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CIVIL DISTURBANCE AND RIOT LEGISLATION

An Introduction to Riot Legislation

by Jerold H. Israel

My speech will provide an introduction to criminal code legislation specifically pertaining to riots and a brief description of our recent experience with riots. Hopefully, this description, supplemented by the film on the Detroit riot, will provide an appropriate factual background for both the remainder of my own talk and the analyses of proper police procedures during riots (and other civil disorders) to be presented by Major Brown and Professor Martin.

I. THE NATURE OF A RIOT

A "riot" may be defined, with some oversimplification, as a situation in which there is a mass violation of law accompanied by a pattern of widespread violence and destruction of property. It should be emphasized that many situations producing mass violations of the law involve little or no violence. This is true, for example, of many illegal political demonstrations—e.g., parades without permits, sit-ins, and illegal picket lines. Other mass violations may involve a fair amount of violence, but the violence will arise primarily in the context of resisting arrest; they do not present the general pattern of property destruction and violence found in the riot.

Recent riots in this country have occurred primarily in two places—inner city ghettoes and college campuses. You probably are all familiar to some degree with the ghetto riot. The campus riot is of more recent vintage—assuming you define a riot, as I do, as involving considerably more than the mass law-violations (and occasional violence) that may accompany a substantial sit-in, lie-in, or parade on campus. During the past year we have had several disorders involving considerable violence and property damage on college campuses. At Berkeley, where the intervention of National Guardsmen was required, there was at least one death, numerous injuries, and nearly 1,000 arrests. The disorder at North Carolina A&T, also requiring Guard assistance, involved some shooting (by snipers) as well as considerable malicious destruction of property. At City College of New York,

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bands of vandals evaded police on campus and raced through buildings, breaking windows and turning on fire hoses. Eleven "suspicious" fires broke out, and one destroyed the wing of a substantial university building.

Unfortunately, we have collected very little data on the full-fledged campus riot. These riots seem to be occasioned by many of the same types of incidents as produce considerably more sedate political demonstrations, and occur at virtually the same times (early fall, shortly after the school year begins, or late spring, shortly before it terminates). Why one series of incidents leads to an all-day strike or sit-in at one campus and arson, sniping, and malicious destruction of property at another, is a subject on which we need much more information.

We know considerably more about the ghetto riot. The Kerner Commission, for example, examined 164 disorders reported during the first nine months of 1967. Reports by committees in various cities have closely examined subsequent riots.

It should be emphasized that the ghetto riots have varied dramatically in scope. Of the 167 disorders studied by the Kerner Commission, only 8—approximately 5 percent—were in the same general category as the Detroit riot. That is, they involved a series of fires, intensive looting, sniping, violence lasting more than two days, and the use of the National Guard or federal forces as well as other control forces. About 20 percent of the total disorders studied by the Kerner Commission were placed in the "serious" but not "major" category. These disorders were characterized by isolated looting, some fires, some rock throwing, violence lasting less than two days, some crowds (but generally of manageable size), and the use of the state police, though generally not National Guard or federal forces. Finally, 123 disorders—75 percent of the total—were of a significantly lesser scope. These disorders probably would not have been classified by the press as "riots" had the nation not been sensitized by the more serious disorders. They were characterized by "a few fires and broken windows, violence lasting generally less than one day, participation by a fairly small number of people, and, in most cases, involved only the local police, although help was often given by neighboring police." It should be emphasized that the disorders were not limited to large cities. Almost one-quarter of the total group occurred in areas with populations of 50,000 or less. Of course, most of the disorders in cities of this size could be classified as comparatively minor. Yet, we did have at least eight disorders which were categorized as "serious" in towns with populations of less than 100,000.

The cost of the 1967 disorders in terms of loss of property and life was very substantial, although not as significant as original estimates in the papers indicated. The Detroit riot, in particular, outstripped all others. Thus, while the Detroit disorder resulted in damage estimated at 50-150 million dollars, the riot in Washington, although involving a larger number of troops, resulted in an estimated loss of no more than $13 million. There was also a serious loss of life, and injury to limb. In its study of 75 disorders in 67 cities, a Senate committee reported 83 riot-related deaths and 1,897 injuries. It should be noted, however, that a large percentage of these deaths and injuries occurred in two cities—Newark and Detroit.

While the death toll in Detroit exceeded 40, that in other major riots, e.g., Washington and Chicago, amounted to approximately one-fourth of that total.

A review of the various government reports on riots indicates that there is no such thing as a "typical" ghetto riot. As the Kerner Commission noted, our past disorders have been "unusual, irregular, complex and unpredictable social processes. Like most human events, they do not unfold in orderly sequence." The Commission's analysis of the 1967 riots did reveal certain characteristics, however, that were common to many disorders.

First, the timing of the disorders followed a fairly regular pattern. More than 60 percent of the disorders studied by the Kerner Commission that occurred during the first nine months of 1967 had occurred in the month of July. Moreover, even those disorders that did not occur in July were grouped closely together during the other summer months, especially after well-publicized disorders in other cities. There also seemed to be a general pattern of violence within an individual riot, which ordinarily followed some precipitating event and then escalated rapidly. Although there were a few exceptions, violence usually subsided during the day and flared rapidly again at night.

Who were the typical participants in the ghetto disorders? A typical rioter, as described by the Kerner Commission, was an unmarried Negro male between the ages of 15 and 24. He generally was not a migrant to the city, but was born in the state and often was a life-long resident of the city. Economically, his position was about the same as that of many of his neighbors who did not participate in the riot. Although he usually had not graduated from high school, he was somewhat better educated than the average inner city Negro, having at least attended high school for a time. Nevertheless, he was more likely to be working in a menial or low-status job as an unskilled laborer. If he was employed, he was not working full time and his employment was frequently interrupted by periods of unemployment. The Kerner Commission described his attitude as one of general hostility towards whites, but they noted that that hostility was more apt to be a product of social and economic class than of race; the typical participant was almost equally hostile towards middle-class Negroes.

