Getting Rid of the Riot Act

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ABSTRACT

The Canadian Criminal Code retains a version of the "Riot Act," an 18th-century law empowering officials to proclaim a tumultuous assembly unlawful, creating offences for failing to peaceably disperse, and providing unqualified immunity to persons enforcing the proclamation. We contend that the Riot Act is not only antiquated, ineffective, and unnecessary but also that the provision of absolute immunity for state actors who use unnecessary violence is inconsistent with sections 7 and 12 of the Canadian Charter of Rights and Freedoms ("Charter"). Given these unconstitutional effects and the riot act's limited utility, we advocate for its repeal.

I. INTRODUCTION

In response to a series of violent disturbances, the United Kingdom Parliament passed the *Riot Act* in 1714.[1] The statute authorized designated local officials to declare groups of twelve or more persons to be "unlawfully, riotously, and tumultuously assembled together," order such persons to disperse within one hour, and arrest anyone who failed to comply.[2] It also immunized anyone assisting with the dispersal from legal

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1 An Act for preventing tumults and riotous assemblies, and for the more speedy and effectual punishing the rioters, 1 Geo, 1 St 2, c 5 (1714), online: <www.gutenberg.org/files/8142/8142-h/8142-h.htm> [Riot Act].

2 *Ibid.* The Act conferred the declaratory power on "one or more justice or justices of the peace, or by the sheriff of the county, or his under-sheriff, or by the mayor, bailiff or bailiffs, or other head-officer, or justice of the peace of any city or town corporate": *ibid.* To invoke the act and compel dispersal, one of these officials was required to read the following declaration:

> Our sovereign Lord the King chargeth and commandeth all persons, being

liability and created offences for failing to disperse, damaging designated types of property, and hindering officials in executing their powers under the Act.[3]

The statute was invoked many times over the subsequent two centuries in Britain and its colonies, including in several notorious cases where authorities killed scores of protestors.[4] However, it fell into disuse after the First World War and was repealed in most of the United Kingdom in 1967.[5] Many former British colonies carried the Act forward into their own legislation, however, and some have retained it to this day.[6] This includes Canada, where riot act provisions were included in the 1892 *Criminal Code* and have remained largely unchanged ever since.[7]

As in the United Kingdom, the riot act's use in Canada became increasingly infrequent over the past century. But attempts to invoke it have occurred in recent memory,[8] and the 2022 pandemic-related protests sparked renewed interest in the adequacy and appropriateness of existing governmental powers to control public order disturbances.[9] It is accordingly prudent to consider whether these provisions are worth preserving in any form.

In our view, they are not. The *Criminal Code*'s riot act provisions are antiquated, ineffective, and unnecessary. They should accordingly be

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> assembled, immediately to disperse themselves, and peaceably to depart to their habitations, or to their lawful business, upon the pains contained in the act made in the first year of King George, for preventing tumults and riotous assemblies. God save the King."

3 The Act made failing to disperse or causing serious damage to designated types of property felonies punishable by death, *ibid*. This punishment was later reduced to transportation for a period between 15 years and life. See *The Punishment of Offences Act 1837*, 7 Will 4 & 1 Vict c 91, s 1 (1837).

4 See Richard Vogler, *Reading the Riot Act: Magistracy, the Police and the Army in Civil Disorder* (Milton Keynes: Open University Press, 1991); Wilfried Nippel, "'Reading the Riot Act': The Discourse of Law-enforcement in 18th Century England" (1985) 1 Hist Anthropol 401.

5 *Criminal Law Act 1967*, c 58, s 10(2) (England and Wales); *Criminal Law Act (Northern Ireland),* 1967, c 18 s 10(2). See also *Statute Law (Repeals) Act 1973* (c 39) (repeal for Scotland).

6 See Part III(B), below.

7 *Criminal Code of Canada*, SC 1892, c 29, s 84 [*Criminal Code 1892*]; *Criminal Code*, RSC 1985, c C-46, ss 32-33, 67-68 [*Criminal Code*]. We examine the details of these provisions in Part I(C) below.

8 See Part III(A), below.

9 See Canada, Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency, vol 5: Policy Papers* (The Commission, 2023).

repealed. We also argue that by exempting officials from criminal liability for the use of excessive force in enforcing the riot act proclamation, section 33(2) of the *Code* is particularly problematic as it violates several rights under the *Canadian Charter of Rights and Freedoms*.[10]

These arguments are elaborated in three parts. In Part I, we review the *Criminal Code* provisions dealing with riots and other public order disturbances and examine how they have been and should be interpreted by the courts. Part II details the argument that the unqualified immunity granted by section 33(2) violates individuals' "security of the person" under section 7 in a manner that offends three principles of fundamental justice: overbreadth, gross disproportionality, and "failure to protect." We also explain how it violates the right to be free from "cruel and unusual treatment" under section 12 of the *Charter*. In Part III, we make the case for repealing the remaining riot act provisions. We summarize the history of their use in Canada, review the experience of comparable jurisdictions, and explain why they are unwieldy, ineffective and, given other means at the state's disposal to deal with violent and disorderly assemblies, unnecessary.

II. Legislative and Jurisprudential Overview

Canada's "riot act" appears in the *Criminal Code* alongside other provisions dealing with "Unlawful Assemblies and Riots."[11] These provisions set out overlapping offences, duties, and immunities comprising an integrated scheme for dealing with disturbances to the public order. They may be grouped into three categories: (i) those related to the offence

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10 Being Schedule B to the Canada Act 1982 (UK), 1982, c11 [*Charter*].

11 See *Criminal Code*, *supra* note 7, ss 63-69.

of being a member of an "unlawful assembly," (ii) those related to the offence of taking part in a "riot," and (iii) those related to the proclaiming of the "riot act." We deal with each category in turn below.

A. Unlawful Assemblies

Section 63 of the *Criminal Code* defines an "unlawful assembly" as a gathering of at least three people with a common purpose who "cause persons in the neighbourhood" to reasonably fear that they will either "disturb the peace tumultuously" or "needlessly and without reasonable cause provoke other persons to disturb the peace tumultuously."[12] An unlawful assembly is not a "riot" and accordingly does not trigger the power to invoke the riot act. However, section 66(1) of the *Criminal Code* makes it a summary conviction offence to be a "member" of an unlawful assembly.[13]

This provision has been interpreted to impose liability only where a person took part in a gathering giving rise to a reasonable fear of "a tumultuous disturbance of the peace."[14] By using the word "tumultuous," the courts have held that Parliament required the assembly to have induced a reasonable fear of violence and not mere disorder or disruptiveness.[15] Most courts have found, however, that where such fear was caused, liability may flow from mere presence in the assembly.[16] In other words, the accused

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12 *Ibid*, s 63(1). See *R c Lecompte* (2000), 149 CCC (3d) 185 (QBCA) leave to appeal refused [2000] SCCA No 498 (rejecting challenges to the provision under sections 2 and 7 of the *Charter*) [*Lecompte*]. Under section 63(2), "persons who are lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in a manner that would have made the assembly unlawful if they had assembled in that manner for that purpose." Section 63(3) exempts from liability individuals "assembled to protect the dwelling-house of any one of them against persons who are threatening to break and enter it for the purpose of committing an indictable offence therein."

13 As there is no specific punishment for being a member of an unlawful assembly, the general punishment for summary offences prevails (imprisonment for a maximum of two years less a day). See *Criminal Code*, *supra* note 7, s 787. A person who commits this offence while "wearing a mask or other disguise to conceal their identity without lawful excuse," however, may be prosecuted either summarily or by indictment; in the latter case, the maximum punishment is five years. *Ibid*, s 66(2).

14 See *Lecompte*, *supra* note 12 at para 15 (translation of "*troublent la paix tumultueusement*").

15 See *Conway c R*, 2015 QCCA 1389 at para 40; *R v Kalyn* (1980), 52 CCC (2d) 378 at paras 4-9 (SKPC). See also *R v Lockhart*, [1976] NSJ No 387 at para 35 (NSCA) (interpreting same language in context of taking part in a riot); *R v Berntt* (1997), 120 CCC (3d) 344 at paras 19-26 (BCCA) (same); *R v Brien* (1993), 86 CCC (3d) 550 at para 28 (NWTSC) (same); *R v Hill*, 2014 BCPC 145 at para 93 (same) [*Hill*].

16 See *R v Paulger and Les*, 18 CCC (3d) 78 at 80-81 (BCSC); *R v Kalyn* (1983), 52 CCC (2d) 378 (SKPC); *R c Popovic*, [1998] RJQ 2869 at paras 12, 32 (QCCQ) [*Popovic*]; *R v*

need not have actively participated in or encouraged violence (or even been aware that such behaviour was being committed by others).

