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# Long, Hot Summer: A Legal View

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# SURVEY

## THE LONG, HOT SUMMER: A LEGAL VIEW

### I. Riot Prevention

#### *A. Introduction*

The number and severity of race-related disturbances has increased steadily from 1961 to 1967.[1] In the search for the causes of this violent civil disorder, the conclusion most often reached is that the riots are a direct attack on the conditions of slum ghetto existence.[2] Therefore, the most effective anti-riot legislation is undoubtedly that in the form of social and economic measures designed to eliminate the root causes of poverty and discrimination.

However, as long as the conditions which spawn the riots exist, it is essential that law enforcement officials be prepared to suppress the disturbances promptly whenever they occur. The purpose of this Note is to examine selected legal problems that arise in the context of mass urban disorder and to suggest possible solutions. First considered is an analysis of the legal foundations of the police and military functions pertinent to riot prevention and control. Then, the scope of the suppression power during the actual riot situation is delineated. Finally, an in-depth treatment is offered on the possible sources of recovery for riot victims who attempt to assert their claims in the aftermath of the disaster.

#### *B. State Statutory Controls*

1. State Powers and Duties

The primary responsibility for keeping the peace by the prevention and suppression of disorder falls upon state and local law enforcement agencies. This is in accord with the principle that the general duty of the administration of

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1 For a comprehensive city-by-city outline of racial disturbance from 1961 to September 25, 1967, see P. Downing, "Race Riots, 1961 to September 25, 1967," Civil Disorder (Legislative Reference Service of Library of Congress, Aug. 4, 1967). As of July 27th, 1967, the total riot costs for the year 1967 were summarized as follows:

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|---|---|
| Number of riots: | 42 |
| Killed: | 78 |
| Injured: | 3,120 |
| Arrests: | 7,050 |
| Property Damage: | $524 million |

These figures were gathered from newspaper reports and reprinted in 36 CONG. Q. 1707 (Sept. 8, 1967).

2 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 37 (1967). *See generally* GOVERNOR'S COMMISSION ON THE LOS ANGELES RIOTS, VIOLENCE IN THE CITY — AN END OR A BEGINNING? (1965). The National Advisory Commission on Civil Disorders has pointed out that one of the most "bitter fruits" of "white racism" has been the formation of Black ghettos. These ghettos are an integral part of the "explosive mixture which has been accumulating in our cities since the end of World War II." NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS, REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 203-04 (Bantam ed. 1968) (hereinafter cited as RIOT COMMISSION REPORT).

criminal justice rests with the states.[3] The riot itself, and any crimes committed during its course, such as murder, assault, arson, theft and vandalism, are all violations of state law. Therefore, it is necessary to examine and evaluate the existing legal machinery that states employ to cope with urban racial violence.

State provisions dealing with the riot situation generally follow a pattern formulated by the common law. Three distinct common-law crimes pertaining to the disruption of public order were recognized by Blackstone. "Unlawful assembly" occurred when three or more persons assembled with the common intention of performing an unlawful act in a violent and tumultuous manner.[4] If action was taken to further this illegal cause, the activity was characterized as a "rout."[5] "Riot" itself was committed when the mob actually employed force or violence to accomplish its illegal purpose.[6] Several states have no statutory provisions relating directly to riot[7] and thus still rely primarily on these common-law definitions. Other states maintain the common-law crimes as a supplement to their statutory enactments.[8] These riot statutes themselves, although varying in form, incorporate the common-law dichotomy between unlawful assembly and riot.[9] The crime of rout is usually either abandoned or merged with unlawful assembly.[10] Thus, the fundamental state legal tools for the protection of the public order from violence are based on the common-law conception of riot, supplemented by statutory prohibitions against disorderly conduct and breach of the peace.[11]

2. State Statutory Scheme

*a. Unlawful Assembly*

Unlawful assembly statutes have as a basic requirement the assemblance of at least two,[12] and usually three,[13] persons with the common purpose of performing an unlawful act. The states are divided as to whether there must be an intention to perform the planned activity in a violent manner. Many states require the presence, or at least the threat, of force or violence disruptive of public order. The Iowa statute is a typical example of this class:

> When three or more persons in a violent or tumultuous manner assemble together to do an unlawful act, or, when together, attempt to do an act, whether lawful or unlawful, in an unlawful, violent, or tumultuous

3 Jerome v. United States, 318 U.S. 101, 104-05 (1943). *See also* United States v. Cruikshank, 92 U.S. 542, 556 (1876); 41 Op. Att'y Gen. 313, 322-23 (1963).
4 4 Blackstone, Commentaries *146.
5 *Id.*
6 *Id.*
7 For example, the laws of Mississippi, Tennessee, and Wyoming do not specifically define and prohibit a "riot."
8 *See, e.g.*, Commonwealth v. Frishman, 235 Mass. 449, 455, 126 N.E. 838, 840 (1920).
9 *E.g.*, Iowa Code Ann. § 743.1 (unlawful assembly), § 743.2 (riot) (1950).
10 *See, e.g.*, N.Y. Penal Law §§ 240.00-.10 (McKinney 1967). *Contra* Cal. Penal Code § 406 (West 1955).
11 Disorderly conduct and breach of the peace offenses are considered in the context of demonstration controls in Part C see text accompanying notes 89-140 *infra.*
12 *E.g.*, Ala. Code tit. 14, § 407 (1959); Cal. Penal Code § 407 (West 1955).
13 *E.g.*, Del. Code Ann. tit. 11, § 361 (1953); N.Y. Penal Law § 240.10 (McKinney 1967); Ore Rev. Stat. § 166.040(2) (1953).

> manner, to the disturbance of others, they are guilty of an unlawful assembly. . . .[14]

In other jurisdictions, however, the element of force or violence need not be present to sustain a conviction if the purpose of the assembly is unlawful. The California unlawful assembly provision is representative of this latter category of statutes:

> Whenever two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, . . . such an assembly is an unlawful assembly.[15]

In addition to raising constitutional difficulties,[16] such a formulation tends to obscure the basic common-law conception of unlawful assembly as an anticipatory act to a riot.

The Supreme Court has upheld state legislation that prohibits assemblies having as their purpose the execution of an unlawful act by means of force or violence. In *Cole v. Arkansas*[17] the Court stated that there was "no abridgment of free speech or assembly for the criminal sanctions of the state" to be fastened upon persons "promoting, encouraging and aiding an assemblage the purpose of which is to wreak violence."[18] However, convictions under some of the statutes containing vague terminology have been reversed on the ground that the statute's overly broad language failed to establish adequate standards for distinguishing between constitutionally permissible and constitutionally impermissible suppression.[19] These difficulties usually arise when the offense of unlawful assembly is employed in specific cases against conduct that does not pose an immediate threat to public safety.[20] Presumably, this argument would not be available to participants who assemble with the intention of creating or furthering the type of disorder that has characterized a modern urban riot.

Historically, unlawful assembly statutes were used chiefly to suppress the violence that has often accompanied labor disputes.[21] During the early period of the civil rights movement, at least one Southern state employed this sanction against sit-in demonstrators assembling at lunch counters and department stores.[22] Although the terminology of most state provisions is broad enough to cover almost any type of unruly gathering,[23] the antiquated forms in which the statutes are cast indicate that they were not intended to cope with modern mass urban

14 IOWA CODE ANN. § 743.1 (1950).
15 CAL. PENAL CODE § 407 (West 1955).
16 In State v. Bulot, 175 La. 21, 142 So. 787 (1932), an unlawful assembly statute was struck down because the lack of a requirment for violence gave police officers too much discretion in applying the provision to peaceful assemblies.
17 338 U.S. 345 (1949).
18 *Id.* at 353-54.
19 *E.g.*, Wright v. Georgia, 373 U.S. 284, 292 (1963).
20 In the *Wright* case, the statute in question had been applied to six Negroes whose "unlawful assembly" consisted of playing basketball in a public park that had traditionally been segregated for "whites only." There was no evidence of any activity that could be characterized as a breach of the peace. *Id.* at 285.
21 *E.g.*, Cole v. State, 214 Ark. 387, 216 S.W.2d 402, *aff'd*, 338 U.S. 345 (1949).
22 *See generally* Pollitt, *Dime Store Demonstrations: Events and Legal Problems of First Sixty Days*, 1960 DUKE L.J. 315, 334.
23 *See* the cases collected in Annot., 71 A.L.R.2d 875 (1960).

disorder. However, by modernizing the language of the statutes, an effective riot-prevention tool can be forged.

In the context of an urban riot, a modern unlawful assembly provision should be so formulated so as to place a legal sanction on each member of a mob that forms with the intention of doing violence. The special efficacy of such a formulation is that it would enable the police to arrest violators for the offense even before any violence actually occurs.[24] For example, such a law would be of great value in a situation where a demagogue exhorts a crowd of fifteen or twenty persons in a slum area to stone a passing police car. Once the group acquiesces in this common purpose, the people comprising the crowd can all be held guilty of unlawful assembly, whether or not the project is actually accomplished.[25]

The recently adopted New York Penal Code incorporates an unlawful assembly provision that is specifically designed to achieve this purpose:

> A person is guilty of unlawful assembly when he assembles with four or more other persons for the purpose of engaging or preparing to engage with them in tumultuous and violent conduct likely to cause public alarm, or when, being present at an assembly which either has or develops such purpose, he remains there with intent to advance that purpose.[26]

The Practice Commentary to the New York Penal Code states that the statute is designed to make unlawful assembly an "inchoate or anticipatory offense" with respect to an actual riot.[27] Conceivably, the provision might have been constitutionally strengthened by replacing the broad phrase, "likely to cause public alarm," with a more explicit "clear and present danger" test, keying upon the probability that grave violence would result if immediate action were not taken. In this way, the first amendment rights of free speech and assembly would be better insulated from abuse, and more emphasis would be placed on the preventive nature of the law. However, even as it is presently phrased, the New York statute illustrates the useful function that a modern unlawful assembly provision can perform in the prevention of urban disorder: it provides legal authority to arrest each member of a threatening mob before violence breaks out.

*b. Riot*

The statutory riot provisions have the same general purpose as the common law upon which they are based: the maintenance of public order. The essence of riot implies the idea of lawless mobs bent on accomplishing some object in a violent and tumultuous manner.[28] Although the statutes vary widely in form, their basic framework is similar.

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24 The actual commission of the intended violence is not an element of the offense of unlawful assembly, but rather it is the distinction between unlawful assembly and the crime of riot. BLACKSTONE, *supra* notes 4 & 6.

25 *See* Denzer & McQuillan, *Practice Commentary*, N.Y. PENAL LAW § 240.08, at 121-22 (McKinney 1967).

26 N.Y. PENAL LAW § 240.10 (McKinney 1967).

27 Denzer & McQuillan, *supra* note 25, § 240.10, at 122.

28 People v. Edelson, 169 Misc. 386, 7 N.Y.S.2d 323 (Kings County Ct. 1938).

> The essential elements of the crime as defined by statute are: (a) An assemblage of three or more persons for any purpose; (b) use or attempted use of force or violence against property or persons . . . ; and (c) a resulting disturbance of the public peace.[29]

Although many of the statutes remain couched in archaic language, the typical form is illustrated by the Minnesota provision:

> When three or more persons assembled disturb the public peace by an intentional act or threat of unlawful force or violence to person or property, each participant therein is guilty of riot . . . [30]

At least three states have varied this traditional pattern by placing the crime of riot in the more explicit context of illegal mob action.[31] Here again, the primary focus is upon the preservation of peace and order. Mob action is defined in the same terms as riot, but the penalties are structured so as to be most severe when actual injury to persons or property results from the disorder.[32]

There is no doubt that the states have the constitutional power to punish individuals for participation in riotous assemblies. When the statutes have been challenged on constitutional grounds, the main thrust of the argument has centered on the vagueness of the terminology as applied to a particular factual situation. A three-judge federal district court in *International Longshoremen's and Warehousemen's Union v. Ackerman*[33] held the riot statute of Hawaii unconstitutional because the criterion of "striking terror or tending to strike terror into others"[34] was necessarily one that must be "purely subjective and hence objectionable."[35] Such a rationale could cast doubts on nearly all state riot acts, since "public alarm,"[36] "disturbing the public peace,"[37] or "terror"[38] is the language commonly employed to differentiate riot from other types of permissible assemblies. However, the *Ackerman* case was reversed on other grounds on appeal without a discussion of the subjective standard point.[39] More recently, in *Carmichael v. Allen*,[40] an attempt was made to secure a federal injunction to prevent enforcement of the Georgia riot statute on the ground that it was "too vague and uncertain to state any ascertainable standard of guilt."[41] The threat-

29 State v. Winkels, 204 Minn. 466, 468, 283 N.W. 763, 764 (1939).
30 MINN. STAT. ANNOT. § 609.71 (1964).
31 N.H. REV. STAT. ANN. § 609-A:1 (Supp. 1967); N.J. STAT. ANN. § 2A:126-1 (1953); OHIO REV. CODE ANN. § 3761.01 (Page 1954).
32 *E.g.*, N.H. REV. STAT. ANN. §609-A:2,3 (Supp. 1967).
33 82 F. Supp. 65 (D. Hawaii 1948), *rev'd on other grounds*, 187 F.2d 860 (9th Cir.), *cert. denied*, 342 U.S. 859 (1951).
34 HAWAII REV. LAWS § 11571 (1945), as quoted in 82 F. Supp. at 96 n.60.
35 *Id.* at 101.
36 N.Y. PENAL LAW § 240.05-.06 (McKinney 1967).
37 CAL. PENAL CODE § 404 (West 1955).
38 DEL. CODE ANN. tit. 11, § 361 (1953).
39 International Longshoremen's & Warehousemen's Union v. Ackerman, 187 F.2d 860 (9th Cir.), *cert. denied*, 342 U.S. 859 (1951), *rev'g on other grounds*, 82 F. Supp. 65 (D. Hawaii 1948).
40 267 F. Supp. 985 (N.D. Ga. 1967).
41 *Id.* at 995. The state riot statute in question provided:

> Any two or more persons who shall do an unlawful act of violence or *any other act in a violent and tumultuous manner*, shall be guilty of a riot . . . . GA. CODE ANN. § 26-5302 (1953) (emphasis added).

Petitioner argued that the statute was unconstitutional in that there were many presumably

ened riot indictment in this case came as a result of activities engaged in by the petitioners during a violent racial disturbance in Atlanta on September 6th and 10th, 1966. The court, in refusing to issue the injunction, held that the acts charged in the indictment were obviously within the power of the state to punish as a type of hard-core public misconduct that would be prohibited under any construction of the statute.[42] Thus, it appears that a constitutional argument based on vagueness would not be available to participants in mass urban violence who were being prosecuted under the standard form of riot statutes.

As was the case with unlawful assembly provisions, the riot statutes have traditionally found their most prolific application in the area of labor disputes.[43] Although the common-law concept of riot embodied in the statutes is broad enough to cover urban violence, the effective use of statutory riot provisions in this field could be hampered by their archaic form.[44] In the more recent racial disturbances, it appears that there were relatively few prosecutions under the riot statutes. Instead, most rioters were indicted for crimes that were committed incidentally to the riot itself, such as arson, assault and battery, resisting arrest, and larceny.[45] Nevertheless, a well-drafted riot statute can still serve a vital function in the context of modern urban disorder. Under such a provision, an individual engaging in mob violence could be prosecuted for a felony offense when it would be difficult to indict him personally for one of the more traditional incidental crimes committed during the course of the riot.

The new New York riot provisions are designed to accomplish this very purpose. The crime of riot is divided into two offenses. The lesser offense, riot in the second degree, focuses on riotous conduct that is terminated before actual injury results, and it renders participants guilty of a misdemeanor.

> A person is guilty of riot in the second degree when, simultaneously with four or more other persons, he engages in tumultuous and violent conduct and thereby intentionally or recklessly causes or creates a grave risk of causing public alarm.[46]

The crime of riot in the first degree increases the penalty to a felony offense if the proscribed conduct actually results in personal injury or property damage.

> A person is guilty of riot in the first degree when (a) simultaneously with ten or more other persons he engages in tumultouous [*sic*] and violent conduct and thereby intentionally or recklessly causes or creates a grave

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legal acts done in a violent and tumultuous manner that were beyond the power of the legislature to proscribe. However, the prosecution recognized this weakness in the statute and was careful to charge only unlawful acts in the indictment. Carmichael v. Allen, 267 F. Supp. 985, 995 (N.D. Ga. 1967). *See also* Remarks of Lewis R. Slaton, Greenbrier Conference of the National District Attorneys Association, Aug., 1967, printed in *Riot Panel*, 3 THE PROSECUTOR 282, 285 (1967).

42 Carmichael v. Allen, 267 F. Supp. 985, 996 (N.D. Ga. 1967).

43 *E.g.*, People v. Brown, 193 App. Div. 203, 184 N.Y.S. 165 (Sup. Ct. App. Div. 1920).

44 *See, e.g.*, CONN. GEN. STAT. ANN. § 53-169 (Supp. 1967).

45 During the August, 1965 Watts riot in Los Angeles, 71% of the 3,438 adults and 81% of the 514 juveniles arrested were charged with the crimes of burglary and larceny. GOVERNOR'S COMMISSION ON THE LOS ANGELES RIOTS, *supra* note 2, at 24.

46 N.Y. PENAL LAW § 240.05 (McKinney 1967).

> risk of causing public alarm, and (b) in the course of and as a result of such conduct, a person other than one of the participants suffers physical injury or substantial property damage occurs.[47]

As explained in the Practice Commentary to the New York Penal Code, this latter formulation of the crime of riot is drafted to conform to the usual conception of a "genuine" urban riot. The minimum number of people required to constitute a riot is increased from three to eleven, and the violence produced must now result in actual harm.[48] The phrase, "tumultuous and violent conduct," is described as meaning more than just loud noise or disturbance and is designed to include "frightening mob behavior involving ominous threats of injury, stone throwing or other such terrorizing acts."[49] Presumably, "public alarm" would also be construed in such a fashion that its existence would depend on grave danger to life and property, rather than mere annoyance or inconvenience. As such, the New York statute stands as an example of the necessary function that a riot provision must serve: it shifts the emphasis from retribution for the commission of some incidental crime and imposes a direct legal penalty on intentional and active participation in the riot itself.

*c. Inciting to Riot*

An inciting to riot provision focuses upon the instigator of the disorder, rather than upon the participants. Its function is to provide a legal basis for silencing demagogues who create a clear and present danger of serious public disorder by going beyond the boundaries of protected speech in an attempt to stir an assemblage into the use of illegal force or violence. Action can be taken against the agitator even before the requisite number of persons necessary for unlawful assembly acquiesce in the proposed riotous activity.[50]

Obviously, the major problem encountered in this area is defining the crime of inciting to riot in such terms so as to take it out from under the free speech guarantees of the first amendment. Although the Supreme Court has made it clear that the fundamental rights of the first amendment are so vital that they are to be accorded the utmost protection,[51] the Court has recognized that there are limits to the exercise of these liberties. Words which by their very utterance tend to incite an immediate breach of the peace have been placed in "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem."[52] Even more explicitly, the Court stated in *Cantwell v. Connecticut*[53] that

> [n]o one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot . . . . When clear and present danger of riot, disorder, . . . or other immediate threat to public safety,

47 *Id.* § 240.06.
48 Denzer & McQuillan, *supra* note 25, § 240.06, at 121.
49 *Id.* § 240.05, at 118-19.
50 *Id.* § 240.08, at 121-122.
51 United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see* Dombrowski v. Pfister, 380 U.S. 479, 486-87 (1965).
52 Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942).
53 310 U.S. 296 (1940).

> peace, or order, appears, the power of the state to prevent or punish is obvious.[54]

The factual pattern in *Feiner v. New York*[55] most closely approximates the type of situation that is likely to occur in a modern urban ghetto. Feiner made an inflamatory speech to a group of about seventy-five or eighty Negroes and whites gathered on a city street. Both the thrust of his remarks and his manner of speaking were directed at arousing the Negro audience to rise up in arms and fight against the whites. When the crowd's reaction, both for and against the speaker, threatened to erupt into violence, the police attempted to disperse the assembly. Because Feiner refused to step down, he was placed under arrest for the offense of breaching the peace. In upholding Feiner's conviction, the Court noted that when a "speaker passes the bounds of argument or persuasion and undertakes incitement to riot,"[56] the police are not powerless to act if "motivated solely by a proper concern for the preservation of order and protection of the general welfare."[57]

Both *Cantwell* and *Feiner* were cited with apparent approval in a more recent decision in *Cox v. Louisiana*.[58] Although the Court in *Cox* distinguished them on their facts, it pointed out that nothing said in the opinion was "to be interpreted as sanctioning riotous conduct in any form."[59] Thus, it is clearly within the power of the state to proscribe speech that intentionally threatens to incite violence, provided that the customary test of "clear and present danger"[60] is satisfied.

State courts have not been hesitant to uphold convictions based on inciting to riot against the agitators who played a part in the more recent urban disturbances. During a disturbance in Philadelphia in August, 1964, the defendant in *Commonwealth v. Hayes*[61] was observed leading a large crowd in directing chants against the police and attempting to hinder the dispersal of an unruly gathering. Evidently there was no violence when the defendant first appeared on the scene, but after he began to lead the assembly, a witness testified that:

> [E]verything just seemed to cave in at once. Bottles and bricks and whatever kind of missiles that could be thrown started to rain down from the air, and windows started breaking all over the place.[62]

The Supreme Court of Pennsylvania concluded that evidence of this nature was sufficient to support a conviction of inciting to riot. Apparently this court assumed that speech that is intentionally used to incite such illegal activity is

54 *Id.* at 308.
55 340 U.S. 315 (1951).
56 *Id.* at 321.
57 *Id.* at 319.
58 379 U.S. 536, 551, 554 (1965). Here, the judgment of the Supreme Court of Louisiana, upholding the convictions of demonstrators under a breach of the peace statute and an obstructing public passages statute, was reversed on the grounds that the statutes were unconstitutionally applied and enforced. *Id.* at 552, 558.
59 *Id.* at 559, 574.
60 Dennis v. United States, 341 U.S. 494, 505 (1951). *See also* Yates v. United States, 354 U.S. 298, 321 (1957).
61 205 Pa. Super. 338, 209 A.2d 38 (1965).
62 *Id.* at 342, 209 A.2d at 40.

conclusively within the power of the state to punish, because it did not even discuss the conviction in the context of the first amendment. In *Lynch v. State*,[63] however, the Court of Special Appeals of Maryland, in upholding an inciting to riot conviction, made a point of specifically distinguishing the type of remarks that had been made by the defendant from the classes of speech protected by the Constitution.[64] Relying primarily on *Feiner v. New York*,[65] the court held that such exhortations as "Rise up and unite white man and fight" following a diatribe against Negroes, Jews, and other minority groups were a factor in inciting some of the estimated three thousand listeners to commit the acts of violence which ensued.[66]

It is interesting to note that in both *Lynch* and *Hayes* the arrests, which were based not on statutes but on the common-law crime of inciting to riot,[67] were made after the speeches had brought about actual riotous conduct. By pointing to this actual result, the courts could easily conclude that the language employed posed a clear and present danger to public order. However, the eruption of violence after an inflammatory speech should not be a condition precedent to prosecution if the crime of inciting to riot is to serve as a preventive as well as a punitive measure. A legal basis for silencing the intentional agitator is created once a clear and present danger situation arises. Although dispensing with the requirement that actual disorder must result from the inciter's activity makes the offense more susceptible to arbitrary abuse, the Supreme Court has recognized the need for such discretion and has upheld its exercise when performed with the sole motive of preventing serious violence.[68]

Many states have failed to enact an inciting to riot provision in addition to the normal statutory prohibitions against riot and unlawful assembly. As has been seen in *Hayes* and *Lynch*, there is a common-law basis for the crime that can be employed in those states lacking a statutory prohibition. However, probably as a direct result of the widespread occurrence of racial violence, the distinct trend among these states is toward adoption of a specific inciting to riot statute.[69] The recent Georgia provision illustrates the form into which the offense is usually cast:

> Any person who, with intent to cause a riot, does an act or engages in conduct which urges, counsels, or advises others to riot, at a time and place and under circumstances which produce a clear and present danger of a riot, shall be guilty of a misdemeanor.[70]

Although there have been no reported cases under these new statutes, they

63 236 A.2d 45 (Md. 1967).
64 *Id.* at 48-54.
65 340 U.S. 315 (1951).
66 Lynch v. State, 236 A.2d 45, 43-54 (Md. 1967).
67 *Id.* at 55; Commonwealth v. Hayes, 205 Pa. Super. 338, 341, 209 A.2d 38, 39 (1965).
68 Feiner v. New York, 340 U.S. 315, 319 (1951).
69 *E.g.*, CAL. PENAL CODE § 404.6 (West Supp. 1967); GA. CODE ANN. § 26-5304 (Supp. 1967); N.Y. PENAL LAW § 240.08 (McKinney 1967); TEX. PEN. CODE art. 466a (Supp. 1967).
70 GA. CODE ANN. § 26-5304 (Supp. 1967). The General Assembly of Georgia is expected to increase the penalty for inciting to riot from a misdemeanor to a felony in 1968. Remarks of Lewis R. Slaton, *supra* note 41, at 285.

seem to emphasize sufficiently the preventive nature of an inciting to riot measure and are couched in the judicially acceptable terms of clear and present danger.

*d. Conspiracy*

As yet, there is no evidence that some form of nationwide conspiracy has been responsible for the planning and execution of the recent urban violence.[71] Nevertheless, on the local scene, various radical organizations have been quick to seize upon discontent growing out of a spontaneous incident and to enkindle it into full scale disorder.[72] Often the individuals in the organizations so involved do not take part in the actual riot activity, yet it is their behind-the-scene manipulations that determine the course and extent of the violence. Such conduct falls within both the spirit and the letter of the law proscribing criminal conspiracies.

In *People v. Epton*[73] a conviction based on conspiracy to incite riot was upheld by the New York Court of Appeals. Evidence produced at the trial established that, during the Harlem riots of July, 1964, Epton and his co-conspirators did their utmost to stir into violence the unrest caused by the shooting of a fifteen-year-old boy by an off-duty police lieutenant. The court clearly distinguished the conspiracy charge from the crime of riot itself:

> The essence of a conspiracy is an agreement or plan among two or more persons to commit a crime in the future. The crime of riot, however, is not committed until three or more persons, actually assembled, have disturbed or immediately threatened the public peace. A previous agreement or plan is not a necessary element of the crime. . . . One who agrees with others to organize a riot sometime in the future and who commits an overt act pursuant to that agreement is guilty not of riot but of conspiracy to riot.[74]

Although Epton argued that his conviction could not stand because the bulk of the evidence against him centered on his speech, this contention was rejected as a misunderstanding of the gravamen of a conspiracy to riot charge.[75] It was not speech, but the illegal agreement that constituted the essence of the crime. Furthermore, while recognizing the first amendment limitations upon prosecution for non-speech crimes when the evidence consists solely of speech, the court concluded that the language employed fell outside the scope of constitutional protection. It created a "clear and present danger" of attempting or accomplishing the prohibited crime.[76]

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71 RIOT COMMISSION REPORT, *supra* note 2, at 202.

72 In People v. Epton, 19 N.Y.2d 496, 227 N.E.2d 829, 281 N.Y.S.2d 9 (1967), *cert. denied,* 88 S. Ct. 824 (1968), the defendant, convicted of conspiracy to incite riot, was president of the Harlem club of the Progressive Labor Movement. *Id.* at 501, 227 N.E.2d at 831-32, 281 N.Y.S.2d at 12. Other radical organizations that advocate violence to achieve desired goals include the Revolutionary Action Movement and the Nation of Islam. *See* Excerpts from the Testimony of J. Edgar Hoover before the House Subcommittee on Appropriations, reprinted in 36 CONG. Q. 1711 (Sept. 8, 1967).

73 19 N.Y. 2d 496, 227 N.E.2d 829, 281 N.Y.S.2d 9 (1967), *cert. denied,* 88 S. Ct. 824 (1968).

74 *Id.* at 508, 227 N.E.2d at 836, 281 N.Y.S.2d at 18.

75 *Id.* at 507, 227 N.E.2d at 835, 281 N.Y.S.2d at 18.

76 *Id.,* 227 N.E.2d at 836, 281 N.Y.S.2d at 18.

The case illustrates the useful function that a conspiracy charge can perform in the prevention of mass urban violence. This penal sanction can be applied to the activities of conspirators even before their illegal plan is executed. The overt act required for a conspiracy indictment does not have to be the riot itself, but can consist of any preliminary independent action performed by one of the conspirators in order to bring the planned disturbance into existence.[77] If violence does erupt as a result of the agreement, the agitators can be prosecuted both for the conspiracy and the substantive crime of riot, even though they may not be physically present at the riot scene.[78]

*e. Emergency Powers*

State legislatures often grant to cities various emergency powers that can be employed to preserve public health and safety during periods of natural disaster or civil disorder.[79] If the rioting in a city becomes intensive or threatens to spread, authority can be found in these provisions for such tactical measures as the imposition of a curfew, restrictions on the sale of gas and liquor, and a blockade of the riot area.[80] The local district attorney should keep a catalogue of the emergency powers available to the various public officials in order to insure that the required action can be taken without undue delay.[81] As in the other areas of riot legislation, the usefulness of many of these emergency powers is hindered because they were not drafted to cope with the problems of mass urban racial violence.[82] One state, Ohio, has recently passed a statute that is expressly designed to delegate to local authorities the power to impose necessary restrictions during a period of riot:

> The chief administrative officer of a political subdivision with police powers, when engaged in suppressing a riot or when there is a clear and present danger of a riot, may cordon off any area or areas threatened by such riot and prohibit persons from entering such area or areas . . . and may prohibit the sale . . . or transportation of firearms or . . . other dangerous explosives in, to, or from such areas. . . .[83]

77 Although something more than mere conversation among conspirators forming and planning the riot would be necessary, one federal court has gone so far as to designate the making of a telephone call as an "overt act" sufficient to sustain a conspiracy conviction. Bartoli v. United States, 192 F.2d 130, 132 (4th Cir. 1951).

78 Pinkerton v. United States, 328 U.S. 640, 645-47 (1946).

79 *E.g.*, WIS. STAT. ANN. § 66.325 (1965):

> (1) Not withstanding any other provision of law to the contrary, the common council of any city of the first class is empowered to declare, by ordinance or resolution, an emergency existing within such city whenever conditions arise by reason of . . . riot or civil commotion . . . .
>
> (2) The emergency power of the common council herewith conferred shall include such general authority to order, by ordinance or resolution, whatever is necessary and expedient for the health, safety, welfare and good order of such city in such emergency . . . .

80 RIOT COMMISSION REPORT, *supra* note 2, at 524-25. The National Advisory Commission on Civil Disorders has recognized the efficacy of the measures and has recommended that states adopt legislation that will specifically authorize their employment in emergency situations. *Id.* at 524-27.

81 Remarks of Melvin G. Rueger, Greenbrier Conference of the National District Attorneys Association, Aug. 1967, printed in *Riot Panel, supra* note 41, at 287.

82 *E.g.*, CONN. GEN. STAT. ANN. § 53:169 (Supp. 1967).

83 OHIO REV. CODE ANN. § 3761.16 (Page Current Material Binder 1967).

If properly implemented by local officials, such a statute appears to be a legitimate exercise of emergency police power. Although freedom of movement is probably not accorded the same degree of importance as the basic first amendment guarantees, it has received recognition as a significant right.[84] Nevertheless, considering the efficacy of a curfew and other related measures in riot suppression and control, a vital state interest can be recognized in their utilization during such disorders.[85] The clear and present danger test incorporated into the statute serves to insure a reasonable and acceptable standard by which the necessity for the emergency restrictions can be judged.

3. Conclusion

The major defect hindering the effective application of state riot provisions is the archaic terminology employed in the statutes. The existence of common-law formulations of the crimes in the statutes often results in one of two extremes: the wording is so vague as to be susceptible to constitutional challenge[86] or the elements are specified in technical terms that have little relation to the factual pattern of a modern urban riot.[87] However, by modernizing the language of existing statutes and adding, when necessary, a well drafted inciting to riot provision, a state can provide an adequate legal foundation for prosecuting those who attempt to cause or actually participate in urban violence. Proper utilization of the conspiracy and inciting to riot statutes can serve to silence agitators whenever their activity intentionally causes a clear and present danger of grave public disorder. The unlawful assembly and riot provisions place a blanket legal sanction on all who participate in mob action that threatens or in fact produces a riot situation. Finally, in addition to the above offenses, a state can also indict a rioter for any of the substantive incidental crimes, such as arson or looting, that he may personally commit during the course of the riot.[88]

### *C. State Power Over the Right to Demonstrate*

1. Scope of Power

Although the majority of the recent riots were characterized as "spontaneous

84 Kent v. Dulles, 357 U.S. 116, 125-27 (1958). *See also* Edwards v. California, 314 U.S. 160, 177-181 (1941) (concurring opinion of Justice Douglas).

85 Roadblocks and a curfew used in conjunction with massive force sweep tactics were credited with an important role in bringing the August 11-17, 1965 Watts riot in Los Angeles under control. GOVERNOR'S COMMISSION ON THE LOS ANGELES RIOTS, VIOLENCE IN THE CITY — AN END OR A BEGINNING? 20, 21 (1965).

86 *See* International Longshoremen's & Warehousemen's Union v. Ackerman, 82 F. Supp. 65, 101 (D. Hawaii 1948), *rev'd on other grounds*, 187 F.2d 860 (9th Cir.), *cert. denied*, 342 U.S. 859 (1951); *cf.* Baker v. Binder, 274 F. Supp. 658, 661 (W.D. Ken. 1967).

87 *E.g.*, MASS. ANN. LAWS ch. 269, § 1 (Supp. 1966). The National Advisory Commission on Civil Disorders has recognized the need for updating and strengthening state riot control statutes. RIOT COMMISSION REPORT, *supra* note 2, at 523-24.

88 The National Advisory Commission on Civil Disorders concluded as a result of a survey that there was "no basic lack of legal tools available to control disorders." RIOT COMMISSION REPORT, *supra* note 2, at 522. The Commission has recommended, however, the adoption of certain additional state legislation to cover specific problem areas. It cited the need for measures designed to restrict the sale of firearms, proscribe the manufacture or possession of incendiary devices ("Molotov cocktails") and prohibit forceful interference with the work of firemen or other emergency workers. *Id.* at 522-23.

outbursts,"[89] there have been instances when planned demonstrations have degenerated into mob action resulting in serious violence.[90] The purpose of this section is to outline the legal procedure that a state governmental agency can employ to prohibit or control such demonstrations in racially tense areas. The basic problem is structured by the conflict between first amendment rights granting freedom of speech and assembly and the police power of the state to preserve public peace and order.

There is no doubt that peaceful assemblies are protected under the Constitution. The ability to demonstrate en masse has proved to be a vital tool for minorities wishing to air their grievances in public view. Such conduct has been upheld, even when the views expressed by the demonstration were extremely unpopular.[91] Often it is the only recourse for groups who find publication in the mass media either ineffective or prohibitively expensive.[92]

Nevertheless, the right to demonstrate is not accorded the same privilege as communication by "pure speech." In *Cox v. Louisiana*[93] the Supreme Court stated that

> [W]e emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.[94]

Obviously, when a demonstration loses its peaceful character, the state can intercede and effect dispersal of the demonstrators.[95] A more complex problem results when the demonstration itself remains peaceful, but its presence in a racially tense area incites spectators to violence. In such a situation, the general rule is that the right of assembly cannot be abridged merely because of a hostile audience reaction.[96] Rather, it is the duty of the state to provide adequate police protection to insure the safety of the demonstrators.[97] However, if the magnitude of the impending disorder poses a serious danger to life and property, suppression or regulation of the demonstration may be warranted.[98] Thus, whether it be the

89 PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 37 (1967).

90 The wave of violent demonstrations which occurred in Chicago during the summer of 1966 is chronicled in City of Chicago v. King, 86 Ill. App. 2d 340, 343-49, 230 N.E.2d 41, 42-46 (1967). During 1966 and 1967, demonstrations in the following cities resulted in riots or serious disorder: Birmingham, Ala. Jan. 11, 1966; Lorman, Miss. April 4, 1966; Philadelphia, Miss. June 21, 1966; Jacksonville, Fla. July 18-19, 1966; Louisville, Ky. April 20, 1967; Houston, Texas May 16-17, 1967; Boston, Mass. June 2-4, 1967. 36 CONG. Q., *supra* note 72, at 1710-12.

91 Cox v. Louisiana, 379 U.S. 536, 551-52 (1965). *See generally* H. KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT 140-60 (1965).

92 *See* Adderley v. Florida, 385 U.S. 39, 50-51 (1966) (dissenting opinion of Justice Douglas); Williams v. Wallace, 240 F. Supp. 100, 106 (M.D. Ala. 1965).

93 379 U.S. 536 (1965).

94 *Id.* at 555.

95 *E.g.*, Pritchard v. Downie, 326 F.2d 323 (8th Cir. 1964); State v. Leary, 264 N.C. 51, 140 S.E.2d 756 (1965).

96 *See* the cases cited in note 125 *infra* and accompanying text.

97 *See* Hague v. CIO, 307 U.S. 496, 516 (1939); Kelly v. Page, 335 F.2d 114, (5th Cir. 1964); Williams v. Wallace, 240 F. Supp. 100, 110 (M.D. Ala. 1965).