It should be emphasized that these are only general characteristics. In any particular riot situation, there may be substantial variations, as evidenced by a comparison of the Chicago and Detroit riots. While only 21 percent of those persons arrested in Detroit were under the age of 21, over 50 percent of those arrested in Chicago were under that age. Similarly, while 80 percent of the persons arrested in Detroit were employed, 40 percent of those arrested in Chicago were unemployed. The percentage of female involvement also differed substantially, with a far greater number of women being arrested in Detroit than in Chicago. Also, while over half of those arrested in Detroit had a prior criminal record, less than a third of those arrested in Chicago had a record. Finally, while the Kerner Commission Report indicates that rioters generally were born in the state in which they resided at the time of the riot, surveys of both the Chicago and Detroit riots noted than less than 50 percent of the persons involved in those riots were born in Illinois

or Michigan. Fifty-nine percent of the persons arrested in Detroit were born in the South and 50 percent of those arrested in Chicago came from southern or border states.

The Kerner Commission noted that in virtually every riot it studied, a single triggering or precipitating incident could be identified as having immediately preceeded the outbreak of the disorder. Ordinarily, these were relatively minor local incidents. Subsequent to the Commission report, we experienced a national "triggering incident," the Martin Luther King assassination, which was followed by riots in several cities. Whether the precipitating incident was local or national in nature, it is clear that the ensuing violence was generated not merely by the incident itself, but by what the Kerner Commission described as "an increasingly disturbed social atmosphere in which typically not one but a series of events occurred over periods of weeks or months prior to the outbreak of disorders." The Commission noted that in Detroit, for example, there had been several incidents, aside from the immediately precipitating incident (a raid on a blind pig on July 23rd) that had contributed to a general state of community anger. On June 26, a young Negro man had been shot to death at a picnic while reportedly trying to protect his pregnant wife from assault by seven white youths. Subsequently, only one of the white youths was caught and charged. During the same month, a Negro prostitute was shot to death in front of her house. A rumor had spread throughout the Negro community that she had been shot by an officer on the vice squad, although a later investigation reportedly unearthed leads to a disgruntled pimp.

The precise impact of each such incident can hardly be measured except to note that they serve to heighten and provide a point of focus for a general feeling of discontent–a feeling that, in turn, has been attributed to a wide range of underlying problems, e.g., poverty, unemployment, poor housing, lack of education, and poor police–community relations. It should also be noted that the impact of these incidents was obviously heightened in many instances by media sensationalism in reporting those incidents. It seems likely that, in some areas, the news media's consistent emphasis on racism as the "cause of all evil" may in itself have been a major factor in promoting the general feeling of discontent among blacks.

It should be emphasized that the Kerner Commission found no evidence that any of the disorders or the incidents that led to them were planned and directed by any organization or group, international, national or local. This is not to say that militant organizations did not contribute to the riots. Certainly the activities of some of these organizations may have contributed to a general atmosphere encouraging violence. Moreover, in several cases, once the disorders started, representatives of such organizations allegedly did encourage their continuation and expansion. It is difficult to evaluate the significance of their participation, however. Several Congressmen have suggested that the impact of such persons was rather insignificant, at least as compared to the basic underlying factors mentioned previously, or, for that matter, to the influence of the news media.

The number of arrests made by police during ghetto riots quite naturally varied with the seriousness and size of the riot. In almost every situation, however,

that number represented a substantial portion of the total number of arrests made throughout the month, even though the riot arrests were made over a period of several days. It was not uncommon, for example, for the police to arrest during a single day more people than would ordinarily be arrested over a period of one or two weeks. In Detroit, over 7,200 arrests were made in six days; in Newark, 1,600 arrests in six days; in Washington, 7,370 in six days. The arrests were based on various charges. In fact, in Chicago, riot-connected arrests were based on over 30 different crimes. Generally, however, three offenses were most common: theft from a building; breaking and entering with intent to commit a felony; and curfew violation. In most areas, curfew violation was the most frequent ground for arrest. In Washington, for example, almost 50 percent of the over 7,000 arrests were based on curfew violations. On the other hand, in Detroit, less than 15 percent were based on curfew violations. In Detroit, the most frequent basis for arrest was looting. The offenses involved usually were breaking and entering with intent to commit a felony, entering without breaking with that intent, theft from a building, or other offenses involving stolen property. In addition, arrests were made during the most serious riots, including Detroit's, for arson, robbery and attempted robbery, and possession of dangerous weapons.

While arrests were universally high, the extent of prosecution varied considerably from city to city. In Detroit, over 7,200 arrests resulted in over 4,250 prosecutions. A substantial percentage of these prosecutions–approximately 75 percent–were based on felony charges. In Washington, on the other hand, a much smaller percentage of the arrestees was prosecuted. In large part, this was due to the high percentage of curfew-violation arrests. Only a small percentage of the curfew cases, less than 10 percent, were handled by court charges. In most instances, the curfew violators posted $25 collateral which they subsequently forfeited and thereby avoided court appearances. As in Detroit, most of the offenses charged were on the felony level. In Chicago, on the other hand, the prosecutor charged 1,300 defendants with misdemeanors and only 850 with felonies.

On the whole, the record of convictions based on riot-connected charges was not overly impressive. Unfortunately, the statistics on convictions have not been completed in most jurisdictions. Based on what is available, it is immediately apparent that there has been considerable variation. Of the first 1,630 cases prosecuted in Detroit, 961 were dismissed and 664 were disposed of by a plea of guilty to a misdemeanor charge. Out of 26 persons charged with assault with intent to commit murder, 23 prosecutions were dismissed. Out of 34 prosecutions for arson, 21 were dismissed. Out of 28 prosecutions for incitement to riot, 22 were dismissed. The percentage of convictions in Chicago was substantially higher. Nearly 70 percent of the riot felons whose cases were disposed of in the criminal division by February 28, 1969 were convicted. It should be recalled, however, that Chicago placed considerably more stress on misdemeanor charges. In other jurisdictions, such as Newark and Los Angeles, which followed the Detroit pattern of bringing primarily felony charges, the conviction record generally was on the same order of that in Detroit. For example, in Watts, out of 27 persons charged with arson, only 7 were convicted.