The Quebec Court of Appeal came to a different conclusion in R c Lecompte.[17] To obtain a conviction, it held, the prosecution must prove that the accused was subjectively aware of the facts giving rise to a reasonable fear of tumultuous violence.[18] On this view, a person assembled with two or more others with a common purpose (e.g., to protest or celebrate) would not be guilty of being a "member" of an unlawful assembly unless they: (i) had knowledge of conduct (by themselves or others) that would engender a reasonable fear of violence and (ii) intentionally failed to dissociate themselves from that conduct.[19]

This interpretation is consistent with the presumption that criminal offences require subjective mens rea[20] and the principle that liability should not flow from mere presence at a place where a crime is being committed by others.[21] It also accords with the Charter. It violates no principle of fundamental justice to convict a person who (i) intentionally joins and remains with a group with a common purpose and (ii) is aware of conduct by group members inducing a reasonable fear of violence.[22] Imposing liability for mere presence, in contrast, would violate the principle of fundamental justice prohibiting the conviction of the morally innocent.[23] It would also likely violate the section 2(c) Charter right to "freedom of peaceful assembly."[24]

Thomas (1971), 2 CCC (2d) 514 (BC Co Ct). See also *R v Loewen* (1992), 75 CCC (3d) 184 at para 22 (BCCA) (stating in the context of the sentencing decision that liability may be established by mere presence) [*Loewen*].

17 *Lecompte ,supra* note 12.

18 *Ibid* at paras 14-15.

19 See Rachel Grondin, "La présence sur les lieux du crime" (1991) 22 Revue générale de droit 615 at 620-21.

20 See *R v Zora*, 2020 SCC 14 at paras 32-35.

21 See *Dunlop and Sylvester v The Queen*, [1979] 2 SCR 881 at 891.

22 See in contrast *Popovic*, *supra* note 16 at paras 29-32 (finding *Criminal Code*, *supra* note 7, s 66 unconstitutional on the basis that it imposes liability without fault).

23 See *Re BC Motor Vehicle Act*, [1985] 2 SCR 486. See also generally *R v Khawaja*, 2012 SCC 69 at para 53 (interpreting *Criminal Code*'s "participating in activity of terrorist group" offence provision as excluding liability for "innocent or socially useful conduct that is undertaken absent any intent to enhance the abilities of a terrorist group to facilitate or carry out a terrorist activity" and "conduct that a reasonable person would not view as capable of materially enhancing the abilities of a terrorist group to facilitate or carry out a terrorist activity").

24 See Jamie Cameron, "Freedom of Peaceful Assembly and Section 2(c) of the *Charter*" in Canada, Public Order Emergency Commission, *Report of the Public Inquiry into the*

B. Taking Part in a Riot

Section 65 of the *Code* states that anyone who "takes part" in a riot commits a summary or indictable offence.[25] Section 64 defines a "riot" as "an unlawful assembly that has begun to disturb the peace tumultuously."[26] As stated in *R v Drury*,[27] what "differentiates a riot from an unlawful assembly is that a riot entails an actual, tumultuous disturbance of the peace, whereas an unlawful assembly requires only the reasonable fear that such a disturbance will erupt."[28] Liability does not require, however, that the riot act proclamation have been read.[29]

To obtain a conviction under section 65, the prosecution must accordingly prove that the accused intentionally partook in an ongoing, tumultuous disturbance of the peace.[30] Mere presence will not suffice; nor will any breach of the peace committed after the riot ended.[31] The prosecution is nevertheless not required to prove that the accused's conduct constituted a "separate criminal act."[32] A wilful refusal to obey a police direction to leave an ongoing riot is sufficient to establish liability.[33]

In addition to their authority to arrest persons participating in a riot,[34] police also have the power to "suppress" a riot. Section 32(1) of the *Code* states that:

Every peace officer is justified in using or in ordering the use of as much force as the peace officer believes, in good faith and on reasonable grounds,

(a) is necessary to suppress a riot; and

2022 Public Order Emergency, vol 5: Policy Papers (The Commission, 2023) at 4-34.

25 The maximum period of incarceration is virtually identical in either case: two years less a day if prosecuted summarily and two years if by indictment. See *Criminal Code*, *supra* note 7, ss 65(1), 787. But as with a conviction for being a member of an unlawful assembly, a person who takes part in a riot "while wearing a mask or other disguise to conceal their identity without lawful excuse" may be imprisoned for up to ten years if prosecuted by indictment: *Ibid*, s 65(2).

26 *Ibid*, s 64.

27 *R v Drury*, 2004 BCPC 188.

28 *Ibid* at para 43.

29 See e.g., *R v Greenhow*, 2004 ABCA 22 at para 9; *Thorne v R*, 2004 NBCA 102 at para 8 [*Thorne*].

30 See *Brien*, *supra* note 15 at paras 26-40; *Berntt*, *supra* note 15 at paras 19-26, 35; *Hill*, *supra* note 15 at paras 96-99.

31 See *Brien*, *supra* note 15 at para 31; *Hill*, *supra* note 15 at para 98.

32 See *Hill*, *supra* note 15 at para 98.

33 See *R v Kuhn*, 2003 ABPC 41 at para 38; *Hill*, *supra* note 15 at para 98 [*Kuhn*].

34 See *Criminal Code*, *supra* note 7, ss 494-95 and the discussion in Part III(C).

(b) is not excessive, having regard to the danger to be apprehended from the continuance of the riot.

For this immunity to apply, a peace officer must have honestly and reasonably believed that the force was necessary and not excessive.[35] In applying the objective prong of this test, the court must consider the "peace officer's training, experience, [and] the orders of the day given to him."[36] However, it need not consider what "the person injured was in fact intending to do, nor the actual consequences of the force used, no matter how tragic."[37]

The *Code* also authorizes private citizens to help quell riots. Section 32(3) gives anyone the power "to use force to suppress a riot" if (i) a peace officer orders them to do so, (ii) they act in "good faith," and (iii) the order is "not manifestly unlawful."[38] In addition, section 32(4) empowers anyone who "believes that serious mischief will result from a riot before it is possible to secure the attendance of a peace officer" to use "as much force as he believes in good faith and on reasonable grounds … is necessary to suppress the riot … and is not excessive, having regard to the danger to be apprehended from the continuance of the riot."[39]

Section 25(1) of the *Code* also provides a general, limited immunity to peace officers and others "authorized by law to do anything in the administration or enforcement of the law" for "using as much force as is necessary for that purpose" if they act on "reasonable grounds."[40] Where the use of force meets this standard, it cannot be used to ground criminal or civil liability.[41] As the Supreme Court has stressed, police "should not be

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35 See *Berntt v Vancouver (City)*, 1999 BCCA 345 at para 17 [*Berntt*].

36 *Ibid* at para 25.

37 *Ibid* at para 27.

38 See generally *R v Finta*, [1994] 1 SCR 701 at 834 (interpreting standard of "manifest illegality" in the context of the defence of obedience to superior orders in war crimes prosecutions as an order that "offends the conscience of every reasonable, right-thinking person").

39 See *Criminal Code*, *supra* note 7, s 32(1)(*b*).

40 *Ibid*, s 25(3) specifies that the use of force "intended … or likely to cause death or grievous bodily harm" is not justified "unless the person believes on reasonable grounds that it is necessary for the self-preservation of the person or the preservation of any one under that person's protection from death or grievous bodily harm." Sections 25(4) and 25(5) provide further specificity on the application of this standard in the context of arrests and prison escapes, respectively.

41 See generally *Eccles v Bourque*, [1975] 2 SCR 739 at 742; *Green v Lawrence* (1998), 129 Man R (2d) 291 at para 21 (MBCA). See also *Criminal Code*, *supra* note 7, s 26 (confirming that anyone "authorized by law to use force is criminally responsible for

judged against a standard of perfection;" courts must instead assess their use of force in light of their "dangerous and demanding work" that often requires them to "react quickly to emergencies."[42]

C. Proclamation of the Riot Act

The mere existence of a "riot" does not trigger the power to invoke the riot act and require participants to disperse. For this to occur, there must be at least twelve people "unlawfully and riotously assembled together."[43] When a designated official "receives notice" of such an assembly, they may go to the location of the riot and, if "satisfied that a riot is in progress ... command silence and thereupon make or cause to be made in a loud voice a proclamation" directing the rioters to peaceably disperse.[44] Section 67 of the *Code* provides that only one of the following officials may make the proclamation:

(a) a justice, mayor or sheriff, or the lawful deputy of a mayor or sheriff,
(b) a warden or deputy warden of a prison, or
(c) the institutional head of a penitentiary ... or that person's deputy.

Individuals who fail to disperse within thirty minutes after the proclamation is read may be arrested and charged with an indictable offence carrying a maximum sentence of life in prison.[45]

If a designated official reads the proclamation (or has been prevented from doing so by a rioter), peace officers have a "duty" to suppress the riot.[46]

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any excess thereof according to the nature and quality of the act that constitutes the excess").

42 *R v Nasogaluak*, 2010 SCC 6 at para 35. See also *R v Bottrell* (1981), 60 CCC (2d) 211 at para 16 (BCCA); *R v Power*, 2016 SKCA 29 at paras 29-32.

43 See *Criminal Code*, *supra* note 7, s 67.

44 *Ibid*. The recommended wording is as follows: "[His Majesty the King] charges and commands all persons being assembled immediately to disperse and peaceably to depart to their habitations or to their lawful business on the pain of being guilty of an offence for which, on conviction, they may be sentenced to imprisonment for life. GOD SAVE THE [KING]."

45 *Ibid*, s 68(*b*). The *Criminal Code* also makes it an indictable offence punishable by life in prison to violently oppose, hinder, or assault a person attempting to make the proclamation "so that it is not made." *Ibid*, s 68(*a*). The same offence and punishment apply to a person who "does not depart from a place within thirty minutes when he has reasonable grounds to believe that the proclamation referred to in section 67 would have been made in that place if some person had not opposed, hindered or assaulted, wilfully and with force, a person who would have made it." *Ibid*, s 68(c).