98 *See* City of Chicago v. King, 86 Ill. App. 2d 340, 346-47, 230 N.E.2d 41, 44 (1967); *cf.* Walker v. City of Birmingham, 388 U.S. 307, 315-17 (1967).

demonstrators themselves or the spectators who pose the threat of uncontrollable riot, the essential questions remain the same: at what point in time, and by what legal methods, can the state act to restrict freedom of assembly?

2. Timing of State Action

In *Cantwell v. Connecticut*[99] the Supreme Court pointed out that a state has the power not only to punish, but also to prevent, immediate threats to public safety, such as riots and similar disorders.[100] Thus, if an otherwise legal demonstration threatens to erupt into riot, it would seem that the state can act to disperse it before the violence actually occurs. In an analogous situation occurring during a labor dispute, the Court sustained an injunction against all picketing, including that which was peaceful, when the past activity was marred by violence that threatened to recur.[101] This is basically an application of the "clear and present danger" test to the right of free assembly.

The major problem with the clear and present danger doctrine inheres in its application to a specific set of circumstances. For example, in *Terminiello v. Chicago*[102] both Justice Douglas speaking for the majority and Justice Jackson in dissent agreed that the doctrine should be employed, but they differed as to whether the particular conduct in question posed the requisite menace to justify state action.[103] However, when a threatening urban demonstration is considered in the context of the recent wave of serious disorders that have swept the country, the need for state regulation is readily apparent. One commentator has suggested that a demonstration in such an area as the Watts section of Los Angeles during a period of unrest could by its very presence induce violence.[104] In such a case, it would seem that the state could act to prevent or at least stringently control that presence before any disorder occurred.

3. Methods of Control

*a. Breach of the Peace Statutes*

Statutes and ordinances proscribing breach of the peace or disorderly conduct have traditionally been the primary tools employed by the states to regulate demonstrations. However, in a series of cases beginning with *Edwards v. South Carolina*[105] and culminating in *Cox v. Louisiana*,[106] the Supreme Court has cast grave doubts on the constitutionality of these measures when they are used for that purpose. The primary objection centers on the vague terminology used in such statutes to define the offenses, because the language "sweeps within its broad scope activities that are constitutionally protected free speech and assembly."[107] It is important to note, however, that in the cases where the statutes

99 310 U.S. 296 (1940).
100 *Id.* at 308.
101 Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287 (1941).
102 337 U.S. 1 (1949).
103 *Id.* at 4-5, 26. *See* Comment, *Freedom of Assembly*, 15 DEPAUL L. REV. 317, 321-23 (1966).
104 Note, *Regulation of Demonstrations*, 80 HARV. L. REV. 1773, 1774 (1967).
105 372 U.S. 229 (1963).
106 379 U.S. 536 (1965).
107 *Id.* at 552.

were struck down, the conduct to which they had been applied was in fact protected. The demonstrations were essentially peaceful, or at the least they did not pose the clear threat of violence characterized by an urban riot.[108]

In the last few years there has been a shift in the philosophy of the Negro movement. The theory of non-violence embedded in the early sit-in demonstrations has been replaced to some degree by the more militant views of the vociferous advocates of "Black Power." The transition has been manifested by a marked increase in "community harassment" and, in some cases, has led to actual riot.[109] The question arising from this change in tactics is whether the type of the breach of the peace statutes that the Court held void when applied to peaceful civil rights demonstrations will also be struck down when employed to regulate militant demonstrations threatening the more violent forms of the recent urban disturbances.

As yet, the Supreme Court has not passed on this issue. But it would seem that, even if the statutes were vague in wording, they would still be effective to proscribe the hard-core conduct that is encompassed by even the strictest type of statutory interpretation. In *Carmichael v. Allen*[110] a federal district court employed this rationale to uphold Georgia's riot statute, but it declined to afford the same treatment to a broadly worded municipal disorderly conduct ordinance.[111] Although the conduct in question was clearly within the power of the state to proscribe under the state riot statute, the court enjoined the employment of the municipal ordinance because its vague terminology readily permitted the executive and judiciary "to make a crime out of what is protected activity."[112]

This decision suggests that the standard breach of the peace and disorderly conduct provisions may be too vaguely worded to be an adequate tool in the regulation of demonstrations, even when violence is threatened or actually erupts. However, because of the broad spectrum of conduct that can validly be prohibited as a "breach of the peace," it is virtually impossible to draft the definitions in precise terms.[113] Thus, although states should reexamine the language of such statutes in an attempt to eliminate the more obvious ambiguities, the primary test of validity should turn on the conduct to which they are in fact applied. A certain amount of discretion on the part of law enforcement officials is a necessity. It is the state's responsibility to exercise this discretion in such a manner as to prohibit only that type of activity that is clearly beyond the pale of constitutional protection.

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108 In both *Edwards* and *Cox,* the demonstrators engaged in singing and cheering, but the Court made an independent examination of the record and found that the conduct could not constitutionally be prohibited as a breach of the peace. Edwards v. South Carolina, 372 U.S. 229, 233-35 (1963); Cox v. Louisiana 379 U.S. 536, 545-51 (1965).

109 H. ABRAHAM, FREEDOM AND THE COURT 298-99 (1967). *See generally* Costanzo, *Public Protest and Civil Disobedience: Moral and Legal Considerations,* 13 LOYOLA L. REV. 21, 50-53 (1967).

110 267 F. Supp. 985 (N.D. Ga. 1967).

111 *Id.* at 996, 997-99. See note 41 *supra* for the language of the state riot statute.

112 267 F. Supp. at 999.

113 DENZER & MCQUILLAN, *Practice Commentary,* N.Y. PENAL LAW § 240.20(7), at 129 (McKinney 1967).

*b. Parade Permits*

Many municipalities maintain ordinances requiring those who wish to use the public streets for the purpose of staging a demonstration to acquire prior approval in the form of a parade permit. Although the Supreme Court upheld this type of regulation in *Cox v. New Hampshire*,[114] it was careful to delineate the exact limits of such authority. The undoubted power of the municipality to control the use of its streets for parades was recognized, but the inherent discretion could only be exercised with a " 'systematic, consistent and just order of treatment, with reference to the convenience of public use of the highways . . . .' "[115] It is important to note that the ordinance in *Cox*, as narrowly construed by the state court, was strictly a measure for traffic control. The city had no power to deny a permit because of the content of the message that the demonstration sought to convey.[116]

The rhetoric of "public convenience" in a parade permit ordinance could conceivably be extended to authorize the denial of a parade permit because the demonstration would create a clear and present danger of serious public disorder.[117] However, such a determination would necessarily involve a subjective judgment on the part of the official issuing the permit. The Supreme Court has been extremely reluctant to tolerate this type of administrative discretion on the grounds that it often results in either a prior restraint of the rights of free speech and assembly or a denial of equal protection. In *Cox v. Louisiana*[118] the Court pointed out that

> [i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups . . . by use of a statute providing a system of broad discretionary licensing power . . . .[119]

Hence, it appears that parade permits are valid insofar as they are restricted to the purely empirical function of traffic regulation. But when an official has the power to deny a permit because he believes that the demonstration will cause a serious danger of riot, his decision necessarily incorporates a personal appraisal of the content of the message to be conveyed.[120] Such discretion is clearly prone to the type of abuse condemned in *Cox v. Louisiana*.[121] Thus, although a state or city has the authority to suppress demonstrations that pose a serious threat to public safety, this power should not be exercised by means of the permit system. Because of the subjective elements involved, a more

114 312 U.S. 569 (1941).
115 *Id.* at 576, adopting the language of the New Hampshire Supreme Court in State v. Cox, 91 N.H. 137, 143, 16 A.2d 508, 513 (1940).
116 312 U.S. at 575-76.
117 In *Walker v. City of Birmingham*, 388 U.S. 307 (1967), the Court, in discussing a parade permit, implied that a properly drafted and enforced permit system could be employed to prevent "public disorder and violence." *Id.* at 315-17. *See* notes 131-136 *infra* and accompanying text.
118 379 U.S. 536 (1965).
119 *Id.* at 557.
120 *See* Hague v. CIO, 307 U.S. 496 (1939), where a permit ordinance was held void on its face partly because "[i]t enable[d] the Director of Safety to refuse a permit on his mere opinion that such refusal will prevent 'riots, disturbances or disorderly assemblage.' " *Id.* at 516.
121 379 U.S. 536 (1965).

formal judicial process should be required for ascertaining the facts in each case and weighing them in the context of the "clear and present danger" doctrine.

*c. Judicial Control*

The equity power of a court can be effectively employed as a means of exercising state control over demonstrations. Upon a showing of clear and present danger, a court can lay down specific regulations as to the size, place and time of the proposed demonstration in order to insure that it can be kept under proper police control. Such an injunction can be based either on the power of the court to enjoin violations of a statute, such as a breach of the peace provision,[122] or on the general equity power to meet with an emergency situation.[123] The validity of the decree will depend upon the extent to which it meets the exigencies of the particular situation without needlessly infringing upon protected conduct.[124]

Although the Supreme Court has continually stated that the exercise of constitutional rights cannot be infringed because of hostile audience reaction,[125] there is some authority for the proposition that an injunction can be issued when the magnitude of anticipated disorder threatens to exceed effective police control.[126] Such a situation arose in Chicago during the summer of 1966. Civil rights leaders had embarked upon a program of "creative tension," and the result was several million dollars of property damage, the death of 27 persons and injury to 374 others, including 61 police officers.[127] Much of this violence seemed to emanate from mobs of spectators who constantly harassed the demonstrators, even though the police department strained to provide adequate protection.[128] Finally, the City of Chicago applied for and received a temporary injunction severely limiting the size of future demonstrations, restricting them to daylight hours (exclusive of rush-traffic periods), and requiring twenty-four hours' advance notice of their location.[129] In discussing the necessity of these regulations, the Appellate Court of Illinois seemed impressed with the allegation unless the demonstrations were subject to such measures, the burden placed

122 *See* Walker v. City of Birmingham, 388 U.S. 307, 309, 315 (1967).

123 *See* City of Chicago v. King, 86 Ill. App. 2d 340, 353-54, 230 N.E.2d 41, 47-48 (1967).

124 *E.g.*, Milk Wagon Drivers Local 753 v. Meadowmoor Dairies, Inc., 312 U.S. 287, 298 (1941).

125 Cox v. Louisiana, 379 U.S. 536, 551-52 (1965); Wright v. Georgia, 373 U.S. 284, 292-93 (1963); Watson v. City of Memphis, 373 U.S. 526, 535 (1963); Cooper v. Aaron, 358 U.S. 1, 16 (1958); Brown v. Board of Educ., 349 U.S. 294, 300 (1955). *See generally* Pollitt, *Free Speech for Mustangs and Mavericks*, 46 N.C.L. Rev. 39 (1967).

126 City of Chicago v. King, 86 Ill. App. 2d 340, 346-47, 230 N.E.2d 41, 44 (1967); *cf.* Walker v. City of Birmingham, 388 U.S. 307, 315 (1967).

127 City of Chicago v. King, 86 Ill. App. 2d 340, 342-47, 230 N.E.2d 41, 42-45 (1967).

128 Chicago's Superintendent of Police, O. W. Wilson, charged that in fact the demonstrators did not want adequate police protection.

> I believe that it was the aim of these marchers to subject themselves to violence. If the marches were conducted without incident, nothing would be gained. The violence which occurs is in fact their bargaining wedge. If violence occurs, they can make demands upon the city administration and in return for the granting of those demands agree to end the marches and thereby the violence. Otherwise they have no bargaining power. For this reason, those in charge of the marches do not really want adequate police protection . . . . Wilson, *Civil Disturbances and the Rule of Law*, 58 J. Crim. L.C. & P.S. 155, 159 (1967).

129 City of Chicago v. King, 86 Ill. App. 2d 340, 342-43, 230 N.E.2d 41, 42 (1967). *See* Pollitt, *supra* note 125, at 41-42; Note, *supra* note 104, at 1787 n.86.

on the police department would seriously hinder its ability to preserve peace and prevent crime throughout the entire city of Chicago.[130]

The point of discussing this case is not to call for a general reappraisal of the "hostile audience" doctrine. The right to protest against the majority — peacefully, but with force and vigor — obviously cannot be suspended because of the existence of civil rights tensions in the major cities. However, when the demonstrations that provoke the hostility are carried on in such a fashion as to seriously endanger the safety of not only those who demonstrate, but also the entire community, a state must be permitted to regulate such demonstrations after balancing the interest of the individual against that of society itself.[131] In such a situation, it is both reasonable and necessary to allow a court to subject a demonstration to stringent regulations designed to protect the rights of all persons who are both directly and indirectly affected by the activity.

Once an injunction is granted, the demonstrators are bound to obey it until its expiration or its dissolution through the ordinary methods of appeal. There is no right to engage in the proscribed activity under the theory that the decree was erroneous and then attack it collaterally when cited for contempt.[132] This familiar principle was reaffirmed by a severely divided Court in the recent case of *Walker v. City of Birmingham*.[133] A state circuit court had granted an injunction prohibiting the petitioners from violating a local parade ordinance by engaging in unlicensed demonstrations. Alleging that the decree was clearly unconstitutional, the petitioners proceeded to conduct their demonstrations as planned and were later convicted of contempt. Justice Stewart, speaking for the majority, conceded that the breadth and vagueness of the language employed in both the parade ordinance and the injunction would certainly be subject to substantial constitutional question.[134] However, after pointing out that the state court clearly had jurisdiction over the petitioners and the subject matter of the dispute, he refused to characterize the injunction as "transparently invalid or [having] only a frivolous pretense to validity."[135] Thus the contempt convictions were upheld because the litigants failed to test the injunction according to the prescribed procedure for review. Although there may be doubts as to the ultimate wisdom of the policy embraced by the majority,[136] it does have the advantage of forcing demonstrators whose conduct could validly be proscribed to fight their battle in the courts and not in the streets.

130 City of Chicago v. King, 86 Ill. App. 2d 340, 345-46, 230 N.E.2d 41, 43-44 (1967).
131 *See* Wilson, *supra* note 128, at 159. The Chicago Police Superintendent attributed the marked increase in crime in the entire city during periods of civil disorder to the fact that "a tremendous amount of police personnel and effort had been diverted from crime fighting to dealing with civil disturbances." *Id.* at 158.
132 Howat v. Kansas, 258 U.S. 181, 189-90 (1922).
133 388 U.S. 307 (1967).
134 *Id.* at 316-17.
135 *Id.* at 315.
136 In dissent, Justice Brennan pointed out that
> [w]e cannot permit fears of "riots" and "civil disobedience" generated by slogans like "Black Power" to divert our attention from what is here at stake — not violence or the right of the State to control its streets and sidewalks, but the insulation from attack of *ex parte* orders and legislation upon which they are based even when patently impermissible prior restraints on the exercise of First Amendment rights, thus arming the state courts with the power to punish as a "contempt" what they otherwise could not punish at all. *Id.* at 349 (dissenting opinion).

*d. Police Discretion*

There is no doubt that the police have the power to suppress a demonstration when it crosses the bounds of peaceful protest and erupts into violence.[137] The more subtle problem arises in those borderline cases in which actual disorder has not yet occurred, but there seems to be a clear and present danger that some violence will result. It is understandably difficult for police to make on-the-spot distinctions between validly proscribed disorderly conduct and that form of protected activity that "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[138] Nevertheless, the decision to characterize a demonstration as illegal is first made at the scene by the police, and they must be accorded the necessary discretion to act quickly in the interests of public safety.

The importance of extensive tactical training for police in the field of demonstration control cannot be overemphasized.[139] In the past, police activity during demonstrations has been marred by incidents of serious abuse by some police officers.[140] A peaceful demonstration should not be looked upon with disapproval by a police agency. Rather, it should be considered a safety valve possibly serving to prevent a riot. The spark that could transform a peaceful assembly into a violent mob could very easily be supplied by arbitrary and unwarranted police action. The power in the police to make on-the-spot decisions is present by reason of necessity, the ability to make these decisions correctly is just as essential.

4. Conclusion

The state has a valid interest in suppressing demonstrations that present a clear and present danger of riot or other serious public disorder. However, because of the first amendment rights involved, this authority cannot be employed arbitrarily. There is no doubt that the state can take all reasonable measures necessary to preserve public peace and safety. Nevertheless, unsubstantiated claims of riot prevention will not justify excessive restrictions on assemblies that are essentially peaceful in themselves, or do not pose an uncontrollable threat to the safety of the state. Thus, the fundamental element in demonstration control is the proper exercise of discretion in determining the need for regulation and in fashioning restrictions to meet the specific circumstances of each situation.

### *D. Federal Riot Statutes*

1. The Anti-Riot Statute

On April 10, 1968, the Congress passed H.R. 2516,[141] a civil rights bill

137 *E.g.*, Pritchard v. Downie, 326 F.2d 323 (8th Cir. 1964); State v. Leary, 264 N.C. 51, 140 S.E.2d 756 (1965).

138 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

139 *See* RIOT COMMISSION REPORT, *supra* note 2, at 328-29. *See also* Leary, *The Role of the Police in Riotous Demonstrations*, 40 NOTRE DAME LAWYER 499 (1965).

140 *See* Note, *supra* note 104, at 1785 n.75.

141 114 CONG. REC. 2758-826 (daily ed. April 10, 1968). The entire bill, as passed by the Senate and adopted by the House, is reprinted in 114 CONG. REC. 2578-83 (daily ed. March 11, 1968).

that included a provision making it a federal crime to use any facility of interstate commerce to incite or engage in a riot.[142] This measure was signed into law by the President on April 11, 1968.[143] Whereas state laws center primarily on the disturbance itself, the avowed purpose of the federal criminal statute is to focus on the individual who crosses a state line for the purpose of enkindling public disorder.[144] The section is patterned after the Anti-Racketeering Act[145] and is intended to supplement local law enforcement by assuring federal investigative and prosecutive jurisdiction over "out-of-state" inciters.[146]

The history of the anti-riot provision is rather intricate. Its nucleus can be found in H.R. 421,[147] which passed the House on July 19, 1967.[148] H.R. 421 was strongly criticized by certain Congressmen who pointed out that, among other defects, the definition of inciting to riot was so vague as to be unconstitutional under the first amendment.[149] The Senate did not act on H.R. 421 as such. However, when the Senate was in the process of strengthening the civil rights aspects of H.R. 2516, proponents of an anti-riot statute were able to incorporate the basic features of H.R. 421 into the civil rights bill by means of amendments.[150] Although the present anti-riot statute closely parallels the provisions of H.R. 421,[151] an attempt was made in the Senate amendment to define the crime in more precise language so as to avoid any constitutional challenges.[152] Nevertheless, when the amended civil rights bill was returned to the House, there were still strong reservations concerning the anti-riot measure.[153] However, because of the "realities of the parliamentary situation,"[154] which necessitated acceptance of the anti-riot amendment if the open housing and other civil rights provisions were to be accepted, the measure was passed without prolonged debate.[155]

One of the underlying rationales behind the federal anti-riot statute appears to be the assumption that outside agitators have played a major part in causing modern urban disturbances. As yet, the proof on this issue has certainly not been conclusive. There seems, however, to be no doubt that the immediate cause of nearly all the recent riots has been a spontaneous incident, usually involving police action in a ghetto area.[156] Once the rioting was under way, certain extremist elements became active, but often as not these groups were

142 H.R. 2516, 90th Cong., 2d Sess., ch. 102, §§ 2101-02 (1968), now 18 U.S.C. §§ 2101-02.
143 N.Y. Times, April 2, 1968, at 1, col. 1.
144 H.R. Rep. No. 472, 90th Cong., 1st Sess. 3 (1967).
145 18 U.S.C. §§ 1951-54 (1964).
146 H.R. Rep. No. 472, *supra* note 144, at 3.
147 H.R. 421, 90th Cong., 1st Sess., ch. 102 (1967).
148 113 Cong. Rec. 9010-11 (daily ed. July 19, 1967).
149 *See, e.g., id.*, at 8953-54 (remarks by Rep. Conyers and Rep. Mathias and excerpt from letter of Lawrence Speiser, American Civil Liberties Union).
150 On March 5, 1968, the anti-riot amendment was added to S. 2516 on the floor of the Senate. 114 Cong. Rec. 2220-32 (daily ed. March 5, 1968).
151 114 Cong. Rec. 2764 (daily ed. April 10, 1968) (remarks of Rep. Celler).
152 *Id.* at 2815 (reprint of Memorandum on H.R. 2516 prepared by House Committee on the Judiciary).
153 *Id.* at 2794-95 (remarks of Rep. Ryan).
154 *Id.*
155 *Id.* at 2758-826.
156 *See* President's Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society 37 (1967).

locally based and the crossing of state lines was not involved.[157] In the relatively few cases where outside agitators were present,[158] state criminal laws were adequate to proscribe their conduct.[159]

Of course, even a few inciters traveling interstate with the intention to create a disorder can produce tremendous harm. By being available in such situations, the federal statute can play an important, but limited, role in dealing with riots.[160] Nevertheless, the great majority of street disturbances will probably not be affected by the federal statute but will remain exclusively within the state's criminal jurisdiction.

However, even putting aside doubts cast upon its constitutionality or utility, the federal statute is still open to a basic objection. A criminal statute, whether federal or state, cannot come to grips with the underlying causes of civil disorder.[161] A truly effective congressional anti-riot act would aim at the real problems behind urban riots, such as slum housing, unemployment, and inadequate educational and vocational training programs.[162] These root causes do call for a program that is national in scope, whereas the less challenging task of drafting local police statutes can be relegated to the more appropriate hands of the states. It is to be hoped that Congress has not become distracted from its real obligation by the specific anti-riot section in H.R. 2516, but will come to realize that the most effective anti-riot measures in that law are the open-housing and other civil rights provisions.

2. Control of Riot Reporting by Mass Media

Certain members of Congress also expressed an interest in holding hearings to determine what role the mass communications media plays in inciting and spreading the riots. Charges were leveled that early on-the-spot coverage of the disturbances tended to foment further rioting.[163] Senator Hugh Scott suggested the formulation of a voluntary code under which the news media would

157 For example, the element of the Progressive Labor Movement that was active during the Harlem riots of July, 1964, seems to have been locally based. *See* People v. Epton, 19 N.Y.2d 496, 501, 227 N.E.2d 829, 831-32, 281 N.Y.S.2d 9, 12-13 (1967), *cert. denied,* 88 S. Ct. 824 (1968).

158 In a survey of the twenty-six major race riots between April 1 and July 21, 1967, outside agitators were conclusively found to be present in only seven of the disorders. P. Downing, S. Schlesinger & F. Wyman, "Riots, April 1 to July 21, 1967," Civil Disorder, 1-14 (Legislative Reference Service of Library of Congress Aug. 4, 1967).

The seven cases where the presence of outside agitators was conclusively established are as follows: Willie Ricks (Jackson, Miss., May 12-13, 1967). *Id.* at 2. Stokely Carmichael (Nashville, Tenn. April 8-10, 1967; Houston, Texas, May 16-17, 1967; Prattville, Ala., June 11, 1967; Atlanta, Ga., June 18-21, 1967). *Id.* at 1, 3, 4, 7. H. Rapp Brown (Cincinnati, Ohio, June 12-16, 1967; Dayton, Ohio, June 14-15, 1967). *Id.* at 5, 6. All the above-named individuals are officers of the Student Non-violent Coordinating Committee.

159 *See* note 88 *supra* and accompanying text. Stokely Carmichael's attempt to secure a federal injunction against state prosecution under the Georgia riot statute was thwarted in Carmichael v. Allen, 267 F. Supp. 985 (N.D. Ga. 1967). Notes 40-42 *supra* and accompanying text.

160 Riot Commission Report, *supra* note 2, at 224.

161 *Id.*

162 *See* 113 Cong. Rec., *supra* note 148, at 8945-49 (remarks of Rep. Conyers and Rep. Ryan).

163 Representative Durward G. Hall stated:

> A Stokely Carmichael calling for insurrection on a street corner soapbox is a curiosity — a hippie talking to other hippies. But a Stokely Carmichael talking face-to-face to millions of people (via television) is immediately transformed from

balance the inflammatory statements of riot agitators by presenting at the same time appeals from moderates and government officials.[164] Most executives in the communications industry opposed any imposition of a code, but instead stressed that the best guideline would be the professional judgment of responsible newsmen.[165] At present, it does not appear that any congressional action will be taken to impose restraints on the television or press coverage of riots. Senator Scott has been reported to have abandoned further action on the matter, since "his letters had perhaps served the purpose of causing the industry to examine itself and that this introspection might be sufficient for the time being."[166]

Some of the criticism leveled at the media, at least during the first wave of riots, probably was justified since reporters were inexperienced in handling such situations. The McCone Report, which attempted to dissect the causes of the 1965 Watts riot in Los Angeles, pointed out a lack of balance in the coverage of the early stages of that disorder.[167] Mayor Richard Daley, speaking of disturbances in Chicago during the summer of 1966, claimed that the very presence of the mass media tended to incite rioting. He stated that "in disturbances resulting from protest marches, the television cameras didn't seek the violence, the violence sought the camera."[168] Public officials in Toledo, Ohio, and Newark, New Jersey, also attributed to television a contributing role in their riots.[169]

In an attempt to limit these adverse effects, certain principles of responsible riot coverage have been articulated by the School of Journalism and the Department of Telecommunications of the University of Southern California. These measures have been incorporated into a model code containing sixteen provisions that emphasize the common-sense factors of balanced coverage, inobtrusive presence and prudent reporting of inflammatory incidents.[170] Voluntary adherence to such guidelines is probably the most effective method for insuring that riots are reported in a reasonable manner. Moreover, any form of government-imposed regulations that are enforced by sanctions, such as suspension of

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an oddball to a national figure. Reprinted in 36 CONG. Q. 1756 (Sept. 8, 1967). Representative Torbert H. Macdonald expressed interest in learning whether news coverage operated to put police at a tactical disadvantage.

> I . . . am very concerned whether or not spot coverage of riots tends to foment further rioting. There is some question as to whether those intent on criminal actions use the news media to ascertain where the police are — or are not. 113 CONG. REC. 11265 (daily ed. Aug. 25, 1967).

164 Senator Scott's suggestion is reported in Younger, *Roll a Car — You're on TV!*, 3 THE PROSECUTOR 424, 425 (1967). *See also* 36 CONG. Q., *supra* note 163, at 1756.

165 *See* 36 CONG. Q., *supra* note 163, at 1757; Younger, *supra* note 164, at 425-26.

166 36 CONG. Q., *supra* note 163, at 1757.

167 Discussing a meeting widely covered by the press, radio, and television which occurred immediately before the major outbreak of rioting, the Commission points out that

> one Negro high school youth ran to the microphones and said the rioters would attack adjacent white areas that evening. This inflammatory remark was widely reported on television and radio, and it was seldom balanced by reporting of the many responsible statements made at the meeting. GOVERNOR'S COMMISSION ON THE LOS ANGELES RIOTS, VIOLENCE IN THE CITY — AN END OR A BEGINNING? 13 (1965).

168 Mayor Daley is quoted in Haddad, *A Code for Riot Reporting*, 6 COLUM. JOURNALISM REV. 35 (Spring 1967).

169 36 CONG. Q., *supra* note 163, at 1756.

170 Haddad, *supra* note 168, at 35. *See generally* RIOT COMMISSION REPORT, *supra* note 2, at 362-86.

the broadcasting license by the Federal Communications Commission,[171] would have to be very precisely drafted to avoid infringement of first amendment rights. Therefore, it is submitted that the most practical course at the present time would be to avoid imposing any restrictions that might hinder the media's essential role of carrying news to the public accurately and to trust the media to recognize its responsibility to the community in riot coverage.[172]

## II. Riot Control and Suppression

### *A. Introduction*

It is essential that a state equip itself in advance for the quick and orderly suppression of domestic violence occurring within its borders. The formulation of a sound system of constitutional riot-control laws, however, is not, of itself, sufficient equipment. Because laws are meaningless if not enforced, the state must also be prepared to act surely and swiftly to quell any disturbance that causes their breakdown. It must be prepared to protect or restore immediately the operation of law and order.

An obstacle to the rapid implementation of control measures in riot situations has been the uncertainty fostered by the fact of federalism. The hazy distinction between state and federal responsibility leads to severe consequences in terms of destruction of life and property.[173] Unfortunately, as the recent squabble between President Johnson and Michigan's Governor Romney forcefully indicates,[174] the confusion continues to exist. If needless destruction at the hands of rioters is to be avoided, these problems of uncertain governmental responsibility — and the separate problems of command and control that arise once military assistance is utilized[175] — must be reviewed and resolved in advance. This portion of the Note will address itself to such a resolution.

Suppression of riots and other domestic violence is primarily a state respon-

171 Suspension of licenses was suggested as a possible sanction by Evelle J. Younger, District Attorney of the County of Los Angeles. Younger, *supra* note 164, at 426.

172 The positive aspect of riot reporting is often overlooked. In a speech to the Rice Institute in Houston during the week of Nov. 8, 1967, Deputy Attorney General Warren Christopher noted that rumors were often instrumental in spreading the violence. He cautioned against unreasonable bans on reporting racial incidents, pointing out that "[f]ast accurate reporting of the true state of affairs is probably the best antidote to poisonous rumors in the ghetto." 2 CRIM. L. RPTR. 2119 (1967).

173 The actions of the federal government have generally embodied the spirit of Theodore Roosevelt's assertion that "twenty-four hours of riot, damage, and disorder" are preferable to the illegal use of troops. Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy,* 1966 DUKE L.J. 415, 460 n.162. It is alarming to note that the confusion as to responsibility appears to leave only these unhappy alternatives.

174 The following newspaper articles report the history of the Detroit riot and the ensuing controversy: N.Y. Times, July 24, 1967, at 1, col. 6; *id.*, July 25, 1967, at 1, col. 8; *id.*, July 30, 1967, § 1, at 1, col. 2, & at 1, col. 3, & at 52, col. 1.

175 Note, *Riot Control and the Use of Federal Troops,* 81 HARV. L. REV. 638, 642 (1968). The importance of advance planning and carefully developed systems of command and control was highlighted recently by the experience of events at Watts, Newark, Detroit and Milwaukee. HOUSE COMM. ON ARMED SERVICES, REPORT OF SPECIAL SUBCOMM. TO INQUIRE INTO THE CAPABILITY OF THE NATIONAL GUARD TO COPE WITH CIVIL DISTURBANCES, 90th Cong., 1st Sess. 5662 (December 18, 1967) [hereinafter cited as REPORT ON NATIONAL GUARD CAPABILITY].

sibility, because riots and their incidental crimes are violations of state law.[176] Moreover, since state officers are constitutionally obliged to support the Constitution and to uphold federal laws,[177] the suppression of riots continues to be a state responsibility despite the fact that federal laws may in some way become involved in the riot or its consequences.[178]

In contrast to the states, the federal government does not have the general power or duty to maintain public order. It is not, however, totally without responsibility in this regard. The constitutional provision that "[t]he United States shall guarantee to every State . . . a Republican Form of Government, and shall protect each of them . . . against domestic Violence"[179] provided the basis for an early Supreme Court decision[180] which held that "[i]f a State cannot protect itself against domestic violence, the United States may . . . lend their assistance for that purpose."[181] In addition to this power to assist a state in suppressing domestic violence, the federal government can act when it is itself the target of insurrection, or when unlawful obstructions or assemblages hinder the execution of federal laws or threaten federal property.[182] The constitutional foundation in these instances is the responsibility of the President to take care that the laws be faithfully executed.[183] The statutes that implement these constitutional provisions and thereby form the basis for federal aid in domestic disturbances[184] are discussed below in the context of federal intervention.[185] For present purposes, it is only necessary to understand that the primary responsibility for riot suppression rests with the state, that the state must plan its riot-control operation before any riots break out, and that such planning must recognize and provide for the delicate problems caused by federalism. The necessity of this basic degree of preparation has been acknowledged by a special subcommittee of the House Committee on Armed Services[186] which conducted

176 41 OP. ATT'Y GEN. 313, 324 (1963).
177 Cooper v. Aaron, 358 U.S. 1, 18-19 (1958).
178 41 OP. ATT'Y GEN. 313, 324 (1963).
179 U.S. CONST. art. IV, § 4.
180 United States v. Cruikshank, 92 U.S. 542 (1876).
181 *Id.* at 556.
182 F. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 43 (1940). For a detailed historical study of federal military aid, see S. Doc. No. 263, 67th Cong., 2d Sess. (1922).
183 U.S. CONST. art. II, § 3.
184 10 U.S.C. §§ 331-34 (1964).
185 See notes 229-348 *infra* and accompanying text.
186 The subcommittee expressed the view that

> law enforcement and maintenance of law and order in individual communities remain the primary responsibility of State and local officials. Therefore, the subcommittee cannot emphasize too strongly its view that State and local law enforcement agencies must review and agree upon acceptable plans for contingencies that may arise in the event of future local disorders. Included in this preplanning must be adequate provision for the integration of police and military forces, communications problems, protection of firefighting personnel, handling of prisoners, and a myriad of other details which are essential if a State is to have a truly effective contingency plan for meeting local disorders.
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> . . . .
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> State planning for these contingencies must envision the utilization of Federal support only as a last resort. These plans must nonetheless contemplate the utilization of Federal support in extraordinary contingencies . . . . REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5663.

hearings that touched on several areas of civil disturbance.[187] A succinct statement of this need was given at a recent conference of the National District Attorneys Association:

> Riots — mob violence — insurrection — call it what you will, everyone should be aware of the fact that virtually every community is vulnerable. Thus although the potential problem is not pressing, it is incumbent on each one of us to at least prepare for the eventuality.[188]

### *B. Civilian Law Enforcement Measures*

Since local law enforcement agencies constitute the first line of defense against outbreaks of domestic violence, planning should be initiated at the local level. In the formulation of a city plan, problems of command are virtually nonexistent. The mayor is the chief executive; his orders are enforced by the city police force under the immediate direction of the chief of police. The chain of command that normally operates in the city continues to prevail in the riot situation.

The police force is the basic law enforcement agency of any city. This agency is subjected to strenuous demands when a riot occurs, because it must provide sufficient force to calm the disorder while still carrying on its ordinary function of crime prevention throughout parts of the city not struck by violence. This demand for manpower flexibility requires the implementation of specific riot procedures carefully tailored to fit the needs and circumstances of the particular city.[189] Proper utilization of the task force concept,[190] by which a specially trained and equipped task force of police officers can be moved into a given area on short notice, would seem to maximize flexibility. This concept has the added advantage of providing a "continuity and unity of command and the solidarity which hastily gathered forces lack."[191]

The city plan should further attempt to alleviate any anticipated manpower shortage by providing for assistance to the police from other municipal resources such as the Fire Department, the Public Utilities Department, the Highway Department, and the Department of Health. However, despite these and other means of supplying additional manpower,[192] there are certain physical limits on every local police department which must be recognized.

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187 *Hearings Before Special Subcomm. to Inquire into the Capability of the National Guard to Cope with Civil Disturbances of the House Comm. on Armed Services,* 90th Cong., 1st Sess. (1967) [hereinafter cited as *Hearings on National Guard Capability*].

188 Remarks of Melvin G. Rueger, Greenbrier Conference of National District Attorneys Association, Aug., 1967, printed in *Riot Panel,* 3 THE PROSECUTOR 282, 286 (1967).

189 Conscious of manpower requirements, President Johnson's Riot Commission prepared model plans, adaptable to varying local needs and circumstances, for police mobilization and operations, and recommended that the Department of Justice disseminate them to police throughout the country. RIOT COMMISSION REPORT, *supra* note 2, at 485-88.

190 For a discussion of Chicago's implementation of the task force concept, see Wilson, *Civil Disturbances and the Rule of Law,* 58 J. CRIM. L.C. & P.S. 155, 157 (1967). This article also contains a definition of the police role and an excellent discussion of police tactics and techniques in civil disturbances. *Id.* at 156-58.

191 *Id.* at 157.

192 Wilson also suggests the possibilities of "requiring men to work into the next watch, canceling days off, and putting the force on 12-hour shifts." *Id.*

Riots can reach proportions that exceed the control capabilities of local law enforcement agencies. Therefore, it is essential that a city plan beyond its own limited resources. It can eliminate a great deal of indecision by making an advance determination of the emergency powers of the governor, the county sheriff, the state police force, the National Guard, and the federal troops.[193] Likewise, the assistance available from other state and county sources should be ascertained and catalogued during the planning stage. Advance cooperation agreements should be arranged with law enforcement agents of neighboring political subdivisions. While these agreements must necessarily remain somewhat flexible, they should be specific at least on the point of assigning tasks to the personnel of the cooperating agencies. Insofar as it is possible, such "borrowed" personnel should be utilized in the nonviolent areas of the city. They should assume the routine functions of the local police, such as directing traffic and manning police lines to isolate the affected area. This peripheral use observes the important designation of riot-control as a local responsibility by freeing the local police to participate in the actual suppression of the disturbance. This procedure also simplifies control by leaving suppression of the riot to police officers who are familiar with the area and simplifies command by leaving it to commanders and forces who are used to working with each other.