It should be noted that the comparatively weak conviction record was largely the product of factors that were initially beyond the control of either the prosecutor or the police. Because of the tremendous burden imposed by the huge number of arrests, and the necessity that the police officers stay on the streets to maintain peace, many of the arrests that were made were recorded in a fairly haphazard manner. Moreover, the prosecutors were under great strain and had insufficient time to devote enough attention to serious cases. As a result, prosecutors often came to trial on felony charges only to find that the facts indicated no more than a misdemeanor. Moreover, there often was considerable difficulty establishing the identification of the culprit, not to mention the precise time and location of the offense.

A word should be added about the comparative statistics on juvenile arrests. Substantial arrests of juveniles were made in most riots, although the particular percentage varied. In Washington, over 1,000 of those arrested were juveniles. Among the most common causes of arrest were curfew violations, burglary and attempted burglary, and disorderly conduct. Only 194 arrested juveniles were referred for formal court action. Again, this was a product primarily of the lack of adequate descriptions of the arrests by arresting officers. In Chicago, a substantially higher percentage of juveniles were held for court appearance. Out of 1,207 arrested, 736 were released by the police without further processing, and 461 were held for court appearance.

I should emphasize that the foregoing description of the scope, causes, and results of our past riots necessarily is over-simplified in certain respects. I hope, however, that it will be adequate for our purpose, which is merely to provide you with a general background that will enhance your consideration of specific problems that arise in riot situations. Before turning to some of these problems, however, we might take note of some of the current predictions concerning the future of both campus and ghetto riots.

Although we could use considerably more information on the nature and pattern of full-fledged campus riots, available evidence certainly seems to support the view that they will continue–although most will not reach the magnitude of the riots at Berkeley and North Carolina A&T.

As for the ghetto riot, several professional analysts have suggested that it has "passed its peak." They foresee a new trend toward selected "tactical violence," e.g., assassinations, ambushes, etc. The validity of these conclusions are subject to serious dispute. Yet, even if accepted, they clearly do not suggest the complete disappearance of the ghetto riot. Our experience this summer shows a continued pattern of disorders, quite similar to that suggested by the Kerner Commission. None of these disorders would be classified as "major," along the lines of Detroit, Chicago or Newark, but several might well fall within the "serious" category. Perhaps, the trend is toward smaller and fewer riots in the ghetto, but, if so, it is a gradual trend and riots will certainly remain with us for several more years.

II. RIOT LEGISLATION

Many of the legal problems presented in riot situations relate to general legislation with which you are all familiar–e.g., provisions relating to the law of

arrest, police interrogation, and the definition of such substantive crimes as larceny from a building, breaking and entry with intent to commit a felony. We do have, however, a small group of statutes that deal particularly with the suppression of riots. These statutes tend to fall into two categories: (1) laws creating special criminal offenses relating to riot-connected activities, (2) laws defining the emergency power that may be employed during riots.

Of the two types of legislation, I believe that the second group is far more signficant. I should emphasize, however, that appropriate legislation, even in this area, plays a comparatively minor role in proper police control of riots. Thus, the Kerner Commission Report, which devotes several chapters to the need for improved police procedure in controlling disorders, adds only a few brief comments concerning appropriate riot legislation. The major police problems, as the Commission noted, involve such matters as improved communications in riot areas (including the use of special frequencies during riots), maintaining community cooperation, coordination of operations with the fire department, and development of better techniques of crowd control. Other reports have reached the same conclusion. They recognize that the passage of appropriate riot legislation is important, but it is not a matter of highest priority. However, providing new legislation does have a few distinct advantages over most of the items having greater immediate priority–it costs less and ordinarily involves less bureaucratic or social change and therefore tends to be less controversial. Whether for these reasons or others, the legislatures in most states have been far more prompt in providing new riot legislation than in providing the means for improvement in other areas relating to riot control.

A. Substantive Provisions

Michigan's basic substantive riot provisions were enacted in 1968 and are now part of the supplemental chapter of the Penal Code. Prior to that enactment, offenses such as riot and incitement to riot were treated as common law offenses and there was considerable confusion as to their content. The 1968 legislation now provides fairly specific definitions. Section 752.541 defines the offense of riot, punishable by 10 years in prison and/or a $10,000 fine, as "5 or more persons, acting in concert, * * * [who] wrongfully engage in violent conduct and thereby intentionally or recklessly cause or create a serious risk of causing public terror or alarm." This definition largely follows the common law and, accordingly, carries forward a basic ambiguity of the common law- that is, how does one distinguish between those acts of violence by five or more persons that constitute a riot and those that do not? In one sense, almost every public display of concerted violence by five or more persons is likely to cause "public alarm," at least among those persons who witness the violence. It seems unlikely, however, that the legislature meant to include every such act. If it did, every street fight involving five or more persons would be punishable by 10 years imprisonment. The provision probably should be construed so that the "public alarm" concerns a possible threat to the safety or property of persons other than the participants themselves; but beyond this point there may be considerable difficulty in drawing any clear-cut lines. This difficulty may be increased by the presence of a lesser offense which will often

reach the same type of conduct. Section 750.170 makes it a misdemeanor to "make or excite any * * * contention" in a street, public building or other public meeting place where citizens are lawfully assembled.

From a practical viewpoint, the problems of definition presented by Section 752.241 are hardly insurmountable. Certainly, the applicability of that provision will be clear in most instances in which the prosecutor believes the disorder sufficiently dangerous to press for a felony conviction. In any event, the potential ambiguity in Section 752.241 is largely a problem for the prosecutor and courts, and not for the police officer. It is very unlikely that the officer will be called upon to arrest for the offense of riot itself. Since the crime requires that the participants "wrongfully engage in violent conduct," that conduct alone will ordinarily furnish a sufficient basis for arrest. If five men are running down the street throwing bricks at store windows and street lamps, the officer has no need to stop and determine whether there is probably cause to believe that act poses a risk of causing public terror; the malicious destruction of property provides a ready-made basis for arrest–irrespective of the possible application of Section 752.541.