46 *Ibid*, s 33(1). Section 32(2) also provides that any individual bound by military law to

Section 33(1) requires them to "disperse or to arrest persons who do not comply with the proclamation."[47] If they fail to take "all reasonable steps" to do so after receiving notice of a riot within their jurisdiction, they commit an indictable offence under section 69 of the *Code*.[48] When peace officers act pursuant to this power, section 33(2) immunizes them from civil or criminal liability for "any death or injury that by reason of resistance is caused as a result of the performance" of this duty. This immunity is not restricted (at least not expressly) to harms caused by the use of unnecessary or disproportionate force.

Could section 33(2) be interpreted, however, as implicitly excluding unnecessary or disproportionate force? We think not. In the only appellate decision raising the question, the British Columbia Court of Appeal noted that as the riot act proclamation had not been read, the police could not claim the "protection afforded by s. 33."[49] They were instead limited to that provided by section 32,[50] which as discussed is limited to uses of suppressive force that are "necessary" and "not excessive." If section 33 immunity implicitly hinged on the use of necessary and proportionate force, this distinction would be irrelevant.

Further, section 33 immunity applies only when the *Code*, on pain of criminal punishment, compels officers to assist in dispersing a riot. While police may be disciplined for failing to perform their duties, such failures do not ordinarily give rise to criminal punishment. This suggests that Parliament thought it unfair to hold police liable for violence used against rioters failing to comply with the proclamation. And the fact that rioters who resist enforcement of the proclamation have always been subject to life imprisonment[51] suggests that Parliament views them as unworthy of protection from unnecessary or disproportionate force.

The reading or attempted reading of the proclamation also imposes a duty on private citizens to help peace officers quell the riot. Section 33(1) of the *Code* states that any person "who is lawfully required" to assist a peace officer has a duty to "disperse or arrest persons who do not comply with the

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obey commands by a superior officer is justified in obeying commands to suppress a riot unless the order is "manifestly unlawful."

47 *Ibid*.

48 *Ibid*, s 69 (creating offence punishable either on indictment for a maximum of two years imprisonment or on summary conviction).

49 See *Berntt*, *supra* note 35 at para 10.

50 *Ibid* at para 11.

51 See *Criminal Code 1892*, *supra* note 7, ss 83, 85; *Criminal Code*, *supra* note 7, s 68.

proclamation."[52] Non-peace officers do not commit an offence, however, by failing to take all reasonable steps to fulfill this obligation. As with peace officers, the *Code* immunizes private citizens exercising this power from criminal and civil liability for death or injury caused by resistance to the exercise of this authority.[53]

III. ABSOLUTE IMMUNITY AND THE *CHARTER*

As elaborated above, section 33(2) of the *Code* is unique among use of force provisions in providing an unqualified immunity from civil or criminal liability to peace officers and those assisting them for causing "any death or injury" to a person who resists arrest or dispersal after the reading of the riot act. In our view, this provision violates section 7 of the *Charter* because it deprives such persons of their "security of the person" in a manner that conflicts with several principles of fundamental justice. It also violates section 12 by exposing them to "cruel and unusual treatment." In what follows, we first examine the threshold requirements for section 7 and section 12 claims and then detail how unqualified immunity violates the principles of overbreadth (section 7) and gross disproportionality (sections 7 and 12) as well as a novel principle of fundamental justice imposing a limited obligation on the state to protect its citizens from unjustified violence (section 7).

A. Threshold Requirements

To establish a section 7 violation, claimants must first show a state-imposed deprivation of life, liberty, or security of the person.[54] To engage an individual's security of the person—the threshold interest implicated by unqualified immunity—a state law or policy must cause physical or psychological harm to the applicant.[55] The use of unrestricted force against rioters readily meets this threshold.[56] The Supreme Court has not required that the impugned law be the "only or the dominant cause of the prejudice

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52 See *Criminal Code*, *supra* note 7, s 33(2).

53 *Ibid*.

54 See *Blencoe v British Columbia (Human Rights Commission),* 2000 SCC 44 at para 47.

55 See *Canada (Attorney General) v Bedford*, 2013 SCC 72 at paras 58-72 [*Bedford*]; *Carter v Canada (Attorney General)*, 2015 SCC 5 at paras 64-68 [*Carter*].

56 As the *Criminal Code*, *supra* note 7, s 33(2) provides immunity from criminal and civil consequences even for the use of force causing death, one could also argue that the law implicates the right to "life" under section 7 of the *Charter*. See generally *Carter*, *supra* note 55 at para 62.

suffered by the complainant;" it is sufficient if there is a "real, as opposed to a speculative, link."[57] Here, granting unqualified immunity could feasibly affect a state actor's decision to resort to unnecessary and disproportionate force.[58]

To establish a section 12 violation, claimants must first show that state action constituted "treatment or punishment."[59] While the use of unlimited force to arrest or disperse rioters after the reading of the proclamation would not constitute a "punishment,"[60] it would likely be considered a form of "treatment." To qualify as a treatment, state conduct must consist of "a process or manner of behaving towards or dealing with a person or thing."[61] The mere fact that an act is legally prohibited is not sufficient, however. As the Supreme Court held in Rodriguez, "there must be some more active state process in operation, involving an exercise of state control over the individual, in order for the state action in question, whether it be positive action, inaction or prohibition, to constitute 'treatment' under section 12."[62] The infliction of unnecessary or excessive force clearly constitutes an "exercise in state control" sufficient to engage section 12.

B. Overbreadth (Section 7 of *the Charter*)

The Supreme Court has long recognized that section 7 is violated when an "overbroad" law deprives individuals of life, liberty, or security of the person.[63] This principle of fundamental justice "addresses the situation where there is no rational connection between the purposes of the law and *some*, but not all, of its impacts."[64] An absence of rational connection may arise because the law is inconsistent with its objective or is unnecessary

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57 See *Bedford*, *supra* note 55 at para 76.

58 See *Canadian Foundation for Children, Youth and the Law v Canada (Attorney General)*, 2004 SCC 4 at para 3 (*Criminal Code* provision exempting parents exercising reasonable discipline from liability for assaults conceded to engage children's security of person) [*Canadian Foundation*].

59 See *R v Hills*, 2023 SCC 2 at para 31.

60 See *R v Rodgers*, 2006 SCC 15 at para 63 (a "consequence will constitute a punishment when it forms part of the arsenal of sanctions to which an accused may be liable in respect of a particular offence and the sanction is one imposed in furtherance of the purpose and principles of sentencing").

61 See *Chiarelli v Canada (Minister of Employment & Immigration)*, [1992] 1 SCR 711 at 735.

62 See *Rodriguez v British Columbia (Attorney General)*, [1993] 3 SCR 519 at 610 [*Rodriguez*].

63 See *R v Heywood*, [1994] 3 SCR 761 at 792-93.

64 See *Bedford*, *supra* note 55 at para 112.

to achieve its objective.[65] Importantly, an arbitrary effect on even a single person's life, liberty, or security of the person will render the law overbroad.[66] While many laws are drawn broadly to make enforcement more practical, this consideration is irrelevant at the section 7 stage of the analysis as it does nothing to cure the irrational impact of the law.[67] Enforcement practicality, however, can serve as a justification at the section 1 stage.[68]

In determining a law's objective, it is necessary to assess any statements of purpose in the legislation and its preamble; the text, context, and broader scheme of the legislation; and any extrinsic evidence from the legislative process explaining the legislature's intent in passing the legislation.[69] The fact that the unqualified immunity provision was included in Canada's first *Criminal Code* in 1892[70] suggests that its purpose is tied to the original riot act adopted in early 18th Century England.[71] The preamble to that statute explained its objective as deterring violence and disorder by imposing a significant consequence on anyone who continued to riot after the proclamation was read: originally a death sentence.[72] While there is nothing in the Canadian legislation or its history explaining the provision of unqualified immunity, it was presumably included to give persons enforcing the proclamation significant flexibility to quell disorder without fear of criminal or civil consequences. In the absence of any direct evidence

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65 *Ibid* at para 119.

66 *Ibid* at paras 112, 123.

67 *Ibid* at para 113.

68 *Ibid*. Notably, one of the authors has elsewhere observed that the Supreme Court did not explain how this "individualistic" conception of overbreadth qualifies as a principle of fundamental justice and expresses doubt as to whether it meets the requirements for qualifying as a principle of fundamental justice. See Colton Fehr, "Re-thinking the Instrumental Rationality Principles of Fundamental Justice" (2020) 58 Alta L Rev 133; Colton Fehr, *Constitutionalizing Criminal Law* (Vancouver: UBC Press, 2022) at 72-75; Colton Fehr, "Vaccine Passports and the *Charter*: Do They Actually Infringe Rights?" (2022) 43 NJCL 95 at 109-13.

69 See *R v Safarzadeh-Markhali*, 2016 SCC 14 at paras 31-32.

70 See *Criminal Code 1892*, *supra* note 7, s 84 ("if any of the persons so assembled is killed or hurt in the apprehension of such persons or in the endeavour to apprehend or disperse them, by reason of their resistance, every person ordering them to be apprehended or dispersed, and every person executing such orders, shall be indemnified against all proceedings of every kind in respect thereof").

71 See *Riot Act*, *supra* note 1.

72 *Ibid*, ss 1, 4, and 5.

of Parliament's intent, we can think of no other reasonable purpose to ascribe to the immunity provision.