Another possible means of localizing the force employed in a riot to the greatest extent possible is the use of a *posse comitatus*. It was early recognized that a sheriff has the power to summon the entire population of his county to assist him in keeping the peace.[194] Those summoned were bound to participate under pain of fine and imprisonment.[195] Although this ancient power has had only infrequent use in present-day America, its recent attempted revival in Cook County, Illinois, by Sheriff Joseph Woods[196] has caused considerable interest in its vitality as a riot-control measure.[197] In Illinois, a sheriff is vested with the power to summon a *posse comitatus* "when necessary" to keep the peace.[198] Stressing his "legal right in the time of emergency to deputize a posse comitatus,"[199] Sheriff Woods' plan to train the posse in advance but not to deputize it "until 'Detroit-type' trouble occurs"[200] seems to stretch the statutory requirement of necessity beyond permissible limits. Not surprisingly, the plan has been ruled illegal as being violative of a number of Illinois constitutional and statu-

193 Remarks of Melvin G. Rueger, *supra* note 188, at 287. Although this determination must be made on an individual state basis, the Riot Commission generally found state police or highway patrol to be of little practical assistance. In addition to their lack of experience and training in the control of civil disorders, most state police forces cannot be mobilized in significant numbers because their primary duty to police the entire state has already diluted their strength. RIOT COMMISSION REPORT, *supra* note 2, at 496-97.

194 1 BLACKSTONE, COMMENTARIES *343.

195 *Id.* at *343-44.

196 This plan envisioned a volunteer force of 1,000 men. NEWSWEEK, Feb. 26, 1968, at 26.

197 Law enforcement officials from six counties in six different states have contacted Woods seeking information about his plan. Chicago Sun-Times, Feb. 20, 1968, at 3, col. 3.

198 ILL. ANN. STAT. ch. 125, § 18 (Smith-Hurd 1967) provides:

> To keep the peace, prevent crime, or to execute any writ, warrant, process, order or decree, he [sheriff] may call to his aid, when necessary, any person or the power of the county.

199 Chicago Sun-Times, Feb. 20, 1968, at 3, col. 1.

200 *Id.*

tory provisions and Sheriff Woods has been permanently enjoined from recruiting any persons for use in such a posse.[201] In addition, the concept has been widely criticized as "unnecessary," "vigilante," and the prelude to a "blood bath."[202] Another serious drawback is that such a plan would cause difficult problems in the determination of liability for civil and criminal violations by members of the deputized posse. The objections and resentment to Sheriff Woods' plan clearly outweigh its obvious benefit as a ready source of additional manpower. Therefore, regardless of the usefulness of a pre-trained *posse comitatus,* the utilization of recognized state law enforcement agencies, the National Guard or even federal troops would still seem to be a more desirable solution to the problem of riot control.[203]

Although assistance from state and local law enforcement agencies can be separately arranged between political subdivisions, a state-level assistance plan offers the advantage of insuring assistance to all local areas including those that have failed to make any prior arrangements. California has led the way in this area by the implementation of its Mutual Aid Law Enforcement Plan,[204] and many of the other states are either presently formulating state assistance plans of their own or revising their existing plans.[205] Additionally, some conditions may lend themselves to the adoption of mutual assistance programs between two or more states. Interstate compacts would seem to be particularly appropriate where large metropolitan areas extend across state borders. Indeed, analogous precedent for the execution of such interstate agreements is found in the congressionally approved military aid compact signed by New York, New Jersey, and Pennsylvania.[206]

The important objectives of all state and interstate plans are to establish procedures for requesting assistance and to define authority for granting such assistance. Although the same specific procedures may not be suitable for every state, some basic policies would seem to be of universal application.

Control over state resources must be centralized. Authority to dispatch state assistance should therefore reside in the governor of the state from which assistance is sought, and all requests by local officials should be made directly to him. The plan should further provide for the state-wide or interstate coordination of law enforcement operations and planning and for the coordinated transportation of law enforcement personnel and equipment to local areas in response to requests for assistance. It should develop and outline a system of accountability for law enforcement personnel and equipment. A communica-

201 *Id.,* March 1, 1968, at 2, cols. 1-4. The Illinois State's Attorney's office has indicated that it does not intend to appeal this order. *Id.,* March 13, 1968, at 10, col. 3.

202 NEWSWEEK, *supra* note 196, at 26.

203 Speaking for the Urban League, Deputy Director Alvin J. Prejean expressed the feeling that "professional police matters are best left to professional people." Chicago Sun-Times, Feb. 16, 1968, at 22, col. 2.

204 *See* Letter from Major General Glenn C. Ames, Adjutant General of the State of California, to the House Committee on Armed Services, Sept. 1, 1967, in *Hearings on National Guard Capability, supra* note 187, at 6144, 6150.

205 *See* Letters from Adjutants General of the various states, concerning their ability to cope with local disorders, to the House Committee on Armed Services, in *id.,* at 6135-255 *passim.*

206 Act of June 4, 1956, ch. 365, 70 Stat. 247, *amending* Act of July 1, 1952, ch. 538, 66 Stat. 315.

tions system should be established for the transmission of pertinent law enforcement information between local, state, and federal officials. Finally, the plan should resolve the command and control arrangements that will apply upon the occurrence of the contingency. In this latter regard, it is necessary that some degree of operational control remain in the local officials because of their familiarity with the affected area. The exact arrangement will be dependent upon the structure of the local government and upon the capabilities of the individual officials involved. Whatever arrangements are finally made, all participants should have advance knowledge of who is to make what decision and when, and under whose control and direction forces are to be employed.

A final nonmilitary measure of state law enforcement would be the establishment of a defense force, in addition to, or as a substitute for, the state National Guard, for use within the jurisdiction of the state.[207] In view of the present National Guard strength and availability,[208] however, this tool appears to be of little practical value. When the riot reaches a stage beyond the control of civilian law enforcement agencies at the state level, the obvious step is to look to the military for assistance.

### *C. Martial Law*

An analysis of the declaration and effect of martial law will provide a helpful background against which to consider the use of military force to quell domestic violence. Such an analysis must necessarily define the framework in which the term "martial law" is used in this Note, because the term

> has been justifiably criticized as obscure. However, its dominance in lay and legal parlance makes acceptance of any other terminology seem hopeless. The trouble lies in the fact that "martial law" has been employed to cover the entire spectrum of use of military for civil purposes, from total subversion of civil government to selling tickets at football games.[209] (Citations omitted.)

It will facilitate a grasp of the concept to draw a basic distinction between "absolute" and "qualified" martial law. Absolute martial law refers to the replacement of every civil instrumentality by a corresponding military agency.[210] By definition, therefore, civil courts do not function in a state of absolute martial law; military tribunals function in their stead. Qualified martial law, on the other hand, exists when military instrumentalities carry on certain governmental activities, but civil courts continue to operate.[211] One authority has noted that the "vast distinction" between the two is that absolute martial law

> replaces the former civil law whereas military aid [qualified martial law]

207 States are authorized to enact such legislation by the provisions of 32 U.S.C. § 109 (1964).
208 *See* REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5647-52.
209 Note, *Rule by Martial Law in Indiana: The Scope of Executive Power*, 31 IND. L.J. 456 n.3 (1956). For an excellent discussion of the various meanings that are attached to "martial law," see F. WIENER, *supra* note 182, at 6-15.
210 F. WIENER, *supra* note 182, at 11.
211 *Id.* at 12.

> furnishes no body of law whatsoever but merely the force of arms to ensure that the civil law will remain supreme and not degenerate into military rule. Thus the military forces exercise no legal jurisdiction over offenses committed by civilians or over their persons.[212]

Much of the confusion that has typified the treatment of martial law by the commentators and by the courts seems to result from their failure to observe this distinction. Decisions and treatises alike have gathered widely differing attributes into the general category of "martial law."[213] Looking beyond the label, however, the message is clear and consistent. It is that instances of absolute martial law will, and should, be rare.[214] The reasons for abhorring the imposition of such a state are diverse and compelling. They are an outgrowth of the attitude of a free society that is historically reluctant to give military tribunals the authority to try civilians for non-military offenses.[215] A study of the birth, development, and growth of our governmental institutions reveals that the extension of military jurisdiction to try civilians charged with crime is foreign to our political traditions and our belief in the procedural safeguards of a jury trial.[216] Such an attitude and tradition has caused the American people to regard "[t]he substitution of military, for the civil law, in any community . . . [as] an extreme measure. Socially, economically and politically, it is deplorable and calamitous."[217]

This is not to say that absolute martial law should never exist in our society. Necessity remains the basis and the justification for martial law,[218] whether absolute or qualified. In the event of a sufficiently dire necessity, absolute martial law may be warranted.[219] The determination of necessity is a question of fact; the exact degree required to justify the imposition of martial law is difficult to predict. It is clear, however, that the substitution of military tribunals for civil courts should be the last and most extreme step taken to suppress domestic disturbances and that such a step is not justified as long as the courts are open[220]

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212 Farrell, *Civil Functions of the Military and Implications of Martial Law,* 22 U. KAN. CITY L. REV. 157, 159 (1954).

213 *Compare* language of *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 127 (1866):

> [T]here are occasions when martial rule can be properly applied. If, in foreign invasion or civil war, the courts are actually closed, and it is impossible to administer criminal justice according to law, *then,* on the theatre of active military operations, where war really prevails, there is a necessity to furnish a *substitute* for the civil authority . . . ; and *as no power is left but the military,* it is allowed to govern by martial rule until the laws can have their free course. (Emphasis added.)

*with* language of Note, *Riot Control and the Fourth Amendment,* 81 HARV. L. REV. 625, 632 (1968): "[S]tatutes provide that the governor may declare any county to be under martial law, thus effecting a *partial suspension* of civil government . . . ." (Emphasis added.)

214 F. WIENER, *supra* note 182, at 13.

215 Lee v. Madigan, 358 U.S. 228, 232-33 (1959).

216 Duncan v. Kahanamoku, 327 U.S. 304, 319-24 (1946).

217 *Ex parte* Lavinder, 88 W. Va. 713, 716, 108 S.E. 428, 429 (1921).

218 This point is universally conceded by courts and commentators. *See, e.g.,* Duncan v. Kahanamoku, 327 U.S. 304, 335 (1946) (concurring opinion of Chief Justice Stone); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2, 126-27 (1866); F. WIENER, *supra* note 182, at 16; 45 MICH. L. REV. 86, 87 (1946).

219 *Ex parte* Lavinder, 88 W. Va. 713, 719, 108 S.E. 428, 430 (1921).

220 Frederick Wiener elaborates, saying that " 'open' and 'closed' must be understood as referring not to the mere physical condition of the court house but to the execution and effectiveness of process . . . ." F. WIENER, *supra* note 182, at 120. Applying this definition,

and able to operate. Indeed, the Supreme Court of the United States has recognized that martial law was never intended to supersede the civilian courts, but only to assist the government in keeping those courts open.[221] Frederick Bernays Wiener, a leading authority on martial law, has expressed the belief that no case in the history of the United States has presented a situation of sufficient necessity to warrant the imposition of absolute martial law.[222] His contention is strongly supported by the Supreme Court's holding in *Ex parte Milligan*[223] that military commissions set up to try civilians during the Civil War — certainly this country's hour of most drastic need — were without jurisdiction.[224] Speaking for the *Milligan* Court, Justice Davis used strong language in rejecting the validity of that attempt to institute absolute martial law:

> It is claimed that martial law covers with its broad mantle the proceedings of this military commission. The proposition is this: that in a time of war the commander of an armed force (if in his opinion the exigencies of the country demand it, and of which he is to judge), has the power, within the lines of his military district, to suspend all civil rights and their remedies, and subject citizens as well as soldiers to the rule of *his will;* and in the exercise of his lawful authority cannot be restrained, except by his superior officer or the President of the United States.
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> If this position is sound to the extent claimed, then . . . the commander . . . can, if he chooses, within his limits, on the plea of necessity, with the approval of the Executive, substitute military force for and to the exclusion of the laws, and punish all persons, as he thinks right and proper, without fixed or certain rules.
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> The statement of this proposition shows its importance; for, if true, republican government is a failure, and there is an end of liberty regulated by law. Martial law, established on such a basis, destroys every guarantee of the Constitution, and effectually renders the "military independent of and superior to the civil power" . . . . Civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.[225]

Qualified martial law is far more acceptable to the people because it does not deprive them of their constitutional rights under civil law. On the contrary, in its ordinary characterization as the intervention of National Guard or federal troops to suppress domestic violence, qualified martial law is intended as a means of protecting constitutional rights by keeping the civil courts open.[226] Its use in this capacity has not been infrequent in recent years,[227] a fact that bears testimony to its effectiveness as a riot-control measure and to its general acceptability within the limits of necessity that demand and justify its imposition.

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he goes on to say that trial of civilians by military tribunals would seem to be proper "where conditions are so thoroughly disturbed that the courts are not only closed but there is no likelihood of their opening in the immediate future . . . ." *Id.*

221 Duncan v. Kahanamoku, 327 U.S. 304, 324 (1946).
222 F. WIENER, *supra* note 182, at 120.
223 71 U.S. (4 Wall.) 2 (1866).
224 *Id.*
225 *Id.* at 124-25.
226 *In re* McDonald, 49 Mont. 454, 476, 143 P. 947, 954 (1914).
227 *See* REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5648-49.

A governor's power to declare martial law is a local question with each state.[228] In this regard, state constitutional and statutory provisions are in a state of hopeless confusion. In Indiana, for example, the state attorney general has stated that the governor's power to declare martial law is implied from other specific mandates outlined in the state constitution,[229] namely that the governor is commander-in-chief of the armed forces[230] and, as such, is chargeable with the execution of state law.[231] Contrary to this position, it has been asserted that the governor does not have the power to declare martial law in Indiana.[232] This latter argument views the statutory responsibility for execution of the laws as giving the governor power to use troops in civil disturbances and requiring him to use as much force as is necessary to quell the lawlessness, but denies that it encompasses the "power to suspend civil government."[233]

In some states, statutes specifically bestow upon the governor the power to declare martial law[234] and stipulate that this declaration must be made by proclamation.[235] Even under such statutory authorization, general confusion results from a failure to attribute one definite meaning to the "martial law" label. Attorneys and government officers cannot expect any general certainty in this area; they can only try to ascertain the construction given the elusive term by the courts and legislatures of their particular state.

It is suggested that the rule of necessity provides the only touchstone common to all states in this realm of martial law. If this rule were accepted as a binding criterion — and it should be for the sake of uniformity and certainty — state statutes requiring the formal proclamation of martial law would not be necessary.[236] Under the rule of necessity, "martial law proclaims itself."[237] The proclamation is unnecessary where there is necessity, and useless where there is none.

Whether his power is by implication, by specific statutory provision, or by basic rule of necessity, the governor is the person responsible for the institution of martial law at the state level. The amount of legal significance to be accorded to his declaration has long been the subject of controversy. A series of Supreme Court cases[238] had established and upheld the "doctrine of conclusiveness" as to the use of the military by a governor in quelling civil disorders. In disallowing judicial review of the governor's actions, this doctrine proved to be particularly

228 Sterling v. Constantin, 287 U.S. 378, 395-96 (1932).
229 1967 IND. ATT'Y GEN. OP. No. 66, § III, at 8.
230 IND. CONST. art. 5, § 12, provides: "The Governor shall be commander-in-chief of the military and naval forces, and may call out such forces, to execute the laws, or to suppress insurrection, or to repel invasion."
231 IND. CONST. art. 5, § 16, provides: "He [the Governor] shall take care that the laws be faithfully executed."
232 Note, *supra* note 209, at 473.
233 *Id.*
234 *E.g.*, N.J. REV. STAT. § 38A:2-3 (Supp. 1967) provides:
> Whenever the militia, or any part thereof, is employed in aid of civil authority, the Governor, if in his judgment the maintenance of law and order will thereby be promoted, may by proclamation, declare any county or municipality, or part thereof, in which the troops are serving to be subject to martial law.
235 *Id.*
236 F. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 19-20 (1940).
237 *Id.* at 20.
238 Moyer v. Peabody, 212 U.S. 78 (1909); Luther v. Borden, 48 U.S. (7 How.) 1 (1849); Martin v. Mott, 25 U.S. (12 Wheat.) 19 (1827).

obnoxious to American beliefs in a republican form of government and undoubtedly caused added invective to be written into the Court's opinion in *Ex parte Milligan*.[239]

The doctrine of conclusiveness first appeared in 1827 in the Supreme Court decision of *Martin v. Mott*.[240] In that case conclusive legal effect was accorded the exclusive discretion of the President to call out the militia in cases of actual invasion or the imminent danger of invasion.[241] Twenty-two years later, the Court extended the doctrine to state officials in the celebrated case of *Luther v. Borden*.[242] In *Luther* a group acting under the leadership of a man named Dorr set itself up under a claim of rightful authority in competition with the established government of Rhode Island. A series of arrests, including the arrest of one of the rebels in his own home, followed the declaration of martial law by the older government. In this resulting action in trespass, the Court avoided a decision as to which government was lawfully in power on the ground that, as a political question, it was not proper for judicial review.[243] The Court did say, however, that a state could

> unquestionably . . . use its military power to put down an armed insurrection, too strong to be controlled by the civil authority. The power is essential to the existence of every government, essential to the preservation of order and free institutions, and is as necessary to the States of this Union as to any other government. The State itself must determine what degree of force the crisis demands. And if the government of Rhode Island deemed the armed opposition so formidable, and so ramified throughout the State, as to require the use of its military force and the declaration of martial law, we see no ground upon which this court can question its authority.[244]

In *Moyer v. Peabody*[245] the Court, in language that "went altogether too far,"[246] upheld the conclusiveness of a governor's declaration that an insurrection existed.[247] It chose to test the governor's liability for the arrests made as a precaution against domestic violence by inquiring into his good faith in ordering the arrests rather than by examining their reasonableness. Applying this test of "good faith," Justice Holmes announced for the Court that "[p]ublic danger warrants the substitution of executive process for judicial process"[248] and denied the lower court jurisdiction.[249]

The dangerous precedent established by *Moyer* gave unbridled license to state executives to use the military as a means of accomplishing their own designs. As was predictable in light of the weakness of human nature, the governors

239 *See* quotation set out in text accompanying note 225 *supra*.
240 25 U.S. (12 Wheat.) 19, 29-32 (1827).
241 *Id.* at 29. In now famous dicta, the Court stated that this power "is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." *Id.* at 30.
242 48 U.S. (7 How.) 1 (1849).
243 *Id.* at 47.
244 *Id.* at 45.
245 212 U.S. 78 (1909).
246 F. WIENER, *supra* note 236, at 109.
247 Moyer v. Peabody, 212 U.S. 78, 83 (1909).
248 *Id.* at 85.
249 *Id.* at 86.

patently abused this privilege. Indeed, before the trend was checked, the "over-exuberant rhetoric" employed by Holmes in *Moyer* was "relied upon to justify what may with moderation be called some of the most curious pages in American jurisprudence."[250]

The controversy was finally put to rest in *Sterling v. Constantin*.[251] In that case, the governor declared martial law in certain Texas counties in which the plaintiffs had oil interests. By making this declaration and directing the National Guard to assume supreme command over the area, he attempted to reduce the depletion of oil reserves by the plaintiffs. Acknowledging a governor's discretion to determine the existence of an exigency requiring military aid, the Court nevertheless held that the reasonableness of his determination is a proper matter for judicial review.[252] The decision incorporated, to an extent, the "good faith" test of *Moyer* by allowing a governor a "permitted range of honest judgment" as necessary to the timely exercise of his duty to maintain peace.[253] The real significance of the case, however, derives from its recognition that this discretion cannot be unlimited. The decision reversed the snowballing doctrine of conclusiveness by declaring that "the allowable limits of military discretion, and whether or not they have been overstepped in a particular case, are judicial questions."[254]

In upholding the propriety of reviewing a governor's exercise of discretion, *Sterling* and later cases that reaffirmed it[255] recognized that the rights guaranteed by the Federal Constitution must be protected against unchecked gubernatorial actions that were possible under the conclusiveness doctrine. These cases complemented the "good faith" test of legality enunciated in *Moyer* with a "direct relation" test.[256] The latter test requires a balancing of the purpose of the action and the reasonableness of the means employed against the gravity of the resulting invasion of individual rights. Because martial law is so drastic and oppressive a measure, the cases require a high degree of necessity to carry the balance in favor of its justification.[257]

The *Sterling* decision also makes actions taken by a military commander pursuant to a declaration of martial law subject to judicial review. Such actions no longer remain lawful simply because martial law was properly declared. The criterion for legality, as always, is necessity; it is framed in the context of "whether or not the particular act in question was required by the public safety."[258] In the suppression of civil disorders, only reasonable force can be used and military commanders are liable for excesses.[259]

The application of the reasonableness test presents a danger of confusion

250 F. WIENER, *supra* note 236, at 110.
251 287 U.S. 378 (1932).
252 *Id.* at 400-01.
253 *Id.* at 399.
254 *Id.* at 401.
255 For a citation and discussion of cases reaffirming *Sterling*, see 41 OP. ATT'Y GEN. 313, 320 n.2 (1963).
256 Note, *supra* note 213, at 634.
257 Note, *supra* note 209, at 472.
258 Anthony, *Hawaiian Martial Law in the Supreme Court*, 57 YALE L.J. 27, 54 (1947).
259 Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165, 173, 55 A. 952, 955 (1903).

spawned by another misuse of labels.[260] Courts have carelessly referred to martial law situations interchangeably as "war" or "insurrection" despite the fact that the two concepts are clearly distinct, and differing degrees of authority are allowed to a military commander under each.[261] "Insurrection" is not "war," and costly pitfalls may await the military officer who equates the two. The safest course for military personnel employed in aid of civil authority is to recognize the limitations on their power. According to Wiener, any attempt to justify the use of war powers in an insurrection would never stand the test of review in the Supreme Court.[262] On the other hand, although it is persuasively argued that the word "insurrection" itself is not technically accurate[263] as a description of the circumstances justifying the use of the military,[264] this seeming error in terminology has been largely ignored as a practical matter. In determining the lawfulness of the military force used to quell a domestic disturbance, courts are not troubled by whether or not the disturbance was literally an insurrection. If sufficient necessity is present, military force will be upheld.

This discussion of martial law has attempted to show that the subject is fraught with misunderstanding. In summary, it may be said that a few definite principles stand out. Marital law is justified by necessity. Necessity confines it in area and limits it in duration. Necessity, therefore, provides the measure by which the courts determine the lawfulness of a governor's declaration of martial law and its subsequent implementation by the military. In its absolute form, martial law is a most extreme measure because it suspends civil courts in favor of military tribunals. As such, it is warranted only in a most extreme necessity; indeed, the requisite degree of necessity arguably has not been experienced in the history of this country. A qualified form of martial law, however, which consists in the supplanting of *some* governmental agencies by military counterparts, does have substantial precedent and can be prudently utlized by state governors in times of civil disorder. It is in this latter context that subsequent references to "martial law" should be understood.

### *D. The National Guard*

> "There is no substitute for force in quelling civil disturbances, and if the police are unable to provide the manpower to restore normalcy, then there is no alternative but to put in a call for the National Guard — and as quickly as possible." This is my view in a nutshell.[265]

260 The confusion originates in dicta used by the Supreme Court in *Luther*. In finding that Rhode Island rightfully used military power to "put down an armed *insurrection*," the Court said: "It was a state of *war*; and the established government resorted to the rights and usages of *war* to maintain itself, and to overcome the unlawful opposition." Luther v. Borden, 48 U.S. (7 How.) 1, 45 (1849) (emphasis added).

261 For a general discussion of the differences between war and insurrection, see F. WIENER, *supra* note 236, at 28-35.

262 *Id.* at 78.

263 Wiener contends that the Civil War, the Dorr Rebellion in Rhode Island, and the Whiskey Rebellion in Pennsylvania present the only instances of actual insurrection in this country's history. *Id.* at 30.

264 State prescriptions for the utilization of military force against civil disorder usually allow it, *inter alia*, "to suppress insurrection." *E.g.*, IND. CONST. art. 5, § 12, set out in note 230 *supra*.

265 Wilson, *Civil Disturbances and the Rule of Law*, 58 J. CRIM. L.C. & P.S. 155, 157 (1967).

This tribute to the National Guard by Orlando Wilson, one of the country's leading criminologists, suggests that state and local authorities would be wise to familiarize themselves with the capabilities of their state militia and the procedures by which they can summon its assistance.

The National Guard is the modern descendant of the original militia reserved to the states by the Constitution.[266] Although it is federally equipped and its members are federally compensated, the National Guard is a state force subject to the control of the governor in accordance with state law and is ordinarily administered by the state adjutant general.[267] Its officers are officers of the state and not of the United States.[268] The Constitution makes no provision for a state to use its own militia, but it has been made clear that a state may do so for the purpose of suppressing riots:

> While a State has no right to establish and maintain a permanent military government, it is not to be inferred that it has no power over the militia resident within its borders. Unquestionably a State may use its military power to put down an armed insurrection too strong to be controlled by the civil authorities. The power is essential to the existence of every government . . . and is as necessary to the States of this Union as to any other government.[269]

The use of the National Guard as an emergency force available to a state governor for the maintenance of law and order is not without restriction. Indeed, state use has been partially preempted by federal statutory provisions that permit federalization of the National Guard in the interests of national security[270] or to suppress insurrections.[271] During the periods when Guard units are federalized, they are subject to control solely by the federal government and their members are governed by federal law.[272] They revert to state status under the authority of their governor only upon their discharge from active federal service.[273]

Additional encroachment upon the historical use of the National Guard as a state resource seems to have occurred through recent legislation that shapes the force structure of the National Guard and other reserve components pri-

266 Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 46, *vacated on other grounds*, 382 U.S. 159 (1965).

U.S. CONST. art. I, § 8, provides in part:

> The Congress shall have Power . . .
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> . . .
>
> To provide for calling forth the Militia to execute the Laws of this Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;
>
> . . . .

267 Maryland *ex rel.* Levin v. United States, 381 U.S. 41, 47, *vacated on other grounds*, 382 U.S. 159 (1965).

268 United States *ex rel.* Gillett v. Dern, 74 F.2d 485, 487 (D.C. Cir. 1934).

269 S. Doc. No. 263, 67th Cong., 2d Sess., 219 n.*a* (1922).

270 32 U.S.C. § 102 (1964).

271 10 U.S.C. §§ 331-33 (1964).

272 *Cf.* Houston v. Moore, 18 U.S. (5 Wheat.) 1, 16 (1820); United States *ex rel.* Gillett v. Dern, 74 F.2d 485, 487 (D.C. Cir. 1934).

273 *Id.*

marily according to federal requirements.[274] However, a special subcommittee appointment by the House Committee on Armed Services believes that "appropriate recognition and support of State mission requirements is completely compatible with the concept of establishing the National Guard force structure based initially upon only Federal mission requirements."[275] The subcommittee's view indicates that the Guard will be as available to the state as it has traditionally been; apparently, only the presumption as to its first duty has changed.

The capability of the National Guard as a riot control force appears to be more than adequate in terms of personnel strength. This factor is borne out by experience. A study of state use of the National Guard between 1957 and 1967 revealed that, on the average, only nine percent of the available force was deployed for the purpose of suppressing a local disorder.[276] More significant, perhaps, is the fact that only twice during that period were more than fifty percent of the state troops employed.[277] In addition, the states themselves generally believe that their respective National Guard forces are sufficient to handle local problems.[278]

Thus, there seems to be no need for any increase in the existing strengths of the various National Guard units,[279] despite the fact that any given riot might conceivably exceed the presently existing capability margins. The excess requirements could be easily handled by assisting forces from neighboring states pursuant to interstate mutual aid compacts,[280] or by calling in federal troops. It would be unrealistic and unnecessary to try to achieve a situation in which each state could handle every possible contingency that might arise, especially since the same end can be simply and less expensively accomplished by cooperation and joint planning with neighboring states.

The National Guard's capability to control civil disturbances reaches beyond mere manpower considerations. The special subcommittee found, on the basis of a study made of thirty-eight representative cities, that an average of fifty-nine percent of the states' strength is located within a hundred mile radius of metropolitan areas.[281] This proximity of the bulk of National Guard strength to the probable centers of disorder indicates that the state forces are in a good position to respond rapidly to local urban problems. In fact, the National Guard can generally be committed in significant force within four to six hours after the

274 REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5646.
275 *Id.*
276 *Id.* at 5649. For a table depicting the use of Army National Guard by states in civil disturbances from 1957-1967, see *id.* at 5648-49.
277 The two instances were the 1965 Watts riot when sixty-two percent of the California strength was used and the 1967 Detroit summer when eighty-five percent of the Guard strength was utilized. In the latter situation, however, twenty to twenty-five percent of the forces sent to the city were never committed. It is further significant to note in this regard that in the recent riots in Newark and Milwaukee, only thirty-one and forty-three percent of the available state force were used respectively. *Id.* at 5649.
278 *Id.* at 5650.
279 The internal composition of the National Guard, however, could be profitably changed by immediately increasing the number of Negro Guardsmen. The Riot Commission found that one significant factor that contributed to the superior effectiveness of the army troops in Detroit vis-à-vis the National Guard was that the former had a proportionately greater number of Negroes. RIOT COMMISSION REPORT, *supra* note 2, at 499.
280 Congressional acts approving an existing agreement of this sort between New York, New Jersey and Pennsylvania are cited at note 206 *supra*.
281 REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5651.

time it is alerted.[282] Furthermore, the response will be increasingly effective with each passing month as a result of nationwide implementation of an intensified training program for Guard personnel in civil disturbance and riot-control techniques.[283]

In light of the Guard's mission in instances of civil disorder, there must be prior planning for the call-up and use of the National Guard. It was dramatically illustrated in Watts that "the goal of the military is to complement rather than replace civil authority"[284] and that the military is to assist in maintaining law and order, but is not to "take over" as a means to accomplishing that end.

The riot-control plan must necessarily stipulate procedures whereby local authorities can initiate a call for National Guard assistance. Accordingly, the plan should vest certain local officials with authority to directly request such assistance, and should designate the governor, or another individual in his absence, as the proper authority to grant the request. A general policy decision should be made and implemented in the plan to assist the governor in the exercise of his discretion in employing the state force. It is obvious that the National Guard, as an organized and trained riot-control unit, should be committed to assist at the scene of the riot only when the uprising increases beyond the control of local law enforcement agencies. Within this very general guideline, however, the governor should understand that the containment of civil disorders of the type that have recently rocked major cities throughout this country is utterly dependent on the *judicious early commitment* of adequate National Guard forces.[285]

Also in this regard, the plans should provide phases of preparation for the Guard so that the amount of the time lapse before its readiness for commitment will be minimized. There must necessarily be an alert phase in which the Guard is first notified to proceed toward a state of readiness. There may then be subsequent intermediate phases, each indicative of a higher stage of preparation than the prior one. Finally, there must be the commitment phase, which involves the actual engagement in riot-control activities. The decision on this final phase is subject only to the discretion of the governor or other appropriate official. To assure that Guardsmen will be available upon, and protected by, the governor's call, it should be made a legal requirement of each state that an employer grant a leave of absence to a Guardsman called to active duty because of a civil disturbance. Moreover, the states should require that the Guardsman's rights as an employee not be jeopardized in any way.[286]

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282 *Id.* at 5652.

283 *Id.* at 5655. For a discussion of the requirements for and reaction to this new training program, see *id.* at 5655-57.

284 *Hearings on National Guard Capability, supra* note 187, at 5982.

> Perhaps the most important lesson [of the Watts riot] for military and civil authorities alike is that troops can actually be committed in such [large] numbers, during a disturbance of this nature, with local law enforcement agencies remaining in full control of the situation. *Id.*

285 This view was strongly expressed by the subcommittee and every knowledgeable witness that appeared before it. REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5652.

286 *Cf.* IND. ANN. STAT. § 59-1022 (1961) which provides:

> Any person who, as a reserve member of the armed forces of the United States, is called upon to receive temporary military training, shall be entitled to a

Separate support plans should be drawn up by the National Guard under the direction of the state adjutant general. These support plans should allocate responsibility among the different Guard units for the support of every locality within the state. At that point, each Guard unit should prepare its own plans based on the plans of the city or area that it supports. These plans must remain flexible so that Guard units can be moved with facility to other support areas, as needed.

This prior planning should include the actual utilization of National Guard troops once they have been committed to a riot situation. Since the military mission is one of cooperation to insure execution of the law, the military must operate within strict legal limits.[287] In this regard, the troops should be employed only in the immediate vicinity of the riot area, or in those areas that serve as potential targets for the rioters. Their purpose is to aid in quelling the disorder; it is not to police the entire city.

The uncertainty as to the exact relationship between the military commander and state law enforcement personnel during last summer's rioting in Detroit[288] dictates the necessity of solving the problem of command in advance. If the National Guard is federalized, it is subject to control by federal military superiors, and command is no longer a state responsibility. When acting as a state force, however, the Guard or any part thereof may be placed under the direction of any state or local officer designated by the governor for that purpose.[289] As a general rule, command over the Guard unit should be placed in the hands of local civilian leaders because their familiarity with local conditions best suits them for the job.

A related problem arises when the National Guard and federal troops are simultaneously called to the scene of a riot. In such a situation, the two military forces act independently.[290] Neither force has authority to order the other, although they cooperate as a matter of comity and in the common interest of rapidly and efficiently suppressing the disorder. They will observe each other's rank in a superior-subordinate relationship only if and when the Guard is federalized.

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> temporary leave of absence from his employer, not to exceed fifteen [15] days in any one [1] calendar year: . . . . Upon his return, such person shall be restored to his previous, or similar position, with the same status as he held before leaving for his training period. Such leaves may be granted with or without pay in the discretion of the employer.
>
> Any temporary leave of absence so granted shall not affect the rights of the person to vacation leave, sick leave, or other normal benefits of his employment.

IND. ANN. STAT. § 59-1023 (1961) provides:

> Any employer who refuses to grant an employee a temporary leave of absence, as provided in section 1 [§ 59-1022] of this act, shall be subject to a suit in damages for any damages sustained by the person denied such leave of absence.

While these statutes obviously differ from those proposed in the text both in purpose and in the extent of protection for the Guardsman, they nevertheless suggest a direction for the statutory enactment of pertinent requirements and sanctions.

287 Note, *Rule by Martial Law in Indiana: The Scope of Executive Power,* 31 IND. L.J. 456, 469 (1956).

288 REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5663.

289 Although the Riot Commission made no recommendation in this regard, it did emphasize that any plan of overall command must insure the utilization of National Guard units as units, each of which remains under the immediate command of a National Guard officer. RIOT COMMISSION REPORT, *supra* note 2, at 518-19.

290 F. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 53-54 (1940).

Almost of equal importance with the early commitment of the National Guard is its rapid withdrawal from the area once the riot has been effectively subdued. Request for removal of the Guard should be directed to the governor pursuant to a decision by local authorities, who act on the advice of the military commanders. The withdrawal may be staggered, but its rapidity is essential to easing tension in the area. Despite the immediate need for military force as a police auxiliary when rioting occurs, the value of its assistance is soon forgotten by the average citizen, and a continued military presence is upsetting and unwanted after order has been restored. It would appear advisable, however, to maintain the National Guard at an intermediate phase of readiness at a staging area not too distant from the recently disturbed city until the riot fever has had sufficient opportunity to cool. This provides a reserve force readily available to help suppress any further outbreaks that might occur.

Finally, the problems of liability that might arise from the commitment of the National Guard to suppress civil disorder must be reviewed and resolved in advance. A determination must be made as to the civil and criminal liability of the individual Guardsman under state law. This determination should reflect a policy consideration that the Guardsman, while performing his military duty, should be protected to the greatest possible extent within reasonable limits. Indeed,

> [t]o deny this privilege is to create a state of apprehension about fulfilling and carrying out the orders of superiors in time of riot which will necessarily inhibit the guardsman's effectiveness. We should not ask a guardsman to protect the state if the state is unwilling to protect the guardsman.[291]

A state can and should protect its Guardsmen, first of all, by enacting legislation that requires the state to provide legal counsel for a Guardsman who is sued for his actions while on active state duty. Nevada statutes typify what is needed in this regard,[292] and other states have adopted similar legislation.[293] The obvious inequities of requiring a Guardsman to act in the state interest, while subjecting him to the concomitant threat of a possible civil or criminal suit at his own expense, would seem to obligate all states to provide such statutory relief.

Although many states further protect their Guardsmen by granting them statutory immunity from criminal liability for activities done in the line of their

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291 1967 IND. ATT'Y GEN. OP. No. 66, § VI, at 18.

292 NEV. REV. STAT. § 412.740 (1963) provides in part:

> . . . .
>
> 2. When a suit or proceeding shall be commenced in any court by any person against any officer of the militia for any act done by such officer in his official capacity in the discharge of any duty under this chapter, or against any soldier acting under the authority or order of any such officer, or by virtue of any warrant issued by him pursuant to law, the attorney general shall defend such officer or soldier.
>
> 3. Where the action or proceeding is criminal the adjutant general shall designate the judge advocate general or one of the judge advocates to defend such officer or person.

