessia, 'Online News and Protest Participation in a Political Context: Evidence from Self-Reported Cross-Sectional Data' (2021) 7 *Social Media + Society* 3 (advance article).

¹⁶ Gallacher, John D., Heerdink, Marc W. and Hewstone, Miles, 'Online Engagement Between Opposing Political Protest Groups via Social Media is Linked to Physical Violence of Offline Encounters' (2021) 7 *Social Media + Society* 2 (advance article): “Those who espouse the optimistic view that social media can bring about increased social cohesion highlight that by providing new opportunities for individuals from different groups to gather and interact with members from other groups, the Internet could potentially play an influential role in increasing contact, and breaking down barriers between groups”.

¹⁷ Gallacher, John D., Heerdink, Marc W. and Hewstone, Miles, 'Online Engagement Between Opposing Political Protest Groups via Social Media is Linked to Physical Violence of Offline Encounters' (2021) 7 *Social Media + Society* 3 (advance article).

¹⁸ Jürgen Habermas, 'Political Communication in Media Society' (2006) 16 *CT* 411, 418.

¹⁹ Daniel Trottier and Christian Fuchs, 'Theorising Social Media, Politics and the State' in id (eds), *Social Media, Politics and the State* (Routledge 2015) 3, 32.

absence or presence of property damage and physical violence. The first two are typically associated with protests, while the latter is associated with riots'.²⁰ It goes without saying that the line between protests and riots is very fine and 'partly determined by how these events are labelled by state branches and the media'.²¹ As an example, the mass demonstrations in Hamburg in response to the G20 summit in 2017 have been framed by the mass media as both protests²² and riots.²³ Moreover, the organisation of protests, their spontaneity and the communication through social media contain elements of a so-called "flashmob".²⁴ Flashmobs first occurred in the 2000s, when groups of people organised the sudden occurrence of random events through the internet and made them public via Youtube.²⁵ The method is quite simple: Someone has an idea, circulates it through social media and hopes for many followers.²⁶ Through social media, flashmob participants (so-called "flashmobbers") are able to communicate with each other in real-time, which, *inter alia*, enables them to change the venue of their flashmob spontaneously and quickly – this way, a great amount of people can be moved from one place to another within seconds.²⁷

Social movements and the aim of highlighting distance are often directed at a stronger and more powerful group, if not the state. They are used as a way to reach equality within the discourse – something I will explain in more detail later. To reach that goal, protesters use, in some way, the threat of violence, without necessarily committing violent acts. Protests "may be perceived as strategies through which groups of people simultaneously manipulate others' fears of disorder and violence".²⁸ It goes without saying that this is a descriptive account of protests and not a normative one. Yet, the threat of violence will turn out to be an important element in my later free speech discussion.

²⁰ *ibid.*

²¹ *ibid.*

²² Philip Oltermann, 'Arrests and injuries as Hamburg gripped by mass anti-G20 protests' *The Guardian*, (7 July 2017), <<https://www.theguardian.com/world/2017/jul/07/g20-protests-hamburg-altona-messehalle>>, accessed 8 August 2018.

²³ 'Hamburg G20 riot damages run into millions' *Deutsche Welle* (19 July 2017), <<https://www.dw.com/en/hamburg-g20-riot-damages-run-into-millions/a-39745157>>, accessed 8 August 2018.

²⁴ Michael J Fitzpatrick, 'The Constitutionality of Restricting the Use of Social Media: Flash Mob Protests Warrant First Amendment Protections' (2013) 43 SHLR 799, 801.

²⁵ Kaminski (n **Error! Bookmark not defined.**) 5; Fitzpatrick, (n 24) 800.

²⁶ Kai Biermann, 'Braunschweig vertreibt die Internet-Meute' *Die Zeit* (28 July 2009), <<http://www.zeit.de/online/2009/31/flashmob-braunschweig-sylt>>, accessed 8 August 2018.

²⁷ Michael J Fitzpatrick, 'The Constitutionality of Restricting the Use of Social Media: Flash Mob Protests Warrant First Amendment Protections' (2013) 43 SHLR 799; J David Goodman, 'Debate Over Social Media Incitement as Flash Mobs Strike', *The New York Times* (17 August 2011), <http://thelede.blogs.nytimes.com/2011/08/17/debate-over-social-media-incitement-as-flash-mobs-strike/?_r=0>, accessed 8 August 2018.

²⁸ Tali Hatuka, *The Design of Protest* (2018), p. 82.

b. Bridging Distance: Using Public Space

What distinguishes a social movement from a protest is: the public space. Once social distance has been highlighted, spatial distance has to be reduced. In other words: the movement brings the action to the streets. Social Media Platforms cannot provide this space but can only help *coordinating* to reduce such a space. Movements and even certain forms of protest may occur virtually. Yet, “in public spaces, which are considered to belong to the people as a whole, the exposure of grievances can affect or involve the culture of a place and its politics”.²⁹ During the so-called ‘Arab Spring’, thousands used social media (Facebook, Twitter and Youtube)³⁰ to coordinate and support uprisings against their own government, starting in Tunisia and spreading over other Arab countries.³¹ In London, social media played a major part in demonstrations and gatherings that started in a peaceful way citizens could express their views and became violent to an extent that London experienced its worst riots within the last 25 years.³² The magazine *economist* noted: ‘As Britons ask themselves what has changed in their country that might have caused these riots, one obvious answer stands out: technology’.³³ In fact, it was the use of social media that turned the 2011 riots into something that was unparalleled before.³⁴ In a recent empirical study Gallacher, Heerdink, and Hewstone show that “increased engagement between groups online is associated with increased violence when these

²⁹ Tali Hatuka, *The Design of Protest* (2018), p. 8.

³⁰ Gustin, ‘Social Media Sparked, Accelerated Egypt’s Revolutionary Fire’, *Wired*, 11.02.2011, <http://www.wired.com/business/2011/02/egypts-revolutionary-fire/>, last visited 17.07.2016.

³¹ Schillinger, ‘Social Media and the Arab Spring: What Have We Learned?’, *Huffington Post*, 20.09.2011, http://www.huffingtonpost.com/ramond-schillinger/arab-spring-social-media_b_970165.html, last visited 17.07.2016; Lister, ‘Tunisian Protests Fueled by Social Media Networks’, *CNN*, 13.01.2011, <http://edition.cnn.com/2011/WORLD/africa/01/12/tunisia/index.html>, last visited 17.07.2016; ‘Timeline: Egypt’s Revolution’, *Aljazeera*, 14.02.2011, <http://www.aljazeera.com/news/middleeast/2011/01/201112515334871490.html>, last visited 17.07.2016; Scheid, ‘Shutting Down Dissent: Global Responses to Mobile-Fueled “Flash Mobs” and Political Protests’, *9 I/S: A Journal of Law and Policy* (2013), 173-193.

³² Baker, ‘From the criminal crowd to the “mediated crowd”: the impact of social media on the 2011 English riots’, 11 *Safer Communities* (2012), 40, 41; ‘Krawalle in London: Tottenham brennt’, *Der Spiegel*, 07.08.2011, <http://www.spiegel.de/panorama/gesellschaft/krawalle-in-london-tottenham-brennt-a-778808.html>, last visited 17.07.2016. The leader of the opposition even described the riots as ‘the worst riots in a hundred years’, <http://insidecroydon.com/2012/11/22/91-police-taken-off-croydon-streets-since-riots-claims-miliband/>, last visited 17.07.2016, see also Newburn, ‘The 2011 England Riots in Recent Historical Perspective’, 55 *British Journal of Criminology* (2015), 39.

³³ ‘The BlackBerry riots’, *The Economist* (2011), <http://www.economist.com/node/21525976>, last visited 17.07.2016.

³⁴ Newburn, ‘The 2011 England Riots in Recent Historical Perspective’, 55 *British Journal of Criminology* (2015), 39 (‘Commentators writing in the aftermath of the riots have pointed both to what are taken to be unusual aspects of the 2011 disorders – the role of gangs, the nature and extent of looting and use of social media among others – as well as some of the parallels with previous riots.’).

groups met in the real world”.³⁵ They especially associate activities on Facebook and Twitter with “subsequent increases in protest attendance at a later date”.³⁶

Space is something largely ignored by the debate around inciting speech so far: It does make a difference *where* mob violence takes place. From a perspective of criminal law, this requirement is hardly surprising: Of course, space has an impact on harm, on danger, and on coordination. To hint at something that will be dealt with at a later point: The “clear and present danger”-test of the Schenck case is usually illustrated by the example: “shouting fire in a crowded theatre”. This, the test is also about space – the crowded theatre. And space creates a narrative³⁷ – think of the 6 January riots. This symbolic element may not have such a great influence on criminalisation – in fact, quite the opposite, it provides indications for protected speech.

A good example of the interplay between social media communication and *physical* space are flashmobs: Generally spoken, a flashmob comprises the following elements: The organiser of the flashmob mobilises an undefined number of people and informs them about time, place and (in some circumstances) purpose of the gathering; the group of people then waits for a start signal of the organiser.³⁸ The flashmobbers are not supposed to intervene or instruct but to let the crowd take its course.³⁹

Thus, principally flashmobs are neither dangerous nor cause any alarm. It is quite the opposite. In Göttingen hundreds of people – coordinated through Facebook – suddenly sang along Händels ‘Hallelujah’ in front of the old town hall in celebration of the International Handel Festival, which was a memorable and joyful event.⁴⁰ However, despite the many peaceful flashmobs that occurred around the world, some commentators predicted very early that these

³⁵ Gallacher, John D., Heerdink, Marc W. and Hewstone, Miles, 'Online Engagement Between Opposing Political Protest Groups via Social Media is Linked to Physical Violence of Offline Encounters' (2021) 7 *Social Media + Society* 1 (advance article).

³⁶ Gallacher, John D., Heerdink, Marc W. and Hewstone, Miles, 'Online Engagement Between Opposing Political Protest Groups via Social Media is Linked to Physical Violence of Offline Encounters' (2021) 7 *Social Media + Society* 2 (advance article).

³⁷ Tali Hatuka, *The Design of Protest* (2018), pp. 40-1.

³⁸ Wasik, 'Riot: Self-Organized, Hyper-Networked Revolts – Coming to a City Near You', *WIRED*, 16.12.2011, http://www.wired.com/magazine/2011/12/ff_riots/, last visited 17.07.2016; Kaminski, 'Incitement to Riot in the Age of Flash Mobs', 81 *University of Cincinnati Law Review* (2012), 1, 5; Kaminski, 'Flash mob or protest movement: the First Amendment and regulating online calls to action', in Reiman, Cornelis (ed), *Public Interest and Private Rights in Social Media* (Oxford, Cambridge, New Delhi: Chandos Publishing, 2012), p. 25, 26.

³⁹ Biermann, 'Braunschweig vertreibt die Internet-Meute', *Die Zeit*, 28.07.2009, <http://www.zeit.de/online/2009/31/flashmob-braunschweig-sylt>, last visited 17.07.2016.

⁴⁰ 'Gesang-Flashmob anlässlich der Händel-Festspiele', *Hessische/ Niedersächsische Allgemeine Zeitung*, 18.05.2013, <http://www.hna.de/lokales/goettingen/gesang-flashmob-anlaessliche-haendel-festspiele-2913307.html>, last visited 17.07.2016.

flashmobs might be used as a new form of riots.⁴¹ Thus, unsurprisingly, it was merely a matter of time until flashmob organisers realised the power of flashmobs and how flashmobs could be used for other purposes.⁴² They created so-called ‘smartmobs’, flashmobs with political purposes, which became the preferred form of protests during the uprisings in Tunisia, Egypt, London and San Francisco.⁴³ Another form of flashmobs is explicitly used for criminal purposes: ‘Flashrobs’ are flashmobs where criminal groups use social media to commit robberies at a certain time and place.⁴⁴ Both the sudden occurrence and disappearance (‘flash’) of the crowd and the organisational similarities to flashmobs gave these forms of robberies their name.⁴⁵ The organisers use of flashmob-tactics for criminal purposes and create a very effective and most dangerous moment of surprise: Neither the Police nor potential victims are able to prepare for flashrobs, let alone to react to them.⁴⁶ Flashrobs do not carry the purpose of having harmless fun or making a political statement but to enable criminal activities by providing the offenders with anonymity and the element of surprise.⁴⁷ The offenders literally swarm into supermarkets, clothing stores and other shops to steal as many things they can carry within only a couple of minutes.⁴⁸ The victims usually have no other choice than watching their shops being

⁴¹ Claycomb, ‘Regulating Flash Mobs: Seeking a Middle Group Approach that Preserves Free Expression and Maintains Public Order’, 51 *University of Louisville Law Review* (2013), 375 with fn. 3.

⁴² Fitzpatrick, ‘The Constitutionality of Restricting the Use of Social Media: Flash Mob Protests Warrant First Amendment Protections’, 43 *Seton Hall Law Review* (2013), 799, 800.

⁴³ Tovrov, ‘Flash Mobs: 5 Biggest Flash Mobs of All Time’, *International Business Times*, 24.08.2011, <http://www.ibtimes.com/articles/203118/20110824/flash-mob-biggest-flash-mobs-ever.htm>, last visited 17.07.2016; Kaminski, ‘Flash rob or protest movement: the First Amendment and regulating online calls to action’, in Reiman, Cornelis (ed), *Public Interest and Private Rights in Social Media* (Oxford, Cambridge, New Delhi: Chandos Publishing, 2012), p. 25, 26. About Smart Mobs in more detail, see Rheingold, *Smart Mobs – The Next Social Revolution* (Cambridge, MA: Basic Books, 2002).

⁴⁴ Claycomb, ‘Regulating Flash Mobs: Seeking a Middle Group Approach that Preserves Free Expression and Maintains Public Order’, 51 *University of Louisville Law Review* (2013), 375, 381; Brudereck, ‘Flash-Mob Violence Unlikely in Berks, Officials Say’, *Reading Eagle*, 26.08.2011, <http://readingeagle.com/article.aspx?id=327465>, last visited 17.07.2016.

⁴⁵ Steinblatt, ‘E-Incitement: A Framework for Regulating the Incitement of Criminal Flash Mobs’, 22 *Fordham Intellectual Property, Media & Entertainment Law Journal* (2012), 753, 758.

⁴⁶ Kaminski, ‘Incitement to Riot in the Age of Flash Mobs’, 81 *University of Cincinnati Law Review* (2012), 1, 6; Steinblatt, ‘E-Incitement: A Framework for Regulating the Incitement of Criminal Flash Mobs’, 22 *Fordham Intellectual Property, Media & Entertainment Law Journal* (2012), 753, 755, 764; Zolkos, ‘Flash Mobs Pose Threat to Retailers: Marsh’, *Business Insurance*, 17.11.2011, <http://www.businessinsurance.com/article/20111117/NEWS06/111119902>, last visited 17.07.2016.