It is obvious, however, that the riot act's objective can be achieved without resorting to unnecessary or excessive force. Police encounter many situations threatening public order and safety, yet in no other context does the law give them *carte blanche* to use unlimited force. As discussed, section 32(1) entitles the police to use "as much force as ... is necessary to suppress a riot" as long it is "not excessive, having regard to the danger to be apprehended from the continuance of the riot." Whether or not the riot act proclamation is read, this provision immunizes police from liability for using reasonable force to ensure public order and safety. Given the deferential standard that courts use in assessing the reasonableness and proportionality of police uses of force discussed in Part I(B), it is difficult to see how unqualified immunity is necessary to achieve the riot act's purpose.

C. Gross Disproportionality (Sections 7 & 12 of *the Charter*)

The Supreme Court has also recognized that a law will violate section 7 of the *Charter* if its detrimental effects on personal security are "grossly disproportionate" compared to its objectives.[73] This rule applies in "extreme cases where the seriousness of the deprivation is totally out of sync with the objective of the measure."[74] In considering whether a law meets this threshold, a court "does not consider the beneficial effects of the law for society" but instead "balances the negative effect on the individual against the purpose of the law, not against societal benefit that might flow from the law."[75] As the Court concluded in *Bedford*, "a grossly disproportionate effect on one person is sufficient to violate the norm."[76]

While deterring riots is an important objective, rioters are nonetheless entitled to be treated with respect by the state. Permitting officials to use unnecessary or excessive force poses a stark threat to rioters' physical safety. The utility of unqualified immunity in facilitating enforcement, in contrast, is, at best, limited. Permitting the state to disregard the sanctity of human life to achieve marginal gains in deterring rioting strikes a grossly disproportionate balance between these competing interests. As the Supreme Court put it in *Bedford*, the law's "draconian impact" on *Charter*-

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73 See *Bedford*, *supra* note 55 at para 120.

74 *Ibid.*

75 *Ibid* at para 121 [emphasis removed].

76 *Ibid* at para 122.

protected interests is "entirely outside the norms accepted in our free and democratic society."[77]

The gross disproportionality standard is also used to decide if a law violates the prohibition on "cruel and unusual" treatment in section 12 of the *Charter*.[78] As the Supreme Court concluded in *Bissonnette*, any punishment or treatment that is intrinsically incompatible with human dignity will necessarily be grossly disproportionate and thus "cruel and unusual" under section 12.[79] Any treatment that is "by its very nature, degrading or dehumanizing" will violate this norm.[80] This includes treatments or punishments inflicting unwarranted physical harm, such as corporal punishment, lobotomization, castration, and torture.[81]

While giving police and others an unlimited power to use force to quell riots may not have been considered degrading or dehumanizing in 1892, the Court in *Bissonnette* noted that "society's standards of decency are not frozen in time."[82] "[W]hat constitutes punishment that is cruel and unusual by nature will necessarily evolve," it reasoned, "so as to meet the new social, political and historical realities of the modern world."[83] As with the physical punishments mentioned above, immunizing state actors from liability for using unnecessary or disproportionate force (including causing death) in the face of potentially minimal resistance would similarly shock modern standards of decency. Section 33(2) of the *Code* should, therefore, be found grossly disproportionate under both sections 7 and 12 of the *Charter*.[84]

D. The Protective Function (Section 7 of *the Charter*)

The unqualified immunity provided by section 33(2) may also violate another norm that the courts may wish to recognize as a principle of fundamental justice under section 7 of the *Charter*: the principle that the state cannot entirely exempt its agents from responsibility for unjustified

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77 *Ibid* at para 120.

78 See *R v Boudreault*, 2018 SCC 58 at paras 45-46.

79 See *R v Bissonnette*, 2022 SCC 23 at paras 64-68.

80 *Ibid* at para 67.

81 *Ibid* at para 66.

82 *Ibid* para 65.

83 *Ibid.*

84 As the Supreme Court has indicated a "preference for dealing with *Charter* issues in relation to specific provisions rather than under s. 7 where this is possible," this issue should arguably be resolved under section 12 rather than section 7: *Thomson Newspapers Ltd v Canada (Director of Investigation and Research, Restrictive Trade Practices Commission)*, [1990] 1 SCR 425 at 538 (per Justice La Forest).

violence. This principle is a species of the "protective function" that some theorists have proposed as a basis for the judicial review of governmental action.[85]

The starting point for this argument is recognizing that liberal-democratic polities have an obligation to establish the laws and institutions minimally necessary for peaceful social interaction.[86] As Hamish Stewart puts it, the state must enact "laws that the individuals acting together could give themselves; they must, at a minimum, be laws that respect the personhood of each of the individuals who came together to make them."[87]

On this view, the state's commitment to protecting its citizens' physical integrity is foundational to the social contract underlying governmental legitimacy and authority.[88] This does not inexorably lead to the conclusion that a state can never take the life of one of its citizens. While the Supreme Court of Canada has concluded that capital punishment is almost certainly inconsistent with section 12 of the *Charter*,[89] other liberal-democratic jurisdictions, such as the United States, still impose it.

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85 See *e.g.*, Frank Michelman, "The Protective Function of the State in the United States and Europe: The Constitutional Question" in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 156 [Michelman]; Dieter Grimm, "The Protective Function of the State" in Georg Nolte, ed, *European and US Constitutionalism* (Cambridge: Cambridge University Press, 2005) 137 [Grimm]. In Canada, see Vanessa MacDonnell, "The Protective Function and Section 7 of the *Canadian Charter of Rights and Freedoms*" (2012) 17 Review of Constitutional Studies/Revue d'études constitutionnelles 53 [MacDonnell]; Craig Forcese, "The Obligation to Protect: The Legal Context for Diplomatic Protection of Canadians Abroad" (2007) 57 UNB LJ 102 at 119-23 (discussing an "obligation to protect" under section 7 of the *Charter*) [Forcese].

86 See Hamish Stewart, "The Constitution and the Right of Self-Defence" (2011) 61 UTLJ 899 at 900. See also generally Thomas Hobbes, *The Leviathan* (1651) [Stewart].

87 See Stewart, *supra* note 86 at 901 citing Immanuel Kant, "On the Common Saying: That may be Correct in Theory, but it is of No Use in Practice" in Mary Gregor, ed and trans, *Immanuel Kant, Practical Philosophy* (Cambridge: Cambridge University Press, 1996) at 297-98.

88 For an argument that the state has a broader responsibility to protect citizens from all violence, see generally Michelman, *supra* note 85; Grimm, *supra* note 85.

89 This issue has technically not been decided because the death penalty was repealed in Canada (in 1976 for civilian offences and in 1998 for military offences). See Paul Gendreau and Wayne Renke, "Capital Punishment in Canada" (6 February 2006), online: *Canadian Encyclopedia* <www.thecanadianencyclopedia.ca/en/article/capital-punishment>.

The Supreme Court has nevertheless held that because a death sentence is "irreversible" and "its implementation necessarily causes psychological and physical suffering", it "engages the underlying values of the prohibition against cruel and unusual punishment." See *United States v Burns*, 2001 SCC 7 at para 78 (section 7 of

But permitting the state to kill offenders after concluding beyond a reasonable doubt that they committed heinous crimes is very different from giving police an unfettered authority to kill or grievously injure resistant rioters in the heat of the moment. In the latter scenario, a state actor is allowed to act as judge, jury, and executioner without either *ex ante* constraint or *ex post* accountability. This is precisely the type of scenario that violates the social compact undergirding liberal-democratic government.

Framed in this manner, the protective function proposed here is not a "positive" right to protection from any harm, a conception of rights that has proven controversial.[90] To date, the Supreme Court has only been prepared to interpret section 7 of the *Charter* "as restricting the state's ability to *deprive* people" of their interests in life, liberty, or security of the person.[91] Accordingly, recognizing the protective function as a principle of fundamental justice would not impose a positive duty on governments to protect people from physical harm from state and non-state actors. It would instead simply require the state not to wholly exempt its agents from criminal liability when they use violence. To do otherwise would leave citizens without peaceable, lawful means for redressing unjustly imposed bodily harm.

To qualify as a principle of fundamental justice under section 7, the proposed principle must meet three criteria.[92] First, it must be a "legal principle."[93] The purpose of requiring a principle to meet this standard is to avoid the "judicialization" of policy matters.[94] Second, it must be capable of being defined in a sufficiently precise manner.[95] This ensures that "vague generalizations about what our society considers to be ethical or moral" do not form the basis for striking down democratically enacted laws.[96] Finally,

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the *Charter* prohibits extradition without assurances that the death penalty will not be imposed in all but exceptional circumstances).

90 See *Gosselin v Québec (Attorney General)*, 2002 SCC 84 at para 81 [*Gosselin*] (observing that "[n]othing in the jurisprudence thus far suggests that s. 7 places a positive obligation on the state to ensure that each person enjoys life, liberty or security of the person"). For arguments in favour of a positive rights interpretation of section 7, see generally MacDonnell, *supra* note 85; Forcese, *supra* note 85 at 119-23.

91 See *Gosselin*, *supra* note 90 at para 54 [emphasis in original].

92 See *Canadian Foundation*, *supra* note 58. See also Hamish Stewart, *Fundamental Justice: Section 7 of the Charter of Rights and Freedoms*, 2nd ed (Toronto: Irwin Law, 2019) at 122-27.