Two companion sections to Section 752.541 probably fall in the same category. Section 752.542, titled "Incitement to Riot," makes it a felony, punishable on the same level as riot, for a person, "intending to cause or aid the institution or maintenance of a riot," to engage in conduct that urges other persons to commit acts of unlawful force or violence, unlawful "burning or destroying of property, or unlawful interference with the lawful performance of a peace officer, fireman, national guardsman or other person assigned to riot duty." This provision constitutes an extension of current laws relating to incitement and aiding and abetting, and apparently was designed to increase penalties for the incitement or aiding of illegal activities during a riot. It goes beyond Section 750.157(b), which provides that a person who incites or exhorts another to engage in specific dangerous crimes (arson, murder) or any felony or circuit court misdemeanor that may endanger life "shall be punished in the same manner as if he committed the offense incited, induced, or exhorted." Thus, here again, the police officer need not determine for himself whether a riot exists. A person encouraging another to engage in at least 30 of the four unlawful activities listed in Section 750.542 will usually be liable under Section 750.157(b) if a riot does not exist. Moreover, since Michigan recognizes the common law offense of solicitation, that too may serve as the basis for the arrest.

The only complication presented by Section 752.542 and related sections concerns situations involving public speeches that could be interpreted as urging the audience to engage in illegal activities. A prosecution based upon a public speech, removed from a riot area, that commented favorably on the use of violence as a matter of abstract theory would present serious First Amendment difficulties.[1] Riot-connected prosecutions, however, have usually involved persons clearly intending to incite a crowd by urging their immediate participation in ongoing unlawful activity, and, accordingly, have been easily sustained against First Amendment objections.

[1]See Brandenburg v. Ohio 395 U.S. 444 (1969).

Another 1968 provision, Section 752.543 is designed to supplement the riot and incitement to riot provisions by prohibiting "unlawful assemblies for the purpose of riot," an offense punishable by five years imprisonment and/or a $5,000 fine. This provision applies to a person who "assembles or acts in concert with 4 or more persons for the purpose of engaging in conduct constituting a riot" *or* is "present at an assembly that either has or develops such purpose and remains thereat with intent to advance such purpose." This provision, in effect, replaces former Section 750.522, which authorized the arrest of persons unlawfully assembled following an order to disperse. The older provision, however, failed to define an unlawful assembly. Section 752.543 will be helpful in dealing with those participants in a riot situation who are gathered in the street, but are not themselves engaged in acts of violence or incitement to violence. Assuming an actual riot is occurring (as defined in Section 752.42) and an order to disperse has been communicated, the police officer presumably would be justified in arresting those who remain in the area on the ground that their action constitutes probable cause to believe that they acted with intent to further the riot. Of course, if the particular person is identified as a reporter or other person on the scene in some business capacity, his act in remaining at the scene would not, in itself, suggest an intent to advance the riot.

Although sections 752.542-44 are the major riot provisions, we also have several miscellaneous sections that deal specifically with riots. Section 750.241 makes it a felony "during a riot or other civil disturbance" to "knowingly and willfully hinder, obstruct, endanger or interfere with any person who is engaged in the operation, installation, repair or maintenance of any essential public service facility." (Interference with a fireman in the performance of his duty is made a felony in all situations by another subdivision of that section.) Sections 750.523-28 of the former riot act, which were not repealed by the 1968 provisions, deal with such subjects as the refusal of a citizen to obey a police order to aid and assist in seizing rioters.

B. Emergency Legislation

As noted previously, the second group of statutes specifically directed at riots are the so-called "emergency-power" provisions. These statutes authorize the exercise of certain extraordinary powers by specified public officials in emergency situations. To my mind, this legislation is far more important to the successful control of riots than the substantive criminal provisions relating to riots. Provisions creating specific crimes of unlawful assembly, riot, and incitement to riot are hardly crucial in riot control. Since such legislation serves primarily to increase penalties for acts that were already offenses, it ordinarily would not strengthen police authority to make arrests, control crowds, or obtain evidence for convictions. The presence of appropriate "emergency legislation," on the other hand, may be the crucial factor in sustaining various riot-control techniques—e.g., the area-wide search for weapons, curfews, blockades, and the preventive detention of persons arrested during riots. Admittedly, not all of these techniques may be desirable, but insofar as a legislature does consider them appropriate, they are more likely to

survive constitutional attack if specifically authorized under limited conditions by "emergency-power" legislation.

Consider, for example, the constitutional status of a curfew: In the absence of a riot or similar emergency, an extensive curfew would most certainly be unconstitutional. The curfew would not be sustained simply because it eased police work, reduced crime in a general sense, and saved the city money. The nature of the individual liberty restricted by the curfew—the liberty of movement from place-to-place—requires greater justification for a curfew than a rational relationship to the preservation of the general health or welfare. Admittedly, that right is not specifically recognized in the Constitution, but it has frequently been recognized as a specially protected liberty by the United States Supreme Court (with reference to interstate movement) and various state courts. Thus, even very limited curfews imposed under normal circumstances, such as those commonly imposed on juveniles, have had difficulty before state courts. Moreover, insofar as the curfew is framed so broadly as to prohibit the assembly of persons for political discussion (and most riot curfews have that effect), it imposes a clear burden on First Amendment rights. It seems clear, therefore, that a curfew as extensive as that imposed during riots could only be sustained on the basis of some extraordinary compelling interest that would override an otherwise protected constitutional liberty. The prevention of mass violence—potentially even a threat to the basic operation of government—would be such an interest. Indeed, the imposition of a curfew in such a situation can be justified as designed to preserve liberty of travel by enabling the government to restore the order necessary for general usage of the streets.