293 *E.g.*, CAL. MIL. & VET. CODE § 393 (West Supp. 1967); ILL. ANN. STAT. ch. 129, § 220.90 (Smith-Hurd Supp. 1967).

military duty,[294] such a degree of protection seems to go beyond the balance that must be struck. Placed in the hands of some Guardsmen, immunity from criminal liability can amount to license for committing otherwise illegal acts. If granted to Guardsmen, who despite their training in riot-control are not professional soldiers, it can have the dangerous effect of supplying approval to their natural reaction in the tension of a riot situation to counter any opposition with excessive or even deadly force. Rather, actions by the Guardsmen should be subject to review by the courts for a determination of liability based on the common-law tort notion of "reasonableness under the circumstances." Furthermore, immunity is not a proper solution to those who accept the seemingly better view that the use of military force against domestic disturbances amounts to the undeclared institution of a state of qualified martial law.[295] Consistent with basic martial law principles, use of the military to assist the civil authorities is reviewable[296] and can be justified only by necessity.[297] When the force applied exceeds the necessity, it becomes unreasonable; military personnel are not allowed to escape liability for such excesses.[298]

### *E. Federal Intervention*

Although the suppression of domestic violence is primarily a responsibility of the individual states, the federal government is also constitutionally responsible in this regard.[299] This federal obligation is implemented by a series of statutes that prescribe the circumstances under which federal forces may be used to control riots,[300] and by a separate statute that imposes limitations on the use of federal forces.[301]

#### 1. The Request Statute

If the dimensions of an urban riot expand beyond the state's capability to control, the state can request federal assistance under section 331 of title 10 of the United States Code.[302] Whether or not federal assistance will be granted upon

294 *E.g.*, CAL. MIL. & VET. CODE § 392 (West 1955); NEV. REV. STAT. § 412.740(1) (1963); N.Y. MIL. LAW § 235 (McKinney 1953).

295 See the general discussion under "Martial Law" in text accompanying notes 209-264 *supra*.

296 Sterling v. Constantin, 287 U.S. 378 (1932).

297 *See* note 218 *supra* and accompanying text.

298 Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165, 173, 55 A. 952, 955 (1903).

299 U.S. CONST. art. IV, § 4 provides:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. CONST. art. II, § 3 provides in pertinent part: "[H]e [the President] shall take Care that the Laws be faithfully executed . . . ."

300 10 U.S.C. §§ 331-34 (1964).

301 Posse Comitatus Act, 18 U.S.C. § 1385 (1964) provides:

> Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or the Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than $10,000 or imprisoned not more than two years, or both.

302 10 U.S.C. § 331 (1964) provides:

> Whenever there is an insurrection in any State against its government, the President may, upon the request of its legislature or of its governor if the legisla-

receipt of a proper state application rests within the sole discretion of the President.[303]

An issue that arises in connection with the use of federal troops under this statute is that their use is authorized against "insurrection," whereas the constitutional basis for the statute uses the broader language of "domestic violence."[304] Although one commentator finds this is to be the basic issue,[305] it presents little practical difficulty. As a matter of precedent, any combination of words used to indicate widespread violence and disorder has generally been regarded by Presidents as sufficient for the dispatch of troops.[306] This problem of semantics was further lessened in late 1967 when Attorney General Ramsey Clark wrote a letter to state governors advising them of the "legal requirements for the use of federal troops in case of *severe domestic violence* . . . ."[307] (Emphasis added.) The practical result is that, as with martial law statutes,[308] "insurrection" is a label and not a literal prerequisite for the implementation of the statute.

The procedure whereby federal troops are sent to assist in putting down a riot under section 331 can be reduced to four distinct steps. For a full understanding of the workings of section 331, it will be helpful to consider the prerequisites and legal requirements that attach to each of them.

*a. Application by the State*

The state should apply for federal aid only when it is experiencing a condition of severe domestic violence that "cannot be brought under control by the law enforcement resources available to the Governor, including local and State police forces and the National Guard."[309] This prerequisite reflects the basic concept that riot control is primarily the responsibility of the state, and if the prerequisite is not satisfied before application is made the President will not be favorably inclined to honor the request.

The application must be made by the legislature of the state or by the governor in the event that the legislature "cannot be convened."[310] As a practical matter, the overwhelming difficulties of convening the legislature while a riot is in progress eliminate the former alternative, and the duty to make the request thus falls upon the governor by default. Current federal guidelines indicate that the gubernatorial request will ordinarily suffice.[311]

The request from either the legislature or the governor should be in writing and should set out the details that provide its justification. This requirement of writing is not an absolute essential, because the President will entertain an

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ture cannot be convened, call into Federal service such of the militia of the other States, in the number requested by that State, and use such of the armed forces, as he considers necessary to suppress the insurrection.

303 Letter from Attorney General Ramsey Clark to the governors of the separate states, Aug. 7, 1967, in REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5669, 5670.

304 U.S. CONST. art. IV, § 4. See note 299 *supra* for the language of this section.

305 Poe, *The Use of Federal Troops to Suppress Domestic Violence,* 54 A.B.A.J. 168, 169-70 (1968).

306 Note, *Riot Control and the Use of Federal Troops,* 81 HARV. L. REV. 638, 644-45 (1968).

307 Letter from Attorney General Ramsey Clark, *supra* note 303, at 5669.

308 *See* text accompanying notes 260-4 *supra.*

309 Letter from Attorney General Ramsey Clark, *supra* note 303, at 5669.

310 10 U.S.C. § 331 (1964).

311 Letter from Attorney General Ramsey Clark, *supra* note 303, at 5669.

oral request in the event of extreme emergency.[312] If the application is made orally, however, a written communication to the President should follow immediately to furnish him support for the issuance of his proclamation pursuant to federal law.[313] While this final formal request should be addressed to the President, the state should direct all preliminary communications to the Attorney General.[314] Observance of this procedure will relieve the President of detailed and unnecessary burdens, but will nevertheless keep the federal government informed of current developments so that it can save valuable time by taking such preliminary steps as placing troops on alert.

Another requirement is that the language used in the request be unconditional. This will preclude a presidential decision not to send troops on the ground that the application is inadequate, as has been the case on the few occasions when the requesting governor used language that was less than unequivocal.[315] The justification for this requirement is not altogether clear, but it seems to be an extension of the policy that underlies the basic statutory requirement of a formal request. It recognizes, first of all, the advantages of providing local solutions to local problems. Further, the probability of cooperation between federal troops and state authorities is increased if the former operate in the riot area at the positive request of the latter. But the most important justification seems to be a political one — "a desire to have the governor on record as undeniably calling for federal aid so that he can not later recharacterize the nature of his request and criticize the President for sending troops."[316]

*b. Exercise of Presidential Discretion*

Following the President's receipt of a state request, he must deliberate as to whether the request merits federal intervention. A preliminary consideration revolves around both the form and substance of the request received. It has already been suggested that political considerations might cause the President to deny a conditional request or a mere recommendation that he send assistance. He must also evaluate the validity of the state's assertion that it is unable to control the riot, and he must do so with an awareness that

> [b]oth the Constitution and statute [section 331] recognize it to be the right and duty of the State to preserve its own order. The State's duty to itself as well as its duty to the United States requires that application be made for Federal assistance only when the strength of the State is exhausted or is inadequate. . . . The growing strength of the National Guard in each of the States warrants the belief that occasions for the employment of Federal power to suppress insurrection against a State will be less frequent in the future than in the past.[317]

312 *Id.* at 5670.
313 10 U.S.C. § 334 (1964) provides: "Whenever the President considers it necessary to use the militia or the armed forces under this chapter, he shall, by proclamation, immediately order the insurgents to disperse and retire peaceably to their abodes within a limited time."
314 Letter from Attorney General Ramsey Clark, *supra* note 303, at 5670.
315 Note, *supra* note 306, at 641. For a comparison between language used in state requests that have been granted and state requests that have been denied for inadequacy, see *id.* at 641 n.31.
316 *Id.* at 641.
317 S. Doc. No. 263, 67th Cong., 2d Sess., 318 (1922).

The requirement that a state be unable to control a riot despite the utilization of all of its force is a prerequisite to an affirmative decision to send federal troops. Its purpose

> is to limit the number of occasions for federal intervention upon the assumption that the unnecessary commitment of federal troops would discourage the states from using their own peace-keeping forces. The requirement also reflects a general distaste for using the army as a police force.[318]

Once the President has verified the state's claim of inability to control the riot, he must consider such factors as the size of the force required, when it should be sent, and whether to federalize the National Guard instead of, or in addition to, sending federal troops.[319]

*c. Issuance of Proclamation*

The above steps constitute procedural and substantive requirements that must be met before federal troops can be dispatched pursuant to section 331. Once the President has made an affirmative decision in regard to a state's request for federal assistance, he must issue a proclamation as required by section 334 of title 10 of the United States Code.[320] This proclamation is clearly distinguished from a proclamation of martial law, and its issuance must not be considered an imposition or justification of martial law measures. Although a requirement of law, this proclamation is void of legal effect; it is required as a means of giving notice of the dispatch of federal troops to the scene, and of emphasizing the seriousness of the situation.[321] Hopefully, as a final warning to the unlawful elements, it may help to successfully avoid the necessity of using federal troops.

*d. Presidential Dispatch of Troops*

Finally, the President causes formal instructions to be given to the commander of the Army troops or federalized National Guard units that he has selected to commit to the riot in response to the request. These instructions should provide guidance for the conduct and command of the troops at the scene of the riot.

The problems of control in such a situation are particularly difficult and delicate. Federal troops are an integral part of the military organization of the United States and, as such, are responsible to the President as their Commander-in-Chief. It would seem, therefore, that the President should retain control of the federal troops in the hands of their own military superiors, despite the fact that local control undeniably offers the unique advantage of familiarity with the riot area. First of all, federal control would seem to be dictated by the fact that the state failed in its attempt to successfully contain the riot and thus necessitated the presence of the federal troops in the first place. Because the troops of the United States have been sent in a discretionary response to the

318 Note, *supra* note 306, at 645-46.
319 Letter from Attorney General Ramsey Clark, *supra* note 303, at 5670.
320 10 U.S.C. § 334 (1964). See note 313 *supra* for the language of this section.
321 F. WIENER, *supra* note 290, at 50-51.

state's request, the state can really neither demand nor expect to control them. Furthermore, armed forces personnel and federal officers are presently without the protection of federal law, since current federal statutes do not prescribe criminal sanctions against rioters.[322] It seems, therefore, that the federal government is under a non-delegable duty to control them. Since it offers no statutory protection for its personnel, it should afford them the only remaining protection that it can — the exercise of proper and responsible command. A separate argument for the federal retention of control over federal troops is grounded in a desire to save the President the political embarrassment of being able to approve the requests for federal troops from only those governors to whom he feels he can safely entrust command of the federal troops.[323] This federal command would also prevent the possible misuse of federal troops by a partisan governor.[324] Although close cooperation between federal and state agencies must characterize the operation, the balance of the competing considerations clearly favors the retention of federal control over the federal forces.

2. The Non-Request Statutes

The federal government has an important interest of its own in the preservation of its property and the execution of its laws and cannot be totally dependent on the will of state governors to protect those interests. The Supreme Court has recognized that the national government has a constitutional power and responsibility to compel obedience to law and order:

> We hold it to be an incontrovertible principle, that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the power and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent.[325]

In addition to this judicially recognized constitutional power, Congress has granted the President specific statutory power to deal, on a non-request basis, with civil disorder occurring within a state. The relevant statutes are sections 332[326] and 333[327] of title 10 of the United States Code.

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322 REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5665. This is a deplorable situation, and the subcommittee strongly recommends the enactment of legislation enabling the federal government to criminally prosecute rioters for assaulting federal personnel who are acting in an official capacity to quell the disorder. *Id.*

323 Note, *supra* note 306, at 642.

324 *Id.* For a capsule discussion of the misuse of federal troops by the Idaho Governor during the Coeur d'Alene mining dispute of 1899 and the subsequent effects of that misuse, see *id.* at 642 n.33.

325 *Ex parte* Siebold, 100 U.S. 371, 395 (1880).

326 10 U.S.C. § 332 (1964) provides:

> Whenever the President considers that unlawful obstructions, combinations, or assemblages, or rebellion against the authority of the United States, make it impracticable to enforce the laws of the United States in any State or Territory by the ordinary course of judicial proceedings, he may call into Federal service such of the militia of any State, and use such of the armed forces, as he considers necessary to enforce those laws or to suppress the rebellion.

327 10 U.S.C. § 333 (1964) provides:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a

No state application for the use of federal troops is necessary for the operation of these statutes. Once the President decides that the execution of federal laws or the protection of constitutional guarantees is being hindered or obstructed, his duty to "take care that the Laws be faithfully executed"[328] authorizes him to dispatch federal troops to enforce those laws and guarantees, and he may do so even over protest by the state.[329] Upon an affirmative decision to act under either of the non-request statutes, the President is required to issue a proclamation pursuant to section 334.[330]

Section 332 and the second clause of section 333 clearly authorize the use of federal troops in a situation where domestic violence is interfering with the enforcement of a court order. The obvious illustrations of such an instance were the school desegregation cases in Little Rock, Arkansas, and Oxford, Mississippi, where federal troops were sent by Presidents Eisenhower and Kennedy, respectively, to subdue any possible mob violence that might prevent the execution of federal court injunctions ordering integration. These instances point out the necessity for non-request statutes, because the court orders sought to be enforced were directed against the governors themselves.

The use of federal troops under these statutory provisions can conceivably be extended to situations other than the enforcement of court orders,[331] but such an extension is beset with doubts and difficulties.[332] Because of these difficulties and because the first clause of section 333 seems a more promising justification for the presidential exercise of discretion under a non-request statute, sections 332 and 333(2) should generally be limited to use as a means of guaranteeing the enforcement of federal court orders.

Section 333(1), on the other hand, is a broad discretionary provision that may be employed by the President when the state is deemed to have denied the equal protection of the laws, and the federal objective is to accord that protection. As such, this provision is readily adaptable to situations where rioting is racially motivated. Specifically, the President can dispatch troops under this section to

> any State in which a civil disturbance not only impedes the administration of Federal and State laws but also has the effect, as a consequence of a

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State, any insurrection, domestic violence, unlawful combination, or conspiracy, if it—

(1) so hinders the execution of the laws of that State, and of the United States within the State, that any part or class of its people is deprived of a right, privilege, immunity, or protection named in the Constitution and secured by law, and the constituted authorities of that State are unable, fail, or refuse to protect that right, privilege, or immunity, or to give that protection; or

(2) opposes or obstructs the execution of the laws of the United States or impedes the course of justice under those laws.

In any situation covered by clause (1), the State shall be considered to have denied the equal protection of the laws secured by the Constitution.

328 U.S. CONST. art. II, § 3.

329 REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5668.

330 10 U.S.C. § 334 (1964). See note 313 *supra* for the language of this section.

331 For a discussion of theories of presidential action under these sections without a court order, see Note, *supra* note 306, at 649.

332 *Id.*

> default on the part of a State, of depriving inhabitants thereof of certain rights secured to them by the Constitution and laws of the United States.[333]

Section 333 (1) has been said to contemplate circumstances "where there has been such a complete breakdown of law and order that civilian law enforcement measures are overwhelmed and use of the armed forces is required."[334] This characterization likens it to section 331, but in apparently assuming that state inability is a prerequisite to its operation, this view seems too limited to be entirely accurate.[335] By its terms, federal troops may be dispatched to a state by the President under this section when state authorities "are unable, fail, *or refuse*"[336] to protect the constitutional rights of state citizens.

Section 333(1), in mitigating the harshness of the "state inability" requirement of section 331, broadens the area of permissible use of federal troops far beyond the contemplation of section 331. Furthermore, because the President can act under the former statute without having to await a state invitation, the obvious argument is made that it should be used as an alternative to the request statute to avoid problems of delay that can mean added bloodshed.[337] Equally meritorious is the argument that the state's failure to protect the constitutional rights of its inhabitants "constitutes grounds for taking appropriate remedial action."[338] However, caution must be advised against too free a use of section 333(1). The President must bear in mind that since *Sterling,* actions that he takes to use federal troops under this or other statutes are subject to judicial review and, if not justifiable thereunder, constitute a violation of the Posse Comitatus Act.[339] Also, he will naturally be reluctant to act too hastily in sending federal aid because of the likelihood of resulting criticism, such as charges of "federalism" in an area of state responsibility, which mirror the deep-rooted expectations of local autonomy and the traditional civilian distrust of the military supplanting civil authority.[340] Most importantly, the President should remember that suppression of disorder is primarily a state responsibility, and that if the federal government too frequently acts to protect constitutional rights in this manner, it will encourage the states to ignore that responsibility.

Some speculation exists as to the meaning of the "any other means" that the President can utilize to suppress domestic violence under section 333. Although the term may suggest the use of federal civil officials such as agents of the Federal Bureau of Investigation, such a construction is not in keeping with the "salutary policy that the agents . . . shall not be used as a national police . . . ."[341] One of the "other means" contemplated is the use of United

333 REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5668-69.
334 Letter from Deputy Attorney General Nicholas deB. Katzenbach to Representative John Lindsay, July 30, 1964, in 110 CONG. REC. 18662 (1964).
335 *Contra,* Comment, *Federal Intervention in the States for the Suppression of Domestic Violence: Constitutionality, Statutory Power, and Policy,* 1966 DUKE L.J. 415, 419 n.20.
336 10 U.S.C. § 333(1) (1964) (emphasis added). See note 327 *supra* for the full text of this section.
337 Poe, *supra* note 305, at 170.
338 *Id.*
339 18 U.S.C. § 1385 (1964). See note 301 *supra* for the language of this section.
340 Comment, *supra* note 335, at 459-60.
341 41 OP. ATT'Y GEN. 313, 328 (1963).

States marshals. A United States marshal has the power to appoint deputies[342] and to summon a *posse comitatus*.[343] Generally, in executing federal law, he may exercise those same powers that a sheriff may exercise in executing state law.[344] In this latter regard, the marshal's exercise of power to keep the federal peace within a state has been upheld by the United States Supreme Court.[345] Marshals would seem to be useful in instances where only a relatively small amount of force is necessary to enforce a federal court order or to preserve the peace. But where their strength is insufficient, and time does not permit the effective enlistment of the citizenry to assist them in their efforts to maintain law and order, it would seem that resort must be had to the use of federal troops.

A federal force that is likely to see action in future disorders is a specially trained Army unit whose existence has recently been reported in testimony before the Senate Armed Services Committee.[346] Under this scheme,

> seven special task forces of Regular Army troops — more than 15,000 men — have been assigned as an elite service to cope with urban disruption. The riot forces will be dispatched only if the National Guard — which has been undergoing special riot training since its woefully inept performances in Newark and Detroit last summer — cannot do the job.[347]

Although this force will ultimately be available to quell riots, the Army is seeking to lessen the chance of its being needed by establishing special schools in civil disorder for Guardsmen and by arranging to supply them with special riot-control equipment.[348] These plans commendably preserve responsibility for the suppression of domestic violence in its proper perspective, by supplying a federal reserve to be used only after a much improved state force has demonstrated its inadequacy.

3. Criminal Jurisdiction Over Federal Troops and Federalized Guardsmen

Once a National Guardsman or a regular member of the armed forces of the United States has been released from active federal service, he is no longer subject to trial by federal court-martial. The de-federalized Guardsman may be tried by court-martial under his state law, but the usual forums for trying alleged offenses committed by such troops while in active service for the federal government are the appropriate civilian courts.[349]

342 28 U.S.C.A. § 562 (Supp. 1967) provides: "The Attorney General may authorize a United States marshal to appoint deputies and clerical assistants. Each deputy marshal is subject to removal by the marshal pursuant to civil-service regulations."

343 28 U.S.C.A. § 569(b) (Supp. 1967) provides: "United States marshals shall execute all lawful writs, process and orders issued under authority of the United States, . . . and command all necessary assistance to execute their duties." For an early analysis of the power of a United States marshal to summon a *posse comitatus*, see 6 OP. ATT'Y GEN. 466 (1856).

344 28 U.S.C. § 570 (Supp. 1967) provides: "A United States marshal and his deputies, in executing the laws of the United States within a State, may exercise the same powers which a sheriff of the State may exercise in executing the laws thereof."

345 *Ex parte* Siebold, 100 U.S. 371, 394-96 (1880).

346 TIME, Feb. 23, 1968, at 20.

347 *Id.*

348 *Id.*

349 Letter from Martin F. Richman, First Assistant, Office of Legal Counsel of the Department of Justice, to Representative F. Edward Hebert, Chairman of Special Subcommittee on Civil Disturbances, House Committee on Armed Services, Sept. 1, 1967, in REPORT ON NATIONAL GUARD CAPABILITY, *supra* note 175, at 5666.

More difficult problems arise in the case of a regular soldier or a Guardsman who is in federal military status when charged with a criminal offense committed while on federal duty. Such an individual may clearly be tried by federal court-martial, but unless the civil courts are closed as a result of the improbable imposition of absolute martial law, this military jurisdiction is not exclusive. Civilian courts also have jurisdiction; however, it is important to note that unless civil authorities actually make the arrest of a defendant soldier, this jurisdiction can attach only after a decision by the military to honor the request of state officials that such defendant be made available for civil trial.[350] In the deliberations pursuant to such a request, the defendant himself is without a voice — "he is not entitled to demand either trial by court-martial or trial by a civil court to the exclusion of the other."[351] The military is not required to grant such a request, but a decision to do so recognizes that the offense may be a violation of state law, punishable by the courts of the state. In this light, the granting of this request would seem proper as a general matter of comity. Furthermore, an affirmative response to the request will not deprive the military of its court-martial jurisdiction. Because the same act may offend both state and federal law, it is clear that a defendant may be tried by federal court-martial and also by a state tribunal without violating the double jeopardy clause of the fifth amendment.[352]

Yet laws that allow a defendant to be twice tried and twice sentenced for a single act seem offensive to the public's sense of equity, notwithstanding the fact that the same act violated two sets of laws. The injustice seems even stronger in a situation where the defendant is subjected to state punishment for an offense he would not have been in a position to commit but for the inability of, or refusal by, that state to cope with a local problem that necessitated his presence there as part of a federal force. While the federal military laws may be criticized for lacking the jury trial as a procedural safeguard, this alleged drawback certainly does not work to the state's detriment in the sense of preventing the exaction of proper retribution from the defendant. Until there is a change in the present state of the law that allows this possibility of double trial, it would seem an advisable policy for the military to generally deny these state requests, particularly in instances of riot-connected offenses, and to try the federal offender once and for all by a court-martial.

Moreover, the applicable legal standards would be substantially the same in either a state civil court or a federal military tribunal. Standards of sound military conduct are prescribed by the Uniform Code of Military Justice.[353] The basic rule of military law is the rule of martial law — that troops may use whatever force is reasonably necessary to effectuate their orders to suppress unlawful violence. In employing such force as is "reasonably necessary," military personnel are allowed a "permitted range of honest judgment" but the reason-

350 *Id.* at 5667. Article 14 of the UNIFORM CODE OF MILITARY JUSTICE, 10 U.S.C. § 814 (1964), provides that "a member of the armed forces accused of an offense against civil authority may be delivered, upon request, to the civil authority for trial."
351 Letter from Martin F. Richman, *supra* note 349, at 5667.
352 *Cf.* Bartkus v. Illinois, 359 U.S. 121 (1959).
353 10 U.S.C. §§ 801-940 (1964), *as amended.*

ableness of their actions is nevertheless properly reviewable by the courts.[354] What is justifiable under this basic rule cannot be articulated with a high degree of precision, but must be decided on a case-by-case basis in light of the circumstances as they appeared to the actor at the time of his action.[355] It is generally understood, however, that

> [i]n the context of a domestic riot, it may be necessary to use greater force than could lawfully be exerted for ordinary law enforcement purposes; this conclusion naturally follows from the fact that the military is not called upon in such cases until the resources of conventional law enforcement have proved inadequate to suppress the violence.[356]

Perhaps the largest area of protection given an individual soldier against criminal liability is the defense of good faith obedience to orders. The courts have even excused homicide when it was committed in obedience to an order that was fair on its face.[357] However, unlawful orders will not justify their execution when, to a reasonable man, they would clearly exceed the basic rule of necessary force.[358]

If prosecution is brought in a state court, either directly or by military release, against anyone in the military service of the United States for an act done under color of his office, such a suit may be removed to the appropriate federal district court.[359] The "color of office" test means that the act complained of must somehow have been related to the defendant's official duties in such a way that it was thereby within the general scope of his authority as an officer or soldier. In the event that the military decides to follow the harsh policy of releasing soldiers to state jurisdiction, this allowance of removal is essential to insure the defendant a fair trial, free from local prejudice. In addition to this statutory protection, the federal government should also support military defendants by providing them with counsel when their alleged offenses are found by the district courts to have been done under color of office. According to recent indications from the Department of Justice, this legal assistance will ordinarily be given.[360] Yet even with these protective measures, the trial of military personnel under state law for offenses that simultaneously violate

354 Sterling v. Constantin, 287 U.S. 378 (1932).
355 Mitchell v. Harmony, 54 U.S. (13 How.) 115, 134 (1851).
356 Letter from Martin F. Richman, *supra* note 349, at 5667.
357 *E.g.*, Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165, 55 A. 952 (1903).
358 *E.g.*, United States v. Bevans, 24 F. Cas. 1138 (No. 14,589) (D. Mass. 1816) (orders given were to kill a man who had used opprobrious language).
359 Removal jurisdiction may be claimed under the applicable provision of either of two statutes. 28 U.S.C. § 1442a (1964) provides in pertinent part:

> A civil or criminal prosecution in a court of a State of the United States against a member of the armed forces of the United States on account of an act done under color of his office or status, or in respect to which he claims any right, title, or authority under a law of the United States respecting the armed forces thereof, . . . may . . . be removed for trial into the district court of the United States for the district where it is pending . . . .

28 U.S.C. § 1442 (1964) provides in pertinent part:

> (a) A civil action or criminal prosecution commenced in a State court against any of the following persons may be removed by them to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Any officer of the United States or any agency thereof, or person acting under him, for any act under color of such office . . . .

360 Letter from Martin F. Richman, *supra* note 349, at 5668.

federal law presents a poor alternative to the simpler and seemingly fairer justice afforded by a single trial in a military court.

## III. Procedure and Practice of Law Enforcement Agencies During a Riot

### *A. Force Used in Quelling a Riot*

Perhaps the first and most crucial problem faced by state and municipal officials when masses of urban ghetto dwellers take to the streets bent on violence and destruction is the question of what amount of force may be practically and lawfully utilized to suppress the disturbance. The problem is compounded for the conscientious official who is aware of the practical need to restore calm to the community while avoiding the harsh measures that may only lead to future riots. This latter consideration is especially significant in view of the fact that the conduct of the police in dealing with suspected lawbreakers has been the initial spark and motivating factor in many of the ghetto riots.[361] As one public official has pointed out: "The major civil disturbances in this country, Watts, Detroit, Jersey City [Newark], arose not out of a demonstration getting out of hand but rather out of law enforcement incidents."[362] Thus, in addition to the legal questions that will be treated in this Note, local officials must consider the far more serious social ramifications of their response to urban rioting.

If any generalizations can be made about so complex and unsettled an area of the law, they would be that "[i]n making an arrest, an officer may use whatever force is reasonably necessary"[363] and that the standard of reasonableness involved is that of the ordinarily prudent and intelligent person faced with the same situation as the policeman.[364] However, the policeman will run the risk of civil and/or criminal liability[365] should he use more force than ". . . reasonably appears to be necessary, or subject the person arrested to unnecessary risk of harm."[366] But it has further been recognized that this standard of reasonableness includes an additional consideration when the officer is acting under color of duty because

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361 *See, e.g.*, Ransford, *Attitudes of Negroes Toward the Los Angeles Riot*, 3 LAW IN TRANSITION Q. 191 (1966).

> When asked [of Los Angeles Negroes], "What do you think caused the riot?" 42% named police brutality, 24% named police methods or bad police treatment. The fact that 66% of the total sample mentioned either police brutality or poor methods as a cause is a remarkably high proportion, when considering that the question was open-ended; that is, mention of the police was completely spontaneous.

*Id.* at 193.

The report of the National Advisory Commission on Civil Disorder listed the first and most intense grievance of ghetto dwellers as police practices. RIOT COMMISSION REPORT, *supra* note 2, at 143.

362 Comments by Louis Ancel (Corporation Counsel for the Village of Maywood, Illinois), Illinois State Bar Association Midyear Meeting, Symposium: Riots and Mass Demonstrations: The Problem and the Law, in Chicago, Illinois, January 25, 1968. A copy of this presentation is on file in the office of the NOTRE DAME LAWYER.

363 Breese v. Newman, 179 Neb. 878, 140 N.W.2d 805, 808 (1966).

364 *Id.*

365 Noback v. Town of Montclair, 33 N.J. Super. 420, 428, 110 A.2d 339, 343 (1954).

366 City of Miami v. Albro, 120 So. 2d 23, 26 (Fla. Dist. Ct. App. 1960).

> [p]olice officers are not volunteers. They are armed and required to act to enforce the law. They may err in their judgment and exceed their authority in the sense that they misjudge the need for extreme measures or their right to resort to them. Yet, where the purpose is to comply with duty, it would be unreasonable to impose the measure of criminal responsibility applicable to the citizen whose involvement does not originate in a legal compulsion to act and who is free to turn away.[367]

Perhaps the primary distinction between the peace officer and the ordinary citizen with regard to the force that they may impose is that the police officer is under no duty to retreat when effecting an arrest. He may become the aggressor and use all reasonable force to overcome what resistance the arrestee may offer.[368]

1. Force Against Misdemeanants

Although the standards governing the use of force are often confusing, some rules are quite clear. It has long been recognized at common law that a peace officer could not kill a misdemeanant in order to effect an arrest.[369] The reason for such a rule is that

> [t]he law values human life too highly to allow an officer to proceed to the extremity of shooting an escaping offender who in fact has committed only a misdemeanor or lesser offense, even though he cannot be taken otherwise.[370]

That the law on this point is quite settled was aptly demonstrated in *Noback v. Town of Montclair*.[371]

> Police officers must learn, if they are not already aware, that there are definite limitations upon the amount of force that may be used by them in arresting a citizen charged with a crime or with a violation of the Disorderly Persons Act; that they may be held liable, both civilly and criminally, for the use of excessive force either in making a lawful arrest or in attempting to capture a fleeing offender; and that the law will not countenance the shooting or killing of a fleeing offender charged merely with a misdemeanor, breach of the peace, or violation of the Disorderly Persons Act.[372]

This rule has even been extended as far as to hold a policeman liable for wounding a suspect after the suspect assaulted the officer and began to retreat.[373] The *Restatement (Second) of Torts* supports the general proposition.[374]

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367 State v. Williams, 29 N.J. 27, 36, 148 A.2d 22, 27 (1959).

368 *Id.* at 39, 148 A.2d at 28.

369 Davis v. Hellwig, 21 N.J. 412, 416, 122 A.2d 497, 499 (1956). *See also* Moreland, *The Use of Force in Effecting or Resisting Arrest*, 33 NEB. L. REV. 408, 419 (1954).

370 Davis v. Hellwig, 21 N.J. 412, 419, 122 A.2d 497, 499 (1956).

371 33 N.J. Super. 420, 110 A.2d 339 (1954).

372 *Id.* at 428, 110 A.2d at 343; *accord*, Wimberly v. City of Paterson, 75 N.J. Super. 584, 594, 183 A.2d 691, 696 (1962).

373 Padilla v. Chavez, 62 N.M. 170, 306 P.2d 1094 (1957).

374 In the absence of legislative authority, neither a peace officer nor a private person is privileged to use force against or impose confinement upon another for the purpose of preventing the violation of a statute or a municipal ordinance or a continuance

These limitations on the use of force in dealing with misdemeanants are especially significant in the area of riot control since a substantial number of the persons apprehended during civil disturbances are merely misdemeanants. In the Detroit riot of 1967, of the 7,223 persons arrested, 1,652 were arrested for misdemeanor offenses[375] and 743 out of 3,356 arrests in the Watts riot of 1965 were for misdemeanors.[376] However, the law does recognize that under certain limited conditions a police officer, for his own protection, may be forced to resort to the use of more serious force than would otherwise be allowed[377] and that emergencies may arise ". . . when the officer cannot be expected to exercise that cool and deliberate judgment which courts and juries exercise afterwards upon investigations in court."[378] Likewise, the officer is privileged to threaten deadly force to deter and apprehend misdemeanants by firing warning shots so long as he does not intend to actually shoot the suspect[379] and exercises extraordinary care in the use of his firearms.[380]

Thus, when dealing with those suspected of, or in the act of, committing misdemeanor offenses, the police are strictly bound by the tradition that "[i]t is more in consonance with modern notions regarding the sanctity of human life that the offender escape than that his life be taken, in a case where the extreme penalty would be a trifling fine or a few days imprisonment,"[381] unless the circumstances are such that the officer must defend himself or his fellow officers against an attack by the misdemeanant.

2. Force Against Felons

Where the police are confronted with a felony offender, the law takes a much more liberal position with regard to the amount of force that may be used to effect his arrest. There are three basic approaches possible in analyzing

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or commission of a misdemeanor other than an affray or equally serious breach of the peace.

RESTATEMENT (SECOND) OF TORTS § 140 (1965). When a breach of the peace is concerned, the *Restatement* goes further:

> Either a peace officer or a private person is privileged to use force against another or to impose confinement upon him for the purpose of terminating or preventing the renewal of an affray or an equally serious breach of the peace which is being or has been committed in the actor's presence or of preventing such other from participating therein, if
>
> (a) the other is or the actor reasonably believes him to be participating or about to participate in the affray, and
>
> (b) *the confinement or force is not intended or likely to cause death or serious bodily harm, and*
>
> (c) the actor reasonably believes that the force or confinement is necessary to prevent the other from participating in the affray or other equally serious breach of the peace. *Id.* § 141 (emphasis added).

375 Cahalan, *The Detroit Riot*, 3 THE PROSECUTOR 430, 432 (1967).

376 *See* LOS ANGELES POLICE DEPARTMENT 1965 ANNUAL REPORT 21 (1966). In a much smaller riot in Cincinnati, Ohio, July 3 through July 5, 1967, there were approximately 400 arrests, generally for misdemeanors. Remarks of Melvin G. Rueger, Greenbrier Conference of National District Attorneys Association, Aug., 1967, printed in *Riot Panel*, 3 THE PROSECUTOR 282, 287 (1967).

377 *E.g.*, People v. Wilson, 36 Cal. App. 589, 172 P. 1116 (1918); Hutchinson v. Lott, 110 So. 2d 442, 444 (Fla. Dist. Ct. App. 1959); Fugate v. Commonwealth, 187 Ky. 564, 219 S.W. 1069 (1920); Padilla v. Chavez, 62 N.M. 170, 306 P.2d 1094, 1095 (1957) (dicta).

378 Mead v. O'Connor, 66 N.M. 170, 344 P.2d 478, 480 (1959).

379 Hutchinson v. Lott, 110 So. 2d 442, 444 (Fla. Dist. Ct. App. 1959).

380 Wimberly v. City of Paterson, 75 N.J. Super. 584, 600, 183 A.2d 691, 699 (1962).

381 Wilgus, *Arrest Without a Warrant*, 22 MICH. L. REV. 798, 814-15 (1924).

the permissible force that can be used against a felon.[382] The first approach is that deadly force is allowed whenever the officer reasonably believes that a felony has been committed and reasonably believes that the person against whom the force is to be applied has committed it.[383] This view has received only limited judicial support. In reversing and remanding a judgment rendered against the city of Miami for damages caused by a police officer when he shot and killed a fifteen-year-old burglary suspect, the Florida District Court of Appeals said:

> The fact that the person has not actually committed a felony or that no crime of any sort has been committed makes no difference, as long as the appearances are such as to lead a police officer to reasonably believe that a felony has been committed and the person he is about to arrest or apprehend is the person who has committed the felony.
>
> . . . .
>
> Having reasonable grounds to believe J. C. Nelson had committed a felony, the officers were entitled to use force which was reasonably necessary to capture him, even to the extent of killing or wounding him.[384]

But the dangers inherent in this approach are such that it generally is, and should be, rejected.[385] It would give a policeman the discretion, based on his reasonable belief, to use whatever force he felt necessary under the circumstances. This would have the ultimate effect of allowing police to respond in numerous apparent felony cases, which are in fact either misdemeanors or no crimes at all, with the degree of force that has been traditionally reserved for felony offenses.[386]

The second approach for considering the use of force against felons holds that "[k]illing is privileged if a felony has been committed and the arresting officer reasonably believes that the person killed committed the felony."[387] This more widely accepted test was adopted in *Petrie v. Cartwright*[388] which stated that ". . . where there is only a suspicion of a felony the officer is not warranted in treating the fugitive as a felon."[389] Thus, the officer must know that a felony actually was committed and then must reasonably believe that the suspect actually committed it before he can resort to the use of deadly force.

By far the most severe restriction on the use of force by the police is that imposed by the third approach. The Pennsylvania Supreme Court adopted this approach in the celebrated case of *Commonwealth v. Duerr*,[390] which, like *Petrie*, insisted that a felony must have actually been committed before deadly

382 94 U. Pa. L. Rev. 327, 328 (1946).
383 *Id.*
384 City of Miami v. Nelson, 186 So. 2d 535, 537-38 (Fla. Dist. Ct. App. 1966). *See also* Dixon v. State, 101 Fla. 840, 132 So. 684 (1931); Note, *Killing a Suspected Felon Fleeing to Escape Arrest*, 38 Ky. L.J. 618, 619-21 (1950).
385 *E.g.*, Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902). *See also* Note, *Killing a Suspected Felon Fleeing to Escape Arrest*, 38 Ky. L.J. 609, 612 (1950).
386 *See* Note, *supra* note 385, at 616.
387 94 U. Pa. L. Rev. 327, 328 (1946) (footnote omitted).
388 114 Ky. 103, 70 S.W. 297 (1902).
389 *Id.* at 109, 70 S.W. at 299. *See also* Moreland, *supra* note 369, at 409-10.
390 158 Pa. Super. 484, 45 A.2d 235 (1946).

force may be used. The court, however, went one step further by holding that "[t]he right to kill an escaping offender is limited to cases in which the officer *knows* that the person whom he is seeking to arrest is a felon and not an innocent party."[391] (Emphasis added.)