⁴⁷ Steinblatt, ‘E-Incitement: A Framework for Regulating the Incitement of Criminal Flash Mobs’, 22 *Fordham Intellectual Property, Media & Entertainment Law Journal* (2012), 753, 758; Tucker and Watkins, ‘More Flash Mobs Gather with Criminal Intent’, *NBC News*, 09.08.2011, <http://www.nbcnews.com/id/44077826/#.Um5Q4yRnbdU>, last visited 17.07.2016.

⁴⁸ Daublebsky, ‘“Flashrob”: Kriminalität im Internet wird analog’, *Der Standard*, 30.12.2011, <http://derstandard.at/1324501581385/Blitz-Raub-Flashrob-Kriminalitaet-im-Internet-wird-analog>, last visited 17.07.2016; Scheid, ‘Shutting Down Dissent: Global Responses to Mobile-Fueled “Flash Mobs” and Political Protests’, 9 *I/S: A Journal of Law and Policy* (2013), 173, 183.

emptied within minutes – at the time the police arrive, the assault has long been over.⁴⁹ The London riots, for instance, were also labelled as the ‘shopping riots’, because of the very frequent occurrence of flashrobs.⁵⁰ In fact, ‘[a]bout 2,500 shops and businesses are estimated to have been looted during the riots across England’.⁵¹ Both government officials and police repeatedly remark that violent flashmobs, especially flashrobs, are also the result of the increasing use of social media for organisational purposes.⁵²

2. Contagion

The fuel that drives social movements is contagion. Within a group of people, the individual is governed by different psychological laws, the laws of crowds.⁵³ This already realised Sartre when he described the storming of the Bastille:

“It was a collective action: everyone was forced to arm himself by others’ attempts to find arms, and everyone tried to get there before the Others because, in the context of this new scarcity, everyone’s attempt to get a rifle became for the Others the risk of remaining unarmed. At the same time, this response was constituted by relations of imitation and contagion, everyone finding himself in the Other in the very way he followed in his footsteps”.⁵⁴

Accordingly, the French psychologist Gustave Le Bon, identified – at the end of the 19th century – the following crowd elements: (1) Disappearance of the clear awareness of someone’s own personality; (2) domination of the unconscious nature of the individual; (3) influence of

⁴⁹ Daublebsky, “Flashrob”: Kriminalität im Internet wird analog’, *Der Standard*, 30.12.2011, <http://derstandard.at/1324501581385/Blitz-Raub-Flashrob-Kriminalitaet-im-Internet-wird-analog>, last visited 17.07.2016; Scheid, ‘Shutting Down Dissent: Global Responses to Mobile-Fueled “Flash Mobs” and Political Protests’, 9 *US: A Journal of Law and Policy* (2013), 173, 183 *et seq.*

⁵⁰ Newburn, ‘The 2011 England Riots in Recent Historical Perspective’, 55 *British Journal of Criminology* (2015), 39, 54; Williams, ‘The UK Riots: The Psychology of Looting’, *The Guardian*, 9 August 2011, <https://www.theguardian.com/commentisfree/2011/aug/09/uk-riots-psychology-of-looting>, last visited 17.07.2016.

⁵¹ The Guardian, and London School of Economics and Political Science, *Reading the Riots - Investigating England’s summer of disorder* (2011), p. 27; Newburn, ‘The 2011 England Riots in Recent Historical Perspective’, 55 *British Journal of Criminology* (2015), 39, 54.

⁵² Fitzpatrick, ‘The Constitutionality of Restricting the Use of Social Media: Flash Mob Protests Warrant First Amendment Protections’, 43 *Seton Hall Law Review* (2013), 799, 800; Goodman, ‘Debate Over Social Media Incitement as Flash Mobs Strike’, *The New York Times*, 17.08.2011, Aug. 17, 2011, http://thelede.blogs.nytimes.com/2011/08/17/debate-over-social-media-incitement-as-flash-mobs-strike/?_r=0, last visited 17.07.2016.

⁵³ Le Bon, *Psychologie der Massen* (Stuttgart: Kröner, 1964), p. 10; Reiwald, *Vom Geist der Massen* (Zurich: Pan-Verlag, 1946), p. 16; Kostaras, *Zur strafrechtlichen Problematik der Demonstrationsdelikte* (Berlin: Duncker & Humblot, 1982), p. 42; Akram, ‘Recognizing the 2011 United Kingdom Riots as Political Protest’, 54 *British Journal of Criminology* (2014), 375, 379 with further references.

⁵⁴ Sartre, *Critique of Dialectical Reason, Vol. 1: Theory of Practical Examples* (translated by Sheridan-Smith, Alan, edited by Réé, Jonathan, London, New York: Verso, 1976; originally published as *Critique de la Raison Dialectique*, Paris: Editions Gillimard, 1960), pp. 354-5; also cited in May, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights* (Notre Dame, Indiana: University of Notre Dame Press, 1987), p. 34.

thoughts and emotions through transmission; (4) disappearance of a sense of responsibility.⁵⁵ Of course, Le Bon's arguments have been modified by modern psychology, sociology and empirical studies on 'collective behaviour'.⁵⁶ Especially Le Bon's concept of a 'crowdsoul' or 'crowdmind'⁵⁷ has been criticised.⁵⁸ Nevertheless, the uniqueness of a crowd can certainly not be denied. Le Bon's elements of crowd psychology might be criticised⁵⁹ and have to be complemented by more differentiated violence-phenomological analyses and research into the origins of violence, adding the elements of prevention and control.⁶⁰ Le Bon's concepts of

⁵⁵ Le Bon, *Psychologie der Massen* (Stuttgart: Kröner, 1964), p. 10, 18; Baker, 'From the criminal crowd to the "mediated crowd": the impact of social media on the 2011 English riots', 11 *Safer Communities* (2012), 40, 41; Kostaras, *Zur strafrechtlichen Problematik der Demonstrationsdelikte* (Berlin: Duncker & Humblot, 1982), p. 43.

⁵⁶ Newburn, 'The 2011 England Riots in Recent Historical Perspective', 55 *British Journal of Criminology* (2015), 39, 48; Blumer, 'Collective Behavior', in McClung, Lee Alfred (ed.), *Principles of Sociology* (New York: Barnes and Noble 1953), p. 167; Park, *Masse und Publikum (The Crowd and the Public)* (Chicago, IL: University of Chicago Press, ([1904] 1972)); Baker, 'From the criminal crowd to the "mediated crowd": the impact of social media on the 2011 English riots', 11 *Safer Communities* (2012), 40, 40-1.

⁵⁷ Le Bon, *Psychologie der Massen* (Stuttgart: Kröner, 1964, 2002), p. 4: 'Whoever be the individuals that compose it, however like or unlike be their mode of life, their occupations, their character, or their intelligence, the fact that they have been transformed into a crowd puts them in possession of a sort of collective mind which makes them feel, think and act in a manner quite different from that in which individual of them would feel think and act were he in a state of isolation'. See also Akram, 'Recognizing the 2011 United Kingdom Riots as Political Protest', 54 *British Journal of Criminology* (2014), 375, 378; Baker, 'From the criminal crowd to the "mediated crowd": the impact of social media on the 2011 English riots', 11 *Safer Communities* (2012), 40, 41.

⁵⁸ Allport, *Social Psychology*, (Boston, MA: Houghton Mifflin, 1924), p. 295; Hofstätter, *Gruppendynamik. Die Kritik der Massenpsychologie* (Reinbek: Rowohlt, 1957); Stock, *Die Neugestaltung der Delikte gegen die öffentliche Ordnung durch das 3. Strafrechtsreformgesetz* (Hamburg, 1979), pp. 60 *et seq.* with further references. Providing a valuable summary Maurach, Schroeder, and Maiwald, *Strafrecht Besonderer Teil, Teilband 2*, 10th edn (Heidelberg, Hamburg: Müller, 2012), § 60 mn. 15; Krauß, '§ 125 StGB', in Laufhütte, Heinrich Wilhelm (ed.), *Leipziger Kommentar* (Berlin: de Gruyter Recht, 2009), mn. 14; Jäger, *Individuelle Zurechnung kollektiven Verhaltens* (Frankfurt a.M.: Metzner, 1985), p. 15; Akram, 'Recognizing the 2011 United Kingdom Riots as Political Protest', 54 *British Journal of Criminology* (2014), 375, 379; May, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights* (Notre Dame, Indiana: University of Notre Dame Press, 1987), p. 36 ('[W]hat evidence is there for thinking that the Paris mob did take on a will of its own, in which each of the members of the mob had their wills subordinated to the common will? Since there was no decision-making structure, and since no votes were taken, it is quite difficult to show that each and every person in the mob had decided to subordinate his or her will to the larger will.').

⁵⁹ Theories of mass psychology are criticised for harmonising collective behaviour instead of focusing on individual behaviour, see Jäger, *Individuelle Zurechnung kollektiven Verhaltens* (Frankfurt a.M.: Metzner, 1985), p. 14. Summarising Krauß, '§ 125 StGB', in Laufhütte, Heinrich Wilhelm (ed.), *Leipziger Kommentar* (Berlin: de Gruyter Recht, 2009), mn. 14. See also Kaminski, 'Incitement to Riot in the Age of Flash Mobs', 81 *University of Cincinnati Law Review* (2012), 1, 72; Schweingruber and Wohlstein, 'The Madding Crowd Goes to School: Myths about Crowds in Introductory Sociology Textbooks', 33 *Teaching Sociology* (2005), 136 *et seq.*

⁶⁰ Streng, 'Fremdenfeindliche Gewaltkriminalität als Voraussetzung für kriminologische Erklärungsansätze', *Jura* (1995), 182 with further references; Krauß, '§ 125 StGB', in Laufhütte, Heinrich Wilhelm (ed.), *Leipziger Kommentar* (Berlin: de Gruyter Recht, 2009), mn. 17 with further references. Theories more affiliated with sociology and political science involved analyses into issues such as structural strain (Smelser, *Theory of Collective Behaviour* (New York: Free Press, 1962)), racism and relative deprivation (Gurr, *Rogues, Rebels and Reformers: A Political History of Urban Crime and Conflict* (Beverly Hills, CA: Sage, 1976)). See also Newburn, 'The 2011 England Riots in Recent Historical Perspective', 55 *British Journal of Criminology* (2015), 39, 48.

‘suggestibility’ and ‘contagion’ nevertheless still influence the popular discourse, and contemporary psychological interpretation still draws on the crowd’s ‘emotionally homogeneous and irrational characteristics’.⁶¹ Moreover, crowds pose very special dangers to victims.

Although a detailed analysis of the psychology and dynamics of crowds would go far beyond this presentation, slightly simplified three elements can be identified which add to a crowd’s dangerousness: First, the individual person very easily loses his or her sense of responsibility,⁶² which blends into the anonymity of a crowd.⁶³ The sense of responsibility is replaced by the feeling of power and superiority.⁶⁴ Within a crowd, the person does not only lose her fear of prosecution and punishment;⁶⁵ he also experiences an extreme feeling of strength⁶⁶ and, as a result, behaves in a way he or she would probably not behave as an individual person.⁶⁷ Second, the person feels encouraged to behave differently due to the suggestive effect of the crowd, or, in other words, heightened ‘excitement’ or an ‘emotional contagion’.⁶⁸ Group dynamics inevitably lead to the lowering of thresholds up to the

⁶¹ Newburn, ‘The 2011 England Riots in Recent Historical Perspective’, 55 *British Journal of Criminology* (2015), 39, 48; Baker, ‘From the criminal crowd to the “mediated crowd”: the impact of social media on the 2011 English riots’, 11 *Safer Communities* (2012), 40, 42; Burns, ‘Pseudoscience and the London riots: folk psychology run amok’, *Scientific American*, 16 August 2011, <http://blogs.scientificamerican.com/guest-blog/2011/08/16/pseudoscienceand-the-london-riots-folk-psychology-run-amok/>, last visited 17.07.2016.

⁶² Colman, ‘Crowd Psychology in South African Murder Trials’, 46 *American Psychologist* (1991), 1071 (‘deindividuation’); Tiedemann, ‘Beteiligung an Aufruhr und Landfriedensbruch’, *Juristenzeitung* (1968), 761, 762; Schild, ‘Der strafrechtsdogmatische Begriff der Bande’, *Goltdammer’s Archiv* (1982), 55, 69 *et seq.* and Kostaras, *Zur strafrechtlichen Problematik der Demonstrationsdelikte* (Berlin: Duncker & Humblot, 1982), pp. 42 *et seq.*

⁶³ Kostaras, *Zur strafrechtlichen Problematik der Demonstrationsdelikte* (Berlin: Duncker & Humblot, 1982), p. 44.

⁶⁴ *Le Bon, The Crowd* (London: Dover Publications [1895] 2002), xi, pp. 104-5; Baker, ‘From the criminal crowd to the “mediated crowd”: the impact of social media on the 2011 English riots’, 11 *Safer Communities* (2012), 40, 41; Kostaras, *Zur strafrechtlichen Problematik der Demonstrationsdelikte* (Berlin: Duncker & Humblot, 1982), p. 44; also Meyer, ‘Beteiligung am Landfriedensbruch (§ 125 Abs. 1 1. und 2. Variante StGB) und Teilnahme zum Landfriedensbruch (§ 125 Abs. 1 1. und 2. Variante in Verbindung mit §§ 26, 27, 28 Abs. 1 StGB)’, *Goltdammer’s Archiv* (2000), 459, 468; Krauß, ‘§ 125 StGB’, in Laufhütte, Heinrich Wilhelm (ed.), *Leipziger Kommentar* (Berlin: de Gruyter Recht, 2009), mn. 14.

⁶⁵ Kostaras, *Zur strafrechtlichen Problematik der Demonstrationsdelikte* (Berlin: Duncker & Humblot, 1982), p. 49.

⁶⁶ Ostendorf, ‘§125 StGB’, in *id.*, *Alternativkommentar zum Strafgesetzbuch, Vol. 3* (Neuwied et al.: Luchterhand, 1986), mn. 1.

