

Inciting to Riot, Violence, or Insurrection


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By [Rebecca Pirius](#), Attorney

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The First Amendment guards citizens' rights to free speech, to [peaceably assemble](#), and to petition the government. But these rights come with limits. Certain speech or acts receive limited or no First Amendment protections, such as [obscenity](#), [child pornography](#), [threats](#) of violence, and speech that incites riots, violence, or insurrection.

This article will discuss the last item in this list—inciting others to riot, violence, or insurrection. We'll review First Amendment principles at play and highlight federal and state laws that prohibit criminal incitement.

Inciting to Riot, Violence, or Insurrection

Criminal incitement refers to conduct, words, or other means that urge or naturally lead others to riot, violence, or insurrection. Many states and the federal government have enacted laws prohibiting inciting riots, violence, or insurrection, whether by those names or under laws prohibiting [disorderly conduct](#), public disorder, mobs, or [breach of peace](#).

But what about First Amendment protections? How does the law determine when speech crosses the line from protected advocacy to incitement of violence?

The First Amendment: *Brandenburg v. Ohio*

Court decisions stress that democracy cannot stand if speech or conduct disagreeing with the government is criminalized—even when that speech advocates unpopular beliefs, condones racism, or suggests the use of force.

In a seminal case involving a Ku Klux Klan leader, the U.S. Supreme Court found that a KKK leader's anti-black, anti-Semitic, and anti-government comments were [protected speech](#), even those comments that suggested taking future "revengeance" (sic) on the federal government.

To cross the legal threshold from protected to unprotected speech, the Supreme Court held the speaker must *intend to incite or produce imminent lawless action*, and the speaker's words or conduct must *be likely to produce such action*. These requirements are known as the *Brandenburg* test. (*Brandenburg v. Ohio*, 395 U.S. 444 (1969).)

Applying the *Brandenburg* Test

Cases applying the *Brandenburg* test stress just how high the bar is set before the government can criminalize some violence.

First, incitement to violence requires proof that the defendant intended to incite violence or riot (whether or not it is "emotionally charged rhetoric" does not meet this standard. Second, the defendant must create a sort of roadmap for general or vague references to some future act doesn't qualify as imminent lawless action. Finally, the defendant's words must provoke, or urge a crowd to violence. Profanity or offensive messaging alone isn't enough; the messaging must apprise of imminent violence. (*NAACP v. Claiborne Hardware, Co.*, 458 U.S. 886 (1982); *Hess v. Indiana*, 414 U.S. 105 (1973).

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Federal Incitement Crimes

Below are federal statutes that punish acts relating to inciting riots, violence, crimes, or insurrection. Both federal and state laws (listed in the next



section) are subject to the First Amendment principles outlined above.

Federal Anti-Riot Act

In response to times of [civil unrest](#) in the 1960s, Congress enacted the Federal Anti-Riot Act. This law makes it a five-year [felony](#) to travel between states or use a type of interstate commerce (such as mail, phone, wireless communications, or broadcast), intending to:

- incite a riot
- participate in or carry on a riot, or
- commit an act of violence in furtherance of a riot.

A riot means a public disturbance involving three or more persons whose actions or threats represent an immediate danger to persons or property. (18 U.S.C. §§ 2101, 2102 (2020).)

Inciting Insurrection or Rebellion Against the U.S. Government

Federal law also prohibits inciting, assisting, or engaging in any rebellion or insurrection against the authority, laws, or operations of the U.S. Government. To convict, the prosecutor must show the defendant knowingly committed an overt act to further [insurrection](#). A conviction carries up to 10 years in [federal prison](#). (18 U.S.C. § 2383 (2020); *Yates v. U.S.*, 354 U.S. 298 (1957).)

State Incitement Crimes

Below are examples of state statutes prohibiting incitement to riot, violence, and insurrection. Penalties vary widely from months of jail time to years in prison. (This section also includes the District of Columbia Code.)

California. California makes it a [misdemeanor](#) to engage in conduct that urges others to riot, commit acts of force or violence, or commit acts of burning or destroying property. The person must intend that the conduct causes such conduct. A person convicted of incitement to riot faces up to a year in jail and a \$1,000 fine. (Cal. Penal Code § 404.6 (2020).)

District of Columbia. Willfully inciting or urging others to engage in a riot results in up to a [six-month jail sentence](#). The penalty bumps up to a [10-year prison](#) sentence if the riot results in serious bodily harm to a victim or more than \$5,000 in property damage. (D.C. Code § 22-1322 (2020).)

Georgia. Inciting others to overthrow or attempt to overthrow state or local government and committing a violent act in furtherance of that goal can be punished by [one to ten years' incarceration](#) in Georgia. (Ga. Code § 16-11-3 (2020).)

Florida. Florida prohibits inciting or encouraging a riot. A conviction results in a third-degree [felony](#), punishable by up to five years in prison and a \$5,000 fine. (Fla. Stat. § 870.01 (2020).)

Ohio. Ohio makes it a crime to engage in conduct designed to urge or incite another to commit a crime of violence when that conduct creates a clear and present danger of violence or results in violence. The penalty depends on the crime being instigated. If the person urges others to commit a misdemeanor crime of violence, the penalty is a first-degree [misdemeanor](#). For inciting a felony crime of violence, the penalty is a third-degree [felony](#). (Ohio Code § 2917.01 (2020).)

South Carolina. In South Carolina, a person who instigates or promotes a riot commits a [misdemeanor](#) and faces up to two years' imprisonment. A five-year [felony](#) applies if either:

- the offender carries a firearm or dangerous weapon during the riot, or
- the riot or acts of violence are directed at resisting enforcement of a law or to obstruct the duties of a public officer. (S.C. Code § 16-5-130 (2020).)

Talk to a Lawyer

If you've been charged with inciting a riot or violence, contact a [criminal defense attorney](#). Because charges can be want to determine where your charges are filed and find an attorney who practices in that jurisdiction.

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