93 See *R v Malmo-Levine; R v Caine*, 2003 SCC 74 at paras 112-13 [*Malmo-Levine*].

94 *Ibid*.

95 *Ibid*.

96 See *Rodriguez*, *supra* note 62 at 591.

it must attract sufficient "societal consensus"[97] in the sense of being derived from "shared assumptions upon which our system of justice is founded."[98] Principles of fundamental justice "find their meaning in the cases and traditions that have long detailed the basic norms for how the state deals with its citizens" and are viewed by society "as essential to the administration of justice."[99]

The protective function proposed here is obviously a legal principle. Ensuring legal accountability for unjustified state conduct causing death or serious injury is not merely a "general public policy."[100] As the Supreme Court stated in *Canada (Attorney General) v Federation of Law Societies of Canada*, a norm will typically have a sufficiently "legal" character if it is "used as a rule or a test in common, statutory law or international law."[101] The principle that the use of force by state actors should be subject to legal constraint and redress finds expression in each of these sources of law.[102]

The protective function is also sufficiently precise to qualify as a principle of fundamental justice. Unlike the broader conceptions of the principle referenced above, the definition proposed here is limited to a prohibition on the state exempting its own agents from any legal accountability for misconduct causing serious personal injury. This norm is capable of being interpreted and applied consistently and predictably. It is far from a "vague" generalization of what "society considers to be ethical or moral."[103]

Finally, the limited conception of the protective function proposed here would almost certainly attract normative consensus. The ability to use the state's laws to seek justice for wrongs committed by state actors is fundamental to the rule of law and expresses a commitment to human dignity essential to a liberal-democratic society. As the court stated in

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97 See *Malmo-Levine*, *supra* note 93 at para 113.

98 See *Canadian Foundation*, *supra* note 58 at para 8.

99 *Ibid*.

100 *Ibid* at para 9.

101 See *Canada (Attorney General) v Federation of Law Societies of Canada*, 2015 SCC 7 at para 91 [*Federation of Law Societies of Canada*].

102 See e.g., *Criminal Code*, *supra* note 7, ss 25, 32 (limiting use of force in criminal law enforcement); *Fleming v Ontario*, 2019 SCC 45 at para 116 (noting that section 25 of the *Criminal Code* does not shield police from liability in battery for using excessive force); *R v Finta*, [1994] 1 SCR 701 at 842-43 (Justice Cory) and 779 (Justice La Forest dissenting) (defence of obedience to superior orders in international law negatived by use of excessive force).

103 See *Rodriguez*, *supra* note 62 at 591.

Federation of Law Societies, it is "fundamental to how the state and the citizen interact in legal matters."[104]

E. Section 1 of the Charter

The Supreme Court of Canada has never upheld a law found to violate either section 7 or section 12 under section 1 of the *Charter*, which subjects *Charter* rights to "reasonable limits prescribed by law" that "can be demonstrably justified in a free and democratic society."[105] If we are correct that section 33(2) of the *Criminal Code* infringes these rights, it is extremely unlikely that it would be justified under section 1. The reason for this is straightforward: having declared that a law is either inconsistent with a "principle of fundamental justice" or is "cruel and unusual," it would be difficult to claim that it is nevertheless "demonstrably justified."[106]

For some laws, the "interests to be balanced" in the section 1 analysis might differ from those at play in deciding whether they infringed section 7 (and perhaps section 12) of the *Charter*.[107] As the Supreme Court stated in *Carter v Canada (Attorney General)*, "in some situations[,] the state may be able to show that the public good — a matter not considered under s. 7, which looks only at the impact on the rights claimants — justifies depriving an individual of life, liberty or security of the person under s. 1 of the *Charter*."[108]

But in the case of section 33(2) of the *Code*, the interests are the same. The law's objective is coextensive with its practical contribution to the public good (enhancing law enforcement efficacy by removing any disincentive to use force to quell riots). As discussed, the vast proportion of this benefit could be achieved by extending qualified immunity to persons enforcing the riot act. Section 33(2) consequently fails both the "minimal impairment" and "salutary *vs* deleterious effects" branches of the *Oakes* proportionality test.[109]

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104 See *Federation of Law Societies of Canada*, *supra* note 101 at para 95.

105 Only one appellate court has upheld a breach of section 7 of the *Charter*. See *R v Michaud*, 2015 ONCA 585 at paras 144-45 (upholding breach of overbreadth principle by a regulatory provision requiring speed limiters for commercial drivers) [*Michaud*].

106 See generally *New Brunswick (Minister of Health and Community Services) v G(J)*, [1999] 3 SCR 46 at para 99; *Charkaoui v Canada (Citizenship and Immigration)*, 2007 SCC 9 at para 66; *Bissonnette*, *supra* note 79 at para 121; *R v Nur*, 2015 SCC 15 at para 111.

107 See *Bedford*, *supra* note 55 at para 144.

108 See *Carter*, *supra* note 55 at para 95. See also *Michaud*, *supra* note 105 (upholding overbroad driving regulation under section 1).

109 See generally *R v Oakes*, [1986] 1 SCR 103 at 138-40.

IV. Repealing the Riot Act

If we are correct that section 33(2) is unconstitutional, Parliament should repeal it. Failing that, any court presented with an opportunity to do so should strike it down (or, in the case of a provincial court, declare it inoperative to the case at hand).[110] While the remaining riot act provisions may not violate the *Charter*, Parliament should nevertheless repeal them. As we elaborate below, these provisions are ineffective and unnecessary. We set out this argument by exploring the history of the riot act's use in Canada, examining comparable jurisdictions that have done away with it, and detailing the legislation's frailties and redundancy in light of the other riot-related provisions of the *Code*.

A. The Riot Act's Use in Canada

While the *Riot Act* was read frequently in early Canada, in the 20th Century, the frequency of riots, and therefore the opportunity to invoke the *Riot Act*, diminished considerably.[111] Many factors contributed to this, including the introduction of blind electoral ballots (which ensured voters need not publicly proclaim their vote), the elimination of public executions, the calming of sectarian conflict during religious holidays, and the adoption of modern labour legislation.[112]

The *Riot Act* was, nevertheless, invoked during the 1919 Winnipeg General Strike. In response to violent disturbances, the mayor read the proclamation, and police subsequently used batons and rifles to disperse the crowd, eventually killing two rioters.[113] The *Riot Act* was also read in Prince Rupert, British Columbia in 1958 during the "Centennial Riot" that broke out after police attempted to arrest three Indigenous people for

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110 See *R v Lloyd*, 2016 SCC 13 at para 15.

111 See Tyler Wentzel, "'Not in the Cards': The Non-Use of the Canadian Armed Forces in the 2022 Public Order Emergency" (2022) 70 Crim LQ 310; Desmond Morton, "Aid to the Civil Power: The Canadian Militia in Support of Social Order, 1867-1914" (1970) 51 Can Hist Rev 407; JJB Pariseau, *Disorders, Strikes and Disasters: Military Aid to the Civil Power in Canada, 1867-1933* (Ottawa: Directorate of History, National Defence Headquarters, 1973) [Wentzel].

112 See generally Wentzel, *supra* note 111.

113 See HA Robson, Commissioner, *Royal Commission to Enquire into and Report Upon the Causes and Effects of the General Strike Which Recently Existed in the City of Winnipeg for a Period of Six Weeks, Including the Methods of Calling and Carrying on Such Strike* (Winnipeg: The Commission, 1919) reproduced in 2021 42:2 Man LJ 99 at 123-24. See also generally Margaret E Beare and Nathalie Des Rosiers, "Introduction" in Margaret E Beare, Nathalie Des Rosiers, and Abigail C Deshman, eds, *Putting the State on Trial: The Policing of Protest During the G20 Summit* (Vancouver: UBC Press, 2015) 3 at 5-12.

fighting. The mayor read the proclamation, which was followed by over two hours of violence involving the use of tear gas by police.[114]

In recent decades, however, the *Riot Act* has been lawfully invoked very infrequently. In the summer of 1991, the mayor of Penticton, BC, read the section 67 proclamation after participants in a large outdoor party became violent toward the police.[115] Of the reported and unreported convictions arising from the incident, however, none appear to have been for defying the proclamation.[116]

In 2006, in Fort St. John, British Columbia, police were called to a house party hosting approximately 200 residents.[117] In response to guests throwing bottles at police and starting fires, a police officer purported to read the "*Riot Act*" to deter the residents from continuing their assault on police. His directive was initially ignored, but police were eventually able to subdue the rioters and bring the party to an end.[118]

In 2011, a large and destructive riot arose in downtown Vancouver after the hometown Canucks hockey team lost game 7 of the Stanley Cup Finals.[119] Police used a mobile, long-range loudspeaker system to broadcast a "pre-recorded message loop" warning rioters that they were "taking part in an unlawful assembly and [had] 10 minutes to leave the area."[120] Large numbers of people failed to disperse, however, and the rioting continued for several hours before finally dissipating.[121]

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114 See Robert Campbell, "A 'Fantastic Rigmarole': Deregulating Aboriginal Drinking in British Columbia, 1945-62" (2004) 141 British Columbia Stud 81 at 81.