⁶⁷ Arzt, Weber, Heinrich, and Hilgendorf, *Strafrecht Besonderer Teil*, 3rd edn (München: Beck, 2015), § 44 mn. 6; Canetti, Elias, *Crowds and Power* (engl. translation by Stewart, Carol, New York: Continuum, 1973; originally published as *Masse und Macht*, Hamburg: Claassen Verlag, 1960), p. 74 (‘A special type of crowd is created by a *refusal*: a large number of people together refuse to continue to do what, till then, they had done singly.’, emphasis in the original).

⁶⁸ *Le Bon, The Crowd* (London: Dover Publications [1895] 2002), xi, pp. 104-5; Baker, ‘From the criminal crowd to the “mediated crowd”: the impact of social media on the 2011 English riots’, 11 *Safer Communities* (2012), 40, 41; Stock, *Die Neugestaltung der Delikte gegen die öffentliche Ordnung durch das 3. Strafrechtsreformgesetz* (Hamburg: 1979), p. 60 *et seq.*; Maurach, Schroeder, and Maiwald, *Strafrecht Besonderer Teil, Teilband 2*, 10th edn (Heidelberg, Hamburg: Müller, 2012), § 60 mn. 16.

synchronisation of motivations in the sense of a psychological solidarisation.⁶⁹ Some even suggest that the crowd creates an own identity,⁷⁰ an observation that received some criticism over the years.⁷¹ It is particularly the presence of other people that has a controlling effect on the individual.⁷² Third, it is incredibly difficult to prove, who has committed a criminal act within a crowd and who was just passively present.⁷³ Violent behaviour of people within a group can hardly be attributed to a certain person.⁷⁴ Thus, the anonymity of a crowd increases the probability of impunity, which is also a reason for the loss of responsibility, since the individual person can give in to the feeling that he is just one out of many, who can hardly be identified.⁷⁵ During the drafting of the German provision on riots and breaches of peace respectively, the difficulty to prove the identity of an offender within a crowd was the reason

⁶⁹ Krauß, ‘§ 125 StGB’, in Laufhütte, Heinrich Wilhelm (ed.), *Leipziger Kommentar* (Berlin: de Gruyter Recht, 2009), mn. 14; Sonnen, ‘Anmerkung zu AG Freiburg, Beschluss vom 20.1.1982 – AK 55/81 – Ls 76/81’, *Juristische Arbeitsblätter* (1982), 566, 567; Starke and Stein, ‘Der Gesetzentwurf der Bundesregierung zur Änderung des § 125 StGB’, *Juristische Rundschau* (1984), 97, 98; Streng, ‘Fremdenfeindliche Gewaltdelinquenz als Voraussetzung für kriminologische Erklärungsansätze’ *Jura* (1995), 182, 189. The ‘threshold’ theory has famously been proposed by Granovetter, who, however, applies it in a different context, namely the decision to join a riot: ‘The threshold is simply that point where the perceived benefits to an individual of doing the thing in question (here, joining the riot) exceed the perceived costs.’, Granovetter, Mark, ‘Threshold Models of Collective Behavior’, 83 *The American Journal of Sociology* (1978), 1420, 1422; Rheingold, *Smart Mobs – The Next Social Revolution* (Cambridge, MA: Basic Books, 2002).

⁷⁰ See, e.g., Sartre, *Critique of Dialectical Reason, Vol. 1: Theory of Practical Examples* (translated by Sheridan-Smith, Alan, edited by Réé, Jonathan, London, New York: Verso, 1976; originally published as *Critique de la Raison Dialectique*, Paris: Editions Gilliland, 1960), pp. 372-3; May, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights* (Notre Dame, Indiana: University of Notre Dame Press, 1987), p. 60 (‘The members of a mob can attain the kind of collective consciousness of each others’ needs that unites them as if they were one organic totality.’).

⁷¹ Bagguley and Hussain, for instance, observe that ‘the rather dull reality is that there is no magical collective identity that all are encompassed by, but rather an aggregate of groups, individuals and processes’ (Bagguley and Hussain, *Riotous Citizens: Ethnic Conflict in Multicultural Britain* (Aldershot: Ashgate, 2008), p. 12). See also Newburn, ‘The 2011 England Riots in Recent Historical Perspective’, 55 *British Journal of Criminology* (2015), 39, 48 with further references.

⁷² Stock, *Die Neugestaltung der Delikte gegen die öffentliche Ordnung durch das 3. Strafrechtsreformgesetz* (Hamburg, 1979), p. 61.

⁷³ Arzt, Weber, Heinrich, and Hilgendorf, *Strafrecht Besonderer Teil*, 3rd edn (München: Beck, 2015), § 44 mn. 6.

⁷⁴ Official parliamentary statement to law E 62, BR-Drucksache 200/62, p. 467.

⁷⁵ Baker, ‘From the criminal crowd to the “mediated crowd”: the impact of social media on the 2011 English riots’, 11 *Safer Communities* (2012), 40, 41; Kostaras, *Zur strafrechtlichen Problematik der Demonstrationsdelikte* (Berlin: Duncker & Humblot, 1982), p. 49.

why the provision was introduced in the first place and amended accordingly.⁷⁶ Decisions of a group are riskier than the previous decisions of individuals.⁷⁷

3. Hierarchy

Hierarchy as an element in protests is counter intuitive. We imagine a group of people, loosely connected and hardly coordinated. In fact, hierarchy and organisation is the element that – at least sociologically – distinguishes violent protests from terrorism. Due to space constraints, I cannot address the difference in detail. I am therefore reluctantly forced to deliberately neglect the two major cases in the USA on the provision of support for a terrorist organisation, *Holder v. Humanitarian Law Project*⁷⁸ and *United States v. Mehanna*.⁷⁹

Indeed, riots and terrorism may have similarities: Resonating the English Terrorism Act 2000, terrorism means the use or threat of certain (serious and grave) actions, which are ‘designed to influence the government or an international governmental organisation or to intimidate the public or a section of the public’,⁸⁰ and must be ‘made for the purpose of advancing a political, religious, racial or ideological cause’.⁸¹ The same holds true for the German provision on ‘forming terrorist organisations’ (s. 129a German Criminal Code [StGB]), even though here the “designed to influence” purpose is not an element of every terrorist offence. As the above-mentioned element of social distance suggests, riots can indeed involve acts of violence or threats that are used to influence the government, involving racial feelings, or ‘feelings of religious, political or general social deprivation or injustice’.⁸² Consequently, political leaders

⁷⁶ See the official parliamentary statement to law E 62, BR-Drucksache 200/62, p. 467; Ostendorf, ‘§125 StGB’, in *id.*, *Alternativkommentar zum Strafgesetzbuch, Vol. 3* (Neuwied et al.: Luchterhand, 1986), mn. 1; Ostendorf, ‘§ 125’, in Dölling, Dieter (ed.), *Gesamtes Strafrecht: StGB, StPO, Nebengesetze, Nomos Kommentar* (Baden-Baden: Nomos, 2013), mn. 1.

⁷⁷ Stoner, *A Comparison of Individual and Group Decisions Involving Risk* (Massachusetts Institute of Technology, 1961), p. 45; Isenberg, ‘Group polarization: A critical review and meta-analysis’, *50 Journal of Personality and Social Psychology* (1986), 1141.

⁷⁸ 561 U.S. 1 (2010), 130 S.Ct. 2705.

⁷⁹ No. 09-cr-10017-GAO (D. Mass. 2011). See generally George D. Brown, ‘Notes on a Terrorism Trial’ (2012) 4 HNSJ 1-57; Innokenty Pyetranker, ‘Sharing Translations or Supporting Terror?’ (2012) 2 NSLR 21-41.

⁸⁰ Terrorism Act 2000, s 1(1)(b).

⁸¹ Terrorism Act 2000, s 1(1)(c). See generally Adrian Hunt, ‘Criminal prohibitions on direct and indirect encouragement of terrorism’ (June 2007) CLR 441, 443, 446.

⁸² Marvin E Wolfgang, ‘Surveying Violence Across Nations’ (1981) 37 IRCP 62, 80.

reflexively label riots as terrorism and prosecute rioters for terrorist crimes.⁸³ The US State Alabama even included a “terror” element in its riot statute.⁸⁴

Yet, so far, the element of both organisation and hierarchy has been used to differentiate between rioting and terrorism. de la Roche, for instance, differentiated lynching, rioting, vigilantism, and terrorism *inter alia* along the lines of what she calls ‘their breadth of liability and degree of organization’ and ‘the degree of social polarization and [...] the continuity of the deviant behavior at which the violence is directed’.⁸⁵ Let us just focus on the degree of organization: Riots are ‘situational, spontaneous, and decentralized’ and therefore always much less organised and structured than terrorism.⁸⁶ In the words of de la Roche:

Lynching and rioting are distinguished by their relatively low level of organization and vigilantism and terrorism by their high level of organization. Lynching and rioting are temporary as well as informal. Even though collective violence that qualifies as a riot occasionally lasts more than a day and what qualifies as lynching may last as much as a week or more, greater degrees of organization would ultimately change the classification of a riot to terrorism or a lynching to vigilantism.⁸⁷

Yet, the criterion of organization is at risk being treated to formally. Of course, a terrorist organization might have, on paper, a greater level of organization than a protest. Yet, today’s protests, due to well coordinated social media communication, have at least an informal order.⁸⁸ This informal order has not so much an impact on agency – as I will argue later – but is more of a social nature. The question of agency is of course most important for this presentation and so is, as a result, the difference between terrorism and rioting from a criminal law perspective.

⁸³ See, for instance, the riot of 850 political prisoners in a prison in Hama, west-central Syria, ‘protesting against the prison management and calling on the Syrian government to put an end to show trials of political detainees, arbitrary detentions and the use of torture’, which have all been charged with terrorism, Zuhour Mahmoud, ‘Hama Prison Riot Highlights Judicial Malpractice In Syria’ *Huffpost* (10 June 2016), <http://www.huffingtonpost.com/entry/hama-prison-riot-judicial-malpractice_us_575b15ade4b00f97fba84e3d>, accessed 8 August 2018. See also Sallyann Nicholls, ‘Erdogan dubs student protesters “terrorists” and threatens university ban’ *Euronews* (25 March 2018), <<http://www.euronews.com/2018/03/25/erdogan-dubs-student-protesters-terrorists-and-threatens-university-ban>>, accessed 8 August 2018.

⁸⁴ AL Code § 13A-11-3 (2015): ‘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.’ (emphasis added), available at <<http://law.justia.com/codes/alabama/2015/title-13a/chapter-11/article-1/section-13a-11-3/>>, accessed 8 August 2018.

⁸⁵ de la Roche, ‘Collective violence as social control’, 11 *Sociological Forum* (1996), 97, 115.

⁸⁶ de la Roche, ‘Collective violence as social control’, 11 *Sociological Forum* (1996), 97, 103, 104. In the same vein Lutz and Lutz, *Terrorism in America* (New York: Palgrave Macmillan, 2007), p. 101; May, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights* (Notre Dame, Indiana: University of Notre Dame Press, 1987), p. 36 (‘The mob attained a status somewhere between a random collection of individuals and an organized group.’).

⁸⁷ de la Roche, ‘Collective violence as social control’, 11 *Sociological Forum* (1996), 97, 103.

⁸⁸ In a similar vein Tali Hatuka, *The Design of Protest* (2018), p. 54.

Yet, not only for space reasons must this debate be reserved for another day. It is certainly tempting to analyse incitement to rioting through social media including the law on terrorism. However, for the many reasons I have just brought forward, involving terrorism runs risk to lose sight of the unique peculiarities of riots and the rioter's interaction with social media. Analysing rioting in the form of terrorism would be like listening to one of the many cover version of The Beatles' 'Lucy in the sky with diamonds': Surely, the cover versions make the most of the rumours the song was connected to LSD and Alice in Wonderland by bringing out its unusual arrangement and lyrics. This, however, blocks the view to the unique modulations between musical keys, when Lennon composed a bridge between A major (for verses), B♭major (for the pre-chorus), and G major (for the chorus).

4. Supplement: Citizenship

There is an element of group violence I will completely ignore: The element of citizenship. Ignoring it does not make it less relevant. On the contrary: It is vital. Yet, as I see it, it is connected to a meta-debate about citizenship and discourse. I have done this elsewhere⁸⁹ and leave here a sketch of the argument: The demand of overcoming social distance stems from citizenship. The public is the collective body of all citizens. Communication systems and markets have created a global context, a cosmopolitan public sphere. This sphere creates the world citizen. Thus, even in a regional, domestic context, people suddenly voice demands that they have not done before. Put differently: German citizen A is suddenly invested in a US social movement and makes the same social demands as the US citizen.

III. The Criminalisation of Violent Protests

Having described the social peculiarities of violent protests, let us turn now to the criminalisation of those protests, especially of persons who incite or even coordinate them. As a basis, I repeat premise 2 mentioned at the outset: Violent protests cause harm and/or endanger certain legal goods or interests. Unsurprisingly, the US, England and Wales and Germany, have in common that they recognise the dangers of possible riots and the necessity for an appropriate reaction of the law; they differ, however, with regard to the design of these laws: Some riot provisions are rather detailed, some don't; some require only two persons for a riot, some twelve persons or more; for some a reckless act is sufficient, some require intent or even specific intent.

⁸⁹ Alexander Heinze, "The Statute of the International Criminal Court as a Kantian Constitution", in Morten Bergsmo and Emiliano J. Buis (editors), *Philosophical Foundations of International Criminal Law: Correlating Thinkers*, Torkel Opsahl Academic EPublisher, Brussels, 2018

1. International and Regional Human Rights Protections

However, to understand the different laws on either the incitement or planning of violent protests, it is essential to understand the underlying human rights regimes. And this sounds easier than it actually is. To start off, again, with the largest common denominator: Protests and their planning or support are protected by the right to assembly and the freedom of speech. Internationally, the right to assembly is protected, *inter alia*, by Article 21 ICCPR, Article 11 ECHR and Article 20(1) of the UDHR. Freedom of speech is guaranteed by Article 19 ICCPR, Article 10 ECHR and Article 19 UDHR. When it comes to protests, those provisions overlap,⁹⁰ since participation in a protest constitutes an act of expression which attracts the protection of the freedom of speech.⁹¹

Only peaceful assembly is protected, though. Furthermore, all the mentioned human rights instruments allow for certain limitations: imposed in conformity with law; necessary in a democratic society; and, necessary in the interest of one of the permissible grounds.⁹² Thus, the encouragement of violence, hatred or intolerance can be subject to punishment, *inter alia*, were necessary in a democratic society, for which Courts have considered a number of factors including:

- whether the statements were made against a tense political or social background
- whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance
- the manner in which statements were made
- their capacity – directly or indirectly – to lead to harmful consequences.⁹³

2. Human Rights Protections in the US and Germany: A Matter of Culture and Perspective

This rough sketch of the regional or international human rights protections shall suffice. The hard cases, some of which were mentioned at the beginning of the presentation, are solved by other factors, including a certain what I call human rights culture. This human rights culture does not so much impact the way the above-mentioned protections are being interpreted, but

⁹⁰ Wainwright, Tom, Morris, Anna, Greenhall, Owen and Parker, Lochlinn, *The Protest Handbook* (2nd edn, London, Bloomsbury Professional Law 2020), 190.