Although the rule allowing the use of deadly force in dealing with *all* felony offenses is still followed by most jurisdictions, there is a rising trend of, and call for, modification of the rule to preclude such force in instances of minor, non-atrocious felonies.[392]

3. Force in Riot Situations

Under riot conditions, the courts seem to take a much more lenient attitude in regard to the permissible amount of force that may be employed by peace officers. Just as in a non-riot situation, should police officers find their lives endangered by lawless conditions existing on the streets, they are always privileged to use whatever force is necessary to protect themselves and their fellow officers.[393] This same right is extended to those military forces called in to aid in the restoration of order.[394] Thus, it would certainly appear that the officers are clearly justified in the *proper* and *reasonable* use of deadly force to deal with snipers and other rioters who are intent on inflicting serious bodily harm on the officers.

Even in dealing with the large street-crowds which may be looting or destroying during a riot, the police and military are justified, under the law, in using more force than would be allowed in dealing with like criminal offenses under ordinary, non-riot conditions. An extreme application of this proposition was seen in *Commonwealth v. Stewart*,[395] where a lower Pennsylvania court upheld the actions of the police in quelling a small civil disturbance by pointing out:

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391 *Id.* at 492, 45 A.2d at 239.

392 *See* Moreland, *supra* note 369, at 412-15. That the law seems to be heading in just such a direction is demonstrated by the RESTATEMENT (SECOND) OF TORTS § 143 (1965).

> (1) Either a peace officer or a private person is privileged to use force against or impose confinement upon another which is not intended or likely to cause death or serious bodily harm for the purpose of preventing any felony which the actor reasonably believes the other is committing or is about to commit if the actor reasonably believes that commission or consummation of the felony cannot otherwise be prevented.
>
> (2) The use of force or the imposition of confinement intended or likely to cause death or serious bodily harm is privileged if the actor reasonably believes that the commission or consummation of the felony cannot otherwise be prevented and the felony for the prevention of which the actor is intervening is of a type threatening death or serious bodily harm or involving the breaking and entry of a dwelling place. *Id.*

393 *E.g.*, Gordy v. State, 93 Ga. App. 743, 92 S.E.2d 737 (1956) (dicta) which states: "A person making a lawful arrest is justified in killing under the fears of a reasonable man that a felony is about to be committed upon himself or his fellow officers." *Id.* at 739.

394 Manley v. State, 62 Tex. Crim. 392, 137 S.W. 1137 (1911), *aff'd on other grounds on second appeal*, 69 Tex. Crim. 502, 154 S.W. 1008 (1913). Speaking of the rights of National Guardsmen, the court said:

> If in the performance of his [National Guardsman's] duties his life becomes endangered, or it appeared to him under all the facts and circumstances in evidence that some person was about to assault him with the intention of killing him, or doing him some serious bodily injury, he would have the right to act in self-defense. 137 S.W. at 1141.

395 58 Dauphin County Reports 209 (Ct. of Quarter Sessions of Dauphin County, Pa. 1947).

In Commonwealth vs. Martin, 9 Kulp 69, it is said, with reference to the amount of force that may be used:

> Those who attend a sheriff in order to suppress a riot may take such weapons as are necessary to effectuate the purpose, and they may justify beating, wounding, or even killing such rioters as shall resist or refuse to surrender.
>
> The policemen of the city of Harrisburg have the same authority as a sheriff under such circumstances.[396]

Hopefully, courts today would not be so inhumane, but it does appear that, at least in Pennsylvania, the police are authorized to use the utmost force in suppressing a riot.

An earlier Pennsylvania decision adopted this same position with regard to the amount of force that the military may use in the suppression of rioting. In *Commonwealth ex rel. Wadsworth v. Shortall*,[397] which upheld the action of a National Guardsman on riot duty in his killing, pursuant to orders, a person who ignored his repeated commands to halt, the Pennsylvania Supreme Court reasoned that

> . . . while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible, for *the first and overruling duty is to repress disorder, whatever the cost, and all means which are necessary to that end are lawful.* The situation of troops in a riotous and insurrectionary district approximates that of troops in an enemy's country, and in proportion to the extent and violence of the overt acts of hostility shown is the degree of severity justified in the means of suppression.[398] (Emphasis added.)

The harsh result reached in *Shortall* has received some support from one of the leading commentators on martial law, Frederick Bernays Wiener, who said:

> We may disagree with much of what the court said and still approve the decision. Dynamiters do not respond to sweet reasonableness, and the disturbed situation in the community while not amounting to a state of war or even calling for the application of the rules of war, certainly justified drastic measures.[399] (Footnote omitted.)

Even if one rejects the undesirable conclusion reached in *Shortall* that under riot conditions the National Guard enjoys war powers and adopts the more moderate view that the troops acting in aid of civil authorities to suppress a riot have only the powers of the local peace officers,[400] troops in Pennsylvania

396 *Id.* at 218.
397 206 Pa. 165, 55 A. 952 (1903).
398 *Id.* at 174, 55 A. at 956.
399 F. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 73 (1940).
400 *See* Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911); Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924); State v. McPhail, 182 Miss. 360, 180 So. 387 (1938); Fluke v. Canton, 31 Okla. 718, 123 P. 1049 (1912).

would possess virtually the same amount of power under the doctrine advanced in *Commonwealth v. Stewart.*[401]

Fortunately, until the current rash of ghetto riots, the United States had not experienced enough civil disorder for the courts to demonstrate whether a more enlightened view of the law will reject the legal theories arising from *Stewart* and *Shortall.* But it does seem obvious that the law will allow greater force in the suppression of riots than in the control of ordinary crime. The *Restatement (Second) of Torts,* which is ordinarily most reluctant to sanction the use of force in controlling criminal conduct,[402] has adopted in section 142 a rather permissive standard with regard to the amount of force authorized in riot control.

> (1) Either a peace officer or a private person is privileged to impose confinement upon or use force against another for the purpose of suppressing a riot or preventing the other from participating in it if
>
> (a) the other is or the actor reasonably believes him to be participating or to be about to participate in the riot, and
>
> (b) such force or confinement is not intended or likely to cause death or serious bodily harm, and
>
> (c) the actor reasonably believes that the riot cannot otherwise be suppressed or the other's participation in it otherwise be prevented.
>
> (2) *The use of force or the imposition of a confinement which is intended or likely to cause death or serious bodily harm for the purpose of suppressing a riot or preventing the other from participating in it is privileged if the riot is one which threatens death or serious bodily harm.*[403] (Emphasis added.)

That the *Restatement* does countenance the use of deadly force in the suppression of riots, such as those this country has experienced in the urban ghettos during the past several summers, is made quite clear by comment *g* to subsection 2 of section 142:

> If the riot itself threatens death or serious bodily harm, it is sufficiently serious to justify the use of deadly means to suppress it. It is not necessary that the avowed purpose of the riot be to inflict such harm. It is enough that the conduct of the rioters is such as to create the probability or even the possibility of such consequences. Thus a riot the purpose of which is the wholesale destruction of structures or chattels usually involves something more than a bare possibility of serious bodily harm to persons in the vicinity.[404]

Hence, for better or for worse, there has been, and will probably continue to be, a tradition in the law of allowing a most severe use of force against rioters.

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401 58 Dauphin County Reports 209 (Ct. of Quarter Sessions of Dauphin County, Pa. 1947).
402 *See* notes 374 & 392 *supra.*
403 RESTATEMENT (SECOND) OF TORTS § 142 (1965).
404 RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 142, comment *g* at 257 (1965).

### *B. Arrest Procedures During a Riot*

1. Power to Arrest

During a major ghetto riot, large numbers of persons are arrested and detained by civil and military law enforcement officials. In the first of the major riots of this type, Watts in 1965, the Los Angeles Police Department reported that 3,356 persons were arrested.[405] In the week-long rioting in Detroit in 1967, 7,223 citizens were arrested.[406] Faced with the likelihood of such an inordinately large number of arrests, officials charged with the suppression of violence and the restoration of order must determine when and whom the law permits them to arrest.[407]

In the area of arrest without a warrant, the law again makes a distinction between felony and misdemeanor offenses. Generally, it can be said that "[a]n officer can make an arrest for a misdemeanor without a warrant only when the offense is attempted or committed in his presence."[408] According to its strictest interpretation, the requirement of an officer's presence means that ". . . the acts constituting the offense become known to him at the time they are committed through his sense of sight or through other senses."[409] Practically speaking, the requirement that the misdemeanor must have been committed in the officer's presence should not cause much difficulty for riot arrests. During a riot, the police confront the persons whom they will arrest directly on the city streets and can learn of the crime only through their senses. In Detroit, for example, most of the 1,652 misdemeanor arrests were for curfew violations[410] which clearly must be committed in the presence of the police if they are to be detected.

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405 *See* LOS ANGELES POLICE DEPARTMENT 1965 ANNUAL REPORT 21 (1966).

406 Cahalan, *supra* note 375, at 430.

407 It is sufficient here to note that there are certain differences in the law with regard to arrest with and without a warrant. However, under riot conditions it is unthinkable that the police and military officers would be able or disposed to obtaining warrants to arrest persons they confront on the streets. Therefore, the discussion may safely be limited to situations in which arrests are made without the use of a warrant.

408 Coakley, *Restrictions in the Law of Arrest*, 52 NW. U.L. REV. 2, 11 (1957) (footnotes omitted). It might also be noted that often there is an additional requirement for arrest without a warrant in the case of a misdemeanor, namely, that the offense must involve a breach of the peace. Commonwealth v. Gorman, 288 Mass. 294, 297, 192 N.E. 618, 619 (1934); Comment, *The Law of Arrest*, 17 MERCER L. REV. 300, 303 (1965). However, such a requirement is meaningless during actual riot conditions since riot-related offenses, by their very nature, involve a breach of the peace. This is made quite clear by examining what constitutes a breach of the peace. The Supreme Court of North Carolina has said:

> As to what constitutes a breach of the peace within the meaning of the rules which authorize an arrest without a warrant in such cases, the better reasoned authorities emphasize the necessity of showing as an element of the offense a disturbance of public order and tranquility by act or conduct not merely amounting to unlawfulness but tending also to create public tumult and incite others to break the peace. State v. Mobley, 240 N.C. 476, 83 S.E.2d 100, 104 (1954).

The RESTATEMENT (SECOND) OF TORTS defines a breach of the peace as ". . . a public offense done by violence, or one causing or likely to cause an immediate disturbance of public order." RESTATEMENT (SECOND) OF TORTS § 116 (1965). From the definitions advanced by these authorities, it would be difficult to envision any riot-related offense that would not be a breach of the peace, with the possible exceptions of loitering and curfew violations (which may be considered "likely to cause an immediate disturbance of public order," when done in the context of a riot).

409 State v. Pluth, 157 Minn. 145, 151, 195 N.W. 789, 791 (1923).

410 Cahalan, *The Detroit Riot*, 3 THE PROSECUTOR 430, 432 (1967). Furthermore, most states now authorize a peace officer to arrest without a warrant for any offense committed in his presence. Comment, *supra* note 408, at 304.

The arrest requirements for a felony offense are somewhat more permissive; they give the police greater freedom as to whom they can arrest and on what basis. These less stringent requirements for felony arrests take on added significance when it is remembered that the majority of those arrested in the course of a riot are charged with felonies.[411] The basic requirement for such an arrest is that it be made only upon probable cause which ". . . exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed."[412] Mere ". . . suspicion is not enough for an officer to lay hands on a citizen,"[413] although "[e]vidence required to establish guilt is not necessary."[414] One commentator has stated:

> With respect to felony offenses, therefore, the officer can act upon the complaint or report of reliable citizens, or upon information from reliable informants, and upon observed facts and circumstances which, although short of the actual commission of a crime, give rise to reasonable cause to believe that the suspect did commit a felony offense.[415]

Thus, if the officer has probable cause to believe that a felony has been committed and that the suspect committed it, he is entitled to arrest without a warrant. There is no indication that this legal principle would be any different during a riot.

However, there is some authority for the proposition that the rules governing arrest without a warrant may be relaxed, in some undefined manner, for military forces charged with, or aiding in, the suppression of a civil disorder. As Wiener has pointed out, there are three schools of thought on the powers that may be exercised by the military in controlling a riot.[416] On one extreme is the theory that under such conditions, military forces enjoy the powers they would have in conditions of actual war.[417] This appears to be the approach adopted by the Supreme Court of Pennsylvania in *Commonwealth ex rel. Wadsworth v. Shortall,*[418] where the court said that ". . . while the military are in active service for the suppression of disorder and violence, their rights and obligations as soldiers must be judged by the standard of actual war. No other standard is possible . . . ."[419] Such a position has received support in several equally antiquated cases from other jurisdictions.[420] It grants troops the same flexibility

411 In the Detroit riot, 5,571 of the 7,223 arrests were for felonies. *See* Cahalan, *supra* note 410, at 430, 432. And in the Watts riot, of the 3,356 persons arrested, 2,613 were charged with felonies. *See* LOS ANGELES POLICE DEPARTMENT 1965 ANNUAL REPORT 21 (1966).

412 Henry v. United States, 361 U.S. 98, 102 (1959).

413 *Id.* at 104.

414 *Id.* at 102.

415 Coakley, *supra* note 408, at 12. *See also* Comment, *supra* note 408, at 302-03.

416 F. WIENER, *supra* note 399, at 74-78.

417 *Id.* at 77, 78.

418 206 Pa. 165, 55 A. 952 (1903). Although Wiener, without any stated reason, says that the case does not confer such power, F. WEINER, *supra* note 399, at 77 n.61.

419 Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165, 174, 55 A. 952, 956 (1903).

420 United States *ex rel.* Seymour v. Fischer, 280 F. 208 (D. Neb. 1922) where it was said:

> When a state of war or insurrection exists, and the Governor has legally called into action the military forces of the state, the will of the commander becomes the controlling authority in the occupied territory, so far as he chooses to exert it, *subject to the laws and usages of war. Id.* at 210 (emphasis added).

*See also* Hatfield v. Graham, 73 W. Va. 759, 81 S.E. 533 (1914); *Ex parte* Jones, 71 W. Va.

to respond to the riot situation according to the severity of the disorder as if they were engaged in the occupation of enemy territory.[421] Apparently, this approach would give the troops unlimited discretion in making riot arrests.[422] Fortunately,[423] such a position would not likely be accepted today because

> . . . it is believed that this issue [military having war powers to suppress riots] is erroneous and unsound and that—perhaps more to the point—it will never stand the test of review in the Supreme Court of the United States. Pending . . . authoritative precedent, it is suggested that it is potentially both dangerous and costly for military personnel employed in aid of the civil power to imagine themselves at war. The safer course is to regard their powers as not unlimited.[424]

On the other extreme is the view that military men answering the call to control domestic disorder have no greater power than that of the civil peace officers.[425] This position likewise has received some smattering of support as was demonstrated by *State v. McPhail*[426] which stated that ". . . whatever the Governor does in the execution of the laws, or whatever members of the militia do under such authority, must be as civil officers, and in strict subordination to the general law of the land."[427] At least one commentator has adopted this position by saying: "In carrying out their mission the troops are bound to follow legal procedures. The extent of their power is that of any peace officer acting under similar circumstances."[428] Were such a restricted standard adopted, the federal troops and National Guardsmen would be compelled to abide by the same arrest requirements as do the local police.

However, the more generally accepted approach is to regard the military as having powers somewhere in between those of actual war and those of the local police.[429] The Supreme Court of Iowa exemplified the majority position in *State ex rel. O'Connor v. District Court*[430] where it said:

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567, 77 S.E. 1029 (1913); State *ex rel.* Mays v. Brown, 71 W. Va. 519, 77 S.E. 243 (1912).

421 Commonwealth *ex rel.* Wadsworth v. Shortall, 206 Pa. 165, 174, 55 A. 952, 956 (1903).

422 Although the cases do not explicitly spell out the effect of war powers on the ability of the military to make arrests, this unlimited arrest power is implicit in the decisions. See *id.*; United States *ex rel.* Seymour v. Fischer, 280 F.208 (D. Neb. 1922); Hatfield v. Graham, 73 W. Va. 759, 81 S.E. 533 (1914); *Ex parte* Jones, 71 W. Va. 567, 77 S.E. 1029 (1913); State *ex rel.* Mays v. Brown, 71 W. Va. 519, 77 S.E. 243 (1912).

423 The possible horrors of such a position were graphically demonstrated by Charles Fairman when he said:

> Other jurisdictions have gone to the opposite extreme and conceded war powers to the governor. Paint Creek takes on the importance of Manassas, and militia officers controlling longshoremen at Galveston or strikers at Nebraska City are assimilated to Glorious Ben [appropriately nicknamed "Beast"] Butler in the plentitude of his exuberant military government in New Orleans in 1862. Fairman, *The Law of Martial Rule and the National Emergency*, 55 HARV. L. REV. 1253, 1273 (1942) (footnotes omitted).

424 F. WIENER, *supra* note 399, at 78. *See also* Fairman, *supra* note 423, at 1273-74.

425 F. WIENER, *supra* note 399, at 74-76.

426 182 Miss. 360, 180 So. 387 (1938).

427 *Id.* at 371, 180 So. at 390. *See also* Franks v. Smith, 142 Ky. 232, 134 S.W. 484 (1911); Bishop v. Vandercook, 228 Mich. 299, 200 N.W. 278 (1924); Fluke v. Canton, 31 Okla. 718, 123 P. 1049 (1912).

428 Note, *Rule by Martial Law in Indiana: The Scope of Executive Power*, 31 IND. L.J. 456, 473 (1956).

429 Fairman, *supra* note 423, at 1274.

430 219 Iowa 1165, 260 N.W. 73 (1935).

> . . . we think that overwhelming weight of authority does extend to the military officers under such [riot] conditions much greater latitude in the exercise of their discretion as to what means it is necessary and proper for them to employ than is possessed by civil officers in time of peace.[431]

The commentators, for the most part, agree that the military does enjoy increased powers in dealing with domestic violence.[432] In the area of actual arrest procedure, this additional power remains undefined[433] and the actions must be judged on a case-by-case basis until the courts do announce the applicable standards.

2. Identification of Arrestees

Because of the large number of persons who may be arrested during a major riot, an arresting officer would be unable to remember the surrounding circumstances under which he arrested each of a number of persons.[434] Therefore, it has been suggested by several prominent prosecutors that the police obtain Polaroid cameras so that on-the-spot pictures may be taken of the officer and the arrestee for future reference.[435] This procedure was effectively utilized during the Detroit riot in 1967.

> The police knew that the individual police officer could not possibly remember all the persons whom he had arrested and the loot with which such persons were apprehended and the circumstances of the arrest when it came time to testify in court. In many precincts, therefore, the arresting officer and the accused were photographed with a Polaroid camera side by side with the loot piled on the floor before them. On the back of the photo, particulars of name, location of arrest, etc. were noted. These photos were placed in the police file folder of the case and were referred to by the arresting officer just before his taking the witness stand for the purpose of refreshing his recollection. They proved an invaluable aid to the police officers.[436]

The use of such a procedure violates none of the constitutional rights of the accused. In *Holt v. United States*[437] Justice Holmes said of fifth amendment safeguards:

> [T]he prohibition of compelling a man in a criminal court to be witness against himself is a prohibition of the use of physical or moral compulsion

431 *Id.* at 1187, 260 N.W. at 84. *See also* Herlihy v. Donohue, 52 Mont. 601, 161 P. 164 (1916); State *ex rel.* Roberts v. Swope, 38 N.M. 53, 28 P.2d 4 (1933).

432 F. WIENER, *supra* note 399, at 76, where he states ". . . a broader scope of action is permitted to the troops, and acts which if done by police officers would be without authority of law are considered legal when done by the military in situations involving violence." *See also* Fairman, *supra* note 423, at 1274; Fairman, *Martial Law, in the Light of* Sterling v. Constantin, 19 CORNELL L.Q. 20, 32-33 (1933).

433 However, there is some authority for the proposition that the military will be granted the power to detain rioters until the disorder is suppressed. This topic will be discussed later in text accompanying notes 487-97 *infra.*

434 Cahalan, *supra* note 410, at 430-31.

435 *See* Remarks of Melvin G. Rueger, Greenbrier Conference of National District Attorneys Association, Aug. 1967, printed in *Riot Panel*, 3 THE PROSECUTOR 282, 287 (1967); Remarks of Donald L. Knowles, *id.* at 286.

436 Cahalan, *supra* note 410, at 430-31.

437 218 U.S. 245 (1910).

> to extort communications from him, not an exclusion of his body as evidence when it may be material.[438]

This reasoning has been developed in the law to mean that the privilege protects only against the compelling of the person to give evidence ". . . of a testimonial or communicative nature."[439] Finally, the Supreme Court has ruled that ". . . it [fifth amendment] offers no protection against compulsion to submit to fingerprinting, *photographing*, or measurements, to write or speak for identification . . . ."[440] (Emphasis added.)

However, in *United States v. Wade*,[441] the Supreme Court, after accepting the proposition that such practices as photographing the defendant do not violate fifth amendment rights,[442] vacated and remanded a conviction because the defendant's sixth amendment rights were violated.[443] Defendant's counsel was not present at a lineup where witnesses identified the defendant in a manner that could not be adequately challenged in court and could have been warped by the circumstances.[444] This identification procedure was deemed a "critical stage of the prosecution."[445] But it was further stated that the defendant need not have counsel present at non-critical stages where ". . . there is minimal risk that his counsel's absence . . . might derogate from his right to a fair trial."[446] It would appear obvious that this suggested initial photographing is such a non-critical stage since there would be no meaningful function for counsel to perform.[447]

A practical problem that may be confronted, however, arises from the fact that slight shifts in camera position or the relative distances of the photographed persons from the camera and from the surroundings may greatly distort the photograph.[448] Therefore, the police should receive prior training in the proper use of the camera; for example, the suspect should be photographed beside the arresting officer so that any distortions would be obvious when they appear in court. This policy would avoid any problems that may be raised by *Wade*.

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438 *Id.* at 252-53.
439 Schmerber v. California, 384 U.S. 757, 761 (1966) (footnote omitted).
440 *Id.* at 764; *accord*, Kennedy v. United States, 353 F.2d 462, 466 (D.C. Cir. 1965); Smith v. United States, 324 F.2d 879, 882 (D.C. Cir. 1963); United States v. Amorosa, 167 F.2d 596, 599 (3d Cir. 1948); Williams v. State, 239 Ark. 1109, 396 S.W.2d 834, 837 (1965); Graef v. State, 1 Md. App. 161, 228 A.2d 480, 484 (1967); C. McCormick, Treatise on the Law of Evidence § 126 (1954).
441 388 U.S. 218 (1967).
442 *Id.* at 223.
443 *Id.* at 227-39.
444 This could occur, for example, in cases where all participants in the lineup except the suspect are known to the witness, the other lineup participants are "grossly dissimilar" to the suspect, only the suspect is made to wear the distinctive clothing worn by the actual criminal, and where the police inform witnesses that the actual criminal has been arrested. *Id.* at 233.
445 *Id.* at 237.
446 *Id.* at 228.
447 Haworth, *The Right to Counsel During Police Identification Procedures*, 45 Texas L. Rev. 504, 515 (1967).
448 For an example of the photographic distortions possible from such shifting, See M. Houts, From Evidence to Proof, 182-83 (1956).

3. Riot Arrests: *Gideon*[449] and *Miranda*[450]

Although there is some support for the proposition that "[d]ue process of law depends upon circumstances and varies with the subject-matter and the necessities of the situation . . . ,"[451] the strong wording of the Supreme Court in *Miranda*[452] leaves no doubt that the specified procedural safeguards must be applied in riots as well as in normal circumstances.

> It is impossible for us to foresee the potential alternatives for protecting the privilege [freedom from self-incrimination under the fifth amendment] which might be devised . . . . However, unless we are shown other procedures which are at least as effective in apprising accused persons of their right of silence and in assuring a continuous opportunity to exercise it, the . . . safeguards must be observed.[453]

In view of this language, if it became impossible, as a practical matter, to give the specified *Miranda* warnings in the manner prescribed, the police may be allowed to modify the rule so long as none of the accused's rights, as specified under *Miranda,* are violated. But in dealing with a riot, the police are undoubtedly too occupied with the situation on the streets to be concerned with interrogating arrested persons who were probably apprehended in the process of committing the crime for which they are charged. Therefore, the *Miranda* problem in the riot context is not as significant as it first might appear.

*Gideon,* however, does present a more serious problem for local officials.[454] That the Supreme Court considers the right to counsel to be absolute in criminal cases was demonstrated by its statement that

> . . . reason and reflection require us to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to be an obvious truth. . . . The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.[455]

The fact that the police themselves agree that the safeguards of *Gideon* and *Miranda* apply even under riot conditions is exhibited by a letter from the Los Angeles Police Department which reads in part:

> The safeguards of Gideon, Miranda, and Escobedo are applied under riot conditions. Interrogation of arrestees who do not have counsel is scheduled according to the availability of public defenders.[456]

449 Gideon v. Wainwright, 372 U.S. 335 (1963).
450 Miranda v. Arizona, 384 U.S. 436 (1966).
451 United States *ex rel.* Seymour v. Fischer, 280 F.2d 208, 210 (D. Neb. 1922).
452 The accused, before he can be subjected to police interrogation, must be advised that he has the right to remain silent, it must be made clear to him that the police will respect that right, he must be informed that anything he says will be used against him, he must be advised of his right to counsel, and must be told that free counsel will be provided him if he is unable to retain counsel on his own. Miranda v. Arizona, 384 U.S. 436, 467-73 (1966).
453 *Id.* at 467.
454 An accused indigent has an absolute right to counsel paid for by the state. Gideon v. Wainwright, 372 U.S. 335 (1963).
455 *Id.* at 344.
456 Letter from Capt. T. F. Janes, Commander, Public Affairs Division, Los Angeles Police Department, to James P. Gillece, Jr., January 2, 1968, on file with the NOTRE DAME LAWYER.

The problem with these safeguards, then, is not theoretical, but practical. Due to the large number of arrests during a riot[457] and the fact that most of those arrested are poor and without retained counsel,[458] it is quite difficult to supply them with the required legal advice. In Detroit, most of the persons arrested faced arraignment without the benefit of counsel, although attorneys from the bar association were often present as observers.[459] Many local attorneys freely volunteered their services — a necessary measure since the costs of providing appointed counsel to each arrestee would have been prohibitive.[460] But the arrangements were still woefully inadequate in that attorneys were assigned to courtrooms rather than to individual defendants. These attorneys represented all defendants tried in the courtroom to which they were assigned.[461] "While on [*sic*] attorney was conducting an examination, others were interviewing defendants and preparing their cases. In those instances where defense counsel needed more time to prepare, the court granted adjournment."[462] It is difficult to imagine how an adequate defense could be prepared under such conditions, and thus it seems that "Gideon's Trumpet" blew a sour note in riot-torn Detroit.

One possible solution to this difficult problem is for the local prosecutor to aggressively recruit a large number of volunteer attorneys from the local bar association so that all arrested parties could be adequately represented. Such a plan cannot be too highly recommended and must be finalized long before the city burns.

### *C. Detention of Rioters*

One of the most effective, most widely used, and most objectionable methods of riot control is the incarceration of large numbers of rioters and their leaders until the disorder is suppressed.[463] Most law enforcement officials strongly support such a process.[464] The desired result — keeping the arrested rioters and riot leaders off the streets for the duration of the disturbance — can be accomplished by any one of three methods: (1) bail may be denied to those arrested, (2) an excessively high bail may be set so that the poor would be unable to meet it, (3) the military, when involved, may construe their powers in a riot to include the right to detain dangerous persons without bail.

457 *E.g.*, 7,223 in Detroit, Cahalan, *supra* note 410, at 430; 3,356 in Watts, LOS ANGELES POLICE DEPARTMENT 1965 ANNUAL REPORT 21 (1966); and 400 in Cincinnati, Remarks of Melvin G. Rueger, *supra* note 435, at 287.

458 Only 30% of those arrested in Detroit had retained counsel, Cahalan, *supra* note 410, at 433.

459 *Id.* at 432.

460 *Id.* at 432-33.

461 *Id.* at 433.

462 *Id.*

463 It should be pointed out that the possible long range effect of such tactics might be to foster community resentment and thereby increase the chance of future and more severe disturbances. The National Commission on Civil Disorder reported that the most intensely held grievance of ghetto dwellers was police practices and another listed grievance was discriminatory law enforcement. RIOT COMMISSION REPORT, *supra* note 2, at 143-44.

464 *See* Remarks of Brendan T. Byrne, *supra* note 435 at 283: "Almost everyone agrees on the necessity for high bail during the riot . . . ." Remarks of Melvin G. Rueger, *supra* note 435, at 287: "The courts generally set high bonds on persons charged. This, of course, kept a large number in custody, thus preventing them from returning to the scene."

1. Denial of Bail

The eighth amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[465] But the amendment does not, and has not been recognized as, granting an absolute right to bail. The Supreme Court in *Carlson v. Landon*[466] said: "Indeed, the very language of the Amendment fails to say all arrests must be bailable. We think, clearly, here that the Eighth Amendment does not require that bail be allowed under the circumstances. . . ."[467] The Eighth Circuit followed that reasoning in *Mastrian v. Hedman*.[468]

> Neither the Eighth Amendment nor the Fourteenth Amendment requires that everyone charged with a state offense must be given his liberty on bail pending trial. While it is inherent in our American concept of liberty that a right to bail shall generally exist, this has never been held to mean that a state must make every criminal offense subject to such a right or that the right provided as to offenses made subject to bail must be so administered that every accused will always be able to secure his liberty pending trial. Traditionally and acceptedly, there are offenses of a nature as to which a state properly may refuse to make provision for a right to bail.[469]

If bail then can legally be denied in certain cases, the question becomes one of whether it can be denied to arrested rioters. Most public officials agree that it is desirable to hold rioters in custody for the duration of the disturbance under the belief that, if released, they would return to the ghetto and resume their participation in the disorder.[470] There is some legal precedent for the denial of bail in cases where the danger to the community would be increased by the accused's release. "If, for example, the safety of the community would be jeopardized, it would be irresponsible judicial action to grant bail."[471] Thus, if the safety of the community does justify a denial of bail and since the eighth amendment precludes excessive bail, one can only conclude, as did Justice Douglas, that it would be unconstitutional to set a bail so high that the defendant could not possibly afford it, but it would be permissible to deny him the right to bail altogether.[472]

Although such may be the current status of the law, its logical absurdity

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465 U.S. CONST. amend. VIII.
466 342 U.S. 524 (1952).
467 *Id.* at 545-46.
468 326 F.2d 708 (8th Cir.), *cert. denied*, 376 U.S. 965 (1964).
469 *Id.* at 710.
470 *E.g.*, the prosecutor for Wayne County, Michigan, which includes Detroit, said of the situation existing in that city during the riot:

> If each of those arrested had been released on his personal recognizance, there was danger of contempt replacing respect and sober regard for the machinery of law enforcement which might impel him to new acts of lawlessness. What service would it have been to the prisoner or to the community to release one caught *flagrante delicto* looting when the Governor of the State informed the President of the United States that he was not sure that he could maintain law and order in the streets of Detroit? Cahalan, *The Detroit Riot*, 3 THE PROSECUTOR 430, 432 (1967).

471 Carbo v. United States, 82 S. Ct. 662, 666 (1962) (footnote omitted).
472 *See* Rehman v. California, 85 S. Ct. 8, 9 (1964).

was well demonstrated by Justice Burton in a well-reasoned dissent in *Carlson v. Landon.*[473]

> That Amendment clearly prohibits federal bail that is excessive in amount when seen in the light of all traditionally relevant circumstances. Likewise, it must prohibit unreasonable denial of bail. The Amendment cannot well mean that, on the one hand, it prohibits the requirement of bail so excessive in amount as to be unattainable, yet, on the other hand, under like circumstances, it does not prohibit the denial of bail, which comes to the same thing. The same circumstances are relevant to both procedures.[474]

The very concept of holding a person, rioter, or ordinary arrestee in jail because he may commit some crime in the future runs contrary to notions long cherished in our legal system — that future crimes are to be deterred by the threat of future punishment and not by prior incarceration, and that imprisonment should not be imposed on a person without a judicial determination of his guilt.[475] Therefore, such a practice may well constitute a denial of due process of law.[476]

Justice Jackson, sitting as a circuit judge in *Williamson v. United States,*[477] attacked the concept of preventive detention, even in the interest of the national security, by allowing bail to certain convicted communists pending their appeal.

> If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional American law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented in this country and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted.[478] (Footnote omitted.)

However, this whole question of denying bail to those arrested during a riot is actually of little practical significance. Only nine states do not provide in their constitutions for a right to bail in all non-capital cases,[479] and, since the Judiciary Act of 1789,[480] bail has been a matter of right in federal non-capital cases.[481] Therefore, prosecutors will usually resort to another technique to hold the arrestees in custody during the riot.

2. Setting of High Bail

Often during a riot, officials of the community have sought to have high

473 342 U.S. 524 (1952).
474 *Id.* at 569 (dissenting opinion).
475 Note, *Preventive Detention Before Trial,* 79 HARV. L. REV. 1489, 1509 (1966).
476 *Id.* at 1498.
477 184 F.2d 280 (2d Cir. 1950).
478 *Id.* at 282-83.
479 Note, *A Study of the Administration of Bail in New York City,* 106 U. PA. L. REV. 693, 696 n.11 (1958).
480 Judiciary Act of 1789, ch. 20, § 33, 1 Stat. 91.
481 FED. R. CRIM. P. § 46(a)(1) provides: "A person arrested for an offense not punishable by death shall be admitted to bail."

bails set by the courts in the hope that the indigent rioters will be unable to post the bond. In Detroit the county prosecutor publicly announced that he would ask that a bond of $10,000 be imposed on each person arrested for looting, and he received court reaction favorable to his request.[482] That such a practice was extensively used during the disorder in Detroit was demonstrated in the report of a speech made by John Feikens, president of the Detroit Bar Association, which stated:

> Even though the holocaust caused by the rioting, and despite the understandable near-hysteria in the city that cried out against the prisoners, it had to be remembered that each was entitled to be presumed innocent until proven guilty. Mr. Feikens noted that this principle "bent severely" as judges imposed heavy bail, their motivation being to clear the streets of looters and rioters. No one arrested in the early days of the disturbance was allowed released on personal bond.[483]

Bail has a traditional, legitimate purpose — to assure that the accused will appear for trial — and it can be used for no other end. This was conclusively settled by the Supreme Court in *Stack v. Boyle*[484] where it declared:

> . . . [T]he modern practice of requiring a bail bond or the deposit of a sum of money subject to forfeiture serves as additional assurance of the presence of an accused [at trial]. Bail set at a figure higher than an amount reasonably calculated to fulfill this purpose is "excessive" under the Eighth Amendment. . . .
>
> Since the function of bail is limited, the fixing of bail for any individual defendant must be based upon standards relevant to the purpose of assuring the presence of that defendant.[485]

The Constitution does forbid the setting of excessive bail, and under *Stack,* the test for determining whether a particular bail is excessive is by measuring it against the amount of bail reasonably calculated to achieve the purpose for which the bail is used. The only constitutionally acceptable purpose is to assure the accused's presence at trial. When bail is used for any other purpose, including the preventive detention of rioters, it runs contrary to the eighth amendment.[486]

3. Military Detention

It has often been alleged and upheld by the courts that the military, in

482 *See* Cahalan, *supra* note 470, at 431; *cf.* Note, *supra* note 475, at 1489.
483 1 BNA CRIM. L. RPTR. 2286 (Aug. 16, 1967).
484 342 U.S. 1 (1951).
485 *Id.* at 5.
486 United States Senator Sam Ervin of North Carolina, commenting on the misuse of bail, has said ". . . where the right to bail does exist, it cannot be denied or abridged by the setting of excessive bail. This alone should preclude the use of high bail to effectuate preventive detention." Ervin, *The Legislative Role in Bail Reform,* 35 GEO. WASH. L. REV. 429, 444 (1967). *See also* Note, *supra* note 479, which says:

> It is fundamental that the state has no right to punish a person until his guilt has been established beyond a reasonable doubt. And there is no support in the law for the proposition that a person may be imprisoned because of the speculative possibility that he may commit a crime. Judges and prosecutors, therefore, should carefully refrain from employing bail to accomplish these illegal ends. Few cases

suppressing domestic violence, may arrest and detain the rioters and their leaders and hold them without bail until the disorder is terminated.[487] The rationale underlying this practice has been simply explained by one authority on martial law:

> Whenever there is a riot or insurrection, there are pretty certain to be ringleaders; once these are apprehended, the back of the disturbance is likely to be broken. Accordingly, commanders ordered into the field to suppress domestic disorders have almost invariably centered their attention on the heads of the offending movement, have arrested them, and have kept them in custody until such time as the disorders subsided and/or the persons detained could be turned over to the civil authorities for trial. In many instances, no trial ever took place; the detention was conceived to be entirely preventive and not at all punitive.[488]

The existing case law does support such action by the military. In *State ex rel. Roberts v. Swope*[489] it was held that the state executive has discretion to order the seizure of persons who stand in the way of troops engaged in restoring order and to authorize their detention until the disorder is terminated.[490] The Colorado Supreme Court upheld such action in *In re Moyer*[491] because the arrest was lawful and the detention was necessary to suppress the insurrection.[492] In *Moyer v. Peabody*,[493] which arose out of the same situation, the Supreme Court of the United States upheld the governor's action in having the National Guard arrest and detain a union president until the labor troubles were over on the rationale that under such riotous conditions ". . . the ordinary rights of individuals must yield to what he [governor] deems the necessities of the moment. Public danger warrants the substitution of executive process for judicial process."[494]

It may well be that when the military is called in, it operates as a super police force ". . . for the restoration of public order; and . . . under this theory the arrest and detention, under the circumstances stated, can be justified and must be upheld."[495] Wiener has pointed out that ". . . even in jurisdictions that never embraced any of the martial law excesses, the principle that the military may temporarily detain ringleaders in riot situations has been sustained."[496] However, there have been no recent decisions on the matter, and it is most doubtful that military detention would be upheld in light of the more modern Supreme Court decisions.[497]

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of excessive bail ever reach the appellate courts; self-restraint and personal ethics are the only real controls over improper use of bail. *Id.* at 705 (footnotes omitted).