Of course, judicial recognition of the emergency authority to impose a curfew need not rest on legislation, but legislation would probably make such recognition much more likely. A court generally will have less difficulty accepting a legislative directive granting an officer specific powers during an emergency than accepting a position that will establish the inherent authority of the officer to impose "emergency controls." Executive action pursuant to legislation starts off with the advantage of operating on the basis of the combined authority of both of the branches of government. Also, by its very nature, the legislation will tend to set some limits on the executive's authority and will thus reinforce judicial review of the executive action. A court may well fear that recognition of an "inherent" executive authority will either lead to uncontrollable executive power or place the court in the intolerable political position of constantly being viewed as a "Monday morning quarterback" in reviewing the executive's action. It therefore may be less reluctant to accept the emergency authority of the executive where legislation defines the nature and scope of that authority, since such legislation should ease the burdens of judicial review by at least providing an appropriate springboard for such review. For these reasons and others, several cases indicate that legislation, if appropriately framed, may permit even the highest executive, i.e., the governor, to take action that might not be acceptable if supported only by some general theory of inherent emergency powers. And, in the case of lesser officials (e.g., mayors, police chiefs, etc.), where there is a potential conflict with greater executive

authority, specific legislation will usually be essential. In the curfew area, at least, this factor has been recognized by several states, including Michigan, that have sought to supplement any inherent executive power with specific legislative authorization.

The usefulness of such legislation varies, however, largely in accord with its specificity. State statutes differ considerably in defining the type of "emergency" or "disorder" that may permit imposition of a curfew. Some are so loosely drawn as to provide little if any guidance. None, to my knowledge, deal specifically with such matters as the breadth of the curfew. May it, for example, extend substantially beyond the immediate riot area? The curfew imposed by Governor Romney in 1967 included all of the Detroit suburbs and even extended as far as Washtenaw County. The Michigan curfew may have been based on the likelihood that the riot would spread to certain of these areas, but, in other cities, the extension of the curfew to suburbs has been based largely on other considerations. Some persons have advocated a "total-community" curfew on the ground that a curfew limited to the riot area will give rise to cries of discrimination, which, even though unjustified, may worsen police-community relations. Others argue that imposition of a curfew in the suburbs is justified because it permits a better allocation of manpower. With a curfew imposed, fewer men are needed to police these areas and officers usually stationed there can be transferred to the riot areas. Present legislation, even where relatively specific, gives little indication as to whether such factors are valid considerations in determining the scope of a curfew. Admittedly, no statute can include detailed guidelines that will cover every situation, but if the legislature does take the position, for example, that the major consideration should be the likelihood that the riot will spread to a particular neighborhood, it would certainly tend to eliminate potential constitutional difficulties by specifically saying so.

Another riot-control practice that poses serious constitutional difficulties in the absence of appropriate emergency authorization--and perhaps serious difficulties even with such legislative authorization--is the area-wide search of dwellings. Under ordinary circumstances, a search will be limited to a particular dwelling, usually that of a person already arrested. The Fourth Amendment specifically provides that "no warrant shall issue, but upon probable cause * * * particularly describing the place to be searched." Although the "particular description" clause itself refers to warrants, the underlying principle is applicable to searches with or without warrants. That principle is generally viewed as requiring that the police establish probable cause that the subject of the search will be found in the individual dwelling searched. Thus, when officers had information that the owner of a Chinese laundry on a main street running through San Francisco's Chinatown was selling heroin, they could not establish probable cause to search every laundry on the street. During a riot situation, however, the police have sometimes found it necessary to engage in just that broad a search. Thus, police have engaged in searches of several units in a multiple unit apartment where there is evidence that sniper shots may have come from any of the top several floors of the building. Similarly, searches of a whole block may be undertaken on the basis of reliable information that ingredients for a molotov cocktail were being distributed

by someone located on that street. In some instances, searches have extended beyond single blocks and have been based on the most general type of information. This was the case, for example, in the highly publicized, area-wide search during the Plainfield, New Jersey riot in 1967.

The Plainfield riot involved significant looting and substantial violence. At one point, more than 300 Negroes swept through a 14-block area hurling fire bombs, rocks and bottles as they passed. During this period, 46 semi-automatic rifles were stolen from the Plainfield Machine Company in Middlesex, three miles from Plainfield. At the mayor's request, the governor of New Jersey sent troops into the riot area and declared that Plainfield was "in a state of disaster and emergency."

It was reported that during the course of the violence some Negroes had carried carbines, M-ls and 45-caliber submachine guns. It was also rumored that the rioters had armed themselves with the weapons stolen from the factory in Middlesex. Three days after the rioting began, a so-called consensus was reached between certain Negro leaders and local authorities. In exchange for the release of the 12 Negroes arrested during the rioting, the weapons stolen from the factory would be turned over to the authorities. After the release of the 12 prisoners, however, the Negro leaders were unable to produce the weapons. As a result, the commander of the National Guard ordered a general search of certain areas for the purpose of recovering the weapons. The search was conducted on a house-to-house basis in a mile square area of Plainfield, a 128-unit, low income public housing project, and, in 14 other "selective spots." The search was made with a tremendous show of force, and after a short period of time the residents of the area raised such substantial complaints that the search was stopped.

The validity of the Plainfield search has been much discussed in the law reviews. It is generally agreed that the authorities there erred in not obtaining a search warrant since there was ample time to do so. There is also some concern about the skimpy nature of the information which led them to search the areas selected, as well as the manner in which the search was undertaken. Yet, even if these factors were eliminated, there still would be considerable doubt as to the validity of such a broad search–at least under normal standards.

Some commentators have suggested that such a search could be sustained only by recognition that Fourth Amendment rights may be suspended during grave emergencies. Others argue, however, that normal Fourth Amendment principles are sufficiently flexible to permit such a search. They rely primarily on *Camara*[2] and *See*,[3] two recent United States Supreme Court decisions sustaining area-wide searches (with warrants) by public health officials. Under these rulings, a health officer might obtain a warrant to inspect a particular dwelling on no more justification than its location in a general area that has had a health problem in the past and is due for a regularly scheduled, periodic inspection. These commentators have recognized, of course, that a health inspection may be considerably different, from a Fourth Amendment viewpoint, from a search for weapons for the purpose of prosecution. Their main point is that *Camara* and *See* recognize that the nature of

[2] *Camara* v. *Municipal Court*, 387 U.S. 523 (1967).
[3] *See* v. *Seattle*, 387 U.S. 541 (1967).

probable cause may vary with the situation, and that the Supreme Court therefore has left open the possibility that society's needs to control a mass disorder may justify an area-wide search in much the same way that its health needs justify a general inspection.