115 See *Loewen*, *supra* note 16 at paras 3-7; Tracey Hymas, "Riot Ravages City" *Penticton Herald* (29 July 1991).

116 See *R v Peepre*, 2013 BCCA 115, Appendix A (summaries of reported and unreported cases); *Loewen*, *supra* note 16 (sentencing for taking part in riot); *R v G(J)* (1992), 15 BCAC 128 (BCCA) (same).

117 See *R v EP*, 2007 BCPC 159 at paras 2-5 (sentencing for youth convicted of taking part in a riot).

118 *Ibid*.

119 See John Furlong and Douglas J Keefe, *The Night the City Became a Stadium: Independent Review of the 2011 Vancouver Stanley Cup Playoffs Riot* (Government of British Columbia, 2011) at 20 [Furlong and Keefe]; British Columbia, Ministry of Justice and Attorney General, *BC's Prosecution Service: Report on the 2011 Vancouver Stanley Cup Riot Prosecutions* (January 2016) at 3-5 [*Stanley Cup Riot*]; *Hill*, *supra* note 15 at para 7; British Columbia, Vancouver Police Department, "Vancouver Police Department 2011 Stanley Cup Riot Review" (2011) at 66-69, online: *Vancouver Police Department* <vpd.ca/wp-content/uploads/2021/06/vpd-riot-review.pdf> [*Stanley Cup Riot*].

120 See Furlong and Keefe, *supra* note 119 at 20, 40. See also Stanley Cup Riot, *supra* note 119 at 67-68.

121 See Furlong and Keefe, *ibid* note 119 at 20-24; Stanley Cup Riot, *ibid* note 119 at 68-

As detailed in Part III(C) below, while the riot act appears to have been lawfully invoked in Penticton, the announcements made by police in Fort St. John and Vancouver almost certainly did not meet the requirements of section 67 of the *Criminal Code*.[122] Not surprisingly, there is no evidence that anyone participating in these riots was charged, prosecuted, or convicted of any of the offences set out in section 68.

The *Riot Act* has also been read several times in recent decades in prisons. In 2001, the Warden of the Atlantic Institution (a maximum-security facility in Renous, New Brunswick) read the section 67 proclamation during a three-day riot. During this period, many attempts were made to escape the prison, which were met with various uses of force, including tear gas.[123]

More recently, a riot broke out among over 200 inmates in 2016 in the medium security penitentiary in Prince Albert, Saskatchewan. Approximately two hours after the onset of violence, the Deputy Warden read the riot act proclamation over the institution's loudspeaker system.[124] It took almost four additional hours, however, for order to be restored, during which inmates killed one prisoner and seriously injured two others.[125]

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122 This contradicts pre-existing academic commentary, which has assumed that the riot act was lawfully invoked during the 2011 Vancouver riot. See e.g., Jocelyn Stacey, "Governing Emergencies in an Interjurisdictional Context" in Canada, Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency, vol 5: Policy Papers* (The Commission, 2023) 5-1 at 5-8.

123 See *R v Mickey* (2002), 256 NBR (2d) 198 (NBQB) (conviction for defying proclamation). The court noted seven similar prior incidents at the same institution but did not specify whether the riot act was read in any instance. News reports suggest that the riot act proclamation was also used during riots at the same institution in 2005 and 2007. See CBC News, "Renous prisoners locked down after riot" (18 April 2005); Canadian Press, "N.B. inmates on lockdown after riot" (17 June 2007). See also *Thorne*, *supra* note 29 (new trial ordered defying proclamation during 2001 riot; evidence presented to jury did not demonstrate compliance with section 67, though extrinsic evidence suggested that the provision was complied with).

124 See Douglas Quan, "Anatomy of a prison riot: Burning debris, 'bounce shots' and bloodshed inside Saskatchewan Penitentiary" *National Post* (9 December 2019); Canada, Officer of the Correctional Investigator, *Annual Report: 2017-18* (Ottawa: The Correctional Investigator Canada, 2017) at 42 [*Annual Report*]. See also *R v Watetch*, 2019 SKQB 147 [*Watetch*] (sentencing for manslaughter arising from riot).

125 See Officer of the Correctional Investigator, *Annual Report: 2017-18*, *supra* note 124 at 6, 42; *Watetch*, supra note 124 at paras 4-5. See also Douglas Quan, "Anatomy of a prison riot: Burning debris, 'bounce shots' and bloodshed inside Saskatchewan Penitentiary" (9 December 2019), online: *National Post* (noting that the proclamation

B. Foreign Reforms

While some common law jurisdictions have, like Canada, retained versions of the riot act,[126] most have abolished it. As mentioned, the *Riot Act* was repealed in England and Wales and Northern Ireland in 1967.[127] In extending this repeal to Scotland in 1973,[128] Parliament agreed with the English and Scottish law reform commissions that the Act was "obsolete, spent or unnecessary."[129] Subsequent proposals to enact a new riot act were met with similar criticisms.[130]

In its place, Parliament passed two offences: a prohibition against 12 or more people engaging in riotous behaviour[131] and against three or more people engaging in "violent disorder."[132] Rioters may be held liable for up to 10 years imprisonment, while persons committing the violent disorder offence are liable to a maximum of five years imprisonment.[133]

New Zealand has also done away with the *Riot Act* and its accompanying immunity provisions.[134] Like its British counterpart, its Parliament concluded that the Act had outlived its usefulness given the greatly changed nature of both riots and policing since the early 18th Century.[135] Instead,

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had "little deterrent effect").

126 See e.g., *Unlawful Assemblies and Processions Act, 1958*, No 6406 of 1958, ss 5-7, 16 (Vic, Aus); *Criminal Code Act Compilation Act 1913*, s 66 (WA, Aus).

127 See *Criminal Law Act 1967*, c 58, s 10(2); *Criminal Law Act (Northern Ireland)*, 1967, c 18 s 10(2).

128 See *Statute Law (Repeals) Act 1973* (c 39).

129 See "The Law Commission and The Scottish Law Commission, Statute Law Revision: Fourth Report" (1972) at 35, online: </www.bailii.org/ew/other/EWLC/1972/49.pdf>.

130 See e.g., "The Law Commission, Criminal Law: Offences Relating to Public Order" (1983) at 2-3, online (pdf): <s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jsxou24uy7q/uploads/2016/07/LC.-123-CRIMINAL-LAW-OFFENCES-RELATING-TO-PUBLIC-ORDER.pdf> citing Lord Scarman, "The Brixton Disorders 10-12 April 1981: Report of an Inquiry" (1981) Cmnd 8427 at para 7.31.

131 *The Public Order Act, 1986*, c 64, s 1(1).

132 *Ibid*, s 2(1).

133 *Ibid*, ss 1(6), 2(5).

134 *Crimes Amendment Act 1987* (1987 No 1), s 3.

135 See e.g., Parliamentary Debates, "Legislative Council and House of Commons" (20 November 1985), 1st Session, 41st Parliament, 1985, Vol 467 at 8272 ("[w]hen the precise requirements of section 88 are examined it appears that, in practice, they do not meet the kind of circumstances the police encountered in Aotca Square a year ago"). While others agreed the riot act was "obsolete," they were less enthusiastic about its repeal as such action would "cause some devastation to law students throughout the land who always gained much pleasure from it" and likened the riot act to an "elderly,

New Zealand has made it an offence to be a member of a riot ("a group of 6 or more persons who, acting together, are using violence against persons or property to the alarm of persons in the neighbourhood of that group"). Police and others are also authorized to use "reasonable" force to suppress a riot.[136] Rioters are subject to a maximum term of imprisonment of two years, but if they damage property, the maximum is seven years.[137]

The Australian states of Queensland and New South Wales have also abolished the Act. Like New Zealand, both jurisdictions have created offences for being part of violent assemblies[138] and given police and other persons powers to use reasonable force to quell them.[139] Similar models have been adopted in Ireland[140] and at the federal[141] and state[142] levels in the United States. The widespread repeal of the *Riot Act* in similar jurisdictions, therefore, calls for closer scrutiny of the need to preserve these provisions in Canada.

C. Problems with Canada's Riot Act

Neither the infrequency of the *Riot Act*'s use in modern Canada nor its abolishment in many comparable jurisdictions should be surprising. As we elaborate in this section, it is antiquated, largely ineffective, and unnecessary. Law enforcement officials have adequate powers to handle public disorder without resorting to the riot act proclamation.

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eccentric colleague, who will be fondly remembered." *Ibid* at 8273.

136 *Crimes Act 1961*, 1961 No 43, ss 43-46, 87.

137 *Ibid*, s 90.

138 *Criminal Code Act, 1899*, s 61 (Qnsld, Aus) [*Criminal Code Act*] (creating offence, subject to 3 years imprisonment (or greater where aggravating circumstances) to be part of a group of "12 or more persons who ... use or threaten to use unlawful violence to a person or property for a common purpose ... and the conduct of them taken together would cause a person in the vicinity to reasonably fear for the person's personal safety"); *Crimes Act, 1900*, No 40, s 93B (NSW, Aus) (creating offence, punishable by up to 15 years in prison, for anyone using "unlawful violence" for a "common purpose" when part of a group "12 or more persons" who "use or threaten unlawful violence for a common purpose and the conduct of them (taken together) is such as would cause a person of reasonable firmness present at the scene to fear for his or her personal safety").

139 See *Criminal Code Act, supra* note 138, ss 261-65 (providing powers to use "necessary" and "reasonably proportioned" force to suppress riots); *Police Powers and Responsibilities Act, 2000*, s 51(1) (Qnsld, Aus) ("[i]t is lawful for a police officer to take the steps the police officer reasonably believes are necessary to suppress a riot").