487 F. WIENER, A PRACTICAL MANUAL OF MARTIAL LAW 76 (1940).

488 *Id.* at 66.

489 38 N.M. 53, 28 P.2d 4 (1933).

490 *Id.* at 57-58, 28 P.2d at 6-7. *See also In re* Boyle, 6 Idaho 609, 57 P. 706 (1899), *appeal dismissed*, 178 U.S. 611 (1900); *In re* McDonald, 49 Mont. 454, 143 P. 947 (1914).

491 35 Colo. 159, 85 P. 190 (1904); *cf.* Sterling v. Constantin, 287 U.S. 378 (1932).

492 *In re* Moyer, 35 Colo. 159, 170, 85 P. 190, 194, (1904).

493 212 U.S. 78 (1909).

494 *Id.* at 85.

495 *In re* McDonald, 49 Mont. 454, 462, 143 P. 947, 949-50 (1914).

496 Wiener, *Helping to Cool the Long Hot Summers*, 53 A.B.A.J. 713, 716 (1967).

497 Helman, *Inciting to Riot*, 72 CASE & COMMENT 26, 27 (Nov.-Dec. 1967).

### *D. Search and Seizure During a Riot*

1. The Requirement of a Warrant

The fourth amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[498]

Traditionally, the wording of the amendment has been construed as requiring a warrant in the absence of extreme circumstances.[499] This construction of the amendment reached its high point in *Trupiano v. United States*[500] which held that the police were required to obtain a warrant before conducting a search whenever it was possible to do so.[501] However, this approach was later specifically rejected by the Court in *United States v. Rabinowitz:*[502]

> To the extent that *Trupiano v. United States,* 334 U. S. 699, requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled. *The relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable. That criterion in turn depends upon the facts and circumstances — the total atmosphere of the case.*[503] (Emphasis added.)

In later decisions, however, the Court has severely undermined the *Rabinowitz* approach to such an extent that it may have reverted to the *Trupiano* standard. In one of the most recent decisions on the point, *Camara v. Municipal Court,*[504] which overruled *Frank v. Maryland,*[505] Justice White, speaking for the Court, said:

> Nevertheless, one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is "unreasonable" unless it has been authorized by a valid search warrant.[506]

The *Camara* court went on to favorably cite from *Johnson v. United States,*[507] a pre-*Rabinowitz* case that struck down a search without a warrant on the ground that the police reasonably could have obtained a warrant where they

498 U.S. CONST. amend. IV.
499 McDonald v. United States, 335 U.S. 451, 454 (1948).
500 334 U.S. 699 (1948).
501 *Id.* at 705.
502 339 U.S. 56 (1950).
503 *Id.* at 66.
504 387 U.S. 523 (1967).
505 359 U.S. 360 (1959) (allowing administrative searches without a warrant).
506 Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967). *See also* Chapman v. United States, 365 U.S. 610 (1961); Rios v. United States, 364 U.S. 253 (1960).
507 333 U.S. 10 (1948), cited in Camara v. Municipal Court, 387 U.S. 523, 529 (1967).

smelled burning opium coming from the defendant's hotel room.[508] The part of the *Johnson* opinion cited favorably by the *Camara* court reads: "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent."[509]

Some commentators have also interpreted recent decisions of the Supreme Court as indicating that the Court is coming back to *Trupiano:*

> It is apparent that the Supreme Court has in the past regarded the approach later taken in *Rabinowitz* as a backward step in constitutional history and the development of human freedom and there are clear indications that it seems to think so at the present time. An examination of the opinions in *McDonald v. United States* [335 U.S. 451 (1948)], *Johnson v. United States* [333 U.S. 10 (1948)], and *Taylor v. United States* [286 U.S. 1 (1932)] demonstrates clearly that these cases turned upon the availability of, and opportunity to procure, a search warrant. They are still good law today. The very recent case of *Chapman v. United States* [365 U.S. 610 (1961)] is clear evidence of the present Court's intention to revert to the spirit of the *Trupiano* rule, if not to its exact letter.[510] (Footnotes omitted.)

Thus, barring a emergency situation,[511] the police must obtain a search warrant from a magistrate before they may conduct a search of private property.

2. The Area Search

During the civil disorders in Plainfield, New Jersey in 1967, when forty-six semi-automatic rifles were stolen from a nearby firearms plant, large numbers of state policemen and National Guardsmen descended on the Negro section of Plainfield and, without warrants, conducted a house-to-house search for the stolen weapons.[512] Such activities are not unusual during riots[513] since the police officers often wish to search large segments of the rebellious district for weapons, loot, or the ingredients for Molotov cocktails. Because the recent disturbances in this country have occurred in major urban areas with their teeming tenements, massive public housing projects, and other multiple family dwellings, a serious problem confronts the police when they attempt to obtain a warrant to conduct a search in the area. The fourth amendment requires that the warrant state with particularity the place to be searched and the persons or things to be seized.[514] Searches of an area pursuant to a warrant that fails to meet this specificity requirement are necessarily illegal.[515]

508 Johnson v. United States, 333 U.S. 10, 15 (1948).
509 *Id.* at 14, cited in Camara v. Municipal Court, 387 U.S. 523, 529 (1967).
510 *E.g.*, Day & Berkman, *Search and Seizure and the Exclusionary Rule: A Re-Examination in the Wake of* Mapp v. Ohio, 13 W. Res. L. Rev. 56, 88 (1961).
511 *See* text accompanying notes 524-39 *infra.*
512 Governor's Select Commission on Civil Disorder, State of New Jersey, Report for Action 150-52 (1968); Note, *Riot Control and the Fourth Amendment*, 81 Harv. L. Rev. 625 (1968).
513 Note, *supra* note 512.
514 U.S. Const. amend. IV. See text accompanying note 498 *supra* for the language of this amendment.
515 *See* Marcus v. Search Warrant, 367 U.S. 717, 739 (1961) (concurring opinion of Justice Black).

> The specification of the place to be searched must be sufficiently detailed to make clear the search area in which there is probable cause to believe a crime has been committed; a general or roving search warrant is invalid. Thus a warrant describing an entire building as the place to be searched is invalid where probable cause has been shown only for searching one room or apartment.[516] (Footnotes omitted.)

In the *Camara* decision, the Supreme Court stated that it would continue to forbid any type of sweeping or area search, despite the public interest that may be involved.

> . . . [I]n a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.[517]

With regard to searches of apartments, tenements, or other multiple family dwellings, the courts have been uniform in holding that probable cause must be shown for each unit to be searched and that a warrant may not be issued for the entire building unless probable cause is separately shown for each individual unit therein.[518]

> Federal courts have consistently held that the Fourth Amendment's requirement that a specific "place" be described when applied to dwellings refers to a single living unit (the residence of one person or one family). Thus, a warrant which describes an entire building when cause is shown for searching only one apartment is void.[519]

That the courts will not tolerate the use of area searches as was done in Plainfield was demonstrated by the Fourth Circuit in *Lankford v. Gelston*[520] which enjoined the Baltimore Police Department from indiscriminately searching Negro homes while looking for two brothers who killed one city policeman and wounded another.[521] The court concluded that federal courts, although

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516 Day & Berkman, *supra* note 510, at 78. *See also* Note, *supra* note 512, at 628.

517 Camara v. Municipal Court, 387 U.S. 523, 535 (1967).

518 *See, e.g.*, United States *ex rel.* Sunrise Prods. Co. v. Epstein, 33 F.2d 982 (E.D.N.Y. 1929); People v. Estrada 234 Cal. App. 2d 136, 44 Cal. Rptr. 165 (1965); People v. Johnson, 49 Misc. 2d 244, 267 N.Y.S.2d 301 (Dist. Ct. Nassau County, 1966); Grossland v. State, 206 P.2d 649 (Okla. Ct. Crim. App. 1958); State v. Costakos, 226 A.2d 695 (R.I. 1967).

519 United States v. Hinton, 219 F.2d 324, 326 (7th Cir. 1955).

520 364 F. 2d 197 (4th Cir. 1966).

521 From December 24, 1964, to January 12, 1965, the Baltimore police conducted 300 such searches of Negro homes looking for the suspects. *Id.* at 199 n.3. The method used in the search was appalling:

> Four officers carrying shotguns or submachine guns and wearing bulletproof vests would go to the front door and knock. They would be accompanied or followed by supervising officers, a sergeant or lieutenant. Other men would surround the house, training their weapons on windows and doors. "As soon as an occupant opened the door, the first man would enter the house to look for any immediate danger, and the supervising officer would then talk to the person who had answered the door. Few stated any objection to the entry; some were quite willing to have the premises searched for the Veneys, while others acquiesced because of the show of force." *Id.* at 199.

reluctant to intervene in local law enforcement activities, will nevertheless grant equitable relief to stop invasions of constitutional rights by local officials.[522] It is especially significant to note that, in deciding to grant the injunction, the *Lankford* court considered the psychological effects that such police tactics would have on the ghetto residents.

> Courts cannot shut their eyes to events that have been widely publicized throughout the nation and the world. Lack of respect for the police is conceded to be one of the factors generating violent outbursts in Negro communities. The invasions so graphically depicted in this case "could" happen in prosperous suburban neighborhoods, but the innocent victims know only that wholesale raids do not happen elsewhere and did happen to them. Understandably they feel that such illegal treatment is reserved for those elements who the police believe cannot or will not challenge them. It is of the highest importance to community morale that the courts shall give firm and effective reassurance, especially to those who feel that they have been harassed by reason of their color or their poverty.[523]

Thus, those charged with riot prevention and riot control should be most reluctant, for both practical and legal reasons, to resort to the sweeping area searches that were used in Plainfield and condemned in Baltimore.

3. Searches in an Emergency Situation

The primary exception to the warrant requirement applicable in riot conditions[524] is the traditional consideration that justifies searches without a warrant in an emergency situation.[525] This exception was recognized by Justice Brennan, speaking for the court in *Warden v. Hayden*,[526] where he said: "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others."[527]

This emergency exception applies ". . . when a police officer obtains certain knowledge of a grave and pending peril inside a dwelling, which permits of no delay . . . ."[528] Such a case was demonstrated in *People v. Gilbert*[529] where police in pursuit of fleeing suspects, who had already mortally wounded one policeman, were allowed to break into the apartment of one of the suspects since he was armed and dangerous. However, it must be pointed out that, in applying

522 *Id.* at 201.
523 *Id.* at 203-04.
524 There are four major exceptions to the warrant requirement: (1) consent, (2) search incident to an arrest, (3) search based on probable cause that a felony has been committed (This exception is, of course, based on the *Rabinowitz* approach which later Court decisions have virtually made meaningless, *see* notes 504-10 *supra* and accompanying text; and has been specifically rejected for dwellings, *see* cases cited at Day & Berkman, *supra* note 510, at 87 n.193), (4) search in an emergency. Day & Berkman, *supra* note 510, at 80. Since the emergency situation seems primarily applicable to riot conditions, that is where this discussion will center.
525 *See* Camara v. Municipal Court, 387 U.S. 523, 539 (1967) (dictum).
526 387 U.S. 294 (1967).
527 *Id.* at 298-99. It might be noted that the emergency situation includes the right to follow and search a fleeing suspect to avoid the destruction of the evidence, a situation probably not relevant to riot conditions. *See* Day & Berkman, *supra* note 510, at 80.
528 DeBerry & Mueller, *Pending Peril and the Right to Search Dwellings*, 58 W. VA. L. REV. 219, 235 (1956).
529 63 Cal. 2d 690, 408 P.2d 365, 47 Cal. Rptr. 909 (1965), *vacated on different grounds*, 388 U.S. 263 (1967).

this exception, the courts have been very strict in requiring the actual existence of a grave emergency.[530]

As to be expected, this exception does have significant application under riot conditions since ". . . if a policeman sees a sniper or a firebomber in a window of a building he may immediately enter the building to search for both the sniper or bomber and his weapons."[531] The necessity and utility of this exception to law enforcement officers engaged in suppressing a riot are quite obvious.

There has been a long-standing tradition in the law, starting with *Semayne's Case*[532] in 1603 and now generally codified,[533] that a police officer in performing a lawful search of a dwelling must first announce to the occupants his authority and purpose before he may forcibly enter the premises. The federal statute is typical of the law on this point.

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, *after notice of his authority and purpose,* he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.[534] (Emphasis added.)

But this announcement requirement, like the warrant requirement, has recognized an exception in the case of an emergency situation, although this exception has never been codified.[535] If there is imminent danger to the officers or to a third person that would be increased by an announcement of authority and purpose, the officers are excused from making the announcement and are entitled to make immediate forcible entry.[536] But if there is no impending peril to the officers or to others, a forcible entry without a prior announcement of authority and purpose and without a refusal of admittance cannot be sanctioned.[537] Examples of the type of emergencies that justify forcible entry are set out in *Wayne v. United States*:[538]

> Breaking into a home by force is not illegal if it is reasonable under the circumstances. . . . A myriad of circumstances would fall within the terms, "exigent circumstances" referred to in Miller v. United States [357 U.S. 301 (1958)] . . . , the sound of gunfire in a house, threats from inside to shoot through the door at police, reasonable grounds to believe an injured or seriously ill person is being held within.[539]

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530 *See, e.g.,* McDonald v. United States, 335 U.S. 451, 455 (1948); Ellison v. State, 383 P.2d 716, 720 (Alas. 1963); State v. Rogers, 270 Ohio 2d 105, 198 N.E.2d 796 (C.P. Miami County 1963).
531 Note, *supra* note 512, at 626-27 (footnote omitted).
532 5 Co. Rep. 91a, 91b, 77 Eng. Rep. 194, 195 (K.B. 1603).
533 *See* Miller v. United States, 357 U.S. 301, 308 n.8 (1958); Blakey, *The Rule of Announcement and Unlawful Entry:* Miller v. United States *and* Ker v. California, 112 U. PA. L. REV. 499, 508 (1964).
534 18 U.S.C. § 3109 (1964).
535 *See* Blakey, *supra* note 533, at 508.
536 *E.g.,* People v. Hammond, 54 Cal. 2d 846, 357 P.2d 289, 9 Cal. Rptr. 243 (1960).
537 *E.g.,* United States v. Barrow, 212 F. Supp. 837 (E.D. Pa. 1962).
538 318 F.2d 205 (D.C. Cir.), *cert. denied,* 375 U.S. 860 (1963).
539 *Id.* at 212.

Thus, when the police reasonably believe that a sniper or firebomber, or other rioter intent on inflicting serious bodily harm on the police or on others, is within a dwelling place, the officers may forcibly enter and arrest said person and conduct a search for his weapons even though they do not possess a warrant.

## IV. Civil Liability for Riot Damage

At the outset of this Note, it was recognized that the recent disturbing increase in large-scale riots is essentially a socio-economic phenomenon, the intricate causes of which are beyond the scope of legal analysis. Nevertheless, the basic premise of this Note is that when a riot is imminent or in progress, the problem becomes one of immediate and efficient implementation of the state's police power to maintain or re-establish public order. In practice this means principally the promise of criminal sanctions against those who would riot and the imposition of such sanctions against those who have rioted. The emphasis of this Note to this point has been upon the numerous and difficult legal problems that surround the effective use of criminal sanctions to prevent and control riots.

But there is another aspect of large-scale rioting that has yet to be considered — the aftermath. Every year, long after the seething summer nights have passed, more and more American cities carry the scars of untold property damage, and more and more Americans carry scars on their own bodies.[540] However, the real cost of mob violence has a way of escaping most Americans because they tend to view the property damage, injuries, and loss of life in terms of gross figures, failing to recognize that many, if not most, of the scars of mob violence represent personal tragedies to their victims. In recognition of this fact, the emphasis of this Note turns from the criminal sanctions available to society at large for its protection from riots to a consideration of some of the civil remedies available to riot victims against those responsible for their damages.[541]

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540 See note 1 *supra* and accompanying text.

541 The focus here will be on the liability of those individuals and groups responsible for the riot damage. There are two other possible sources of recovery for the riot victim which initially appear to be much more appropriate for the satisfaction of large damage claims, namely, insurance coverage and liability of the governmental unit.

Under present conditions, however, the chances that a riot victim will have insurance to cover his injuries are becoming increasingly slight. The huge losses that have been suffered by insurance companies as a result of the recent riots have caused the companies to refuse to sell or renew policies to owners of property particularly susceptible to riot damage. The result is an insurance crisis in the urban core of most large American cities. The President's National Advisory Panel on Insurance in Riot-Affected Areas has recently published its report "Meeting the Insurance Crisis of Our Cities," which provides a detailed analysis of the problems and proposes various solutions, including the use of urban area plans and insurance pools, with state and federal backing. The five-part program of the Panel has received approval in the recently published RIOT COMMISSION REPORT, *supra* note 2, at 360-62. *See generally* Comment, *Insurance Protection Against Civil Demonstrations*, 7 B.C. IND. & COM. L. REV. 706 (1966); Note, *Riot Insurance*, 77 YALE L.J. 541 (1968).

Municipal and county liability for riot damage is also fraught with numerous problems. Some fifteen or twenty states presently have statutes that impose some degree of liability on cities or counties. Almost all, however, are severely limited in some way such as a restriction on the amount of damages recoverable, or a requirement of a showing of negligence on the part of the municipality; others cover only property damage or only personal injuries. In the absence of any such statute, the traditional doctrine of governmental immunity remains a substantial barrier to municipal liability despite recent judicial inroads in some jurisdictions.

### *A. Liability of Persons Who Participate in Mob Violence*

It has been said that "[s]trictly speaking, there exists no civil action for riot, rout, or unlawful assembly, but only an action for damages as a result of the trespasses or assaults committed pursuant to the mob enterprise."[542] This absence of a separate legal remedy is reflected in the sparsity of authority that attributes any legal significance at all to the fact that the tortfeasor was a member of a mob.[543] One of the few civil cases that even adverts to "mob action" is *Stevens v. Sheriff*[544] in which the plaintiff sued a number of persons alleging that they assaulted him and destroyed personal property belonging to him. The trial court had instructed the jury that the plaintiff could recover only if he proved his allegation that the defendants constituted a mob. The Supreme Court of Kansas reversed saying:

> The allegation of the petition that the defendants acted as a mob was an immaterial one. It could have been obliterated without destroying or changing the legal effect of the petition. . . .
>
> . . . . It was apparently used either as a mere epithet or to imply such a concert of action among the defendants as to constitute them joint wrong-doers, and to render each one liable for the acts of any or all of the others. In the latter case it was only repetition, for the specific averment was also made that the defendants acted in concert, and in pursuance and furtherance of a common design.[545]

A defendant who inflicts intentional injuries upon the person or property of another can claim no defense not otherwise available to him simply because he committed the acts during the course of a riot. Therefore, as against the actual perpetrator of an intentional civil injury, the traditional forms of tort liability are adequate to give a riot victim a cause of action.

Realistically, however, the personal injuries and property damage inflicted during the course of a riot result from various degrees of participation by numerous individuals. The plaintiff may be struck by one member of a mob while several others hold him, various items of his property may be destroyed by some members while still others may be shouting threats or giving encouragement to the actors, and finally there may be numerous other persons standing at varying distances from the spectacle experiencing emotions ranging from delight to indignation. The degree to which each of these persons is subject,

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But even absent these limitations, it is doubtful whether local governments could bear the financial burden of liability for riot damage. *See generally* Note, *Riot Insurance*, 77 YALE L.J. 541 (1968); Sengstock, *Mob Action: Who Shall Pay the Price?*, 44 J. URBAN L. 407 (1967).

542 46 AM. JUR. *Riots and Unlawful Assembly* § 18 (1943).

543 An annotation located at 27 A.L.R. 549 (1923), entitled "Civil Liability of Member of a Mob," is apparently the only annotation in the entire ALR series of volumes that treats this topic. Significantly, the annotation is only two and one half pages long and discusses only seven cases, the most recent being a 1922 case. The four volumes of supplemental decisions to the first ALR series, the last volume of which was published in 1967, cite only two additional cases. 2 A.L.R. BLUE BOOK OF SUPPLEMENTAL DECISIONS 67 (1952); 3 A.L.R. BLUE BOOK OF SUPPLEMENTAL DECISIONS 72 (1958).

544 71 Kan. 434, 80 P. 936 (1905).

545 *Id.* at 435-36, 80 P. at 937. *See also* Dickson v. Yates, 194 Iowa 910, 188 N.W. 948 (1922).

or should be subject, to tort liability gives rise to a difficult entanglement of legal theory and factual distinction.

From the viewpoint of the injured plaintiff, what is sought is a device for holding as many of the rioters as possible vicariously liable for the injuries actually inflicted by a few. The usual approach taken by the plaintiffs in these cases is the application of a theory of civil conspiracy.[546] Originally, the writ of civil conspiracy was used against individuals who combined to abuse legal procedure and thus was the forerunner of the modern action for malicious prosecution.[547] Today, however, the civil action for conspiracy has broadened to include any combination of two or more persons to accomplish by concerted action an unlawful purpose, or to accomplish a lawful purpose by unlawful means.[548] It is a rather unusual form of tort remedy in the sense that it is not generally regarded as a substantive tort; in fact, it "cannot be made the subject of a civil action unless something has been done which, absent the conspiracy, would give a right of action."[549] The utility of the civil action for conspiracy is that it extends traditional forms of tort liability "beyond the active wrongdoer to those who have merely planned, assisted or encouraged his acts."[550]

> [T]he major significance of the conspiracy lies in the fact that it renders each participant in the wrongful act responsible as a joint tortfeasor for all damages ensuing from the wrong, irrespective of whether or not he was a direct actor and regardless of the degree of his activity.[551]

The theory of civil conspiracy as a "tort" has met with criticism on the ground that it is a totally unnecessary addition to the law of torts.[552] Its only significant purpose of widening the sphere of available tortfeasors can usually be accomplished just as well by direct factual allegations to the effect that the

546 Calcutt v. Gerig, 271 F. 220 (6th Cir. 1921); Weber v. Paul, 241 Iowa 121, 40 N.W.2d 8 (1949); Dickson v. Yates, 194 Iowa 910, 188 N.W. 948 (1922).

547 W. PROSSER, LAW OF TORTS § 43, at 260 (3d ed. 1964).

548 Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465 (1921); Neff v. World Publishing Co., 349 F.2d 235, 257 (8th Cir. 1965). For a comprehensive state-arranged list of cases substantially adopting this definition, as well as other definitions, see 15A C.J.S. *Conspiracy* § 1, n.1 (1967).

549 Middlesex Concrete Prods. & Excavating Corp. v. Carteret Indus. Ass'n, 37 N.J. 507, 516, 181 A.2d 774, 779 (1962). A distinction must be drawn between civil conspiracy and criminal conspiracy. The latter is a substantive criminal act in itself and the conspirators may be guilty even if the conspiracy is thwarted, so long as there was some overt act towards its accomplishment. United States v. Tutino, 269 F.2d 488, 491 (2d Cir. 1959). Likewise, if a criminal conspiracy succeeds, the conspirators may be guilty of the offense of conspiracy as well as the substantive crime. United States v. Palladino, 203 F. Supp. 35, 38 (D. Mass. 1962).

550 W. PROSSER, *supra* note 547, § 43, at 260.

551 Mox, Inc. v. Woods, 202 Cal. 675, 677-78, 262 P. 302, 303 (1927). This proposition is cited with favor in De Vries v. Brumback, 53 Cal. 2d 643, 349 P.2d 532, 536, 2 Cal. Rptr. 764, 768 (1960); *see* Royster v. Baker, 365 S.W.2d 496, 499 (Mo. 1963).

552 Hughes, *The Tort of Conspiracy*, 15 MODERN L. REV. 209 (1952). The author's criticism is qualified by his suggestion that the remedy would not have to be dismissed as superfluous if it were confined to acts that if done by one person would not give rise to civil liability. Relevant here is Dean Prosser's observation that some courts have recognized "that there are certain types of conduct, such as boycotts, in which the element of combination adds such a power of coercion, undue influence or restraint of trade, that it makes unlawful acts which one man alone might legitimately do." (Footnote omitted.) W. PROSSER, *supra* note 547, § 43, at 260. *See, e.g.*, Snipes v. West Flagler Kennel Club, Inc., 105 So. 2d 164 (Fla. 1958).

defendants acted as joint tortfeasors. Even without the theory of civil conspiracy, it is a well recognized principle of tort law that all who command, direct, advise, encourage, or otherwise aid and abet the commission of a tort are jointly and severally liable with the active tortfeasor.[553] Thus, it appears that an allegation that the various defendants formed a conspiracy may be no more necessary for a cause of action against them than was the allegation of the plaintiff in *Stevens v. Sheriff*[554] that the defendants constituted a "mob." In that case, the plaintiff's specific averment that the defendants "acted in concert, and in pursuance and furtherance of a common design,"[555] was sufficient to state a cause of action against all of them in joint tortfeasors.

Whatever legal theory an injured riot victim adopts in hopes of enlarging the class of possible defendants, whether it be by direct allegations that the defendants acted in concert or by alleging a conspiracy, the real difficulty still remains: the factual determination of who is a joint tortfeasor. The rhetoric of joint liability — such phrases as "concerted action," "combination," "participation," "common design," and even "encouragement" and "assistance" — offers little practical aid in determining where the line between liability and non-liability should be drawn with regard to the "members" of a mob or a conspiracy. While several states have passed statutes that apparently eliminate any need for alleging a conspiracy as such in order to hold ". . . each and every person engaged or in any manner participating in the mob or riot"[556] liable for all riot damage, they shed no light on the conduct necessary to make a person present at the riot scene a "participant" in the riot for purposes of complete vicarious liability. In recognition of the problem, the courts have attempted to sharpen the dividing line between liability and non-liability by holding that a participant in a mob or conspiracy need not be an original party,[557] nor need he be present at the actual infliction of the injury or damage,[558] nor is it necessary that he have knowledge of the details of the conspiracy so long as he has knowledge of the common design.[559] This common design is often stressed as the essential element of a conspiracy,[560] but this phrase too is blurred by numerous attempted clarifications. No formal or simultaneous agreement is necessary to establish a conspiracy[561] and in fact it may even be implied from the circum-

553 *See* International Bhd. of Elec. Workers, Local 501 v. NLRB, 181 F.2d 34 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951); Oman v. United States, 179 F.2d 738 (10th Cir. 1949); Hutto v. Kremer, 222 Miss. 374, 76 So. 2d 204 (1954); Kuhn v. Bader, 89 Ohio App. 203, 101 N.E.2d 322 (1951); W. PROSSER, *supra* note 547, § 43, at 259.

554 71 Kan. 434, 80 P. 936 (1905).

555 *Id.* at 435-36, 80 P. at 937. See text at notes 544 & 545 *supra.*

556 N.J. STAT. ANN. § 2A: 48-5 (1952). For similar language, see PA. STAT. ANN. tit. 16, § 11823 (1956) and S.C. CODE ANN. § 16-109 (1962).

557 Calcutt v. Gerig, 271 F. 220, 223 (6th Cir. 1921).

558 *Id. See also* De Vries v. Brumback, 53 Cal. 2d 643, 349 P.2d 532, 2 Cal. Rptr. 764 (1960).

559 Hux v. Butler, 220 F. Supp. 35, 41 (W.D. Tenn. 1963), *rev'd on other grounds*, 339 F.2d 696 (6th Cir. 1964); Bedard v. La Bier, 20 Misc. 2d 614, 616-17, 194 N.Y.S.2d 216, 220 (Sup. Ct. 1959).

560 Neff v. World Publishing Co., 349 F.2d 235, 257 (8th Cir. 1965); Rettinger v. Pierpont, 145 Neb. 161, 195, 15 N.W.2d 393, 411 (1944). Also see cases cited in note 559 *supra.*

561 Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939); Otto Milk Co. v. United Dairy Farmers Cooperative Ass'n, 261 F. Supp. 381, 385 (W.D. Pa. 1966); John Wright & Associates, Inc. v. Ullrich, 203 F. Supp. 744, 750 (D. Minn. 1962), *aff'd*, 328 F.2d 474 (8th Cir. 1964).

stances. In the case of *Calcutt v. Gerig*,[562] the court stated the generally accepted view:

> While perhaps there is no proof in this record of any preliminary meeting of these plaintiffs in error, or of a definite plan or agreement entered into by them to injure plaintiff in his person or property or deprive him of his lawful rights as an American citizen, yet such proof is not essential to the establishing of a conspiracy, and indeed would be wholly impossible in the great majority of cases of this character for the evident reason that conspirators do not, as a rule, invite the public into their confidence or advise the contemplated victim or victims in reference to such preliminary matters. . . . It is sufficient if the proof shows such a concert of action in the commission of the unlawful act or such other facts and circumstances from which the natural inference arises that the unlawful overt act was in furtherance of a common design, intention, and purpose of the alleged conspirators to commit the same.[563]

On the other hand, the courts recognize the need for keeping the civil remedies of conspiracy and joint liability within reasonable — and constitutional — limits. Thus, while an agreement may be inferred from the circumstances, "[m]ere association does not constitute a conspiracy."[564] Likewise, mere suspicion or knowledge of another's independent acts, or even acquiescence in or approval of them, without some form of cooperation or agreement to cooperate, is not sufficient to constitute one a joint tortfeasor or a party to a conspiracy.[565]

Despite these judicial attempts to clarify the nature of liability for conspiracy or concert of action, the results are far from satisfying. A workable criterion for determining the liability or non-liability of any given "member" of a riot or conspiracy must depend, as in so many other areas of law, upon the facts of the individual case. An examination of the factual situations involved in the relatively few cases that have dealt with the liability of members of a mob,[566] whether such liability is based on conspiracy or directly upon a finding of concerted action, reveals a similarity which is disturbingly absent in the large-scale riots that cities have been experiencing recently. The typical situation presented by the cases is a relatively small group of angry citizens who converge on the plaintiff's house to force him to leave town[567] or to cancel a judgment he had recovered from one of them,[568] or who are intent on destroying his stock of liquor and cigars,[569] preventing him from putting on his traveling minstrel

562 271 F. 220 (6th Cir. 1921).
563 *Id.* at 222.
564 Hoffman v. Herdman's Ltd., 41 F.R.D. 275, 277 (S.D.N.Y. 1966) and cases cited therein at n.3.
565 Harris v. Capitol Records Distrib. Corp., 64 Cal. 2d 454, 413 P.2d 139, 145, 50 Cal. Rptr. 539, 545 (1966); Aaron v. Dausch, 313 Ill. App. 524, 535, 40 N.E.2d 805, 810 (1942); American Security Benevolent Ass'n, Inc. v. District Ct. of Black Hawk County, 147 N.W.2d 55, 63 (Iowa 1966).
566 See note 543 *supra*.
567 Saunders v. Gilbert, 156 N.C. 463, 72 S.E. 610 (1911).
568 Weber v. Paul, 241 Iowa 121, 40 N.W.2d 8 (1949).
569 Stevens v. Sheriff, 71 Kan. 434, 80 P. 936 (1905).

show,[570] or tarring and feathering him for unpatriotic conduct during a war.[571] In all of these cases, two factors are present: first, the size of the mob is not overwhelming and second, it is possible to speak of a common design to inflict injury upon a definite individual or group of individuals for preconceived, and to a certain extent rational, reasons. The effect was to give the respective courts patterns of conduct that could be reasonably evaluated in the light of the admittedly vague standards of "concert of action," "participation," and "activity in furtherance of a common design."

But the recent mob violence seems to be a different kind of social phenomenon. It is characterized by irrationality and hysteria rather than by common design or purpose. It is rarely directed against any particular individual, but rather against society itself; and, for most of the participants, it is a matter of being caught up in a human juggernaut rather than acting in furtherance of a common plan. The old standards may still prove to be useful in finding joint liability for those whose actual conduct or encouragement contributes immediately to the particular injury and also in exonerating those whose participation is limited to physical presence along with mere knowledge, acquiescence, or approval. But unlike in the earlier cases, there exist today numerous individuals whose boisterous allegiance to the ultimate group goals of social and economic betterment inspires the more militant members of the group to acts of destruction. As yet, there is no indication in the courts of any trend to extend the scope of joint liability to include this intermediate group of "rioters," even in those jurisdictions that have adopted statutes purporting to make any person in any way participating in a riot jointly liable for all resulting damage.[572] This notable lack of any movement to expand the liability of riot participants may simply reflect recognition on the part of plaintiffs and their lawyers that it is quite futile to attempt to satisfy judgments against rioters, regardless of the number that are joined as defendants. On the other hand, it is fair to speculate that if riot damage continues its upward spiral, while the availability of riot insurance to property that is more susceptible to mob violence continues to decrease,[573] greater attention may be given to holding as many rioters as possible jointly liable for the damage they collectively cause.

### *B. Liability of Persons Who Incite Mob Violence*

In light of what has been said regarding the civil liability of participants in a riot, the need to devote separate attention to the civil liability of those whose words and actions have the effect of inciting a riot[574] may not be clear. To be sure, the general principle of tort liability that one who counsels, incites, encourages or otherwise aids and abets a third party in the commission of an intentional tort is treated as a principal is adequate to hold the inciter of a

570 Calcutt v. Gerig, 271 F. 220 (6th Cir. 1921).
571 Walker v. Kellar, 226 S.W. 796 (Tex. Civ. App. 1920).
572 See note 556 *supra* and accompanying text.
573 See note 541 *supra*.
574 This broad phrase was purposely chosen to include both intentional incitement to riot and speech which, under the circumstances, merely has the tendency to incite a riot and in fact does. Each type of speech will be considered separately.

riot jointly liable for all the resulting riot damage.[575] Likewise, incitement alone is sufficient to make a person a member of a conspiracy and thereby render him civilly liable for the wrongs committed by the more active conspirators.[576] However, there are enough significant differences between the person whose words incite others to riot and the actual participant in a riot to warrant separate treatment of the problems involved in the civil liability of the inciter. First of all, there is a chronological difference in that, although his civil liability cannot arise until an injury has occurred, the inciter's role has been completed and he may not even be present during the riot itself.[577] Secondly, his responsibility may be fixed more readily than that of other individual participants because his conduct is, to a variable extent, isolated both in time and kind, with the result that he is less likely to remain anonymous. Finally, and most importantly, the use of language that has the effect of inciting a riot, especially if incitement was not the intention of the speaker, raises significant first amendment problems that do not exist with respect to the riotous activity itself.[578]

1. Intentional Incitement

As is the situation with regard to the civil liability of rioters, there are few reported cases that find civil liability for riot damage on the part of those who intentionally incite a riot[579] — probably in recognition of the fact that payment of a judgment by the inciter of a riot is generally as unlikely as by the rioters themselves. The tort case against the party who intends to incite a riot, however, seems to be as strong as that against the active participants in the riot. One court has stated:

> It would seem almost unnecessary to say that persons responsible for mob violence cannot escape liability for the necessary and natural consequences thereof. It would be just as reasonable to say that a man might start a fire, and then by retiring to some distant spot avoid responsibility for the destruction wrought by the conflagration he initiated.[580]

575 See note 533 *supra* and accompanying text.

576 Calcutt v. Gerig, 271 F. 220, 223 (6th Cir. 1921).

577 In criminal actions involving a riot, the courts are careful to note that the crimes of inciting a riot and participating in a riot are separate and distinct offenses.

> Inciting to riot is not a constituent element of riot; they are separate and distinct offenses. * * * One may incite a riot and not be present or participate in it, or one may be present at a riot, and by giving support to riotous acts be guilty of riot, yet not be guilty of inciting to riot. State v. Cole, 249 N.C. 733, 740-41, 107 S.E.2d 732, 738, *cert. denied*, 361 U.S. 867 (1959), quoting from Commonwealth v. Safis, 122 Pa. Super. 333, 340, 186 A. 177, 180 (1936).

578 Although a riot may be both a form of assembly and a form of expression, the first amendment only protects "the right of the people *peaceably* to assemble, and to petition the Government for a redress of grievances." U.S. Const. amend. I (emphasis added).

579 The standard definition of the crime of incitement to riot is

> such a course of conduct, by the use of words, signs or language, or any other means by which one can be urged on to action, as would naturally lead, or urge other men to engage in or enter upon conduct which, if completed, would make a riot.