The validity of this analogy is certainly open to question. The only point that need be made here, however, is that even under this view, the validity of the search depends in the end on the recognition of special emergency authority, and, once again, such recognition may be helped by explicit legislative authorization. Of course, here too, the degree to which such authorization might be helpful would vary with the specificity of the legislation and the limitations it imposes. Legislation simply authorizing general searches is one matter; legislation setting up particular procedures (e.g., requiring warrants to be requested by certain executive officers), limiting the purpose of the search (e.g., to searches for weapons rather than loot), and limiting the basis for the search (i.e., the type of evidence required to establish "area-wide probable cause") is quite a different matter.

Many of the problems posed by the area-wide search are also raised by the blockade. By the term "blockade" I refer to the combined practice of cordoning off streets leading to the riot areas and stopping, questioning, and searching persons who desire to enter the area. In one sense, the blockade imposes a more serious Fourth Amendment problem than the area-wide search, since there is ordinarily no evidence whatsoever linking the person searched to a particular crime. On the other hand, the search applies only to those persons who desire to enter the riot area; assuming that a curfew could be properly imposed to keep everyone out of that area, it may be viewed as an appropriate basis for conditioning such entry. In this sense, it involves constitutional considerations relevant to both the curfew and the area-wide search.

As in the case of the area-wide search, some have argued that ordinary Fourth Amendment standards are in themselves sufficiently flexible to authorize a search incident to a blockade during a riot situation. They note that courts generally have recognized the right of police to stop cars at random for the purpose of safety inspection. Of course, safety checks are quite different from blockade searches, but the safety inspection illustration, like *Camara* and *See,* is viewed as recognizing a variable concept of probable cause. Similar support is found in an oft-quoted opinion of Justice Jackson in which he suggested that a blockade could be justified if the police were investigating a sufficiently heinous crime.[4] Catching a bootlegger would not be adequate justification, he noted, but rescuing a victim of kidnapping might be sufficient grounds. Of course, even if this principle is accepted and extended to the riot situation, where the search extends to far more vehicles and presumably is far more intensive than any suggested by Justice Jackson, legislative authorization would still be helpful inasmuch as it would be in dealing with area-wide searches of dwellings.

Still another riot-control practice that poses serious constitutional questions is "preventive detention"—i.e., the denial of release to those arrested persons who

[4] *Brinegar* v. *United States,* 338 U.S. 160, 182-83.

presumably might engage in further riot activities. Ordinarily, a person arrested for any offense other than homicide is entitled to release either on his own recognizance or after posting such bail as the court feels necessary to insure his subsequent appearance at the time of trial. During past riots, judges in various cities, including Detroit, initially followed the practice of indiscriminately requiring such high bail that few, if any, arrested persons could be released on bail. In many instances the judges acknowledged that their purpose was to "keep these persons off the streets" and bail was quickly reduced when the violence in the streets had terminated, even though the judges then had no more information about the arrested persons and the offenses charged than they had when they originally set the higher bail.

Most commentators have agreed that this approach to preventive detention is clearly improper. Both state and federal constitutions prohibit excessive bail. Where the court's objective, in effect, is to deny bail, it should do that directly. Several commentators argue that the denial of bail would not be unconstitutional during a riot period as applied to persons whose activities suggest that they would indeed return to the streets. There is considerable question, however, as to whether we can properly identify such persons. We certainly could not justifiably put every looter and curfew violater in that category, as did the judges who purposely imposed excessive bail. Assuming that proper distinctions could be drawn and preventive detention were viewed as desirable, new legislative and constitutional provisions would be needed, if for no other reason than to amend current provisions granting a right to bail on all charges except murder.[5] But aside from the need for such amendments, legislation carefully defining the appropriate use of preventive detention and establishing proper procedures, etc. would be extremely helpful in

[5]See Mich. Const. Art. 1, Section 15, M.C.L. Section 765.6.

[6]It should be emphasized that this provision is optional with the governor. The declaration of martial law is not a necessary incident of the use of the militia. The militia may be called out to serve merely to aid and assist local law enforcement officers in enforcing the law. When the militia is used in this connection, it exercises no greater authority than that of any police agency which it assists. In fact the Kerner Commission suggested that the Guardsmen during the Detroit riot lacked the capacity to make arrests. The basis for this conclusion is unclear, since any private citizen can make an arrest for a felony committed in his presence. M.C.L. Section 764.16. Also, Section 750.526 of the former riot act suggests that the Guardsmen can be specifically authorized to make arrests by local officials. It provides that members of the armed forces called forth to assist civilian authorities "shall obey such orders for suppressing the riot and for dispersing and arresting all persons * * * that they may have received from the Governor, or from any judge or court of record, or the sheriff of the county, any chief of the police or his duly authorized representative, or any member of the Michigan State Police."

There was considerable confusion, however, as to the personal liability of Guardsmen who made improper arrests. This issue was met in a 1968 amendment to the military act which provides that members of the militia "while acting in aid of civil authorities and in line of duty shall have the immunities of peace officers."

The same amendment also includes a provision granting "full protection, civilly and criminally" to a commanding officer where he employes his "honest and reasonable judgment" in determining the amount and kind of force needed in preserving the peace and the propriety of apprehending or dispersing any "snipers, rioters, mob or unlawful assembly."

supporting the constitutionality of that practice for many of the same reasons that would support legislation on curfews, area-searches, and blockades.

Having shown, I hope, the need for emergency-power legislation, I would like now to add a few comments on the present state of Michigan legislation in this area. The suggestion has been made that Michigan has little need for further legislation because of constitutional and statutory authority authorizing the governor to declare martial law during civil disorders. Article V, Section 12 of the 1963 Constitution makes the governor the commander-in-chief of the armed forces and provides that he may "call them out to execute the laws, suppress insurrection, and repel invasion." Section 15 of the recently adopted Military Act (M.C.L. 32.551) authorizes the governor to "call out the militia" in case of "riot, tumult, or breach of the peace," and Section 175 of the same act provides that "when any part of the organized militia is employed pursuant to Section 151, the governor, if in his judgment maintenance of law and order will thereby be promoted, may by proclamation declare the county or city in which the troops are serving or any specified portion thereof, to be under martial law or martial rule."[6] Although this legislation makes no direct reference to curfews, blockades, etc., it has been suggested that such references are unnecessary because prior decisions in other jurisdictions have upheld such practices as clearly within the scope of martial law.