140 See *Criminal Justice (Public Order) Act*, 1994, ss 14-16 (Ireland).

141 See *Anti-Riot Act*, No 90-284, §104(a), 82 Stat 73, 75–77 (11 April 1968).

142 See e.g., *Code of Virginia*, §18.2-405.

To begin, the *Riot Act* is ill-suited to the contemporary realities of policing public order disturbances. Outside of the prison context, the proclamation can only be read by a "justice, mayor or sheriff, or the lawful deputy of a mayor or sheriff."[143] Such officials play a much smaller role in law enforcement today than they did in the past.[144] In theory, requiring officials independent of police to invoke the riot act could serve as a check on overzealous police responses to civil disorder. In practice, however, these officials are unlikely to possess the information necessary to make independent, principled decisions on how to respond.

The size of many contemporary riots may also inhibit the act's legal and practical effectiveness. Section 67 of the *Code* requires a designated official to "go to" the place of the riot, approach it "as near as is safe," "command silence," and be "satisfied that a riot is in progress" before reading the proclamation. For large disturbances in dense urban environments, these requirements may be difficult to meet.

For example, as mentioned in Part III(A), during the 2011 Stanley Cup riot, Vancouver police announced an "unlawful assembly" and directed people to disperse within ten minutes.[145] Whether or not the police believed this constituted a lawful section 67 proclamation, the evidence strongly suggests that it was not. Official reports only state that a police negotiator repeatedly played a recorded message to rioters over a wide geographic area.[146] The message does not appear to have been recorded by any officials designated under section 67.[147] Nor is there any indication that such an official was at the scene when it was broadcast.[148] And the message did not use either the language recommended in section 67 or words of

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143 See *Criminal Code*, *supra* note 7, s 67. The reference to a "sheriff" in the provision appears antiquated as in some provinces "sheriffs" are front-line peace officers with no greater authority, status, or independence from law enforcement than police officers. See *Criminal Code*, *ibid*, s 2 (part (*a*) of the definition of "peace officer").

144 See generally *Newfoundland and Labrador Assn of Public and Private Employees v Newfoundland and Labrador (Minister of Justice)*, [2004] NJ No 134 at paras 25-31 (NfldCA).

145 See Furlong and Keefe, *supra* note 119 at 20.

146 *Ibid* at 20, 40; Stanley Cup Riot, *supra* note 119 at 67-68.

147 A senior police official present at the scene recalled that the message was recorded by a police officer. Personal communication from Doug LePard (15 March 2023). At the relevant time, LePard was Deputy Chief Constable (Operations Division) of the Vancouver Police Department.

148 See *Popovic*, *supra* note 16 at para 31 (QCCQ) (noting that the reader of the proclamation must be present at the scene).

"like effect."[149] As the New Brunswick Court of Appeal concluded in *Thorne v R*, no conviction under section 68 can flow from a proclamation that is neither "in the words referred to in s. 67 or in words which have the same meaning and convey the same message," including the reference to the possibility of a life sentence upon conviction.[150]

While there has been no judicial determination on the question, it is virtually certain that the announcement made during the Stanley Cup riot did not constitute a riot act proclamation under section 67 of the *Criminal Code*.[151] This helps explain why, of the 912 charges laid against 300 rioters, none alleged violations of any proclamation offences in section 68 of the *Code*.[152] The same is true of the purported invocation of the riot act by police in 2006 in Fort St. John.[153]

This is not to suggest that broadcasting such messages is improper. To the extent that warnings of impending police action may assist in dispersing rioters and restoring order, this benefit may be achieved just as readily with informal notice as with the section 67 proclamation. As in the 2011 Vancouver riot, police can simply announce, by whatever means, that the individuals present constitute an "unlawful assembly" or "riot" and are therefore liable to be arrested, charged, and subject to the use of (reasonable) force if they fail to peaceably disperse.[154]

If anyone fails to comply with police orders during a riot, police have several options. As detailed in Part I(A), they would be entitled to arrest anyone they witness committing the offence of being a "member" of an unlawful assembly under section 66(1) of the *Code*.[155] Police would also be

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149 For example, while the recording demanded dispersal within ten minutes, *Criminal Code*, supra note 7, s 68 gives rioters thirty minutes to depart before they commit an offence. See the discussion in Part 1(C), above.

150 See *Thorne*, *supra* note 29 at para 12.

151 For the same reasons, the proclamation read by a police officer in the Fort St. John riot (discussed in Part II(A) above) cannot be considered to have lawfully invoked the riot act.

152 See Stanley Cup Riot, *supra* note 119 at 11; Tania Arvanitidis, *From Revenge to Restoration: Evaluating General Deterrence as a Primary Sentencing Purpose for Rioters in Vancouver, British Columbia* (MA Thesis, Simon Fraser University, 2013) at 65, Table 1, online: <www.csc-scc.gc.ca/research/forum/e012/e012q-eng.shtml>.

153 See the discussion in Part III(A) above.

154 See generally *Canadian Civil Liberties Association v Toronto Police Service*, 2010 ONSC 3525 at paras 127-30 (noting plans of Toronto police to issue "escalating messages" using high-powered loudspeakers to protestors "in the event that lawful demonstrations turn sour" during the G20 summit in 2010).

155 See *Criminal Code*, *supra* note 7 ss 66(1) (creating summary conviction offence), 494(1) (giving all persons, including police, the power to arrest anyone whom they "find

authorized to arrest anyone committing the offence of "taking part" in a riot under section 65. As explained in Part I(B), this is a serious offence punishable by indictment or summary conviction proceedings. Accordingly, police have the power to arrest people for this offence not only if they see them committing it but also if they have reasonable and probable grounds to believe it is being, has been, or is about to be committed.[156] Among the 300 persons charged with offences stemming from the 2011 Vancouver riot, all but two were charged under section 65.[157]

As with unlawful assemblies, section 25 gives police the power to use reasonable force to make such arrests.[158] Moreover, as discussed, section 32 of the *Code* also authorizes police, soldiers, and private citizens to use force to "suppress" riots. This gives police the power to use reasonable and proportionate force to restore order, even against people whom they do not intend to arrest.

Of course, police also have powers to use reasonable force to arrest people for committing many general-purpose offences commonly

committing" a criminal offence), 495(1)(*b*) (giving peace officers the same power). See also *R v McCowan*, 2011 ABPC 79 at para 50 (while arresting officer must personally witness the crime, he or she need not have observed "each and every constituent action of the offence"); *The Queen v Biron*, [1976] 2 SCR 56 at 72 (if officer reasonably concluded that arrestee was committing offence, arrest will lawful even if arrestee is later found not guilty); *R v Roberge*, [1983] 1 SCR 312 at 324-27 (same). See also generally Steve Coughlan and Glen Luther, *Detention and Arrest*, 2nd ed (Toronto: Irwin Law, 2017) at 252-57.

156 See *Criminal Code*, supra note 7, ss 495(1)(*a*) (giving a peace officer the power to arrest anyone without warrant "who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence") and 495(2) (instructing police to arrest without warrant for most offences only when they reasonably believe that it is required to establish identity, secure evidence, ensure appearance in court, or "prevent the continuation or repetition of the offence or the commission of another offence"); *Interpretation Act*, RSC 1985 c I-21, s 34(1)(*a*) (deeming offences to be "indictable" if they may be prosecuted by way of indictment); *Criminal Code*, *ibid*, s 2 (defining "peace officer" as a "police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process"); *R v Storrey*, [1990] 1 SCR 241 at 250-51 (defining reasonable grounds to arrest); *R v Beaudette* (1957), 118 CCC 295 (ONCA) (permitting arrest under s 495(1)(*a*) when police have reasonable and probable grounds to believe that the arrestee made "preparatory steps toward committing a crime").

157 See Stanley Cup Riot, *supra* note 119 at 11.

158 See *Criminal Code*, *supra* note 7, s 25 (giving individuals with law enforcement responsibilities the power to use "much force as is necessary" to do so if they act on "reasonable grounds").

committed during riots, such as assault,[159] arson,[160] common nuisance,[161] mischief,[162] break and enter,[163] causing a disturbance,[164] and obstructing police.[165] They may also arrest rioters for breaching the peace under section 31(1) of the *Code*.[166] Although breaching the peace is not an offence,[167] courts have permitted police to arrest under this provision for conduct that "result[s] in actual or threatened harm to someone."[168]

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159 *Ibid*, ss 265-67 (creating offences for assault, assault with a weapon or causing bodily harm, and aggravated assault).

160 *Ibid*, ss 433-34 (creating offences for "intentionally or recklessly" causing "damage by fire or explosion to property").

161 *Ibid*, s 180 (creating offence for endangering "the lives, safety or health of the public" or causing "physical injury to any person"); *R v Thornton* (1991), 1 OR (3d) 480 (ON CA) aff'd [1993] 2 SCR 445 (where gravity of potential harm is great, even slight risk sufficient to constitute endangerment).

162 See *Criminal Code*, *supra* note 7, s 430 (creating offence for wilfully damaging or interfering with the use of property); *R v Jeffers*, 2012 ONCA 1 at para 19 ("damage must be more than negligible, more than a minor inconvenience").

163 See *Criminal Code*, *supra* note 7, s 348 (creating offence of breaking and entering a place to commit indictable offences).