Commonwealth v. Hayes, 205 Pa. Super. 338, 341, 209 A.2d 38, 39 (1965); *accord*, State v. Cole, 249 N.C. 733, 107 S.E.2d 732, *cert. denied*, 361 U.S. 867 (1959); 77 C.J.S. *Riot* § 1 (1952). Although no case has been found that has considered the question, there is no apparent reason why this description of criminal incitement to riot could not be applied to tortious incitement to riot, with the added stipulation that the riot must actually occur and the plaintiff suffer injury as a result.

580 Calcutt v. Gerig, 271 F. 220, 223 (6th Cir. 1921).

It is generally recognized that the fact that injury or damage is actually inflicted by a third person who himself commits a tortious or criminal act does not relieve the instigator of equal liability for the tort. If the instigator "intends to cause a third person to do a particular act in a particular manner, he is subject to liability for any harm to others caused by that act, although the third person's act is negligent or even criminal."[581] This principle is widely accepted and applied in almost all areas of intentional tort liability: a person who encourages or incites another to commit assault and battery on a third person,[582] to libel or slander him,[583] or to falsely imprison him[584] is jointly liable with the perpetrator for all the resultant damages. Clearly, therefore, on the basis of ordinary principles of tort liability, a person who intentionally incites a riot which results in injury to an innocent party should bear joint liability with the rioters.

One possible barrier to the civil liability of one who intentionally incites a riot is the fact that his utterances may be protected by the first amendment guarantee of freedom of speech. However, this contention hardly seems to be a plausible one in view of the numerous cases upholding criminal convictions of those whose speech constituted a clear and present danger of inciting riotous or seditious conduct,[585] even though the threatened violence did not materialize. The contention becomes even weaker in a tort action when an actual riot has resulted from the inciter's speech and the plaintiff has suffered injury during this intended riot. Likewise, first amendment rights are not sufficient to protect the speaker from civil remedies when he has used speech to inflict intentional harm on the plaintiff. The typical example, of course, is civil liability for libel and slander[586] where the injury caused to the plaintiff is the direct result of the speech alone. It is inconceivable that speech, operating in conjunction with an intended separate tortious invasion of the plaintiff's interests, could give the speaker first amendment protection.[587] One court has put the inevitable conclusion this way: "Nobody doubts that, when the leader of a mob already ripe for riot gives the word to start, his utterance is not protected

581 RESTATEMENT (SECOND) OF TORTS § 303, comment *c*, at 94 (1965).

582 Thompson v. Johnson, 180 F.2d 431 (5th Cir. 1950); Hargis v. Horrine, 230 Ark. 502, 323 S.W.2d 917 (1959); Duke v. Feldman, 245 Md. 454, 226 A.2d 345 (1967); Pike v. Eubank, 197 Va. 692, 90 S.E.2d 821 (1956).

583 Kilian v. Stackpole Sons, 98 F. Supp. 500 (M.D. Pa. 1951); Greer v. Skyway Broadcasting Co., 256 N.C. 382, 124 S.E.2d 98 (1962); Bebout v. Pense, 35 S.D. 14, 150 N.W. 289 (1914).

584 Palmentere v. Campbell, 344 F.2d 234 (8th Cir. 1965); Miller v. Stinnett, 112 App. D.C. 329, 257 F.2d 910 (10th Cir. 1958); Knupp v. Esslinger, 363 S.W.2d 210 (Mo. App. 1962).

585 See notes 52-60 *supra* and accompanying text.

586 The Supreme Court has said that ". . . it must be emphasized that malicious libel enjoys no constitutional protection in any context." Linn v. United Plant Guard Workers of America, Local 114, 383 U.S. 53, 63 (1966). *See also* Curtis Publishing Co. v. Butts, 388 U.S. 130, *rehearing denied,* 389 U.S. 889 (1967).

587 The tendency is exactly the opposite — to give greater protection to "pure speech" than to "speech-in-action":

> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech. Cox v. Louisiana, 379 U.S. 536, 555 (1965).

*See also* NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816, *cert. granted,* 382 U.S. 937 (1965), *cert. dismissed as improvidently granted,* 384 U.S. 118, *rehearing denied,* 384 U.S. 981 (1966).

by the [First] Amendment."[588] But whether the inciter merely gives the word to start or whether he also assists in the ripening process, he should bear the consequences of his tortious conduct without protection from the first amendment.

2. Words or Conduct Unintentionally Resulting in Mob Violence

Where any group of people in a common situation views its lot as one of social and economic subordination, as in the case of racial minorities, or as one of authoritarian oppression, as in the case of certain elements of the younger generation, it may take far less than direct and intentional incitement to impel the group to violent rebellion. The power of suggestion,[589] or even the mere act of calling the group together for the purpose of "discussion" may be entirely sufficient to spark an explosion. What then is the liability of the individual who, while avoiding actual incitement, reminds a "mob already ripe for riot" of their common miseries, or who calls for a "peaceful" demonstration at a time and place, and under circumstances that would indicate to a reasonable man that it is substantially certain that mob violence will ensue and innocent persons will be injured? In terms of criminal liability, the question has apparently been resolved in favor of the agitator on first amendment grounds;[590] civil liability is another question. There are at least three grounds upon which the civil liability of the riot agitator or demonstration organizer could be based: 1.) ordinary principles of negligence, 2.) violation of state law, and 3.) a kind of strict liability for setting in motion forces that erupt into mob violence. Each will be treated separately in terms of its basic elements, followed by a consideration of the possible limitations imposed on all three by the first amendment.

With reference only to general principles of tort liability for negligence, an individual who addresses a crowd with words that are not intentionally designed to incite it to violence, but that should appear to a reasonable man destined to have that effect, may be exposing himself to civil liability for resulting injuries. This may also be true with regard to the individual who assembles the crowd initially, even for peaceful and legal purposes, where it is entirely likely that, given the time, place, and all the circumstances, violence is likely to erupt. The basis for these conclusions lies in the principle that an actor whose conduct creates a known or knowable unreasonable risk of harm to another by the acts of third persons will not be relieved of liability because of those intervening acts.[591] For the purpose of determining whether the actor should

588 United States v. Dennis, 183 F.2d 201, 207 (2d Cir. 1950), *aff'd,* 341 U.S. 494 (1951).

589 Consider, for example, the following words of H. Rapp Brown, spoken at Cambridge, Maryland, on the night of July 25, 1967, before a group assembled in the street:

> You see that school over there . . . . Y'all should have burned that school a long time ago. You should have burned it to the ground. Ain't no need in the world, in 1967, to see a school like that sitting over there. You should have burned it down and then go take over the honkey's school.

Soon after those words were spoken violence erupted and during the night the fifty-year-old, all-Negro Pine Street Elementary School, to which Brown was referring, "was indeed burned to the ground." Gottschalk, *Just How Free Should Free Speech Be?* Wall Street Journal, October 19, 1967, at 16, col. 4 (Eastern ed.).

590 See notes 105-08 *supra* and accompanying text.

591 Barclay Kitchen, Inc., v. California Bank, 208 Cal. 2d 347, 25 Cal. Rptr. 383 (Dist.

recognize that his conduct involves a foreseeable risk of violence by third persons, he is required to know ". . . the qualities and habits of human beings . . . and the qualities, characteristics, and capacities of . . . forces in so far as they are matters of common knowledge at the time and in the community."[592] The *Restatement (Second) of Torts* makes it clear that this applies not only to the ordinary qualities and habits of the majority of human beings, but also

> . . . if the known or knowable peculiarities of even a small percentage of human beings, or of a particular individual or class of individuals, are such as to lead the actor to realize the chance of eccentric and improper action, he is required to take this chance into account if serious harm to a legally important interest is likely to result from such eccentric action . . . .[593]

Thus, an individual's conduct may be held to create an unreasonable risk of harm where he brings into contact with third persons ". . . a person whom the actor knows or should know to be peculiarly likely to commit intentional misconduct, under circumstances which afford a peculiar opportunity or temptation for such misconduct."[594] The application of these principles in a riot context indicates that an agitator who merely tells an already angry crowd what it wants to hear or a person who organizes a "peaceful" demonstration under obviously volatile circumstances may be held accountable for the always present militant minority who can be expected to use the assembly as an occasion for violence. It is no defense for the agitator that the foreseeable acts of the rioters are criminal acts,[595] that the precise manner of the damage done or the identity of the actual victims was not foreseeable,[596] or that the police were negligent in failing to control and disperse the mob or in failing to adequately protect the injured persons.[597] The only defense apparently available is that the risk created by the agitator's conduct was not an unreasonable one, as where the activity was of "such preeminent social utility as to justify the serious character of risk involved therein."[598] What this means in terms of first amendment

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Ct. App. 1962); Torrack v. Corpamerica, Inc., 51 Del. 254, 144 A.2d 703 (Super. Ct. 1958); Johnson v. Clement F. Sculley Constr. Co., 255 Minn. 41, 95 N.W.2d 409 (1959); RESTATEMENT (SECOND) OF TORTS §§ 302-302B (1965).

592 RESTATEMENT (SECOND) OF TORTS § 290(a) (1965).

593 *Id.* § 290, comment *c*, at 48.

594 *Id.* § 302B, comment *e*(D), at 91. *See* Shafer v. Keeley Ice Cream Co., 65 Utah 46, 234 P. 300, 38 A.L.R. 1523 (1925).

595 Barclay Kitchen, Inc. v. California Bank, 208 Cal. 2d 347, 25 Cal. Rptr. 383 (Dist. Ct. App. 1962); Torrack v. Corpamerica, Inc., 51 Del. 254, 144 A.2d 703 (Super. Ct. 1958); W. PROSSER, *supra* note 547, § 51, at 313-14.

596 "The defendant need not foresee the precise injury or the exact manner in which it occurs. . . . It is sufficient if the result is within the ambit of risk created by defendant." Barclay Kitchen, Inc. v. California Bank, 208 Cal. 2d 347, 25 Cal. Rptr. 383, 388 (Dist. Ct. App. 1962). "It is sufficient [to establish defendant's liability] that he should have foreseen that his negligence 'would probably result in injury of some kind to someone. . . .'" Brown v. National Oil Co., 233 S.C. 345, 105 S.E.2d 81, 84 (1958); *accord,* Mathews v. Porter, 239 S.C. 620, 124 S.E.2d 321, 324 (1962).

597 SEE RESTATEMENT (SECOND) OF TORTS § 290, comment *n*, at 53 (1965) which provides in part:

> [An actor] . . . is not, with a few exceptions, entitled to expect that a risk which is involved in his conduct will be prevented from taking effect in harm to others by the positive action of a third person. And this is true even though the third person is not only able to prevent the harm but under a duty to do so.

598 RESTATEMENT (SECOND) OF TORTS § 290, comment *c*, at 48 (1965).

rights will be extensively considered in a later section of this Note.[599]

A second possible ground for finding tort liability on the part of an agitator or individual who causes the formation of a peaceful demonstration that erupts into violence is based on the violation of a statute. As a general rule, the courts look upon the standard of conduct embodied in a statute as a standard required of a reasonable man, so that a violation of the statute may expose the violator to civil as well as criminal liability.[600] It is probably safe to say that all courts recognize, however, that not every violation of a statute constitutes *actionable* negligence; the violation must be a proximate cause of the plaintiff's damages[601] and must also be an unexcused violation.[602] In determining whether the violation of the statute constitutes negligence, the courts will usually look into the purposes of the statute to determine whether the injured party was a member of the class for whose benefit the statute was enacted and whether the injury caused by the defendant's act was the type of injury sought to be avoided by the legislation.[603] However, once the statute is found to comprehend both the plaintiff and his injury, the courts divide sharply as to the operative effect to be given to the defendant's violation. The majority view is that the statutory violation amounts to negligence per se and is therefore binding on a jury,[604] while a significant minority hold that it is only evidence of negligence that the jury is free to reject.[605] Whichever approach is followed, the effect is clear with respect to the individual whose conduct is found to be an unintentional but proximate cause of a riotous disturbance: if he has failed to comply with any constitutional statutes or ordinances[606] aimed at preserving the public order, such as those requiring the securing of a parade permit and the notification of police officials of a planned march,[607] the violation could be viewed as at least some evidence of negligence in a damage action arising out of any violence that may be attributed in part to the statutory violation. This is not to say, how-

599 See notes 612-74 *infra* and accompanying text.

600 Some of the courts adopt the legislative standard only out of deference and respect for the legislature. *See, e.g.*, Tamiami Gun Shop v. Klein, 116 So. 2d 421 (Fla. 1959); Rudes v. Gottschalk, 159 Tex. 552, 324 S.W.2d 201 (1959). Other courts take the view that the legislative standard is binding upon them. *See, e.g.*, Lynghaug v. Payte, 247 Minn. 186, 76 N.W.2d 660 (1956); Scott v. Smith, 73 Nev. 158, 311 P.2d 731 (1957), *overruled on other grounds* in Maxwell v. Amaral, 79 Nev. 323, 383 P.2d 365 (1963).

601 Kaplan v. Philadelphia Transp. Co., 404 Pa. 147, 171 A.2d 166 (1961); Smith v. Virginia Transit Co., 206 Va. 951, 147 S.E.2d 110 (1966).

602 RESTATEMENT (SECOND) OF TORTS § 288 A (1965); W. PROSSER, LAW OF TORTS § 35, at 198-202 (3d ed. 1964); *see* New York Central RR. v. Glad, 242 Ind. 450, 179 N.E.2d 571 (1962).

603 Elder v. Fisher, 217 N.E.2d 847 (Ind. 1966); Kalkopf v. Donald Sales & Mfg. Co., 33 Wis. 2d 247, 147 N.W.2d 277 (1967); W. PROSSER, *supra* note 602, § 35, at 193-98.

604 W. PROSSER, *supra* note 602, § 35, at 202. *See, e.g.*, Foster v. Harding, 426 P.2d 355 (Okla. 1967); Alex v. Armstrong, 215 Tenn. 276, 385 S.W.2d 110 (1964); Bock Constr. Co. v. Dallas Power & Light Co., 415 S.W.2d 227 (Tex. Civ. App. 1967).

605 W. PROSSER, *supra* note 602, § 35, at 202; *see, e.g.*, Aravanis v. Eisenberg, 237 Md. 242, 206 A.2d 148 (1965); Peterson v. Skiles, 173 Neb. 470, 113 N.W.2d (1962).

606 Some courts that hold that violation of a statute is negligence per se take the view that violation of an ordinance or traffic law is only evidence of negligence. But the prevailing view is that a violation of an ordinance is not given a different effect from that accorded a violation of a statute. *See* W. PROSSER, *supra* note 602, § 35, at 203 & n.81.

607 For a discussion of these statutes or ordinances and their constitutionality, see notes 114-21 *supra* and accompanying text.

ever, that statutory compliance automatically rules out the presence of ordinary negligence.[608]

A third possible theory for civil liability of the agitator or organizer of a peaceful demonstration that nonetheless results in violence is a kind of strict liability based on the fact that the purpose of the demonstration was unlawful or even the very fact that it has resulted in actual violence. The leading recent case on both these points is the recent Georgia decision in *NAACP v. Overstreet*.[609] The plaintiff-owner of a grocery store had been accused of beating and discharging a fourteen-year-old Negro employee for alleged stealing. The officers of the local chapter of the NAACP responded by organizing a group to picket the plaintiff's store for the purpose of publicizing a boycott of his business. Despite the "peaceful" purpose that the picketing was intended to accomplish, violence soon erupted; a large hostile crowd gathered, the plaintiff's employees and customers were abused and threatened, bricks and rocks were thrown through windows, at one point a shot was fired, and the plaintiff's business suffered serious economic losses. He sued the individual officers, the local NAACP chapters, and the national NAACP organization for damages and recovered a judgment of $85,793, including $50,000 in punitive damages. The basis of the court's decision was twofold: First, since the legality of civil rights picketing depends on the presence of a genuine civil rights issue, the purpose here was unlawful because the picketing was to punish the plaintiff for his alleged assault and battery. Second, since the picketing was not peaceful, it thereby became unlawful. On this latter point, the fact that the acts of violence may have been committed by members of the crowd attracted by the picketers rather than the picketers themselves was held to be of no consequence because the jury was justified in finding that "the presence of the pickets brought about . . . violence . . . ."[610] The soundness of the case has been severely criticized, especially on first amendment grounds,[611] a matter to be considered below in a broader context, and there are as yet no cases that follow its bold initiative in establishing an almost strict liability for violence caused by the very act of carrying on a civil rights demonstration. Whatever its soundness, however, for the present the case must be reckoned with as a sword of Damocles suspended over the head of any individual who would organize even a peaceful demonstration.

The foregoing discussion of some of the possible grounds for holding one whose conduct unintentionally causes a riot civilly liable for the resulting damage has been purposely framed solely in terms of traditional concepts of common-law tort liability and state-created legal rights. It is apparent, however,

608 RESTATEMENT (SECOND) OF TORTS § 288 C (1965): "Compliance with a legislative enactment or an administrative regulation does not prevent a finding of negligence where a reasonable man would take additional precautions."

609 221 Ga. 16, 142 S.E.2d 816, *cert. granted*, 382 U.S. 937 (1965), *cert. dismissed as improvidently granted*, 384 U.S. 118, *rehearing denied*, 384 U.S. 981 (1966). The holding in this case may be restricted to its facts, *see* notes 667-74 *infra* and accompanying text.

610 142 S.E.2d at 825.

611 NAACP v. Overstreet, 384 U.S. 118 (1966) (dissenting opinion of Justice Douglas), *noted in* 13 How. L.J. 193 (1967) *and* 27 OHIO ST. L.J. 361 (1966); Comment, *Civil Suits and Civil Rights: Recovery of Police Expenses*, 115 U. PA. L. REV. 238, 260-63 (1966). The decision, however, has been approved in one commentary. 37 MISS. L.J. 481 (1966).

that the ultimate success of any of these theories of liability depends upon its compatibility with the first amendment guarantees of freedom of speech and assembly as defined by the United States Supreme Court. The position of the Court with respect to its jealous guardianship of first amendment rights is indicated by the language in *New York Times Company v. Sullivan*[612] regarding civil liability for libel:

> In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet "libel" than we have to other "mere labels" of state law . . . . Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.[613] (Footnotes omitted.)

The Court, however, has made it clear that it views its duty as going beyond the mere elaboration of constitutional principles. When construction of first amendment rights is at issue, the scope of review extends to an independent examination of the whole record to assure that the principles are constitutionally applied as well.[614] In short, it can be expected that any state court decision that finds a person civilly liable when his words or actions unintentionally result in mob violence will be subject to final scrutiny by the Supreme Court, however sound the decision may be in terms of state law principles.

It may be argued that the Supreme Court would be without jurisdiction to review such civil liability cases because the state action required by the fourteenth amendment is lacking.[615] The Court, however, has soundly rejected the argument that merely because the law suit is between private parties, state action is necessarily absent. The Court's position is that the enforcement of any right by the state's judicial machinery can supply the necessary state action to bring the fourteenth amendment into operation and thereby provide the basis for federal jurisdiction.[616]

A related argument also designed to avoid federal jurisdiction is that since a civil suit involves only private persons and a private quarrel, any constitutional questions presented are incidental and too insignificant to warrant Supreme

612 376 U.S. 254 (1964).

613 *Id.* at 269. For a similar view, expressed with regard to traditional agency concepts, see Justice Douglas' dissenting opinion in NAACP v. Overstreet, 384 U.S. 118, 124 (1966).

614 New York Times Co. v. Sullivan, 376 U.S. 254, 285 (1964); *see* Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

615 U.S. CONST. amend. XIV, § 1 provides in part:

> No *State* shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any *State* deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (Emphasis added.)

This necessity for state action as a prerequisite of federal power to protect the individual from violation of his constitutional rights has recently been seriously questioned by a majority of the Supreme Court in United States v. Guest, 383 U.S. 745 (1966). For an evaluation of this position in *Guest*, in terms of its historical soundness, see Avins, *Federal Power to Punish Individual Crimes Under the Fourteenth Amendment: The Original Understanding*, 43 NOTRE DAME LAWYER 317 (1968).

616 Shelley v. Kraemer, 334 U.S. 1 (1948).

Court review. However, in *New York Times Company v. Sullivan*[617] the Court recognized that many of the criminal-law safeguards, such as the requirement of an indictment, proof beyond a reasonable doubt, and double jeopardy protection, are not available in a civil action — a fact that results in ". . . a form of regulation that creates hazards to protected freedoms markedly greater than those that attend reliance upon the criminal law."[618] Accordingly, the Court concluded that since the defendant's alleged libel was constitutionally beyond the reach of the state's criminal libel statute, it must likewise be beyond the reach of its civil law of libel.[619] Although the Court in *Sullivan* was dealing with a libel action, its reasoning would apply with equal strength to the case of an individual whose conduct unintentionally sparks a riot; the mere fact that the suit is a civil rather than a criminal action will not discourage review by the Court of first amendment issues affecting the liability of the defendant.

Granting, then, that the limiting effect of first amendment rights would apply with similar force in the area of civil liability, it is necessary to confront the crucial issue: Is it an infringement of an individual's first amendment rights of free speech and peaceful assembly to hold him civilly liable for damages caused by mob violence where his acts were the unintentional though foreseeable cause of the violence? As of this writing, the Supreme Court has not been confronted by this issue, nor apparently has any other court of record. However, the first amendment rights of free speech and peaceful assembly have generated a body of law that should readily permit the distillation of principles and the construction of analogies.

In its role as final arbiter of the balance between first amendment rights and a state's duty to protect domestic tranquillity,[620] the Supreme Court has adopted the basic approach that complete freedom of speech is the rule, while instances of unprotected speech, for which the speaker may be subjected to potential criminal or civil liability, are exceptions. In *Chaplinsky v. New Hampshire*[621] the Court stated:

> There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.[622] (Footnotes omitted.)

The rationale of the Court in holding that these specified forms of speech are not protected by the first amendment is that they

617 376 U.S. 254 (1964).
618 *Id.* at 278, quoting from Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).
619 New York Times Co. v. Sullivan, 376 U.S. 254, 277 (1964).
620 In the heat of the debate over the degree of preeminence to be accorded first amendment rights, there is a tendency to forget that the Preamble to the Constitution recites that it was established to secure the "domestic Tranquility" as well as the "Blessings of Liberty."
621 315 U.S. 568 (1942).
622 *Id.* at 571-72. When *Chaplinsky* was decided in 1942, it was true that libelous utterances raised no "Constitutional problem." However, since the Court's adoption in *New York Times Company v. Sullivan* of a standard of liability for libel of public officials based on malice, libel has become a fertile source of constitutional controversy. *See* notes 644-60 *infra* and accompanying text.

> are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[623]

The approach of the Court thus seems to be that these categories of speech are unprotected because they are bad in and of themselves, without regard to the specific intention of the speaker or any harmful consequences that may result.[624] The states may accordingly prohibit or punish their very utterance.[625]

If speech having a tendency to incite a riot could be included with these other categories of unprotected speech, the speaker could be subjected to criminal liability without showing that he intended to incite a riot or that one actually occurred or was even imminent under the circumstances. It could then be argued that, by analogy, there is no constitutional necessity for *intentional* incitement in order to establish civil liability so long as the utterances constituted incitement in fact and caused injury to the plaintiff. The language in *Chaplinsky* to the effect that "fighting" words include utterances that "tend to incite an immediate breach of the peace"[626] would seem to support the conclusion that the category of fighting words may be broad enough to include incitement to riot. However, even before *Chaplinsky,* the Court had already given a clear indication that it would not look upon incitement to riot as a category of speech in itself prohibited. In *Cantwell v. Connecticut*[627] the Court stated:

> No one would have the hardihood to suggest that the principle of freedom of speech sanctions incitement to riot . . . . When clear and present danger of riot, disorder, interference with traffic on the public streets, or other immediate threat to public safety, peace, or order, appears, the power of the State to prevent or punish is obvious.[628]

While the first part of the above quoted material indicates that speech constituting incitement to riot is not constitutionally protected, the remainder makes it clear that the non-protection arises not from the speech itself, but from its probable effect under the specific circumstances. The loss of constitutional protection does not result because the utterances are necessarily "no essential part of any exposition of ideas" or of little "social value as a step to the truth,"[629] but because they actually created an imminent threat of a substantial breach of the public peace.

Whether, in addition to the clear and present danger of disorder, it must be shown that the speaker actually intended to incite a riot was not directly considered by the Court. However, the following statement in the *Cantwell* opinion may be enlightening.

> One may . . . be guilty of [breach of the peace] if he commits acts or makes

623 *Id.* at 572.
624 *See* C. PRITCHETT, CIVIL LIBERTIES AND THE VINSON COURT 65 (1954).
625 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). *See* Roth v. United States, 354 U.S. 476 (1957); Fox v. Washington, 236 U.S. 273 (1915).
626 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).
627 310 U.S. 296 (1940).
628 *Id.* at 308.
629 Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

> statements *likely* to provoke violence and disturbance of good order, even though no such eventuality be intended. Decisions to this effect are many, but examination discloses that, *in practically all*, the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks *directed to the person of the hearer.*[630] (Emphasis added.)

The Court seems to be implying that no intent is required only if the language constituting the breach of the peace consists of fighting words — speech that is in and of itself unprotected. But if the speech is capable of conveying truth or exposing an idea, there may be a requirement for an intent to incite the violence.

Eleven years later in *Feiner v. New York,*[631] the Court upheld the defendant's conviction for violating a statute prohibiting speech or conduct which occasions, or by which the actor intends to incite, a breach of the peace. Quoting from *Cantwell,* the Court relied essentially on the power of the state to respond to an immediate threat to the public peace with prevention or punishment.[632] But, in addition, the Court relied on the finding of the state courts that Feiner's conduct under the circumstances amounted to intentional incitement of a breach of the peace.[633] It seems, therefore, that the Court has taken the position that the state has the power to prevent or punish a speaker whose words are tending to provoke a breach of the peace, provided the "speaker passes the bounds of argument or persuasion and *undertakes* incitement to riot. . . ."[634] (Emphasis added.) Since one of the recognized functions of speech is to invite dispute, it cannot be prohibited or punished when it merely "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[635]

Thus, the Court relied on the absence of any actual incitement to violence in *Cox v. Louisiana*[636] where the defendant had been convicted for disturbing the peace under a statute that prohibited ". . . congregating with others 'with intent to provoke a breach of the peace, *or under circumstances such that a breach of the peace may be occasioned* . . . .'"[637] (Emphasis added.) The conviction was reversed ". . . as the statute is unconstitutional in that it sweeps

630 Cantwell v. Connecticut, 310 U.S. 296, 309 (1940).
631 340 U.S. 315 (1951).
632 *Id.* at 320.
633 *Id.* at 319-20. In People v. Feiner, 300 N.Y. 391, 91 N.E.2d 316 (1950), the New York Court of Appeals said that

> [d]efendant, at the very least, knew of the condition [of the crowd] and was heedless of the potential evil consequences. More, as found by the trial court, he deliberately continued in a vein calculated to precipitate those consequences. *Id.* at 400, 91 N.E. 320.

For another portion of this opinion indicating the New York courts found Feiner guilty of intentionally provoking a breach of the peace, see the Supreme Court's opinion in Feiner v. New York, 340 U.S. 315, 319 n.2 (1951).
634 Feiner v. New York, 340 U.S. 315, 321 (1951). In this regard, consider the following statement of the court in Allen v. District of Columbia, 187 A.2d 888 (D.C. App. 1961).

> The appellant's conduct, and not the crowd's reaction to it, must be the starting point, for "the measure of the speaker is not the conduct of his audience." . . . Audience reaction, and the immediacy of disorder, become significant elements of proof only after the speaker "passes the bounds of argument or persuasion and undertakes incitement to riot." *Id.* at 889.

635 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
636 379 U.S. 536 (1965).
637 *Id.* at 551.

within its broad scope activities that are constitutionally protected free speech and assembly."[638] It seems that each case must still be examined on its own facts to determine whether the speaker was undertaking incitement or merely inducing unrest.

Viewing this position of the Court that some intention to incite a riot is necessary to sustain a conviction together with the Court's statement in *Sullivan* that what a state may not constitutionally bring about by means of a criminal statute is likewise beyond the reach of its civil law, the inference can be drawn that an intention to incite is a necessary element of civil liability for riot damage, regardless of the degree of foreseeability of the violence.[639] However, this analogy between civil liability and criminal liability with regard to the inhibiting effect of the first amendment is far from perfect.

First, in all of those cases[640] in which the Court indicated a need for intent to incite violence as a prerequisite to the state's right to punish the speech, no violence in fact occurred. Where there is no violence *and* no intent to incite violence, the imposition of criminal sanctions upon speech that does not of itself fall into one of the prohibited categories such as obscenity or fighting words has all the appearances and connotations of a prior restraint.[641] On the other hand, in any civil action for damages, violence has necessarily occurred and injuries have been suffered. The speaker is not, therefore, being silenced or punished for his speech in itself or even for any threatened violence, but rather he is only being held accountable for injuries in fact resulting from his speech. To hold a speaker liable for such injuries, even though unintentional, may be no more of an unreasonable limitation on the right of free speech than to designate certain categories as unprotected per se and punishable by the state regardless of the intention of the person who uttered them.

The second factor that points up the difficulty in drawing an easy analogy between criminal and civil liability in this area of free speech is that while the criminal action is based on a violation of legitimate state interests, a civil action is based on an invasion of the personal rights of the plaintiff. In effect, the preeminence of first amendment rights in a civil action is determined by a balancing process between competing individual rights where in fact the "substan-

638 *Id.* at 552.

639 Proving the subjective intent of an individual is often extremely difficult. It is therefore possible that the Court would consider a degree of foreseeability equivalent to substantial certainty sufficient to indicate an intention to incite violence. On the other hand, because of the vagueness of "substantial certainty," the Court may not be willing to accept such indirect proof of intent where first amendment rights are at stake.

640 *E.g.*, Cox v. Louisiana, 379 U.S. 536 (1965); Feiner v. New York, 340 U.S. 315 (1951); Cantwell v. Connecticut, 310 U.S. 296 (1940). *See also* Allen v. District of Columbia, 187 A.2d 888 (D.C. App. 1963).

641 The term "prior restraint" or "previous restraint" has long been one of the watchwords used by the Supreme Court in its role as interpreter and guardian of first amendment rights. Its meaning of the expression is evident from the following statement of Blackstone quoted in Near v. Minnesota, 283 U.S. 697 (1931), concerning one of the first amendment rights — freedom of the press:

> The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity. *Id.* at 713-14.

tive evil . . . rises far above public inconvenience, annoyance, or unrest."[642] And so, while the Supreme Court should exercise the same degree of watchfulness against invasions of free speech and assembly in civil as well as in criminal actions, it by no means follows that the same standard of intentional abuse should apply.

On its face, the legal analogy that seems most appropriate to the solution of the conflict between the demonstration organizer's rights of free speech and the rights of the riot victim who has suffered personal injury or property loss is the standard used by the Court to solve the conflict of similar competing personal rights involved in civil libel suits. In *Sullivan*[643] the task of the Court was ". . . to determine for the first time the extent to which the constitutional protections for speech and press limit a State's power to award damages in a libel action brought by a public official against critics of his official conduct."[644] Stressing the fact that it was a public official who was the object of the alleged libel, the Court held that the first amendment requires a rule that

> . . . prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice" — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[645]

By requiring actual malice as a necessary element of a successful libel action, the Court seemed to adopt a standard similar to the one applied in constitutionally permissible convictions for incitement to riot and related crimes — the necessity for deliberate or malicious abuse of first amendment rights. However, the Court failed to give any indication whether "actual malice" was to be the only acceptable constitutional standard in all libel suits or only those involving public officials.[646] Subsequent decisions of the state and lower federal courts,[647] and even of the Supreme Court itself,[648] left doubts as to whether the *Sullivan* standard would be broadly applied in all libel actions.

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642 Terminiello v. Chicago, 337 U.S. 1, 4 (1949).

643 New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

644 *Id.* at 256.

645 *Id.* at 279-80.

646 We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. . . . Nor need we here determine the boundaries of the "official conduct" concept. *Id.* at 283 n.23.

647 For an extensive list of these cases, see Curtis Publishing Co. v. Butts, 388 U.S. 130, 134 n.1 (1967).

648 In Garrison v. Louisiana, 379 U.S. 64 (1964), the Court applied the *Sullivan* standard in reversing the conviction of the appellant for his allegedly libelous attacks on the integrity and honesty of eight local judges. The Court found "no difficulty" in extending this standard even though the state court had found that the attacks were not directed at any official conduct of the judges. *Id.* at 76.

In Rosenblatt v. Baer, 383 U.S. 75 (1966), the Court found that a former supervisor of a public recreation area was a "public official" and that his libel judgment against a newspaper columnist would have to be reversed for failure to apply the *Sullivan* standard. The Court, however, added an interesting footnote hinting that society's strong and pervasive interest in preventing and redressing attacks on reputation might preclude application of the *Sullivan* standard where the libeled person is not a public official:

> It is suggested that this test might apply to a night watchman accused of stealing state secrets. But a conclusion that the *New York Times* malice standards

But it was not until *Curtis Publishing Company v. Butts*[649] that the Court was squarely presented with the issue of whether or not actual malice or its alternate, reckless disregard of the truth, is a constitutionally required element of a civil libel action brought by a person who was a public figure but not a public official. The Court was being asked to balance the interest of the individual in his reputation against freedom of the press, as it was asked to do in *Sullivan,* but with some critical differences: gone was the significant interest of the public in scrutinizing the official conduct of its own servant;[650] gone also was the danger that a recovery by the plaintiff would be viewed as a "vindication of governmental policy."[651] The issue, stated most narrowly, was whether the absence of these elements from the publishers' side would unbalance the scales of justice in favor of the individual's rights so as to require a less vigorous standard of actionable libel than actual malice. Although the Court affirmed a judgment in favor of the plaintiff for $460,000, it could not resolve this issue; there was no majority opinion. Nonetheless, the plurality opinion[652] of Justice Harlan, joined by Justices Clark, Fortas, and Stewart, represents a definite retreat from an across-the-board application of the actual malice standard of *Sullivan.* The thesis of the opinion was that "the rigorous federal requirements of *New York Times* are not the only appropriate accommodation of the conflicting interests at stake."[653] In deciding upon an appropriate standard, the opinion said:

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apply could not be reached merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation. The employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy. *Id.* at 86 n.13.

Finally in Time, Inc. v. Hill, 385 U.S. 374 (1967), the Court found the *Sullivan* standard applicable to a damage suit brought by a private individual whose personal life had been exposed to the public view by a magazine review that had falsely stated that a certain play was based on events involving him. Significantly, however, the suit was brought under a state invasion of privacy statute and was not a libel suit. In fact, the false account portrayed the plaintiff in a favorable light. The Court expressly cautioned against reading the case as an extension of the *Sullivan* standard to all libel actions:

> We find applicable here the standard of knowing or reckless falsehood, not through blind application of *New York Times Co. v. Sullivan,* relating solely to libel actions by public officials, but only upon consideration of the factors which arise in the particular context of the application of the New York statute in cases involving private individuals. This is neither a libel action by a private individual nor a statutory action by a public official. Therefore, although the First Amendment principles pronounced in *New York Times* guide our conclusion, we reach that conclusion only by applying these principles in this discrete context. *Id.* at 390-91.

649 388 U.S. 130, *rehearing denied,* 389 U.S. 889 (1967). The case was argued with Associated Press v. Walker and the opinion is written for both cases. Walker sued the Associated Press for alleged libel arising out of a dispatch which stated that he, a politically prominent figure but not a public official, had encouraged and led a violent mob against federal marshals on the University of Mississippi campus. The jury found this account to be false and awarded him a damage verdict which the Supreme Court reversed unanimously, five justices applying the *Sullivan* standard and four applying the gross negligence standard of Justice Harlan.

650 *See* Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

651 Curtis Publishing Co. v. Butts, 388 U.S. 130, 154 (1967).

652 The opinion represents an elaboration of the views expressed by Justice Harlan in his opinion, concurring in part and dissenting in part, in Time, Inc. v. Hill, 385 U.S. 374, 402-11 (1967). See note 648 *supra.*

653 Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967).

> We are prompted, therefore, to seek guidance from the rules of liability which prevail in our society with respect to compensation of persons injured by the improper performance of a legitimate activity by another. Under these rules, a departure from the kind of care society may expect from a reasonable man performing such activity leaves the actor open to a judicial shifting of loss.[654]

Justice Harlan concluded that

> . . . a "public figure" who is not a public official may . . . recover damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of *highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers.*[655] (Emphasis added.)