⁹¹ *Steel v UK* [1999] 28 EHRR 603. Wainwright, Tom, Morris, Anna, Greenhall, Owen and Parker, Lochlinn, *The Protest Handbook* (2nd edn, London, Bloomsbury Professional Law 2020), 184.

⁹² Moulds, Olivia, 'Fracking the Bedrock of Democracy: The United States Policing of Protests Violates the Right of Peaceful Assembly Under the ICCPR' (2021) 36 *American University International Law Review* 887, 900-901.

⁹³ *Alekhina v Russia* (2019) 68 EHRR 14; Wainwright, Tom, Morris, Anna, Greenhall, Owen and Parker, Lochlinn, *The Protest Handbook* (2nd edn, London, Bloomsbury Professional Law 2020), 189.

rather how they are weighed against other human rights protections or obligations. In its General Comment No. 10 (about Article 19 International Covenant on Civil and Political Rights (ICCPR), the Human Rights Committee of the UN emphasized that “[i]t is the interplay between the principle of freedom of expression and such limitations and restrictions which determines the actual scope of the individual’s right.”⁹⁴

In the US, the First Amendment provides for an extreme protection of free speech – much broader than the protection afforded by the human rights covenants mentioned above.⁹⁵ There are three prominent justifications for protecting free speech in the United States: (1) it acknowledges human autonomy and dignity, (2) it promotes the marketplace of ideas,⁹⁶ and (3) it is an effective tool of democracy.⁹⁷ Only speech that falls into the following categories may be restricted: advocacy intended and likely to incite imminent lawless action (a likelihood to produce illegal action and an intent to cause imminent illegality),⁹⁸ obscenity,⁹⁹ defamation,¹⁰⁰ child pornography,¹⁰¹ “fighting words”,¹⁰² fraud,¹⁰³ true threats,¹⁰⁴ speech integral to criminal conduct,¹⁰⁵ and speech presenting a grave and imminent threat the government has the power to prevent.¹⁰⁶ The case law on false speech is less clear. While earlier case law allowed for some

⁹⁴ U.N. Office of High Comm’r for Human Rights, *General Comment No. 10: Freedom of Expression (Art. 19)*, U.N. Docs. CCPR General Comment No. 10, ¶ 3 (June 29, 1983), <https://www.ohchr.org/Documents/Issues/Opinion/CCPRGeneralCommentNo10.pdf>.

⁹⁵ *Texas v. Johnson*, 491 U.S. 397, 414 (1989); Winfried Brugger, *Ban on or Protection of Hate Speech - Some Observations Based on German and American Law*, 17 TULANE EUROPEAN AND CIVIL LAW FORUM, 1, 2 (2002); Michel Rosenfeld, *Hate Speech in Constitutional Jurisprudence: A Comparative Analysis*, 24 CARDOZO L. REV. 1523, 1523 (2003); See also Bakircioglu, *supra* note **Error! Bookmark not defined.**, at 20.

⁹⁶ In more detail Alexander Tsesis, *Deliberate Democracy, Truth, and Holmesian Social Darwinism*, 72 SMU LAW REVIEW, 496-503 (2019).

⁹⁷ Thomas J. Webb, *Verbal Poison - Criminalizing Hate Speech: A Comparative Analysis and a Proposal for the American System*, 50 WASHBURN L.J., 445, 448-449 (2011).

⁹⁸ *Brandenburg v. Ohio*, 395 U.S. 444 (1969); Mari Matsuda, *Dissent in a Crowded Theater*, 72 SMU LAW REVIEW, 441-456 (2019). About the application of the Brandenburg test to speech acts uttered via social media to incite violent protests see Alexander Heinze, *Planning and Inciting Violent Protests Through Social Media: A Criminal Law and Comparative Law Perspective*, 2 CRIM. L. & PRAC. REV., 29-51 (2018). Comparing US-Law and the law in England and Wales on dangerous speech: Jeffrey W. Howard, *Dangerous Speech*, 47 PHILOSOPHY & PUBLIC AFFAIRS, 208-254(2019).

⁹⁹ *Miller v. California*, 413 U.S. 15 (1973).

¹⁰⁰ *New York Times v. Sullivan*, 376 U.S. 254 (1964).

¹⁰¹ *New York v. Ferber*, 458 U.S. 747 (1982).

¹⁰² *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

¹⁰³ *Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

¹⁰⁴ *Watts v. United States*, 394 U.S. 705, 709 (1969).

¹⁰⁵ *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

¹⁰⁶ *N.Y. Times Co. v. United States*, 403 U.S. 713, 727 (1971) (per curiam); *Near v. Minn. ex rel. Olson*, 283 U.S. 697, 716 (1931); *Chaplinsky*, 315 U.S. at 572. See generally Daniel S. Harawa, *Social Media Thoughtcrimes*, 35 PACE LAW REVIEW, 366, 380 (2014); G. Edward White, *Falsity and the First Amendment*, 72 SMU LAW REVIEW 519-520 (2019).

“breathing space”¹⁰⁷ for false remarks about, *inter alia*, public officials, recent decisions tend to be more favorable to false speech in general.¹⁰⁸

The German protection of free speech differs substantially from this approach. Both freedom of expression and freedom of the press enjoy constitutional protection in Germany, under Article 5 of the Basic Law. At the same time, German civil law prohibits and criminalizes incitement of hatred and attacks on human dignity because of race, religion, ethnic origin, or nationality.¹⁰⁹ It is not a requirement that speech lead to a clear and present danger of imminent lawless action before becoming punishable.¹¹⁰ Rather, a “distant and generalized threat to the public peace and to life and dignity, particularly of minorities, suffices for legal sanctions irrespective of whether and when such danger would actually manifest itself.”¹¹¹

It does not have a self-defeating purpose of displaying these differences and it is all too easy to treat them as such. Instead, those differences reveal two fundamentally different approaches to a rights discourse. The ink used to describe these differences could easily fill oceans. It therefore does not do justice to distill the main elements of difference and yet, the confinements of an article require just that: (1) the historical element; (2) the protection of dignity and its constitutional role; (3) the balancing of individual rights versus constitutional interests; and (4) the interpersonal effect of the constitution. I have analysed all elements elsewhere,¹¹² and will only focus on the last element:

While free speech is restricted in Germany by countervailing constitutional rights of the defamed person, in the US it is restricted by the state’s interests.¹¹³ It is therefore hardly surprising that the American public is reluctant to interpret these interests broadly, while the public in Germany is less reluctant to grant the defamed person a minimum amount of dignity protection. In other words, allowing the state to restrict my right to free speech for policy reasons feels less intuitive than for reasons that protect the person I am directing my speech at. This goes to nothing less than the relationship between the state and society. In the United States Constitution there is a clear distinction between the state and society – an “essential dichotomy”

¹⁰⁷ See *Sullivan*, 376 U.S. at 272 (1964).

¹⁰⁸ For an overview see White, *supra* note 106, at 516 *et seq.*

¹⁰⁹ See John C. Knechtle, *When to Regulate Hate Speech*, 110 PENN STATE LAW REVIEW, 539, 541 (2006); See Deborah Levine, *Sticks and Stones May Break my Bones, But Words May Also Hurt Me: A Comparison of United States and German Hate Speech Laws*, 41 FORDHAM INTERNATIONAL L. J., 1293, 1318 (2018).

¹¹⁰ See Guy E. Carmi, *Dignity Versus Liberty: The Two Western Cultures of Free Speech*, 26 BOSTON UNIVERSITY INTERNATIONAL L. J., 277, 329 (2008); Levine, *supra* note 109, at 1318-1319.

¹¹¹ *Id.*

¹¹² “L’État, c’est moi!” - The Defamation of Foreign State Leaders in Times of Global-ized Media and Growing Nationalism, *Journal of International Media and Entertainment Law* 9 (2020), 33-67, 48 ff.

¹¹³ *Id.* at 316.

between state and private action – and adheres to the position that only the state is bound by the fundamental law.¹¹⁴ To a certain extent, society must be free from constitutional restraint and, “although individuals and private groups can be substantially regulated, that regulation must be undertaken by statutes or other measures of positive law which are subject to continuing contemporary adjustment unlike the more rigid rules of constitutional law.”¹¹⁵ The German doctrine is very skeptical that a clear line can be drawn between the public and the private sphere.¹¹⁶ As a result, certain constitutional values such as dignity, “permeate state and society.”¹¹⁷ In practical terms, this means that constitutional values play a certain role when individuals interact with each other – in contractual relations or when one person insults another.

By the way: These different conceptions of the human rights discourse go far back to the rule of law itself: While the Rule of Law is political, its German counterpart, the *Rechtsstaatsprinzip*, is apolitical. Therefore, in the US and England and Wales, subjective rights have always been closely connected to a functioning process of democratic political participation. The roots of the *Rechtsstaatsprinzip*, by contrast, are a reaction to the failed attempt at democracy in 1848 and 1849 and are thus apolitical and individualistic.¹¹⁸

3. Discourse-Analysis

What does that mean for the cases described at the outset of this presentation? It means that the protections of speech that advocates for violent protests needs to be counterbalanced against the rights of those who are endangered by these protests. But even if you do not ascribe to this counterbalancing exercise, for whatever conceptual reason, the protection of this speech can never be absolute as long as it is made within social discourse. Oftentimes regulation of such speech acts is countered by the argument that regulation has a chilling effect, eventually leading to silencing the speaker because he or she is afraid to speak his or her mind. In world of social

¹¹⁴ See *National Collegiate Athletic Ass'n v. Tarkanian*, 488 U.S. 179, 191 (1988); *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 349, 350 (1974) (“The mere fact that a business is subject to state regulation does not, by itself, convert its action into that of the State for purposes of the Fourteenth Amendment.”); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936-937 (1982) (“A major consequence is to require the courts to respect the limits their own power as directed against state governments and private interests. Whether this is good or bad policy, it is a fundamental fact of our political order.”).

¹¹⁵ Quint, *supra* note **Error! Bookmark not defined.**, at 339.

¹¹⁶ See generally Heinrich de Wall & Roland Wagner, *Die sogenannte Drittwirkung der Grundrechte*, JURISTISCHE ARBEITSBLÄTTER, 734 (2011); Quint, *supra* note **Error! Bookmark not defined.**, at 340.

¹¹⁷ Quint, *supra* note **Error! Bookmark not defined.**, at 340. See Federal Constitutional Court in BVerfG, *Lüth*, Urteil vom 15. Januar 1958 – 1 BvR 400/51 –, BVerfGE 7, 198: “Basic rights are primarily to protect the citizen against the state, but as enacted in the Constitution they also incorporate an objective scale of values which applies, as a matter of constitutional law, throughout the entire legal system.”, translation by Tony Weir, available at <https://law.utexas.edu/transnational/foreign-law-translations/german/case.php?id=1369>.

¹¹⁸ In more detail Heinze, *Private International Criminal Investigations and Integrity*, in Morten Bergsmo and Viviane Dittrich (eds.), *Integrity in International Justice*, Torkel Opsahl Academic EPublisher, Brussels (2020), 615-738, 658.

media and shit storms, however, this is two-way street: Unrestricted speech might well lead to others fearing to express their opinions. In Goldberg’s words: “If private entities chill too much speech, free speech values can be sacrificed by free speech doctrine, just as these values can be served by free speech doctrine”.¹¹⁹ This is an argument that has increasingly come up in recent German defamation law reform: Restrict speech to save the discourse. This is not the place to go into discourse analysis and I myself have refuted this argument. Yet, I understand – empirically – why it is tempting to make this argument. In the US, this reversed chilling effect does not lead to a “First Amendment claim by the party seeking governmental regulation”.¹²⁰ Yet, this discourse-related argument also has rights dimension: equality – equality as a democratic right against hierarchy.¹²¹ This means that in a discourse, everyone enjoys the same rights and the state obliged to protect these rights. What use has the paradigm that speech should stay unregulated and be counterbalanced by more speech if more speech is factually impossible – because those potentially violated do not have the capacities for more speech? This goes back to the ideas of Catherine McKinnon as summarized by Susanne Baer: “Equality embodies the right against disadvantage, against dominance; it is not a right based on a false 'neutrality'. Therefore, equality requires the law to intervene when speech produces hierarchy”.¹²² Applied to the January 6 scenario: The way events unfolded indicates that the person inciting these events – Donald Trump – intended to close down discourse – namely Congress itself – instead of encouraging counterbalancing speech.

IV. Criminalisation of Violent Protest, their Encouragement and Coordination

After I have demonstrated how speech that encourages protests is protected, let us now turn to the criminalisation of speech that encourages or even coordinates violent protests. I will start with a general account of incitement to mob violence. In a second part, I will apply the results to the scenario where the incitements arguably amounts to coordination or planning.

1. The Law in the USA

In the United States, many the criminal laws of many jurisdictions contain regulations on assemblies. At the federal level, several codes criminalize riots and similar conduct.¹²³

¹¹⁹ Goldberg, Erica, 'Competing Free Speech Values in an Age of Protest' (2018) 39 *Cardozo Law Review* 2163, 2166.

¹²⁰ Goldberg, Erica, 'Competing Free Speech Values in an Age of Protest' (2018) 39 *Cardozo Law Review* 2163, 2166.

¹²¹ Baer in Kretzmer, David and Hazan, Francine Kershman (eds), *Freedom of Speech and Incitement Against Democracy* (The Hague London Boston, Kluwer Law International 2000), 92.

¹²² Baer in Kretzmer, David and Hazan, Francine Kershman (eds), *Freedom of Speech and Incitement Against Democracy* (The Hague London Boston, Kluwer Law International 2000), 92.

¹²³ See 18 U.S.C. § 231 (authorizing punishment for interfering with the work of federal official); 18 U.S.C. § 2101 (authorizing punishment for organizing, promoting, or inciting riots across state lines); 18 U.S.C. § 2383 (authorizing punishment for organizing, inciting, or participating in a rebellion against the United States).