164 *Ibid*, s 175(1) (creating the offence of causing a "disturbance in or near a public place … by fighting, screaming, shouting, swearing, singing or using insulting or obscene language … being drunk, or … impeding or molesting other persons"; loitering "in a public place" and obstructing "persons who are in that place"; or disturbing "the peace and quiet" of residents "by discharging firearms or by other disorderly conduct in a public place"); *R v Lohnes*, [1992] 1 SCR 167 at 177-78 (offence requires proof of an "overtly manifested disturbance" interfering with the "ordinary and customary use by the public of the place in question" in a manner going beyond "mere mental or emotional annoyance or disruption").

165 See *Criminal Code*, *supra* note 7, s 129(*a*) (creating offence for resisting or wilfully obstructing a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer"). See also Morris Manning and Peter Sankoff, *Manning, Mewitt & Sankoff: Criminal Law*, 5th ed (Toronto: LexisNexis, 2015) at 765-68 (summarizing elements of offence and jurisprudence).

166 See *Criminal Code*, *supra* note 7, s 31(1) (giving a peace officer the power to arrest anyone "he finds committing [a] breach of the peace or who, on reasonable grounds, he believes is about to join in or renew [a] breach of the peace").

167 For criticisms of this power, see James Stribopoulos, "The Rule of Law on Trial: Police Powers, Public Protest, and the G20" in Margaret E Beare, Nathalie Des Rosiers and Abigail C Deshman, eds, *Putting the State on Trial: The Policing of Protest During the G20 Summit* (Vancouver: UBC Press, 2015) 105 at 116-18; Steven Penney and Colton Fehr, "Police Powers and Public Order Disturbances" in Canada, Public Order Emergency Commission, *Report of the Public Inquiry into the 2022 Public Order Emergency, vol 5: Policy Papers* (The Commission, 2023) 10-1 at 10-18 – 10-21.

168 See *Brown v Durham (Regional Municipality) Police Force*, 131 CCC (3d) 1 at para 73 (ONCA). See also *R v Khatchadorian*, 1998 CanLII 6115 at para 8 (BC CA); *R v Lefevbre*

The above-noted powers give police ample legal authority to use reasonable and proportionate force to suppress riots and restore order. As mentioned, police may give advance notice of their intent to use force and the legal jeopardy facing those who fail to peaceably disperse. As discussed in Part I(B), to commit the offence of "taking part in a riot," the accused need not have committed a separate crime; a deliberate refusal to leave the scene is enough to establish liability.[169] But unlike the riot act provisions, police can use their powers to arrest people for taking part in a riot, committing other offences, or breaching the peace regardless of whether a proclamation or any notice was properly given.[170]

It is true that a legally effective section 68 proclamation warns rioters that they face the possibility of life in prison. In theory, this could provide a greater incentive for peaceable dispersion than general warnings of the possibility of arrest, the use of force, and prosecution. This maximum sentence is substantially greater than that available for taking part in a riot under section 65 (normally two years, increased to ten where the offenders wore a "mask or other disguise to conceal their identity"). This promise of enhanced deterrence is reflected in a recommendation made by Correctional Services Canada's internal report on the 2019 Saskatchewan Penitentiary riot that consideration be given to educating inmates on the "meaning and consequences" of the riot act proclamation.[171]

As indicated in Part II(A), however, there is little evidence that the threat of severe punishment provides significant additional deterrence, even in the prison setting. As the Correctional Investigator found in his independent investigation of the Saskatchewan riot, the suggestion that it may have been suppressed more readily if inmates had a better understanding of the consequences of defying the proclamation was not supported by the evidence.[172] The record showed that the "overwhelming

(1982), 1 CCC (3d) 241 (BCSC) aff'd 15 CCC (3d) 503 (BCCA); *R v Januska* (1996), 106 CCC (3d) 183 (ONCA). See also generally *Fleming v Ontario,* 2019 SCC 45 at para 59 (breach of the peace involves "some level of violence and a risk of harm" and excludes "[b]ehaviour that is merely disruptive, annoying or unruly").

169 See *Kuhn*, *supra* note 33 at para 38; *Hill*, *supra* note 15 at para 98.

170 See Stanley Cup Riot, *supra* note 119 at 40 (noting difficulties in broadcasting notices during both the 1994 and 2011 Stanley Cup riots).

171 Cited in *Annual Report*, *supra* note 124 at 55. See also "Legal Implications of the 'Riot Act' Proclamation" (3 May 2015), online: *Government of Canada* < www.canada.ca/en/correctional-service.html> (justifying use of riot act proclamation to provide greater deterrence and give greater latitude for using deadly force).

172 See *Annual Report*, *ibid* note 124 at 55-56, 59 (CSC recommendation on riot act education "misinformed and misplaced").

majority of inmates" who were disciplined for rioting "confirmed that they heard and understood" the proclamation's meaning.[173] "The reading of the *Riot Act*," he concluded, "certainly did *not* have the desired deterrent effect on those ranges that continued to blatantly ignore the order to immediately and peacefully disperse."[174]

Rioting is a social psychological phenomenon ill-suited to rational, cost-benefit calculation.[175] And to the extent that rioters are capable of deliberation, they are likely to (correctly) assume that nothing approaching a life sentence is likely to be imposed for merely failing to disperse when required to do so. While even first-time offenders have frequently been sentenced to non-trivial periods of imprisonment, sentences typically imposed by sentencing judges were for a matter of months and often served pursuant to a conditional sentencing order.[176]

We accordingly recommend that in addition to abolishing the unconstitutional grant of unqualified immunity in section 33(2), Parliament should repeal the following provisions in the *Criminal Code*: sections 67 (empowering designated officials to read the proclamation), 68

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173 *Ibid* at 56.

174 *Ibid* [emphasis added].

175 See generally Tom Postmes and Russell Spears, "Deindividualization and Antinormative Behavior: A Meta-Analysis" (1998) 123:3 Psych Bull 238; Donelson R Forsyth, *Group Dynamics* (Pacific Grove, CA: Brooks/Hole, 2006); Paul B Paulus, ed, *Psychology of Group Influence* (Hillsdale, NJ: Erlbaum, 1980); Marvin E Shaw, *Group Dynamics: The Psychology of Small Group Behavior*, 3rd ed (New York: McGraw-Hill, 1981). See also *R v CMB et al*, 2013 BCPC 52 para 99 (referring to "mob mentality" on display during the Stanley Cup riot).

176 See e.g., Furlong and Keefe, *Independent Review*, *supra* note 119 at 15-16 (noting that 94% of adult rioters received custodial sentences, half of which were to be served in prison and half in the community under a Conditional Sentence Order); *Loewen*, *supra* note 16 at para 2 (Justice Wood dissenting [application for leave] (noting sentences of 6-12 months for Penticton rioters); *Gabriel c R*, 2015 QCCA 1391 at para 8 and n 21 (upholding sentences of 4-15 months incarceration for five offenders convicted of taking part in a riot and listing sentences imposed in other similar cases); *R v Anderson*, [2005] BCJ No 2685, at para 15; *R v IZN*, 2018 BCCA 141 (upholding one-year conditional sentence for youth who took part in correctional facility riot). See also *Peepre*, *supra* note 116 at para 30 (noting that first-time offenders who participated in Stanley Cup riot would receive prison sentence "of *some significant length* if their conduct includes: inciting others; engaging in additional criminal activity, such as assault (particularly of a police officer), arson, or wearing a mask; or committing multiple criminal acts in multiple locations") [emphasis added]; *R v Jacques*, 2002 ABPC 94 at para 23 (noting that "an individual who commits a serious offence under the cover of a riot is likely to receive a term of imprisonment" and imposing 3-month conditional sentence order under house arrest on a youthful adult offender with no prior record).

(creating offences for interfering with the reading of proclamation or failing to disperse), and 33(1) (requiring police to disperse or arrest persons who fail to comply with the proclamation).[177]

V. CONCLUSION

The riot act has outlived its usefulness. Whether it was needed to quell violent disturbances in 1714 or 1892, it is not necessary today. Many other jurisdictions have abolished it, and its infrequent and ineffectual usage in modern Canadian history illustrates why. Numerous laws criminalize participation in violent public disturbances, and police have robust powers to suppress rioting without invoking the riot act. The provision of immunity to persons using excessive violence to enforce the proclamation, moreover, very likely infringes sections 7 and 12 of the *Charter*. In recent years, Parliament has shown a newfound (and welcome) willingness to repeal antiquated, unsound, or unconstitutional provisions of the *Criminal Code*.[178] It is time to add the riot act provisions to that list.

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177 *Criminal Code*, *supra* note 7, s 69, also appears antiquated and unnecessary. As discussed in Part 1(C), it makes peace officers criminally liable for failing to take reasonable steps to suppress a riot. A full discussion of this issue, however, is beyond the scope of this article. See *Berntt*, *supra* note 35 at para 13 (noting that section 69 makes police "criminally liable" if they fail to take "reasonable steps to suppress a riot" yet if they do act, sections 26 and 32 make them criminally liable for using unreasonable or disproportionate force).

178 See e.g., *An Act to amend the Criminal Code, the Youth Criminal Justice Act and other Acts and to make consequential amendments to other Acts*, SC 2019, c 25; *An Act to amend the Criminal Code and the Department of Justice Act and to make consequential amendments to another Act*, SC 2018, c 29.