Central to the opinion was the belief that application of the *Sullivan* standard to all defamation suits brought by public figures would give first amendment rights a much greater weight than is necessary to maintain their ordained primacy. As preferred rights,[656] they must be allotted sufficient "breathing space"[657] so that they may be enjoyed without fearful reliance on a narrow and indefinite boundary between protected and unprotected utterances. But to hold that the breathing space should extend all the way to intentional or even reckless abuse is to needlessly stifle the breathing space that other valuable individual rights need in order to survive. A far more reasonable approach would be to protect false defamatory utterances so long as they are made innocently or negligently but to withdraw protection when they are made in a grossly negligent manner. In short, Harlan's opinion in *Butts* displays an implicit faith in the proposition that the concept of the reasonably prudent man has a place in the world of first amendment rights.[658]

In many respects, the constitutional issue to which Harlan's opinion is addressed resembles the issue that would face the Court in a civil action against an individual whose conduct has unintentionally, but foreseeably caused personal injury or property damage through mob violence. Both situations involve

654 *Id.* at 154.
655 *Id.* at 155.
656 "When we balance the Constitutional rights of owners of property against those of the people to enjoy [first amendment rights] . . . we remain mindful of the fact that the latter occupy a preferred position." Marsh v. Alabama, 326 U.S. 501, 509 (1946) (footnote omitted).
657 This phrase, first used by the Court in NAACP v. Button, 371 U.S. 415, 433 (1963), caught the fancy of the Court and has received heavy play in the recent cases dealing with freedom of the press. Time, Inc. v. Hill, 385 U.S. 374, 388, 407 (1967); Curtis Publishing Co. v. Butts, 388 U.S. 130, 148 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).
658 This terminology is borrowed from Kalven, *The Reasonable Man and the First Amendment: Hill, Butts, and Walker*, in 1967 THE SUPREME COURT REV. 267, 301, 303 (Kurland ed.). This article is an excellent consideration and evaluation of the positions taken by the Justices in the three cases. The author states his suspicion that ". . . properly viewed, there is in the world of the First Amendment no place for 'the reasonable [*sic*] prudent man.'" *Id.* at 303. This suspicion is based on the author's conclusion that since in both *Butts* and *Walker* five Justices applied the *Sullivan* standard, this standard has been applied across the board to civil actions involving public figures. He views the apparent victory of the Harlan standard in *Butts* as a fluke, occasioned when Chief Justice Warren concurred in the result reached by Harlan, but did so by applying the "reckless disregard of the truth" standard of *Sullivan*. *Id.* at 307.

essentially the same conflict between first amendment rights and legitimate state enforced rights. Both situations also entail the balancing of first amendment interests not against the state's own broad interest in preserving public order, but rather against compensation for actual injuries inflicted on other individuals. And finally, the feeling expressed in Harlan's opinion that the fact that an activity is a ". . . legitimate, protected and indeed cherished activity does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the legitimate interests of others,"[659] applies as well to freedom of speech and assembly as to freedom of the press. Whether the Court would find Harlan's theory persuasive in a case involving grossly negligent activity or speech resulting in mob violence is, of course, highly speculative. But two things are clear: 1) Although Justice Harlan's opinion in *Butts* adopting the gross negligence standard was not a majority opinion, the case resulted in the affirmance of a $460,000 judgment even though everyone, including Butts' own counsel,[660] agreed that the *Saturday Evening Post* was not guilty of actual malice under the *Sullivan* standard. 2) There is a valid analogy between unintentional libel and unintentional causation of a riot.

The four opinions in *Butts* represent the Court's most recent consideration of the problem of balancing first amendment rights against other individual rights in the context of civil liability. Of the four, the Harlan opinion takes the most liberties with the traditional sanctity of such rights, a position that clearly stops short, however, of saying that mere negligence in the exercise of such rights destroys their preferred status. The conclusion seems inevitable, therefore, that the first amendment would ordinarily provide full protection from civil liability for an individual who calls a demonstration or who addresses (as opposed to "incites") an assemblage in the streets even if it is reasonably foreseeable that violence will erupt. The lesson of *Edwards v. South Carolina*[661] and *Cox v. Louisiana*[662] is that an initially peaceful protest march during daylight hours at the site of a public building[663] is an exercise of first amendment rights "in their most pristine and classic form,"[664] even though there is the ever-present danger of violence. To hold that the organizers of such demonstrations or the persons who address them must suffer the risk of extensive tort liability would surely drain all the oxygen from the breathing space that the rights of free speech and assembly need to survive.

On the other hand, it would seem that there should be some limits imposed on the exercise of these first amendment rights. Suppose, for example, a protest march is arranged to take place on a steaming July night in the midst of an urban ghetto where the atmosphere is already highly charged by recent violent outbreaks. Add the fact that the organizers have deliberately called it on

659 Curtis Publishing Co. v. Butts, 388 U.S. 130, 150 (1967).
660 *Id.* at 156 n.20.
661 372 U.S. 229 (1963).
662 379 U.S. 536 (1965).
663 *But see* Adderley v. Florida, 385 U.S. 39 (1966), where the Court, in upholding convictions, distinguished conduct in violation of a state malicious trespass statute from the non-trespassory conduct involved in *Edwards* and *Cox*.
664 Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

such short notice as to make adequate police supervision impossible.[665] In this situation, violence is not only foreseeable; it is substantially certain. This situation seems to be tailor-made for the application of the "grossly negligent" standard espoused by Harlan's opinion in *Butts*.

The second ground that was previously considered as a possible basis for the tort liability of one whose conduct or words unintentionally result in mob violence was the violation of a statute designed to protect the public safety. If, even under the Harlan standard, negligence alone is not sufficient to deprive the exercise of a first amendment right of its protected status, it is initially hard to conceive of a statutory violation, whether it be considered evidence of negligence or even negligence per se, serving as a constitutionally acceptable basis of civil liability. At the same time, however, the Supreme Court has upheld the constitutionality of criminal convictions arising out of such violations.[666] By arguing from analogy, it may be possible to sustain a conclusion that when such a statute is violated and the violation results in injuries within the contemplation of the statute, there would be no constitutional barrier to a civil action against the violator, a result achievable without reliance on the gross negligence standard of Harlan's opinion in *Butts*. This position is somewhat weakened by the absence of traditional criminal law safeguards from the civil proceeding and by the threat of a substantial and indeterminate judgment. The Harlan standard might prove to be the best route after all if the statutory violation could be coupled with enough other factors so that the totality of evidence would establish gross negligence.

The final ground considered above with respect to the tort liability of one who organizes a demonstration that unintentionally erupts in violence was a kind of strict liability found in *NAACP v. Overstreet*[667] However, if negligence is not sufficient to deprive one of first amendment protection, a fortiori, any kind of strict liability standard would seem to be equally impotent. But before such a conclusion need be drawn, analysis of the *Overstreet* case may reveal that its value as precedent in the area of civil liability for group action is limited by its own facts.

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665 In this regard, consider the following statement of Chicago's former Superintendent of Police, O. W. Wilson:

> During the Summer of '66 there were several civil rights groups which conducted marches into areas of Chicago where a majority of the residents were not sympathetic with the view of the marchers. I believe that it was the aim of these marchers to subject themselves to violence. If the marches were conducted without incident, nothing would be gained. The violence which occurs is in fact their bargaining wedge. If violence occurs, they can make demands upon the city administration and in return for the granting of those demands agree to end the marches and thereby the violence. Otherwise they have no bargaining power. For this reason, those in charge of the marches do not really want adequate police protection and control, although they say they do.
>
> At first, the leaders of the marches agreed to notify the police sufficiently in advance of the march so that the police might mobilize an adequate force to control the onlookers, hecklers, and other trouble makers. Only twice, however, were we notified.

Wilson, *Civil Disturbances and the Rule of Law*, 58 J. CRIM. L.C. & P.S. 155, 159 (1967).

666 Cox v. New Hampshire, 312 U.S. 569 (1941) (conviction of defendants upheld for violation of state statute requiring parade permits).

667 221 Ga. 16, 142 S.E.2d 816, *cert. granted*, 382 U.S. 937 (1965), *cert. dismissed as improvidently granted*, 384 U.S. 118, *rehearing denied*, 384 U.S. 981 (1966).

It is significant that the violence in *Overstreet* resulted during picketing of a single identified business establishment rather than during a public demonstration. Although the Supreme Court has held that, since picketing is a form of expression, a state cannot constitutionally impose a blanket prohibition on all picketing, it added the proviso that, because picketing was also a form of action, the states could regulate and even forbid it where it posed an imminent threat to the public peace or threatened lives and property.[668] In *Hughes v. Superior Court*[669] the traditional criteria for state regulation of picketing received the Court's approval: "Picketing is not beyond the control of the State if the manner in which picketing is conducted or the purpose which it seeks to effectuate gives grounds for its disallowance."[670] *Overstreet* rests principally on this power of the states to control picketing when it is used for an illegal purpose, which in this case was the malevolent infliction of harm on the legitimate business interests of the plaintiff.

> Where, as alleged here, the sole purpose of the picketing of plaintiff's place of business was to injure and damage his business, as punishment of him for the alleged beating of a negro boy who worked for him, the picketing is unlawful and not protected under the free speech provisions of the Federal and State Constitutions.[671]

Only after grounding the decision on this constitutionally firm foundation did the court imply that the defendants would be liable even if the violent acts were solely the deeds of the sympathetic crowd attracted by the picketing.[672] It would be a mistake, therefore, to read this implication of absolute liability for the resulting violence as a separate and self-sufficient grounds for liability in the absence of an illegal purpose. Where a defendant's conduct constitutes a malicious and unexcused interference with the plaintiff's legitimate business interests, as was found in *Overstreet*, the resulting liability is absolute in the same sense that liability flowing from any other intentional tort is absolute.[673] Therefore, the prominence of the intentional "business tort" basis for liability makes it an inapplicable precedent for any type of strict liability for violence resulting from the conduct or organization of a *public* demonstration, except perhaps when the very purpose of the demonstration is to arouse mob violence. So long as the purpose of a public demonstration is an essentially peaceful one,

668 Thornhill v. Alabama, 310 U.S. 88, 105 (1940).
669 339 U.S. 460 (1950).
670 *Id.* at 465-66.
671 NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816, 824, *cert. granted,* 382 U.S. 937 (1965), *cert. dismissed as improvidently granted,* 384 U.S. 118, *rehearing denied,* 384 U.S. 981 (1966). The Georgia Supreme Court concluded that this was not a case of legitimate civil rights picketing:

> First, there is no allegation that the plaintiff practised racial discrimination nor any facts alleged from which such conclusion could be drawn. . . . The sole reason alleged for the picketing was the alleged assault and battery upon the 14 year old negro boy who worked for the plaintiff. It is not alleged that plaintiff was charged with beating the boy because he was a negro. 142 S.E.2d at 823.

672 142 S.E.2d at 825.
673 The essence of a so-called "business tort" is an intentional interference with legitimate business interests of another with a *purely* malevolent motive. Thus, the tort does not arise where the individual is acting in his own business interests or other legitimate interests. *See* W. PROSSER, LAW OF TORTS § 124, at 978 (3d ed. 1964).

such as the publicizing of grievances and the petitioning for their redress, the purpose itself comes within the protection of the first amendment.[674]

### *C. Liability of Organizations for Incitement by Their Agents*

1. The Nature of the Vicarious Liability

It is apparent that the problems involved in obtaining a judgment against an individual whose conduct unintentionally causes a riot are more complex than those involved in prosecuting a successful damage action against the actual rioters. What is more disturbing, however, is that the likelihood of the extra effort paying off in terms of recovery on the judgment is probably only slightly better in most situations. The greatest advantage that may be gained by succeeding in a cause of action against the individual who occasions a riot is the possibility of enforcing the judgment against an organization that he may be representing. In order for this endeavor to be successful, it must be shown that the individual's activities were sponsored by, or carried on under, the authority of the organization; that is, an agency relationship must be established.

The *Overstreet* case[675] represents a recent and apparently successful example of a national political organization being held liable for the actions of its local officers. The plaintiff joined the national NAACP, a New York corporation, as a party defendant in his damage action, alleging that one of the individual defendants, an officer of the local (Savannah) branch of the NAACP, was "'. . . acting in and for the services [of the national NAACP corporation] as its agent, employee, and servant, within the scope of said agency, employment and service.'"[676] In answering the crucial question ". . . whether there is evidence that the defendants Law or Jaudon were acting as agents of said [organizational] defendants . . . ,"[677] the Georgia Supreme Court followed a two step process. It first reviewed various facts about the relationship between the national and the local chapters, from which it concluded that there existed a close affiliation between the two bodies.[678] Then, in view of this affiliation, the court took the simple but effective approach that

> [i]f Law originally acted without authority and assumed to act for them without authority, they had the option to repudiate or ratify the act,

674 Cox v. Louisiana, 379 U.S. 536 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

675 See text at notes 609-11 *supra* for a summary of the facts of *Overstreet*.

676 NAACP v. Overstreet, 384 U.S. 118, 120 (1966) (dissenting opinion of Justice Douglas).

677 NAACP v. Overstreet, 221 Ga. 16, 142 S.E.2d 816, 825-26, *cert. granted*, 382 U.S. 937 (1965), *cert. dismissed as improvidently granted*, 384 U.S. 118 (1966).

678 The court substantiated its finding of affiliation as follows:

> The Savannah Branch used the corporate name, N.A.A.C.P., and held itself out as representing the national corporation. The national corporation gave orders and counsel to its local representatives at annual conventions; the locals were affiliated with the national organization and under its corporate charter, were units thereof; one paying dues to the local N.A.A.C.P. also became a member of the national N.A.A.C.P.; members of the local were members of the national N.A.A.C.P. and a portion of the dues went to the N.A.A.C.P. corporation. These facts evidence that the locals are within the framework of the national organization and are used in furtherance of the latter's business and interest. 142 S.E.2d at 826.

> but they were required to do one or the other. And where, as here, they never repudiated the act, they are deemed to have affirmed it.[679]

The deftness with which this fatal one-two punch was administered caught not only the NAACP off guard, but apparently also a majority of the United States Supreme Court. The Court granted certiorari on the specific question of whether the national organization had been deprived of "due process of law under the fourteenth amendment by being held liable in damages for acts performed without its knowledge and by persons beyond its control,"[680] but, for unexplained reasons, the writ was then dismissed as improvidently granted.[681] Four Justices dissented in an opinion written by Justice Douglas that took the position that such a manipulation of agency concepts and terms poses as definite a threat to the first amendment rights of freedom of association as forced disclosure of political associations[682] and guilt by association.[683] After stating that "agency" and "affiliation" are mere labels without "talismanic significance," the dissenting opinion concluded that the first amendment forbids the imposition of liability on a national political association because of the misconduct of a local branch without proof that the national organization specifically authorized or ratified the conduct for which liability is sought to be imposed. "A *general* finding of 'agency' or 'affiliation' is not enough."[684] Not only did the corporate NAACP here not authorize the picketing of the plaintiff's store, but it was not even aware of this action until it received secondhand the service of process made on the individual defendants.

The proposal by Justice Douglas that a national principal be liable for a local agent only when the "conduct for which liability is sought to be imposed" is specifically authorized or ratified would be a just and effective standard in situations like that presented in *Overstreet* where the "demonstration" itself was illegal, that is, was conducted for an illegal purpose. But what about the situations in which a demonstration, legal in purpose, erupts into violence through the gross negligence of those authorized by the organization to conduct it? As discussed earlier,[685] if the gross negligence standard of individual liability proposed by the Harlan opinion in *Butts* were applied to find the agents personally liable, could the organization escape liability because it specifically authorized

679 *Id.*
680 382 U.S. 937 (1965).
681 384 U.S. 118, *rehearing denied,* 384 U.S. 981 (1966).
682 DeGregory v. Attorney General of N.H., 383 U.S. 825 (1966); Gibson v. Florida Legislative Investigation Comm., 372 U.S. 539, 543-46 (1963); NAACP v. Alabama, 357 U.S. 449, 462-63 (1958).
683 Schware v. Board of Bar Examiners, 353 U.S. 232, 245-46 (1957). *See also* Elfbrandt v. Russell, 384 U.S. 11 (1966); Aptheker v. Secretary of State, 378 U.S. 500 (1964); Wieman v. Updegraff, 344 U.S. 183 (1952).
684 NAACP v. Overstreet, 384 U.S. 118, 125 (1966) (dissenting opinion) (footnote omitted). Justice Douglas felt that the affiliation standard approved in *Overstreet* in reference to a political organization is the same kind of standard that once burdened labor unions with liability for all the violence of their scattered affiliates. *Id.* at 124; *see* the *Danbury Hatters' Cases,* Lawlor v. Loewe, 235 U.S. 522 (1915); Loewe v. Lawlor, 208 U.S. 274 (1908). Congress came to the unions' rescue with section 6 of the Norris-LaGuardia Act, 29 U.S.C. § 106 (1964), which requires a finding of "clear proof of actual participation in, or actual authorization of, . . . or . . . ratification of" the local union activities before the national organization can be held liable. *See* United Mine Workers v. Gibbs, 383 U.S. 715 (1966).
685 See text accompanying notes 649-58 *supra.*

a peaceful demonstration and not "the conduct for which liability is sought to be imposed"? If "specifically authorized conduct" is read in its strictest sense, liability should not be imposed on the organization in this situation. Such a result would have the anomalous effect of creating a higher degree of first amendment protection for the organization itself when its agent, though acting within the scope of his authority, has been guilty of gross misconduct — a result certainly at odds with the basic agency doctrine of respondeat superior. Perhaps such an exception can be justified on the theory that while gross negligence might be the point at which the first amendment rights of the *individual* are outweighed by the property or personal rights of another individual, there is no comparable balancing point at which such property or personal rights of an individual outweigh the first amendment rights of an *association* of individuals.

On the other hand, this view seems not only unnecessary but equally as unjust, in the opposite direction, as the affiliation theory used by the state court in *Overstreet*. If the organization has authorized the demonstration and placed its agents in charge of its conduct, it has the ability to exert control over the qualifications and reputation of its agents and thus maintain some control over the circumstances. To absolve it of liability in this situation would be to encourage irresponsibility in the choice and control of persons whose every word and act carries the potentiality of dynamite. Furthermore, if actual intent to cause violence were the standard of organizational liability, the practical task of proving intent by producing some kind of resolution or similar evidence would create an impossible burden of proof and bestow veritable tort immunity on the most militant of organizations.

Whether the Douglas standard raises more problems than it solves and what refinements it ought to undergo are not pressing questions under the present state of the law. Regardless of its apparent constitutional inadequacies, the decision of the Georgia Supreme Court in *Overstreet* stands by judicial default: a political organization is liable for the misconduct of persons affiliated with it but acting beyond its control and knowledge.

2. Unincorporated Organizations

It may happen that the organization sought to be held liable for riot damage is not a corporate entity as was the NAACP in *Overstreet*, but rather an unincorporated nonprofit association.[686] In this situation, not only are the problems of finding substantive liability more complicated, but there are additional problems of enforcing the liability once it is found. Initially, it should be emphasized that the same constitutional limitations on the agency relationship should be applied to unincorporated associations as to incorporated ones. Whether a group of individuals united for a common legal purpose is recognized by a

686 The ordinary definition of an "association" is a body of persons united for the prosecution of a common enterprise without a corporate charter but using corporate methods and forms. *See* Hecht v. Malley, 265 U.S. 144, 157 (1924). A "non-profit" association is to be distinguished from a business association such as a partnership where the common enterprise is for the purpose of making a profit.

state as a corporate body would not seem to bear on the value or extent of the constitutional protection accorded it.[687]

The general rule with respect to liability is that an unincorporated association is held to the same standard of care as any other group and is liable for the tortious conduct of its servants or agents committed during the prosecution of the association's business.[688] Some courts have insisted upon the additional requirement that an agent, especially one who is not a servant, must be under the actual control of the association at the time of his tortious conduct.[689] At least one jurisdiction has distinguished between unintentional and intentional acts of the agent, saying that while the former are governed by the general agency rules of scope of employment,[690] the latter must be specifically authorized or ratified before the association can be held liable.[691]

If an unincorporated association is liable for the authorized acts of its agents, logic suggests that it should be subject to suit and required to satisfy a judgment against it. However, the vague legal status of associations both at common law and under the many different state statutory schemes of today often does not admit of logical conclusions.[692] The common-law rule, and thus the rule today in the absence of statute, is that in actions at law[693] an association cannot sue or be sued in its own name because it is not a legal person distinct from its members;[694] rather the action must be brought by or against all the members jointly.[695] The obvious impracticality of such a rule led to widespread statutory modification of the rule so that now procedural statutes in most states provide for class action suits[696] or suits brought in the association name.[697] In New York, suit against an association may be brought against an officer of the association;[698] while in Iowa a class action is essential, but the association may be joined as a

687 Justice Douglas' dissenting opinion in *Overstreet* makes no attempt to distinguish the corporate from the non-corporate, political organization with respect to the agency standard he believes to be constitutionally required. 384 U.S. 118 (1966) (dissenting opinion).

688 Feldman v. North British & Mercantile Ins. Co., 137 F.2d 266, 268 (4th Cir. 1943); Ketcher v. Sheet Metal Workers' Int'l Ass'n, 115 F. Supp. 802, 811 (E.D. Ark. 1953); Weese v. Stoddard, 63 N.M. 20, 312 P.2d 545, 547 (1956).

689 Cox v. Government Employees Ins. Co., 126 F.2d 254 (6th Cir. 1942); Mercury Cab Owners' Ass'n v. Jones, 79 So. 2d 782 (Fla. 1955), *aff'd*, 95 So. 2d 29 (Fla. 1956); Jopes v. Salt Lake County, 9 Utah 2d 297, 343 P.2d 728 (1959).

690 Torres v. Lacey, 5 Misc. 2d 11, 159 N.Y.S.2d 411, *modified on other grounds*, 3 App. Div. 2d 998, 163 N.Y.S.2d 451, *reargument denied*, 4 App. Div. 2d 831, 166 N.Y.S.2d 303 (1957).

691 Kirby v. Dubinski, 39 Misc. 2d 1064, 242 N.Y.S.2d 543 (1963).

692 *See* H. OLECK, NONPROFIT CORPORATIONS, ORGANIZATIONS, AND ASSOCIATIONS § 225-26, at 465-73 (2d ed. 1965). For an excellent general analysis of the procedural problems relating to unincorporated associations, see Brunson, *Some Problems Presented by Unincorporated Associations in Civil Procedure*, 7 S.C.L.Q. 394 (1955).

693 At early common law, there could be no suit by or against an association as an entity. But the class action suit was allowed much earlier in equity than at law and in fact became the model for the class action suit at law in the case of associations. *See* Brunson, *supra* note 692, at 395-99.

694 Morris v. Willis, 338 S.W.2d 777 (Mo. 1960); Teubert v. Wisconsin Interscholastic Athletic Ass'n, 8 Wis. 2d 373, 99 N.W.2d 100 (1959); Brunson, *supra* note 692, at 396-97.

695 Brunson, *supra* note 692, at 398 and cases cited there at note 15.

696 *E.g.*, OHIO REV. CODE ANN. § 2307.21 (Page 1954); WIS. STAT. ANN. § 260.12 (1957). *See also* FED. R. CIV. P. 23.

697 *E.g.*, GA. CODE ANN. § 3-118 (1962); MINN. STAT. ANN. § 540.151 (Supp. 1967). *See also* FED. R. CIV. P. 17(b).

698 N.Y. GEN. ASS'NS LAW § 12 (McKinney 1942), § 13 (McKinney Supp. 1967).

party.[699] Numerous other variations have existed and still do: permitting an association to be sued but not to sue in its common name,[700] or allowing suits of an equitable nature against it in its common name only if it is a business association but not if it is a nonprofit association.[701] The general rule is that these statutory procedures are not considered to be exclusive remedies, so that in a jurisdiction permitting suit against an association as an entity, a class action may also be brought or even a joinder of all the members as at common law.[702]

Many times the procedural device permitting a specified form of suit or specified joinder of plaintiffs or defendants will, as a practical matter, determine and limit the sources from which a judgment can be recovered. For example, in states where an association is not suable as an entity, it has been held that the assets of the association cannot be reached since the members are jointly liable as individuals.[703] Conversely, where statutes exist making an association a suable entity, the courts have held that their effect,[704] or even their purpose,[705] is to make the assets of the association available to satisfy adverse judgments. The courts in Ohio have taken the position that where a plaintiff sues an association under an entity statute, he is limited to recovery from the assets of the association, even though initially he could have brought a class action suit and recovered against the individual members.[706]

In those situations where a plaintiff chooses or is required to use a class action device against an association, the procedural rule may unsettle the substantive liability in certain situations by causing some courts to hold that only those association members who actually participated in the activity that caused the injury can be held liable.[707] Other jurisdictions have disagreed with this view, especially in the labor area, and have found all the members can be liable on a civil conspiracy theory.[708]

In addition to these problems of proper parties and enforcement of judgments in litigation involving voluntary nonprofit associations, there are often

699 Boyer v. Iowa High School Athletic Ass'n, 258 Iowa 285, 138 N.W.2d 914 (1965).
700 PA. R. CIV. P. 2152, 2153. *See generally* Brunson, *supra* note 692, at 401-10.
701 N.J. STAT. ANN. § 2A:64-6 (1952). *See generally* Brunson, *supra* note 692, at 401-10.
702 Lyons v. American Legion Post No. 650 Realty Co., 172 Ohio St. 331, 175 N.E.2d 733 (1961); H. OLECK, *supra* note 692, § 225, at 467.
703 Benz v. Compania Naviera Hidalgo, S.A., 233 F.2d 62 (9th Cir. 1956), *aff'd*, 353 U.S. 138 (1957); Florio v. State, 119 So. 2d 305, 80 A.L.R.2d 1117 (Fla. Dist. Ct. App. 1960).
704 United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922); RESTATEMENT OF JUDGMENTS § 78, comment *c*, at 352 (1942) provides:

> In states in which suit can be maintained against an unincorporated association in its business name, judgment can be rendered which is valid against the assets of the association. . . . Whether the judgment is effective to bind personally the members of the association over whom the court has jurisdiction depends upon whether the judgment is directed against the members or merely against the assets of the organization.

705 Donnelly v. United Fruit Co., 40 N.J. 61, 190 A.2d 825 (1963).
706 *E.g.*, Miazga v. International Union of Operating Eng'rs, 2 Ohio St. 2d 49, 205 N.E.2d 884 (1965); Lyons v. American Legion Post No. 650 Realty Co., 172 Ohio St. 331, 175 N.E.2d 733 (1961).
707 Barry v. Covich, 332 Mass. 338, 124 N.E.2d 921 (1955); Lyons v. American Legion Post No. 650 Realty Co., 172 Ohio St. 331, 175 N.E.2d 733 (1961); *see* Martin v. Curran, 303 N.Y. 276, 101 N.E.2d 683 (1951).
708 Ketcher v. Sheet Metal Workers' Int'l Ass'n, 115 F. Supp. 802 (E.D. Ark. 1953); Hall v. Walters, 226 S.C. 430, 85 S.E.2d 729, *cert. denied*, 349 U.S. 953 (1955).

problems of jurisdiction, venue, and process — matters equally subject to the vagaries of state law.[709] In the context of this topic on civil liability of organizations for riot damage, it is not possible to cover in detail all the procedural problems that could arise when the organization sought to be held is unincorporated. Rather it is hoped that this brief discussion will serve to emphasize that not all problems of organizational liability involve unsettled constitutional issues. Much of the complexity in the area is essentially procedural; the solutions in any particular case must be sought in the appropriate statutory and decisional law of the forum jurisdiction.

3. Charitable Immunity

Whether the organization sought to be held liable for riot damage is incorporated or not, there is one other doctrine of local law that bears some mention, namely, the once vigorous doctrine of charitable immunity.[710] The time was when practically all the states accorded charitable organizations some degree of immunity from tort liability for the acts of their servants.[711] Today in more than half of the states the doctrine has been repudiated,[712] and in the rest of the states, it is being increasingly subjected to inroads and exceptions.[713] Where the doctrine still survives in one form or another, however, it could conceivably be pleaded as a defense by organizations whose agents and servants are responsible for mob violence.

The availability of this defense depends first of all upon the ability of the organization to bring itself within the legal status of a "charitable" organization. One of the standard descriptions of a charitable organization is that " . . . it has no capital stock and no provision for making dividends or profits, but derives its funds mainly from public and private charity, and holds them in trust to be expended for charitable and benevolent purposes."[714] Charitable purposes, in turn, are said to include the relief of poverty, the advancement of education or religion, the promotion of health, governmental or municipal purposes, and

709 *See generally* Brunson, *supra* note 692, at 411-19.

710 The doctrine applies or does not apply regardless of whether the charitable organization is incorporated or not. Farrigan v. Pevear, 193 Mass. 147, 78 N.E. 855 (1906).

711 In an exhaustive analysis of the doctrine in President and Directors of Georgetown College v. Hughes, 130 F.2d 810 (D.C. Cir. 1942), Justice Rutledge recognized that although it had already been "devoured in 'exceptions,'" charitable immunity was still the rule in almost all the states. *Id.* at 817.

712 Dean Prosser in the 1964 edition of his treatise on tort law lists nineteen states that have repudiated charitable immunity; they are Alaska, Arizona, California, Delaware, Florida, Iowa, Kansas, Kentucky, Michigan, Minnesota, Montana, New Hampshire, New York, North Dakota, Oklahoma, Oregon, Utah, Vermont, and Wisconsin. W. PROSSER, LAW OF TORTS § 127, at 1023-24 (3d ed. 1964). As of March 1968, the following states may be added to the list: Idaho (Bell v. Presbytery of Boise, 421 P.2d 745 (Idaho 1966)); Illinois (Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 211 N.E.2d 253 (1965)); Nebraska (Meyers v. Drozda, 180 Neb. 183, 141 N.W.2d 852 (1966)) (nonprofit charitable hospitals); Nevada (NEV. REV. STAT. § 41.480 (1965)); Pennsylvania (Flagiello v. Penn. Hosp., 417 Pa. 486, 208 A.2d 193 (1965)); Washington (Friend v. Cove Methodist Church, Inc., 65 Wash. 2d 174, 396 P.2d 546 (1964)); West Virginia (Adkins v. St. Francis Hosp., 149 W. Va. 705, 143 S.E.2d 154 (1965)).

713 *See* text at notes 720-26 *infra.*

714 Town of Cody v. Buffalo Bill Memorial Ass'n, 64 Wyo. 468, 492, 196 P.2d 369, 377 (1948).

other purposes the accomplishment of which is beneficial to the community.[715] The courts are in substantial agreement regarding these definitions as well as the abstract standards to be applied in determining the charitable status of organizations. For example, it is generally held that an organization's charter or articles of incorporation are only prima facie evidence of its charitable nature, so that evidence as to its actual operation may be introduced to establish otherwise.[716] Likewise, there is substantial agreement that the fact that the organization is a nonprofit one is not conclusive for its charitable status,[717] nor is the fact that it may receive some form of compensation for its services conclusive against charitable status.[718]

But, despite the consensus on the general characteristics of charitable organizations, the cases clearly reveal that different courts often achieve opposite results in applying the standards to similar organizations.[719] It would therefore be futile to attempt to propose a single test for determining whether an organization responsible for riot damage would or would not qualify for charitable immunity. This is especially true because the organizations that could conceivably be responsible for mob violence do not fall into a well defined category; the numerous civil rights organizations differ greatly from each other as to purposes and activities and, as a group, they differ greatly from various other political groups, and even more so from student organizations and clubs.

Simply qualifying as a charity, however, under whatever standards the court may apply or whatever evaluation of the facts the court may make, does not mean that the organization can automatically claim charitable immunity under all circumstances. Almost all the states that still recognize some form of charitable immunity will protect the charity only when the claim against it arises out of an actual charitable activity.[720] Following this view, numerous courts have held that when the charitable organization engages in primarily commercial activities such as running a bingo game,[721] a parking lot,[722] or an office building,[723] it cannot claim charitable immunity from injuries arising from these activities, even though the profits are to be used ultimately for charitable purposes. Likewise, it can be argued that an organization that otherwise qualifies as a charity should not be able to claim immunity with respect to activities such as demon-

715 Boyd v. Frost Nat'l Bank, 145 Tex. 206, 196 S.W.2d 497, 502 (1946). *See also* RESTATEMENT (SECOND) OF TRUSTS §§ 368-74 (1959).

716 Krpan v. Otis Elevator Co., 226 F. Supp. 293 (E.D. Pa. 1964); Barrett v. Brooks Hosp., 338 Mass. 754, 157 N.E.2d 638 (1959); Hodgson v. William Beaumont Hosp., 373 Mich. 184, 128 N.W.2d 542 (1964). *But see* Oak Park Club v. Lindheimer, 369 Ill. 462, 17 N.E.2d 32 (1938) (certificate of incorporation is controlling for tax purposes).

717 Krpan v. Otis Elevator Co., 226 F. Supp. 293 (E.D. Pa. 1964); Bush v. Aiken Elec. Cooperative, Inc., 226 S.C. 442, 85 S.E.2d 716 (1955).

718 *See* Duncan v. Steeper, 17 Wis. 2d 226, 116 N.W.2d 154, 157 (1962), and authorities cited therein.

719 *E.g., compare Appeal of* Subers, 173 Pa. Super. 558, 98 A.2d 639 (1953) *with* Neptune Fire Engine & Hose Co. v. Board of Educ., 166 Ky. 1, 178 S.W. 1138 (1915), *overruled on other grounds* in Greene v. Stevenson, 295 Ky. 832, 175 S.W.2d 519 (1943).

720 *E.g.*, Blatt v. Geo. H. Nettleton Home for Aged Women, 365 Mo. 30, 275 S.W.2d 344 (1955); Eiserhardt v. State Agricultural & Mechanical Soc'y, 235 S.C. 305, 111 S.E. 2d 568 (1959).

721 Blankenship v. Alter, 171 Ohio St. 65, 167 N.E.2d 922 (1960).

722 Eiserhardt v. State Agricultural & Mechanical Soc'y, 235 S.C. 305, 111 S.E.2d 568 (1959).

723 Gamble v. Vanderbilt Univ., 138 Tenn. 616, 200 S.W. 510 (1918).

strations, marches, and picketing, even though they may indirectly further admittedly charitable purposes and goals. Such activities may not be commercial enterprises in the same sense as a bingo game or a publishing house, but they are equally as non-charitable and even more likely to adversely affect the interests of third persons.

There are other limitations often imposed on charitable immunity that may affect the availability of the defense to an organization responsible for mob violence. For example, several jurisdictions that hold charitable organizations immune from the tortious conduct of their servants will nonetheless find the organization liable where it has been negligent in hiring or retaining an employee.[724] Where this exception is recognized, it seems evident that an organization may lose its charitable immunity for entrusting the conduct of a demonstration to an agent who it knows is likely to incite violence. Other courts limit immunity to cases where the person suing is a beneficiary of the charitable activities of the organization, but allow others to recover.[725] In these states, the organization responsible for the violent demonstration would have to establish that the injured person was a beneficiary of the demonstration in order for the organization to qualify for immunity. It is difficult to imagine such a finding unless perhaps the injured person may have requested or approved of or participated in the demonstration. Finally, some states, especially those basing immunity on a trust fund theory, hold that the organization is freed from liability only to the extent that its trust funds may not be made subject to judgment; but where it has other funds available, usually in the form of liability insurance, it may be held liable up to the policy limits.[726]

There is no doubt that the law of charitable immunity today is undergoing rapid changes — all tending toward an eventual elimination of the doctrine altogether or at least a confinement of it to its narrowest limits. Whether an organization that would otherwise be liable for mob violence could escape that liability by claiming charitable immunity is a question apparently not yet considered by any court.[727] But if such a case should arise, it is predictable that the pronounced trend away from charitable immunity will motivate most courts that still recognize the doctrine to seize upon one of the available exceptions

724 Southern Methodist Univ. v. Clayton, 142 Tex. 179, 176 S.W.2d 749 (1943); Hill v. Lehigh Memorial Hosp., 204 Va. 501, 132 S.E.2d 411 (1963).

725 Viosca v. Touro Infirmary, 170 So. 2d 222 (La. App. Ct. 1964); Peacock v. Burlington County Historical Soc'y, 95 N.J. Super. 205, 230 A.2d 513 (1967).

726 Michard v. Myron Stratton Home, 144 Colo. 251, 355 P.2d 1078 (1960); YMCA v. Bailey, 112 Ga. App. 684, 146 S.E.2d 324 (1965); ME. REV. STAT. ANN. tit. 14, § 158 (Supp. 1967).

727 It may perhaps be worthy of noting that in the *Overstreet* case, discussed at length above, there is no indication that a charitable immunity defense was raised at all by the NAACP, although the doctrine is still recognized in Georgia and although the organization could possibly qualify as charitable for purposes of tort immunity. *See* Justice Douglas' dissenting opinion in *NAACP v. Overstreet*, 384 U.S. 118, 120 (1966) where he recognized that the NAACP is "a nonprofit corporation . . . for the purpose of promoting equality of treatment for Negro citizens," citing *NAACP v. Alabama*, 357 U.S. 449, 451-52 (1958). In short, it was at least arguable that the NAACP in *Overstreet* could have pleaded itself as a charitable corporation. Why it was not attempted is, of course, speculation, but it is possible that the NAACP attorneys recognized that even if they could establish the organization as a charitable one, they would still have the problem of showing that the picketing was a charitable activity, almost certainly an impossibility in view of the violence that erupted and the fact that the picketing itself was found to be illegal.

as grounds for denying charitable immunity to an organization otherwise responsible for mob violence.

## Conclusion

The entire area of law applicable to a riot situation is currently a topic of vital concern for this nation. There are strong indications that the long, hot summers of civil unrest in the cities will continue, at least, in the immediate future. For this reason, the solution of the legal problems that were considered in this Note will continue to plague the courts and other law enforcement agencies in the years to come. Since the root causes of the recent urban ghetto riots are basically social and economic inequalities, the legal system alone cannot effect a total remedy for the riot problem. However, until the causes of riots are eliminated from our society, it remains the burden of the legal system to restore and maintain law and order. It is to this latter objective that this Note is directed.

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728 Text accompanying notes 361-539 *supra.*
729 Text accompanying notes 173-360 *supra.*
730 Text accompanying notes 540-727 *supra.*
731 Text accompanying notes 1-172 *supra.*