While this line of reasoning is not without some legal support, it presents too many legal difficulties to invite reliance thereon as a feasible alternative to more specific emergency-power legislation. Initially, there is some question as to whether Michigan recognizes the form of martial law that would be applied in a riot situation.

Martial law is premised on the concept of granting the military the responsibility of actually carrying on the government, i.e., military rule supplants civilian rule. Carried to its fullest extent, martial law would involve the delegation to the military of the complete authority commonly exercised by the executive, legislature, and judiciary. This would include the issuance of military regulations prohibiting various activities in the affected area (including activities normally permitted under civil rule), the enforcement of those regulations by the military, and the trial of offenders by military tribunal. The application of total martial law in this sense is generally limited to areas in which the civil agencies are incapable of operating. Certainly, this form of total or "absolute" martial law would not apply to the type of riot situations we have experienced.

Many authorities suggest, however, that martial law is not an all or nothing arrangement. They argue that the military agencies need not replace the civil agencies in all respects, but that "qualified" martial law can be imposed. In the riot situations, this would mean that the military would supplant civil agencies only with respect to certain areas which the civil agencies were not capable of handling. Thus, the military might be given the function of enforcing normal criminal legislation and adopting such supplemental regulations as are needed to keep the peace generally, but it would not be operating its own judicial system. Individuals

would be arrested and charged by the military, but would be tried in civilian courts for violations of both the general criminal laws and supplemental regulations.

Martial law of this type has been quite extensively employed in the United States in situations somewhat closely resembling the current riots. In fact, it was quite commonly used during the 1930's when we had significant labor violence. Although "qualified" martial law was upheld by a significant number of courts during this period, others questioned its validity. They argued that martial law was available "only where raging warfare made it physically impossible for the machinery of the government to function." They noted that where the legislature and the courts can still meet and carry on their normal functions, there is no need for any form of qualified martial law. They viewed the exercise of such power as an attempt by the governor to engage in an "end run" around the legislative power (since the governor is the commander-in-chief of the state militia, martial law operates subject to his direction). They also suggested that the employment of "qualified" martial law cannot be used to bypass normal constitutional requirements.

One of the leading cases supporting this position was a Michigan case, *Bishop v. Vandercook.*[7] In 1918, during the prohibition period, the sheriff of Monroe County requested the aid of the governor in enforcing the prohibition laws, and the governor authorized troops to protect the highways. After experiencing some difficulty, the troops were directed to set up a blockade by placing a log across the roadway. Mr. Bishop suffered personal injuries when his car ran into such a roadblock. The Michigan Supreme Court, in rejecting the argument that the officers involved were immune from civil liability, noted that there could be no such thing as "qualified martial law." It stated that "there is no middle-ground or twilight zone between government by law and martial rule." Martial law, it noted, could not arise unless and until there was suspension of civil power. In reaching this conclusion the court relied upon, *inter alia,* the provision in the Michigan Constitution to the effect that "the military shall in all cases and at all times be in strict subordination to civil power."

The impact of *Bishop* upon our current law is, to say the least, highly uncertain. First, only four of the eight judges on the Michigan Supreme Court at the time joined the opinion of the court. Second, the case apparently did not involve a true civil disorder, and certainly not the extreme violence found in the riot situations. Finally, we now have Section 175 of the Military Act specifically authorizing a declaration of martial law during a riot, "when maintenance of law and order will thereby be promoted." On the other side, our Constitution still contains a provision requiring that the military be "in strict subordination to civil power." See Art. 1, Section 7. Also, the postion taken in *Bishop* in oppostion to a concept of qualified martial law does find support in several decisions in other jurisdictions.

Even if we assume, however, that Michigan accepts the concept of qualified martial law, it is not clear how far the exercise of that power would take one in

[7]228 Mich. 299, 200 N.W. 278 (1928).

sustaining various riot-control practices that otherwise present serious constitutional difficulties. United States Supreme Court opinions have recognized that the appropriate imposition of martial law may justify at least some suspension of constitutional rights. But most of the relevant discussion refers to the imposition of total martial rule during a time of war. However, one case, *Moyer* v. *Peabody*,[8] did sustain a substantial restriction of individual freedom, pursuant to the exercise of qualified martial law. *Moyer* arose out of martial rule imposed in areas of Colorado following the outbreak of violence in connection with a bitter labor dispute. The governor, after determining that Moyer, a labor leader, "had been, and * * * would continue to be an active participant in formenting and keeping alive the condition of insurrection," ordered that he be arrested by the military and detained without trial "during the * * * continuing condition of affairs" in the area. Although the courts apparently were operating at the time and Moyer petitioned for writ of habeas corpus, his application was denied. After his release by the military authorities, he brought suit for damages against the governor, alleging that he had been deprived of liberty without due process in violation of the Fourteenth Amendment. The United States Supreme Court, in a unanimous opinion, affirmed the dismissal of his action. Justice Holmes, speaking for the Court, noted initially that the governor's declaration as to the existence of a "state of insurrection" was "conclusive of the fact." Under those circumstances, the governor was not bound by limitations applicable to the ordinary situation:

> "No doubt there are cases where the expert on the spot may be called upon to justify his conduct later in court, notwithstanding the fact that he had sole command at the time and acted to the best of his knowledge. * * * But even in that case great weight is given to his determination and the matter is to be judged on the facts as they appeared then and not merely in the light of the event. * * * When it comes to a decision by the head of the state upon a matter involving its life, the ordinary rights of the individual must yield to what he deems the necessities of the moment. Public danger warrants the substitution of executive for judicial process. * * * This was admitted with regard to killing men in the actual clash of arms, and we think it obvious, although it was disputed, that the same is true of temporary detention to prevent apprehended harm."