Most of the state laws criminalising incitement to riot are influenced by two Supreme Court cases: Schenck, with its ‘clear and present danger’ test (likelihood of imminent, significant harm [shouting fire in a crowded theater]),¹²⁴ and Brandenburg, introducing the ‘imminent lawless action’ (a likelihood to produce illegal action and an intent to cause imminent illegality).¹²⁵ Both tests provide for a too high of a threshold to actually punish incitement to riot through social media. On the federal level, the law that *prima facie* seems to best cover the problems of incitement of rioting through social media is the Federal Anti-Riot Act, enacted a year before Brandenburg v. Ohio was decided. Contrary to the riot law in the states, the Federal Anti-Riot Act does not criminalise rioting per se, but the interstate travel and use of certain tools of communication to somehow participate in a riot. Thus, the incitement to riot through social media could indeed be a violation of the Federal Anti-Riot Act¹²⁶ - it needs, however, to be tested against its compliance with the requirements set out in Brandenburg.

Consider the case of Trump in Fayetteville: Since North Carolina’s incitement to riot law relies on the clear and present danger test (conduct that ‘creates a clear and present danger of injury or damage to persons or property’), investigations against Trump were soon discontinued due to a lack of evidence. An almost identical incident occurred in Louisville, Kentucky in 2016.¹²⁷ Here, the protesters filed a civil suit against Trump, the Trump campaign, and the alleged assailants in a federal district court in Kentucky, seeking damages.¹²⁸ The inciting speech made

¹²⁴ Schenck v. United States, 249 U.S. 47, 52 (1919). See generally Walter Signorelli, *Criminal Law, Procedure, and Evidence* (CRC Press 2011) 29; Steven Less, ‘United States of America’, in Anne Peters and Isabelle Ley (eds), *The Freedom of Peaceful Assembly in Europe* (Nomos 2016) 67, 73. About the application of the clear and present danger test in Debs, Abrams and Whitney see Guyton (n **Error! Bookmark not defined.**) 694-8. Examples for incitement to riot state laws that follow the clear and present danger test: AR Code § 5-71-203 (2015), available at <<http://law.justia.com/codes/arkansas/2015/title-5/subtitle-6/chapter-71/subchapter-2/section-5-71-203/>>, accessed 8 August 2018; CA Penal Code § 404.6 through (2015) Leg Sess, available at <<http://law.justia.com/codes/california/2015/code-pen/part-1/title-11/section-404.6/>>, accessed 8 August 2018; GA Code § 16-11-31 (2015), available at <http://law.justia.com/codes/georgia/2015/title-16/chapter-11/article-2/section-16-11-31/>, accessed 8 August 2018; NC Gen Stat § 14-288.2(d) (2015).

¹²⁵ 395 U.S. 444 (1969). See also Hannah Steinblatt, ‘E-Incitement’ (2012) 22 Fordham IPMELJ 753, 758; David G. Barnum, ‘Indirect Incitement and Freedom of Speech in Anglo-American Law’ (2006) 3 EHRLR 258, 276. Examples for incitement to riot state laws that follow the imminent lawless action test: SC Code § 16-5-130 (2015), available at <<http://law.justia.com/codes/south-carolina/2015/title-16/chapter-5/section-16-5-130/>>, accessed 8 August 2018; NY Penal L § 240.08 (2015), available at <<http://law.justia.com/codes/new-york/2015/pen/part-3/title-n/article-240/240.08/>>, accessed 8 August 2018.

¹²⁶ In the same vein Margot E. Kaminski, ‘Incitement to Riot in the Age of Flash Mobs’ (2012) 81 UCLR 1, 61.

¹²⁷ ‘Judge to Trump: No Protection for Campaign Rally Speech Inciting Violence’ *CNBC* (2 April 2017), <<https://www.nbcnews.com/politics/politics-news/judge-trump-no-protection-campaign-rally-speech-inciting-violence-n741731>>, accessed 9 August 2018.

¹²⁸ As a result, in US District Court, Western District of Kentucky, Louisville Division, *Nwanguma et al v. Trump et al*, Memorandum Opinion and Order, Judge David J. Hale found ‘sufficient factual support’ for the allegation that Trump incited riot, decided that the plaintiffs had a ‘plausible claim’ in that regard and referred the matter to a Magistrate Judge ‘for resolution of all litigation planning issues’. See also Garrett Epps, ‘Did the President Incite a Riot?’ *The Atlantic* (5 April 2017), <<https://www.theatlantic.com/politics/archive/2017/04/did-the-president-incite-a-riot/521931/>>, accessed 9 August 2018.

on platforms such as Facebook or Twitter needs to incite an ‘imminent lawless action’, that is an imminent or predictable¹²⁹ riot including violent acts.¹³⁰ This can rarely be shown in court. For instance, in 2009 Pennsylvania State Police arrested Elliot Madison in his Pittsburgh motel room for enabling a non-permitted march during the G-20 Summit in Pittsburgh, Pennsylvania.¹³¹ Madison allegedly used Twitter messages to contact protesters at the summit ‘and to inform the protesters and groups of the movements and actions of law enforcement’.¹³² It is doubtful whether Madison’s actions satisfy the Brandenburg-test, due to a lack of imminence.¹³³ Furthermore, a person could only be held liable for inciting or encouraging riot once the riot or flashmob actually occurred, provided support for violent acts committed by the crowd and ‘at least one person was arrested for committing a crime associated with the mob.’¹³⁴ On the state level, riot participation through social media did not receive any special legislative attention and must therefore fulfil the elements of ordinary riot and incitement to riot laws to be criminalised. On a regional level, however, Cleveland tried to proactively address social media’s impact on riot participation: Following a flash mob incident, the City Council proposed an emergency ordinance ‘prohibiting the improper use of social media to induce persons to commit a criminal offense’ (section 605.091).¹³⁵ However, the Mayor of Cleveland, Frank Jackson, refused to sign the ordinance, pointing out that ‘although there are no legal objections or constitutional concerns regarding the ordinances’, they ‘mirror state laws already in place’.¹³⁶ The law banned inciting to riot and ‘added computers and cellphones to a list of items that can be considered criminal tools when used illegally’.¹³⁷ The components of the law were:

[1] Inciting to riot. No person shall knowingly engage in conduct designed to incite another to commit a riot. This supplement ordinance targets the individual(s) who organize a riot and would be a misdemeanor of the first degree.

¹²⁹ David Crump, ‘Camouflaged Incitement’ (1994-1995) 29 GLR 1, 69-60.

¹³⁰ Hannah Steinblatt, ‘E-Incitement’ (2012) 22 Fordham IPMELJ 753, 782.

¹³¹ Ed Pilkington, ‘New York man accused of using Twitter to direct protesters during G20 summit’ *The Guardian* 4 October 2009, <<https://www.theguardian.com/world/2009/oct/04/man-arrested-twitter-g20-us>>, accessed 10 August 2018.

¹³² *ibid.*

¹³³ Guyton, ‘Tweeting “Fire” in a Crowded Theater’ (n **Error! Bookmark not defined.**8) 722.

¹³⁴ Hannah Steinblatt, ‘E-Incitement’ (2012) 22 Fordham IPMELJ 753, 782.

¹³⁵ Margot E. Kaminski, ‘Flash mob or protest movement’, in Cornelis Reiman (ed), *Public Interest and Private Rights in Social Media* (Chandos 2012) 25, 28.

¹³⁶ Pat Galbincea, ‘Flash mob ordinances become law in Cleveland minus Mayor Frank Jackson’s signature’ *Cleveland.com* (12 December 2011), <http://blog.cleveland.com/metro/2011/12/flash_mob_ordinances_become_la.html>, accessed 8 August 2018.

¹³⁷ Thomas Ott, ‘Cleveland again targets social media role in “flash mobs”’ *Cleveland.com* (6 December 2011), <http://blog.cleveland.com/metro/2011/12/cleveland_again_targets_social.html>, accessed 8 August 2018.

[2] Riot. No person shall participate with four or more others in a course of disorderly conduct in violation of Section 605.03, including but not limited to a community event, place of business, or any City of Cleveland property, facility, or recreation area. This amending ordinance focuses on the individuals participating in a riot and would be a misdemeanor of the first degree.

[3] Criminal tool. This ordinance includes ‘electronic media device’ as part of the listing of criminal tools under section 625.08 of the Codified Ordinances of Cleveland. This amending ordinance would be a misdemeanor of the first degree.¹³⁸

Interestingly, although the first two sections of the ordinance indeed do not differ from the wording of many state laws, and the inclusion of ‘electronic media device’ in the third section merely specifies the means of communication for incitement to riot (underlined by the section title ‘criminal tool’), a view to the riot and incitement to riot law of Ohio – the state that is home to Cleveland – demonstrates that the Cleveland ordinance does indeed go beyond this law: Ohio has no incitement to riot law but only a section called ‘incitement to violence’, that still comprises the clear and present danger test and very generally criminalises conduct ‘designed to urge or incite another to commit *any* offense of violence’.¹³⁹ This law thus fails to take into account the dangerousness of criminal crowd behaviour and sounds rather like a general provision on abetting. Nevertheless, in some states (especially republican) politicians are currently proposing bills that would criminalise or penalise public protests.¹⁴⁰

2. The Law in Germany

In Germany, actions like those of Trump would probably result in a prosecution. In fact, Germany already had its Trump moment: The German Federal Court of Justice in 1984 held the planner and organiser responsible for rioting as a perpetrator.¹⁴¹ The accused in that case was Alexander Schubart, then a civil servant in the legal department of the administration of Frankfurt, who spoke to protesters during a campaign and told them to block the airport on the following day.¹⁴² As a result, several thousand protesters gathered in front of Frankfurt Airport the following day, which resulted in violent clashes with the police. Schubart himself was never

¹³⁸ Quoted in Steinblatt (n 125) 785-6.

¹³⁹ Ohio Rev Code § 2917.01 (2015) (emphasis added), available <<http://law.justia.com/codes/ohio/2015/title-29/chapter-2917/section-2917.01/>>, accessed 8 August 2018.

¹⁴⁰ Reid Wilson, ‘State legislators take steps to criminalize protests’ *The Hill* (24 February 2017), <<http://thehill.com/homenews/state-watch/321018-state-legislators-take-steps-to-criminalize-protests>>, accessed 10 August 2018.

¹⁴¹ German Federal Court of Justice (BGH), Vol. 32, p. 179.

¹⁴² BGH (1984) NJW 931.

present during the riot, however somehow expected the protests to turn violent.¹⁴³ As a result, Schubart was prosecuted and convicted for – *inter alia* – an aggravated case of rioting (*Landfriedensbruch in einem besonders schweren Fall*, sections 125, 125a StGB) by the state supreme court (*Oberlandesgericht*) in Frankfurt/Main.¹⁴⁴ Section 125(1) reads as follows:

Whosoever as a principal or secondary participant participates in

1. acts of violence against persons or objects; or
2. threats to persons to commit acts of violence,

which are committed by a crowd of people who have joined forces in a manner which endangers public safety, or whosoever encourages a crowd of people to commit such acts, shall be liable to imprisonment not exceeding three years or a fine unless the act is subject to a more severe penalty under other provisions.¹⁴⁵

Together with the penal provisions of the German Assembly Act (*Versammlungsgesetz* – see sections 21 *et seq.*), section 125 StGB is at the heart of the so-called protest criminal law (*Demonstrationsstrafrecht*).¹⁴⁶ It is built on the tension between public order, freedom of assembly pursuant article 8 GG (*Grundgesetz* – German Basic Law) and the freedom of speech pursuant to article 5 GG¹⁴⁷ - just as it is the situation in the USA, where the cases *Schenck* and *Brandenburg* demonstrated the tension between the First Amendment and (incitement to) riot laws.¹⁴⁸

Schubart lodged a constitutional complaint against his conviction, arguing that the attribution of the violent acts to his call a day before violated his freedoms of speech (article 5 GG) and

¹⁴³ Ibid.

¹⁴⁴ Ibid.

¹⁴⁵ Criminal Code in the version promulgated on 13 November 1998, Federal Law Gazette [*Bundesgesetzblatt – BGBl*] I p. 3322, last amended by article 1 of the Law of 24 September 2013, Federal Law Gazette I p. 3671 and with the text of article 6(18) of the Law of 10 October 2013, Federal Law Gazette I p 3799. Translation by Michael Bohlander, available at <https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html#p1178>, last visited 8 August 2018.

¹⁴⁶ Jürgen Schäfer, ‘§ 125 StGB’, in Wolfgang Joecks and Klaus Miebach (eds), *Münchener Kommentar, Vol. 3* (3rd edn, Beck 2017) mn 1; Kostaras (n **Error! Bookmark not defined.**) 81; Kristian Kühl, ‘Demonstrationsfreiheit und Demonstrationsstrafrecht’ (1985) *NJW* 2379; crit. Arzt et al. (n **Error! Bookmark not defined.**) § 44 mn. 5. Section 125 StGB is one of the rare provisions that still promote a so-called unitary model of complicity, which is special, considering that the provisions on participation in the general part of the German Criminal Code explicitly opt for a differentiated model of complicity, in other words these provisions distinguish between perpetration and aiding and abetting. A unitary model of participation does not distinguish between perpetration and aiding and abetting with regard to the determination of guilt or innocence but delegates possible differences in contribution to the sentencing stage. See in general James G. Stewart, ‘Complicity’, in Markus D. Dubber, and Tatjana Hörnle (eds), *The Oxford Handbook of Criminal Law* (Oxford University Press 2014) p. 535, 539

¹⁴⁷ Gunther Arzt et al., *Strafrecht Besonderer Teil* (3rd edn, Beck, 2015) § 44 mn 6.

¹⁴⁸ See supra IV, 1.

assembly (article 8 GG).¹⁴⁹ However, the Constitutional Court did not agree with him and followed the interpretation of the Federal Court of Justice.¹⁵⁰ I will return to this decision later.

V. The Impact of the Peculiarities of Mob Violence on Individual Criminal Responsibility

Returning to the investigation against Trump for a possible offence of inciting riot: Although Trump did not say ‘get that guy and punch him in the face’,¹⁵¹ the Cumberland County Sheriff’s Office nevertheless started an investigation, looking instead ‘on the totality of these circumstances [...] including the potential of whether there was conduct on the part of Mr. Trump or the Trump campaign which rose to the level of inciting a riot’.¹⁵² However, because the Office could not prove that Trump created the atmosphere and made the impression that he implicitly supported to use violence during his rallies,¹⁵³ the Sheriff’s Office did not continue the investigation.¹⁵⁴

In this section, I wish to demonstrate that the application Brandenburg-test fails to take into account the peculiarities of mob violence. To do so, let us have a closer look at the test itself:

1. The Brandenburg-test

The famous *Brandenburg v. Ohio* case mentioned earlier revolved around similar circumstances.¹⁵⁵ The leader of the Ku Klux Klan group, who was convicted for ‘advocat(ing) [...] the duty, necessity, or propriety of crime, sabotage, violence, or unlawful methods of terrorism as a means of accomplishing industrial or political reform’ and for ‘voluntarily assembl(ing) with any society, group, or assemblage of persons formed to teach or advocate the

¹⁴⁹ Alfred Rinke, ‘Die Demonstrationsfreiheit’ (1994) StV 95, 97.

¹⁵⁰ See in general *ibid.* 97 *et seq.*

¹⁵¹ For Hermann Walz, a former prosecutor and practicing attorney in New York and an adjunct professor at John Jay College of Criminal Justice, this phrasing might have made an incitement to riot charge more likely, cited in Patrick Howell O’Neill, ‘North Carolina police investigating whether Donald Trump incited a riot’ *The Daily Dot* (14 March 2015), <<http://www.dailydot.com/layer8/nc-trump-riot-rally/>>, accessed 8 August 2018.

¹⁵² ‘After violent scuffle in N.C. rally, officials consider “inciting a riot” charge against Trump’ *PBS Newshour* (14 March 2016) <<http://www.pbs.org/newshour/rundown/after-violent-scuffle-in-n-c-rally-officials-consider-inciting-a-riot-charge-against-trump/>>, accessed 8 August 2018. See also Ali Vitali, ‘Sheriff Muddled If Trump’s Conduct at North Carolina Rally Qualified as “Inciting to Riot”’ *NBC News* (14 August 2016), <<http://www.nbcnews.com/politics/2016-election/sheriff-muddled-if-trumps-conduct-north-carolina-rally-qualified-inciting-n538326>>, accessed 8 August 2018.

¹⁵³ Hermann Walz, cited in Patrick Howell O’Neill, ‘North Carolina police investigating whether Donald Trump incited a riot’ *The Daily Dot* (14 March 2015), <<http://www.dailydot.com/layer8/nc-trump-riot-rally/>>, accessed 8 August 2018.

¹⁵⁴ Ronnie Mitchell, the top attorney for the Cumberland County Sheriff’s Office, quoted in Fahrenthold and Larimer, ‘N.C. sheriff’s office won’t file “inciting a riot” charge against Trump’ *The Washington Post* (14 March 2016) <https://www.washingtonpost.com/politics/after-punching-incident-nc-sheriff-ponders-inciting-a-riot-charge-against-trump/2016/03/14/2f300ec6-ea13-11e5-bc08-3e03a5b41910_story.html>, last visited 8 August 2018.

¹⁵⁵ See generally *supra* IV, 1.

doctrines of criminal syndicalism’,¹⁵⁶ spoke at a Ku Klux Klan ‘rally’ that was held at a farm in Hamilton County, saying: ‘The Klan has more members in the State of Ohio than does any other organization. We’re not a revengent organization, but if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance taken’.¹⁵⁷ As I have previously described, this resulted in the Supreme Court’s famous ‘imminent lawless action’ test.¹⁵⁸ The difference to the German Schubart case therefore lies, first and foremost, in the imminence requirement. As Kaminski once again summarised: ‘[E]ven if the speaker intends to incite action, and the listener understands that speech as incitement, the state cannot regulate the call to action unless the action is both imminent and likely to occur’.¹⁵⁹ However, how imminent must the violent acts or threats be – seconds, hours or days?¹⁶⁰ The Supreme Court fails to provide an answer to that question. It seems that if the Schubart case had happened in the USA, the fact that the violent acts Schubart incited by his speech act had been carried out a day later would have led to an acquittal of Schubart, due to the lack of the imminence requirement. I doubt, however, that imminence can only be measured by time instead of – for instance – context. The Brandenburg case fails to take into account the level of control over the crowd, exercised by the speaker, which can indeed have an impact on the imminence of the lawless action to the extent that it increases the likelihood of its occurrence. In other words: the less control a speaker has over the crowd’s action, the less likely it is that the crowd does as it is told. A little more clarity as to the influence of time on the imminence test provided the Supreme Court in *Hess v. Indiana*: Here the defendant addressed the crowd at an anti-war demonstration (while the police were attempting to clear the street) with the words: ‘We’ll take the fucking street later (or again)’.¹⁶¹ The Supreme Court overturned the conviction of the defendant for violating Indiana’s disorderly conduct statute,¹⁶² because the defendant’s words did not have a ‘tendency to lead to

¹⁵⁶ 395 U.S. 444 (1969).

¹⁵⁷ 395 U.S. 444 (1969), 446.

¹⁵⁸ See *supra* IV, 1.

¹⁵⁹ Margot E. Kaminski, ‘Incitement to Riot in the Age of Flash Mobs’ (2012) 81 UCLR 1, 42, continuing: ‘Any statute regulating incitement to riot as incitement would have to address the speaker’s intent, how likely it is that an audience would understand that intent, the imminence of the action, and the likelihood of the occurrence of illegal activity.’

¹⁶⁰ *Ibid.*, 44.

¹⁶¹ *Hess v. Indiana*, 414 U.S. 105, 107 (1973).

¹⁶² ‘Whoever shall act in a loud, boisterous or disorderly manner so as to disturb the peace and quiet of any neighborhood or family, by loud or unusual noise, or by tumultuous or offensive behavior, threatening, traducing, quarreling, challenging to fight or fighting, shall be deemed guilty of disorderly conduct, and upon conviction, shall be fined in any sum not exceeding five hundred dollars (\$500) to which may be added imprisonment for not to exceed one hundred eighty (180) days.’ Ind.Code 35-27-2-1, (1971), Ind. Ann. Stat. s 10-

violence’, invoking the test in *Brandenburg v. Ohio*.¹⁶³ The Court remarked: ‘At best, however, the statement could be taken as counsel for present moderation; at worst, it amounted to nothing more than advocacy of illegal action at some indefinite future time’.¹⁶⁴ This remark might serve as an indication that time might not be an important factor for the imminence test after all and that a speech act might be imminent even when the violence is carried out days after.¹⁶⁵

2. Individual Criminal Responsibility

a. Imminence

The application of the imminence test is an example for a conceptual confusion of elements of individual criminal responsibility and elements of free speech protection. It seems that the test first and foremost stems from human rights jurisprudence. Yet, this puts the cart before the horse. Remember premises 2 and 3: Violent protests cause harm and/or endanger certain legal goods or interests. It is morally permissible for the state to suppress expression to prevent the harms it risks inspiring.¹⁶⁶ Why, then, does the imminence test only encompass emergency situations? Imminence as an element of incitement in whatever form must be measured against harm or the legal good. Time and space are mere indications. I understand that it is the prevailing view in the US that the moral principle of freedom of expression broadly includes incitement of wrongdoing within its protective ambit, i.e. incitement as a consequentialist test.¹⁶⁷ Indeed, all former and present tests for protective speech breathe consequentialism.¹⁶⁸ However, it is the other way round. In the words of Howard: “[T]here is an enforceable moral duty to *refrain* from such incitement, a duty that shapes and limits the moral right to free speech itself”.¹⁶⁹

1510 (Supp.1972). The law was later repealed, see <<http://law.justia.com/codes/indiana/2015/title-35/article-27/>>, accessed 8 August 2018.

¹⁶³ *Hess v. Indiana*, 414 U.S. 105, 109 (1973).

¹⁶⁴ *Ibid.*, 108.

¹⁶⁵ Hannah Steinblatt, ‘E-Incitement’ (2012) 22 *Fordham IPMELJ* 753, 770.

¹⁶⁶ This point is noted in Alexander Tsesis, “Terrorist Incitement on the Internet,” *Fordham Law Review* 86, 2 (2017): 367–77, at p. 369. One exception is for incendiary speech that simultaneously constitutes a “true threat”; see *Virginia v. Black* 538 U.S. 343 (2003). Such speech could permissibly be banned qua threat, but not qua incitement. Howard, Jeffrey W., ‘Dangerous Speech’ (2019) 47 *Philosophy & Public Affairs* 208-254, 209.

¹⁶⁷ See the descriptive account of Howard, Jeffrey W., ‘Dangerous Speech’ (2019) 47 *Philosophy & Public Affairs* 208-254, 210 with further references.

¹⁶⁸ Lawrence in Kretzmer, David and Hazan, Francine Kershman (eds), *Freedom of Speech and Incitement Against Democracy* (The Hague London Boston, Kluwer Law International 2000), 12: “The irony is that, even as American law has become more protective of speech, consequentialism has remained the dominant approach. In 1969 the Supreme Court, in *Brandenburg v. Ohio*, transformed the ‘clear and present danger’ test that it had applied in *Dennis v. United States* in 1951 to permit the prosecution of leaders of the Communist Party into an ‘imminent incitement standard. Imminent incitement is understood largely in consequentialist terms. In *Brandenburg*, the Court held that the power of the state to regulate expression did not reach ‘advocacy of the use of force or of law violation’ unless that advocacy ‘is likely to incite or produce [imminent lawless] action’”.

¹⁶⁹ Howard, Jeffrey W., ‘Dangerous Speech’ (2019) 47 *Philosophy & Public Affairs* 208-254, 210-11.

By the way: Even understood consequentially, the imminence test of Brandenburg does not seem to be applied rigorously, overemphasizing the element of time at the dispense of the following elements: space and context. Trump's speech prior to the attacks in Washington exemplify this well: Trump stood at close distance to the Capitol – let alone it was right before Congress was scheduled to count the certified electoral votes.¹⁷⁰ The element of context was emphasized by the dissenting half of the judges in the German Federal Constitutional Court's ruling in Schubart, after the other half of the judges interpreted Schubart's choice of words ("close the airport") as a euphemism with a wink, essentially asking to use violence.¹⁷¹ Schubart's promise in a TV-interview on the day before the protests that he is going to make sure that the protests will be peaceful was interpreted a lie, due to the fact that he failed to take steps to implement this promise, such as hiring security personnel.¹⁷² He could not invoke his right to free assembly, since this assembly was never meant to be a peaceful one.¹⁷³ The dissenting half of the judges – the half that found Schubart's actions to be protected by his rights to assembly and freedom of speech – criticized their colleagues for their focus on just the speech instead of the entire context.¹⁷⁴ They remind their colleagues of what I have described at the outset of this presentation: protesters use the threat of violence and that does not mean that they are actually planning to commit violent acts. As I see it, this raises the threshold of a standard of proof to show that a speaker indeed intended to incite violence. And for the dissenting judges this threshold had not been met. Schubart merely intended to create public awareness for the matter. Transferred to the Capitol riots and Donald Trump's speech: There are similarities in the speech itself. The call for non-violence seems to be contradicted by other, more drastic formulations. It is the context-element where both cases differ: First, the element of space. While Schubart made his speech at a rally in the city of Wiesbaden, that means in a different location than the one where the violent protests unfolded (which was Frankfurt), Donald Trump spoke in walking distance from the Capitol. And then, second, there is the context-element of previous statements. Schubart appears to have made his drastic calls only at the rally itself. It is at least not known that he made similar public statements before. Donald Trump, by contrast, made similar calls in prior public remarks, especially in his tweets.¹⁷⁵ As Richard Wilson

¹⁷⁰ https://www.abajournal.com/news/article/could-trump-face-charges-for-speech-before-capitol-riot-experts-differ-on-brandenburg-impact?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories#When:18:06:00Z

¹⁷¹ BVerfG NJW 1991, 92.

¹⁷² BVerfG NJW 1991, 93.

¹⁷³ BVerfG NJW 1991, 93.

¹⁷⁴ BVerfG NJW 1991, 93.

¹⁷⁵ <https://www.abajournal.com/news/article/could-trump-face-charges-for-speech-before-capitol-riot-experts-differ-on-brandenburg->

analysed it: “For years, Donald Trump has been going right up to the line of inciting violence by targeting certain minority groups and individuals with his vitriol”.¹⁷⁶ Wilson then uses a metaphor for his argument that Trump’s speech would not be protected by freedom of speech that I would like to borrow to make a last illustration of the importance of context in incitement. Wilson says: “Trump crossed the Rubicon and incited a mob to attack the U.S. Capitol as Congress was in the process of tallying the electoral college vote results. He should be criminally indicted for inciting insurrection against our democracy”.¹⁷⁷ Trump crossed the Rubicon. In order to cross the Rubicon, someone must get to the Rubicon. And if someone made effort of getting to the Rubicon, the claim that crossing the Rubicon was never intended should be treated with care. No-one walks hundreds of kilometers to the Rubicon, just to remain at its shores. To leave the metaphor: Donald Trumps month-long drastic remarks to “stop the steal” cannot be ignored in the evaluation of Brandenburg-elements.

b. Causation

All this leads to the most important element in incitement law: causation, or, in the Brandenburg language: Likelihood. This is an evergreen argument in free speech scholarship and it goes like this: Dangerous speech cannot have a causal role at all – at least within the contexts of liberal democracies. The supporting argument is: we lack sufficient evidence that hate speech in particular is dangerous within developed democracies.¹⁷⁸ In other words, the argument goes like this: You cannot measure causation between speech and violence (*empirical premise*), so the element of causation should not be relevant in determining whether speech is protected or not (*normative argument*). That’s a logically false conclusion in many ways.

First, the empirical premise: This may be true but not factually. Of course it is factually possible to collect enough data to make a claim about the impact of political speech on violent protests. However, we currently do not have a clear idea of how to measure probabilities to make a claim about causation. Larry Alexander identifies three problems in this regard that must be solved: “the level of probabilistic increase necessary to count as a cause, the level of confidence in the probabilistic increase necessary to conclude that there will be such a probabilistic increase, and the size of the probabilistic increase compared to other causes of probabilistic increases”.¹⁷⁹ Second, the above-mentioned arguments equate general empirical determinations with causation in a specific instance. However, an empirical account the influence of speech acts on

impact?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories#When:18:06:00Z

¹⁷⁶ <https://www.latimes.com/opinion/story/2021-01-11/donald-trump-incitement-insurrection-capitol-attack>

¹⁷⁷ <https://www.latimes.com/opinion/story/2021-01-11/donald-trump-incitement-insurrection-capitol-attack>

¹⁷⁸ Heinze, *Hate Speech and Democratic Citizenship*, pp. 125ff.

¹⁷⁹ Schauer, in Kretzmer, David and Hazan, Francine Kershman (eds), *Freedom of Speech and Incitement Against Democracy* (The Hague London Boston, Kluwer Law International 2000), 56.

other acts in general is not similar to the ascertainment of causation in the *concrete* case. In other words: Just because there are 99 cases where it is almost impossible to measure the impact of a speech act on violence that does not exclude the possibility that there is one case where this impact can in fact be measured. And after all, a trial is about a specific case.