The rationale of *Moyer* was adopted in numerous state cases sustaining various restrictions upon individual liberty imposed pursuant to qualified martial rule. The martial rule imposed in Colorado, when Moyer was arrested, also involved the closing of saloons; a general collection of lethal weapons; the arrest, detention and deportation of "objectionable characters"; the prohibition of assemblages in the street; and the imposition of a curfew. Similar restrictions were upheld in connection with other violent labor disputes.[9]

Several courts, relying on what one commentator described as the "over-exuberant rhetoric" of Holmes in *Moyer*, largely refused to review the propriety of measures used in good faith by governors when martial rule was imposed. The Supreme Court, however, in *Sterling* v. *Constantine*,[10] flatly rejected any such

[8] 212 U.S. 78 (1909).

[9] See Weiner, *A Practical Manual of Martial Law*, 66-74 (1940); Fairman, *The Law of Martial Rule* 83, 218-223 (1943).

[10] 287 U.S. 378 (1932).

interpretation of *Moyer.* The governor in *Sterling* had declared martial law in force and had directed the military to assume command over an oil producing area for the purpose of limiting the depletion of oil reserves by the owners. The owners earlier obtained a court order enjoining the application of state regulations restricting production. It was in reply to this action that the governor imposed martial law. The governor based his declaration on the theory that the failure to restrict oil production would ruin the market price and this, in turn, would lead to a "war-like riot." The Supreme Court noted that while "there is a permitted range of honest judgment as to measures to be taken in meeting force with force, in suppressing violence and restoring order," the "allowable limits of military discretion" remain "judicial questions." In rejecting the gubernatorial directive in *Sterling,* the Court noted that the directive imposed a substantial restriction on property rights and that, unlike *Moyer,* the state was not faced with the necessity of quelling a current disorder.

The significance of *Moyer* and *Constantine* today is uncertain. The *Constantine* case clearly accepted the specific holding in *Moyer,* and while subsequent federal decisions have been most rigorous in reviewing restrictions imposed pursuant to martial rule, they generally have concerned fact situations, like *Constantine* and unlike *Moyer,* involving little or no violence. *Constantine* alone therefore would not seem to undermine the precise *Moyer* holding as applied to a riot situation.

A more likely source of precedent undermining *Moyer* is found in the recent absorption of Fourth and Fifth Amendment standards as part of the due process limitation applied to the states under the Fourteenth Amendment. Although the Holmes opinion in *Moyer* did not stress the limited scope of the Fourteenth Amendment at that time, that factor may well have had considerable bearing on his decision. It also must be recognized that aside from doctrinal distinctions, the Court today plays a considerably different role in protecting individual freedom than the *Moyer* Court.

It is interesting to note that the use of military force during recent riots has not been accompanied by martial law. The imposition of extraordinary measures of control, such as curfews, have generally been based on special statutes authorizing the exercise of emergency powers during riots.

Michigan has such a statute in the Emergency Powers Act of 1945.[11] This Act provides that during times of great public crises, "disaster, rioting, catastrophe or similar public emergency" or when there is "reasonable apprehension of immediate danger of such events," the governor may, upon the application of the mayor, sheriff or commissioner of the state police (or upon his own volition), proclaim a state of emergency in a particular area. Following this proclamation the governor is permitted to promulgate reasonable orders, rules and regulations that he deems necessary to protect life and property and to bring the emergency within the affected area under control. Violation of any such reasonable rules, regulations or orders is punishable as a misdemeanor. The Act provides several illustrations of the types of orders which may be issued. It notes that the governor may provide for

[11] M.C.L. Section 10.31.

control of traffic; public and private transportation; the designation of specific zones in which occupancy and use of buildings and ingress and egress of persons may be prohibited or regulated; control of places of amusement and assembly and persons on public streets and thoroughfares; establishment of a curfew; control of the sale and transportation of alcoholic beverages and liquors; control of the possession and sale and carrying and the use of firearms or other dangerous weapons and ammunition; and the control of the storage, use and transportation of flammable materials.

Reliance upon an emergency statute of this type has several advantages over reliance upon martial rule. Even assuming that Michigan accepts the concept of a qualified martial law, there may be substantial advantage, politically as well as legally, in avoiding the "spectre" of military rule. Admittedly, the same person, i.e., the governor, is exercising ultimate authority, but he is operating in a different capacity. This may make it easier to properly delegate authority to local government officials rather than simply to the military commander. It also permits the imposition of some controls without requiring the use of military forces. Indeed, the Michigan statute applies to situations involving a "reasonable apprehension of immediate danger" of a riot. Finally, for the reasons noted above, there may be considerable advantage in having specific legislative authorization for the governor's action.

Indeed, the inadequacies of the current act, as I see them, relate primarily to the lack of sufficiently direct authorization of various riot control practices. While the legislature cannot anticipate every action that might be necessary, it should deal with as many common riot-control techniques as possible. The Emergency statute should not be limited to those general regulatory directives applicable to the public as opposed to directives relating to police practices. Of course, broader coverage should be accompanied by drawing appropriate distinctions concerning the conditions under which particular techniques may be used. Certain activities may constitute such a substantial interference with individual liberties, e.g., area-wide searches, that they would only be permissible during a period of actual violence. The necessary procedures should also vary. While the issuance of a proclamation may be satisafactory for the imposition of certain controls, others might require application for a court order where that is feasible. Indeed, on a matter like preventive detention, the legislation will be directed primarily to judicial action.

In sum, while the current Michigan statute points in the right direction, further legislation is needed. As a starter, the legislature might clarify ambiguities in the current statute relating to the geographic area subject to regulation—e.g., the scope of a permissible curfew. In addition, it should, at a minimum consider the necessity for preventive detention, blockades, and area searches, and, if they find such procedures may be necessary, specifically authorize the governor to direct or request judicial authorization of such controls under limited conditions.

Above all, the legislature should clearly recognize that the general appropriateness of various riot control techniques are as much a matter for legislative concern as is the definition of substantive criminal offenses.