Last but not least: causation itself. The argument above suggests that causation can be described by empirical data. That is untrue in criminal context. It is only the classical doctrine of crime (*Verbrechenslehre*) that *describes* causation as a naturalistic relationship between the result of a crime and wilful action.¹⁸⁰ This classical doctrine is outdated in most jurisdictions and has been replaced by an understanding of crimes that takes into account the social context of an act. This leads to a chain of consequences: First, causation has normative elements. In the words of Murmann: “causation itself has to be interpreted in light of the underlying normative standards and the purpose of law”.¹⁸¹ It is thus “embedded as a sub-item within the concept of normative imputation”.¹⁸² One of those normative requirements are free speech protections. Thus, whether a speech act should be protected is a normative consideration in causation and not one in isolation. It would, again, put cart before the horse to argue that causation (ore likelihood, which, as I see it, is just an epistemic aspect of causation) is an element to be determined for the greater question of free speech protection.

In sum, the question whether speeches led to violence is one of imputation. This imputation has both factual and normative elements. The factual element in the Schubart case, for instance, was the geography at the airport: was the space narrow? Were there spatial ways to deescalate. And so on. The factual situation in the Trump case is this: Trump encouraged a march to the capitol, to “show strength” “be there, be wild” and to “fight much harder” – otherwise, protesters “would not have a country anymore”. Translated to the spatial situation, it requires some effort and phantasy to think both the speaker and the protesters deemed it sufficient to remain at the steps of the Capitol and still fullfill the demand to “fight much harder”, “stop the steal” etc. And normatively? As I see it, there is no rights-avenue that can normatively exclude the ascertainment of causation in Trump’s speech. There are many in other instances of political speeches that may have led to violence. But not in this case.

One last point: I have demonstrated the logically false argument: You cannot measure causation between speech and violence (*empirical premise*), so the element of causation should not be relevant in determining whether speech is protected or not (*normative argument*). This

¹⁸⁰ See the descriptive account of Murmann, JICJ 12 (2014), 283 with further references.

¹⁸¹ Murmann, JICJ 12 (2014), 283.

¹⁸² G. Jakobs, Allgemeiner Teil: Die Grundlagen und die Zurechnungslehre (2nd edn., de Gruyter, 1991), 7/5; Murmann, JICJ 12 (2014), 283.

argument also cherry picks elements from both deontological and consequentialist approaches to free speech. To put it bluntly: It is a trick. Let's suppose you view free speech from a deontological perspective. In that case, a speech act can be inherently wrong – irrespective of the harms it causes or legal goods it endangers. In this case the element of causation is dispensable. However, the speech act itself can be morally wrong and thus not be protected by freedom of speech. This is a conclusion the advocates of the argument above reject. Alternatively, speech acts are viewed from a consequentialist perspective. In that case, the harm becomes relevant. And when there is harm and an act – there must be causation. This consequence, too, seems to be rejected. Well, you cannot have the cake and eat it, too.

VI. The Spiritual Leader and Organiser of a Violent Protest

So far, group elements have not played a major role in the analysis of the acts of the speaker. I would like to include them now. Their relevance is best illustrated when the speaker has a hierarchically important position within the group. Thus, I will now specifically address the organisation and planning of riots and examine whether a person who does not take part in the riot but provides detailed instructions as to its planning and organisation can be criminally liable. Two case scenarios are of particular interest: Scenario 1, where a person plans and organises a riot through social media; scenario 2, where a person (merely) encourages rioting.

The section is based on two premises: First, that groups of protesters have a normative structure. And second, that within this structure there is usually a person whose speech has a greater impact on protesters than others.

As to the first premise: This structure is not agential, i.e. the mobs are still not corporate groups (even though they can be).¹⁸³ That means that mobs are usually not responsible as a group but by their individuals. I cannot elaborate on this point further. Mob norms are created through solidarity, i.e. “comrade-helping actions of individual mob members”.¹⁸⁴ In Bowden's words: “Mob norms might include those constraining members to act in solidarity, such that when a particular task needs to be performed, or a role filled for the ‘good’ of the collective, someone or other will be compelled to perform that act or fulfil that role”.¹⁸⁵

¹⁸³ Bowden, Sean, Sorial, Sarah and Bourne, Kylie, 'Punishment for Mob-based Harms: Expressing and Denouncing Mob Mentality' (2021) 38 *Journal of Applied Philosophy* 366–383, 368.

¹⁸⁴ See the descriptive account by Bowden, Sean, Sorial, Sarah and Bourne, Kylie, 'Punishment for Mob-based Harms: Expressing and Denouncing Mob Mentality' (2021) 38 *Journal of Applied Philosophy* 366–383, 370, 373.

¹⁸⁵ See the descriptive account by Bowden, Sean, Sorial, Sarah and Bourne, Kylie, 'Punishment for Mob-based Harms: Expressing and Denouncing Mob Mentality' (2021) 38 *Journal of Applied Philosophy* 366–383, 370.

As to the second premise: From a human rights perspective, the OSCE in its Guidelines on Freedom of Peaceful Assembly clarified:

“Organizers of assemblies should not be held liable for failure to perform their responsibilities if they have made reasonable efforts to do so. The organizers should not be liable for the actions of individual participants or for the actions of non-participants or agents provocateurs”.¹⁸⁶ This goes to the first premise: Organisers are not liable as representatives of the group. Not as such. However, Guidelines have a second sentence:

“Instead, there should be individual liability for any individual who personally commits an offence or fails to carry out the lawful directions of law-enforcement officials”.¹⁸⁷

Of course, the position of a person within a group impacts individual liability. Translated to criminal liability, I would like to ask the question of whether people such as Schubart or Trump could be liable beyond incitement – that means as perpetrators themselves, even though they were never present within the group.

1. The Rejection of the Application of the General Rules of Participation to Organisers and Spiritual Leaders of Riots

Applying the general rules of participation, in England and Wales the organiser of a Facebook event would be held responsible according to section 46 of the Serious Crime Act 2007.¹⁸⁸ In the USA, the imminent lawless action test of *Brandenburg v. Ohio* would certainly prevent a conviction of the organiser and spiritual leader. Moreover, the imminence test fails to take into account the peculiarities of speech through social media, which reaches far more people than speech outside the virtual world, but might also go unheard.¹⁸⁹ The test therefore ‘may be better suited for traditional media such as a newspaper, pamphlet, or public address. It is easier to tell how listeners under those conditions are reacting to what the speaker is proposing. The Internet creates a different scenario because reactions to a speaker’s proposal are not easily gauged.’¹⁹⁰

¹⁸⁶ OSCE, Office for Democratic Institutions and Human Rights (ODIHR), Guidelines on Freedom of Peaceful Assembly (2nd edn, Warsaw, OSCE 2010), 20.

¹⁸⁷ OSCE, Office for Democratic Institutions and Human Rights (ODIHR), Guidelines on Freedom of Peaceful Assembly (2nd edn, Warsaw, OSCE 2010), 20.

¹⁸⁸ See supra IV, 1.

¹⁸⁹ Jennifer L. Brenner, ‘True Threats’ (2002) 78 NDLR 753, 765.

¹⁹⁰ *ibid.* In the same vein Guyton (n **Error! Bookmark not defined.**) 725. In this traditional sense, the so-called Pinkerton test in the USA would enable a court to convict a particular conspirator even though there was no evidence that one of the conspirators directly participated in the substantive offense charged in the indictment, see *Pinkerton v. United States*, 328 U.S. 640 (1946), see also James D. Peterson, ‘In for a Penny, in for a Pound – Accessory Liability in Group Violence Cases’ (2017) 65 U.S. Att’y’s Bull. 3, 4. According to the Pinkerton test, a defendant may be held liable for any crimes committed by her co-conspirators that were (1) reasonably foreseeable to the defendant and (2) done in furtherance of the illegal agreement, see *Pinkerton v. United States*, 328 U.S. 647-948 (1946). Even though the drafters of the Model Penal Code rejected the test, it became a useful tool for prosecutors in the early 1970s and later, see Alex Kreit, ‘Vicarious Criminal Liability and the Constitutional Dimensions of Pinkerton’ (2008) 57 Am. U. L. Rev. 585, 597. In the context of rioting, Pinkerton

In Germany, applying the general abetting provision (section 26 StGB)¹⁹¹ to the organiser or spiritual leader of a riot acting through social media, it is controversial whether the abettor is only required to *cause* the violent acts, or whether further requirements such as a ‘pact about the wrongfulness of the act’ between abettor and perpetrator are necessary.¹⁹² The broad causation requirement makes a conviction of the spiritual leader of a riot much more likely than the imminence test in *Brandenburg v. Ohio*. Unless the *Brandenburg*-test is tailored to groups assembly, which “would directly address the criminalization of group conduct. It would not ask whether speech is relevant, but whether the application of conspiracy law violated the freedom of assembly”.¹⁹³ Indeed, the application of conspiracy in lieu of incitement is conceptually¹⁹⁴ more convincing, since as an inchoate crime, it takes the crime as a starting point.¹⁹⁵ The side effect is, that groups are deprived of the breathing space speakers enjoy through free speech protections of their potentially inciting conduct.¹⁹⁶ Nevertheless, the distinction between incitement and conspiracy with regard to the application human rights protections is unconvincing. Acts that constitute incitement can well be, under certain conditions that I will demonstrate, be acts of conspiracy; at the same time as violent protests can be speech acts.¹⁹⁷

2. Treating Organisers and Spiritual Leaders of Riots as Perpetrators of Rioting

The German Federal Court of Justice, as elaborated elsewhere,¹⁹⁸ does not apply the general rules of participation but the aggravated offence of rioting pursuant to section 125(1) StGB. In its *Schubart* Judgment it held the planner and organiser – acting in advance and from a distance – responsible for rioting as a perpetrator. This basically means that according to the Court, the participation to rioting requires the accessory to act within the crowd, while the same does not

was employed in *Ferguson v. Estelle*, 718 F.2d 730 (5th Cir. 1983). The German Criminal Code does not contain a provision labelled “conspiracy”. The conduct under *Pinkerton* could be covered though by the *funktionale Tatherrschaft* (n 142 and main text) or attempted participation, s. 30 of the German Criminal Code.

¹⁹¹ ‘Any person who intentionally induces another to intentionally commit an unlawful act (abettor) shall be liable to be sentenced as if he were a principal’.

¹⁹² See in more detail Bernd Heinrich, *Strafrecht Allgemeiner Teil* (5th edn, Kohlhammer 2016) mn. 1287; Wolfgang Joecks, ‘§ 26’, in Bernd von Heintschel-Heinegg (ed), *Münchener Kommentar zum StGB, Vol. 1* (3rd edn, Beck 2011) mn. 10-25.

¹⁹³ Morrison, Steven R., ‘*Brandenburg for Groups*’ (2015) 19 *Lewis & Clark Law Review* 2, 15.

¹⁹⁴ The elements of conspiracy are less useful. They are: “(1) an agreement to commit a crime; (2) an overt act taken in furtherance of the agreement; (3) and the intent to both agree to and to commit the conspiracy’s substantive target crime”, Morrison, Steven R., ‘*The System of Modern Criminal Conspiracy*’ (2014) 63 *Catholic University Law Review* 371, 403, fn. omitted. From a comparative perspective: Momsen, Carsten and Washington, Sarah Lisa, ‘*Conspiracy als Beteiligungsmodell – Teil 1*’ (2019) *Zeitschrift für internationale Strafrechtsdogmatik (ZIS)* 182 ff. and Momsen, Carsten and Washington, Sarah Lisa, ‘*Conspiracy als Beteiligungsmodell – Teil 2*’ (2019) 14 *Zeitschrift für Internationale Strafrechtsdogmatik* 243–251.

¹⁹⁵ Morrison, Steven R., ‘*The System of Modern Criminal Conspiracy*’ (2014) 63 *Catholic University Law Review* 371, 403; Morrison, Steven R., ‘*Brandenburg for Groups*’ (2015) 19 *Lewis & Clark Law Review* 2, 27.

¹⁹⁶ Morrison, Steven R., ‘*Brandenburg for Groups*’ (2015) 19 *Lewis & Clark Law Review* 2, 27.

¹⁹⁷ See Chrisman, Matthew and Hubbs, Graham, “‘*The Language of the Unheard*’: Rioting as a Speech Act’ (2021) *Philosophy & Public Affairs* 1 ff.

¹⁹⁸ Heinze, *Criminal Law and Practice Review* 2 (2018), 34 ff.

apply to the perpetrator.¹⁹⁹ Thus, for the purpose of this presentation the important question is whether a person can be held responsible as a perpetrator of rioting, who provides detailed information, for instance via social media, to a certain group of people (i.e. to his own Facebook contacts or to the members of a previously created group) about the setting up of a protest, including the demand to carry out acts of violence or threats.

a. The Federal Court's Schubart Judgment Applied to Organisation Through Social Media

The German Federal Court of Justice would probably convict this external planner for rioting as a perpetrator, 'if and insofar as the acts of violence committed by a crowd of people comply with the planner's *will* and are carried out under his *control*, which means that the acts can be *attributed* to him or her according to the general principles of imputation'.²⁰⁰ Leaving aside the will- and attribution-criterion, the interesting element here is the control element – an element that stems from the German control-over-the-act theory, which is even applied – quite controversially though – at the International Criminal Court (ICC).²⁰¹ According to this theory, '[a] person is a perpetrator if he controls the course of events; one who, in contrast, merely stimulates in someone else the decision to act or helps him to do so, but leaves the execution of the attributable act to the other person, is an instigator or abettor'.²⁰² Thus, a perpetrator is someone who "dominates" the commission of the criminal offence in that he or she has the power to determine whether or not the relevant acts are carried out'.²⁰³

A more moderate form of the control over the crime theory leaves room for the qualification of a person as perpetrator, even though he or she was not present at the scene of the crime: According to the proponents of this moderate form, a contribution prior to the commission of the offence is sufficient, as long as this contribution continues to have an effect on the actual commission of the crime and encourages the (co-)perpetrator to commit the crime.²⁰⁴ Holding

¹⁹⁹ Maria-Katharina Meyer, 'Beteiligung am Landfriedensbruch (§ 125 Abs. 1 1. und 2. Variante StGB) und Teilnahme zum Landfriedensbruch (§ 125 Abs. 1 1. und 2. Variante in Verbindung mit §§ 26, 27, 28 Abs. 1 StGB)' (2000) GA 459, 465.

²⁰⁰ '[...] wenn und soweit die aus der Menge verübten Gewalttätigkeiten oder Bedrohungen seinem Tatwillen entsprechen und unter seiner Tatherrschaft begangen werden, ihm also nach allgemeinen Grundsätzen als eigene Tat zuzurechnen sind', see BGH (1984) NJW 934; German Federal Constitutional Court (BVerfG) (1991) NJW 91, 92 (emphasis added, translation A. Heinze).

²⁰¹ In more detail, see Kai Ambos, *Treatise on International Criminal Law, Vol. I: Foundations and General Part* (OUP 2013) 150 with further references.

²⁰² Claus Roxin, 'Crimes as Part of Organized Power Structures' (2011) 9 JICJ 193, 196.

²⁰³ Gerhard Werle and Boris Burghardt, 'Introductory Note' (2011) 9 JICJ 191.

²⁰⁴ Heinrich (n 192) mn. 1228; Jürgen Baumann at al., *Strafrecht Allgemeiner Teil* (12th edn, Ernst und Werner Giesecking 2016) § 29 mn. 83; Hans-Heinrich Jeschek and Thomas Weigend, *Lehrbuch des Strafrechts, Allgemeiner Teil* (5th edn, Duncker & Humblot 1996) § 63 III 1; Kristian Kühl, *Strafrecht Allgemeiner Teil*, (8th edn, Vahlen 2016) § 20 mn. 110 *et seq.*

the organising and planning person acting in advance of the commission of the crime responsible would be appropriate, if – and only if – this person’s contribution was grave enough to compensate his absence during the commission of the crime (so-called *funktionelle Tatherrschaft*, functional control over the crime).²⁰⁵ Thus, the functional control over the crime theory allows for the qualification of the gang leader, who stays on the sideline and plans with foresight, as (co-)perpetrator.²⁰⁶ On a more result-driven note, holding the very influential organiser and planner of a crime responsible for abetting would not live up to his or her role in the commission of the crime. This also holds true from a moral point of view: In entities such as crowds, which – due to contagion and solidarity – have very harmful consequences, the ‘collective responsibility’ requires that ‘those who take a leadership role within the mob, may be singled out for individual blame and punishment’.²⁰⁷

b. The Organiser and Spiritual Leader of Riots, Their Impact on the Crowd’s Dangerousness, and the Functional Control Over the Crime

Having said that, in the following I will measure the case scenario of a person who plans and organises violent riots through social media against the elements of a moderate control over the act theory, to find out whether this person’s planning has such a grave impact of the later committed violent acts, that his absence on the crime scene is compensated and that it would be more appropriate to hold him or her responsible as perpetrator than as a mere abettor.

Studies prove that the organiser who sets up a detailed roadmap for a flashmob or flashrob, is a most vital component in the commission of these forms of rioting: Only if flashmobs are thoroughly organised and planned, the flashmobbers could play out all their strength, that is the occurrence of crimes in a flash and the impossibility to both solve and prevent those crimes.²⁰⁸ Another plus of organising a flashmob or riot via social media is that the organiser is able to keep the group’s size at a maximum, considering that ‘the sheer size of prospective audiences also increases the potential for violent audience reactions. Audience size matters: the bigger the audience, the greater the chance at least one audience member will respond with violence to

²⁰⁵ Heinrich (n 192) mn 1228. This functional form of the control over the act theory is also applied at the ICC, see in more detail Ambos (n 201) 150.

²⁰⁶ Heinrich (n 192) mn. 1228. The test of *funktionale Tatherrschaft* mirrors – at least *prima facie*, albeit not conceptually – the Pinkerton test mentioned above (n 132). See, for instance, *United States v. Miranda-Ortiz*, 926 F.2d 172, 178 (2nd Cir. 1991), where it was held that a ‘defendant could be vicariously liable for substantive crimes that were committed before he even joined the conspiracy, so long as they were reasonably foreseeable and in furtherance of the conspiracy as a whole’, summary by Kreit (n 132) 619.

²⁰⁷ Larry May, *The Morality of Groups* (University of Notre Dame Press 1987) 83.

²⁰⁸ Steinblatt (n 125) 764; Canetti (n **Error! Bookmark not defined.**) 35; Rodd Zolkos, ‘Flash Mobs Pose Threat to Retailers: Marsh’ *Business Insurance* (17 November 2011), <<http://www.businessinsurance.com/article/20111117/NEWS06/11119902>>, accessed 8 August 2018.

speech that is offensive or advocates violence’.²⁰⁹ In general terms, modern communication methods allow the crowd ‘to include a larger body of the community than standard face-to-face interactions permit’.²¹⁰ As previously mentioned, the inventor of flashmobs, Wasik, admitted that the internet community was constantly searching for the next big thing and was therefore happy to take part in any nonsense.²¹¹ He also made the observation that flashmobbers acted like remote-controlled by the organiser²¹² – an observation that indicates the organiser’s control over the crime or act.

It therefore comes to no surprise that many states rather target the masterminds behind the violent riots instead of the actual rioters. The use of social media is thereby the one aspect that blurs the line between the organiser of a riot and the paramount example of a gang leader: The gang leader exercises effective control due to a manageable number of co-perpetrators, which he or she gives detailed orders to. The mastermind of a flashmob or riot does certainly not enjoy such an advantage. However, he has something that compensates the fact that his co-perpetrators are numerous: the rather underestimated tool of communication through social media, which enables him to reach the co-perpetrators at any time and place – prior to, during and long after the commission of the crime.²¹³ From a criminal policy point of view,²¹⁴ it would be improper to punish these powerful masterminds only as abettors to rioting. The size-argument could also be used as an argument for amending the Brandenburg test in the USA, since it implies how much harm the crowd is actually able to cause: the Brandenburg test ‘contains no mention of the impact on the size of a group of listeners on First Amendment analysis’.²¹⁵ Last but not least, I have previously mentioned that within a mob of people, perpetrators would probably go further than they would if they were acting as individuals, without the crowd context.²¹⁶ Due to the emotions and contagion, one could argue for a diminished responsibility of perpetrators within a group. *Argumentum e contrario*,²¹⁷ if a person

²⁰⁹ Lidsky, (n **Error! Bookmark not defined.**) 149; John P. Cronan, ‘The Next Challenge for the First Amendment’ (2001-2002) 51 CULR 425, 428.

²¹⁰ Baker (n **Error! Bookmark not defined.**) 44.

²¹¹ Biermann (n 26).

²¹² Ibid.

²¹³ Laryssa Barnett Lidsky, ‘Incendiary Speech and Social Media’ (2011-2012) 44 Texas Tech LR 147, 149.

²¹⁴ About the foundations of German criminal policy see in more detail Heinz Zipf, *Kriminalpolitik* (C.F.Müller 1980); Michael Bohlander, *Principles of German Criminal Law* (Hart 2009) 18 *et seq.*; Günther Kaiser, *Kriminologie* (3rd edn, C.F. Müller 1996) § 1 mn. 10.

²¹⁵ See the analysis in Margot E. Kaminski, ‘Incitement to Riot in the Age of Flash Mobs’ (2012) 81 UCLR 1, 80.

²¹⁶ See *supra* II 2.

²¹⁷ In Common Law scholarship, the phrase ‘argumentum a contrario’ seems to be preferred, see, e.g., Garner, *Black’s Law Dictionary*, 10th edn (Thomson/West 2014) 128, despite the fact that ‘e contrario’ is the correct latin term, Kramer, *Juristische Methodenlehre* (4th edn, Beck et al. 2013) 212 with fn. 658; Günter Hager,

increases the crowd's dangerousness through an advanced planning distant from the crowd, the privilege of diminished responsibility cannot apply to that person. All these arguments speak for holding the organiser and planner of a riot responsible as (co-) perpetrator.

c. The Restrictive Application of the Control Criterion to Organisers and Spiritual Leaders

However, it cannot be emphasised enough that the application of the control criterion to a person absent during the actual rioting only extends to the mastermind of the riot. In practical terms, the organisation of a riot through social media will very rarely reach such a level that a punishment for perpetration would seem appropriate. The question that needs to be asked is: Does the speaker perform control over the later violent acts to such an extent that it increases the dangerousness of the (still to be established) crowd and therefore justifies holding him responsible as a perpetrator? This could be the case if he or she did detailed planning and communicated it accordingly. The threshold, however, is not reached by merely mentioning time and place. I applied the control element to selected conduct during the London riots but let's finish with applying it to the Capitol Riot scenario:

Again, the reminder: It goes without saying that Trump did not control the protesters through his presence. As one commentator pointed out: "If he was there with a bullhorn in the outside yard of the Capitol and urging people to charge the windows and break them and take Congress hostage, in that situation he would be responsible for what the crowd did".²¹⁸ This is, as I see it, too formalistic, because it disregards the possibility that control can be exercised through position and hierarchy. In fact, it is a typical occurrence in normative groups that there is work sharing, i.e. that those on top of the hierarchy do the planning and leave the implementation of the plan to others. In movie terms: They don't get their hands dirty. Do Donald Trump's acts prior to the attack are of such importance that they compensate his absence during the attack? This goes beyond causation. To start the debate: I say they were. And this makes the case unique: Donald Trump was the President at the time of the speech. As acting president the persuasiveness of his demands indicates a control element. In later trials persons suspected to have committed violence during the Capitol attacks repeated their defense "Trump made me do it". Set aside how believable those statements actually are – the statement of perpetrators that they followed orders by their President Donald Trump is one that has been

Rechtsmethoden in Europa (Mohr Siebeck 2009) 52-3; Ulf Linderfalk, *On The Interpretation of Treaties* (Springer 2007) 279, 299-303.

²¹⁸ https://www.abajournal.com/news/article/could-trump-face-charges-for-speech-before-capitol-riot-experts-differ-on-brandenburg-impact?utm_source=feedburner&utm_medium=feed&utm_campaign=ABA+Journal+Top+Stories#When:18:06:00Z

made before. On 5 August, “MAGA bomber” Cesar Sayoc argued that his pipe-bombing terrorism was because of messages he received from watching Fox News and listening to Donald Trump. Sayoc’s attorneys wrote in a sentencing memo: “Mr. Sayoc came to believe that prominent Democrats were actively working to hurt him, other Trump supporters, and the country as a whole. Thus, the defence “my president made me do it” is one – of other – indications that there is a control element. By virtue of their public status, leaders “have special influence, and their statements carry significant weight with their audience”.²¹⁹ Kretzmer and Kershman add: “The normal immunity intended to operate against a call that encourages a criminal act is not operative to the same degree with respect to those who exploit their power, authority, or special influence. It is therefore necessary, and even justified, to impose a special obligation on such persons”.²²⁰

What these special obligations could be, is hinted at by the German Federal Constitutional Court: The four judges supporting criminal liability found that through his speech he created a legal duty to act, in German: *Garantenpflicht*. It borrowed the language from omission law, since argued that Schubart failed to prevent the violent acts from happening. Of course, he can only fail to act when he had a duty to act.²²¹ Only then can the later acts be attributed to his speech. Without going into too much detail of the concept of omission: The few sentences on this duty can be interpreted as such: The Court creates a duty to secure and supervise (*Überwachungs- und Sicherungspflicht*). Here, again, the element of control is vital. In Ambos words: “[A]ll guarantor duties have as a common starting point that the criminal result brought about by the relevant omission is imputed to the guarantor because of her control over the relevant dangerous event or the protected interest – that is, because of her *Kontrollherrschaft*”.²²² Through his speech, Schubart created a concrete risk (*Ingerenz*)²²³ that violence would erupt. Yet, a legal duty to act – i.e. to prevent violence from happening – only exists when the creation of that risk was in itself wrong. Note the non-consequentialist element here and I draw on premise 3 above. So the key aspect are the deontological requirements for the risk creation: Does the speaker have to commit criminal act through the speech itself? That is the most liberal view in the controversy²²⁴ and it seems doubtful whether either Schubart or Trump committed criminal acts through their speeches, irrespective of the events that later

²¹⁹ Kretzmer, David and Hazan, Francine Kershman (eds), *Freedom of Speech and Incitement Against Democracy* (The Hague London Boston, Kluwer Law International 2000), 168.

²²⁰ Kretzmer, David and Hazan, Francine Kershman (eds), *Freedom of Speech and Incitement Against Democracy* (The Hague London Boston, Kluwer Law International 2000), 168.

²²¹ From a comparative perspective, see generally Ambos, *Core Concepts I*, 27 ff.

²²² Ambos, *Core Concepts I*, 29, fn omitted.

²²³ From a comparative perspective Ambos, *Core Concepts I*, 37 ff.

²²⁴ There to Ambos, *Core Concepts I*, 37.

unfolded. According to a stricter view, it is sufficient that a “non-criminal norm of conduct” is violated, such as a general duty of care; and for the strictest view “any dangerous act would suffice”.²²⁵ According to the latter two views, both Schubart and Trump could well have created a risk to trigger a legal duty to act. There are supporters of this doctrine in the Common Law world and interestingly, they re-introduce the element of causation for the determination of whether the person created a risk that lead to a legal duty to act.²²⁶ In any case: there are good reasons to argue that a context-interpretation of all the statements by former President Donald Trump suggests that he created a concrete risk of violence, hence exercised control, and had the legal duty to ensure that calls to remain peaceful would be heard. A light indication of such a control could be that indeed reached out to the protesters by tweet about 90 minutes after the start of the attack.

VII. Conclusion

‘A mob’s always made up of people, no matter what. Mr. Cunningham was part of a mob last night, but he was still a man. Every mob in every little Southern town is always made up of people you know – doesn’t say much for them, does it?’²²⁷ This is Harper Lee’s observation of crowd behaviour in ‘To kill a mockingbird’. I have shown that mobs consists of individuals that are connected through a normative band. This band is strengthened by hierarchy. As a result, incitement laws or even law of direct perpetration need to take into account the peculiarities of mob violence. The protection of political speech is measured against the element of causation. This does not give the speaker less protection, quite opposite. Protesters can legitimately use a certain level of threats to violence to make themselves heard. Yet, due to normative causation elements, political speech protection is not absolute. The strongest normative element in causation is control. Once control over violence is exercised, speech is not protected.

²²⁵ Thereto Ambos, *Core Concepts I*, 37.

²²⁶ Cf. Ashworth, *Obligations* (2013), 53–4 (‘causal responsibility’, accidental creation of danger); Ambos, *Core Concepts I*, 37-8 with further references.

²²⁷ Harper Lee, *To Kill A Mockingbird* (Grand Central, 1960) 210.