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The Riot Curfew

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Comments

THE RIOT CURFEW

Than was the lawe in Rome toun,
That, whether lord or garsoun
That after Corfju be founde rominde,
Faste men scholden hem nimen and binde.¹

(c 1320 Seuyn Sag. (W.) 1429)

City civil disorder is not a new phenomenon in United States history;² new, however, is the increasing number and frequency of disorders. Domestic turmoil has become part of the American scene in the 1960's.³ In 1963 serious disorders broke out in Birmingham, Savannah, Chicago, and Philadelphia.⁴ Riots struck seven eastern cities in the summer months of 1964.⁵ The Watts riot of August 1965, then the most serious in the United States since the Detroit riot of 1943, left 34 dead, hundreds injured, and caused approximately 35 million dollars in property damage.⁶ Forty-three disorders and riots, of varying length and intensity, swept urban America in 1966,⁷ and 128 cities suffered 164 disorders in the first nine months of 1967,⁸ the most noted of which occurred in Detroit and Newark. One hundred and ten cities experienced racial violence in varying degrees in the period immediately following the assassination of Dr. Martin Luther King, Jr.,⁹ and another series of disorders plagued the nation during the summer months of 1968. The official responses to this wave of violence have been varied. There have been the inevitable hearings¹⁰

¹. 2 Oxford Dictionary 1263 (J. Murray ed. 1893).
². See Report of the National Advisory Commission on Civil Disorders 207-36 (Bantam ed. 1968) [hereinafter cited as Kerner Comm'n Report]. Major disorders occurred in East St. Louis (July 1917), Chicago (1919), and Detroit (1943).
³. For a narrative of the emerging pattern of civil disorders in the 1960's see Kerner Comm'n Report, supra note 2, at 35-108. See also Comment, Kill or Be Killed?: Use of Deadly Force in the Riot Situation, 56 Calif. L. Rev. 829 (1968).
⁴. Kerner Comm'n Report, supra note 2, at 35.
⁵. New York City (Harlem), Rochester, Jersey City, Paterson, Elizabeth, Chicago, and Philadelphia. Governor's Comm'n on the Los Angeles Riots, Violence in the City—An END OR A BEGINNING? 2 (1965) [hereinafter cited as McCone Comm'n Report].
⁶. Kerner Comm'n Report, supra note 2, at 37-38; McCone Comm'n Report, supra note 5, at 23-25.
⁷. Kerner Comm'n Report, supra note 2, at 40.
⁸. Id. at 112-13. The Kerner Commission characterized 25 percent of these disorders as major or serious and 75 percent as minor. Id. The study discovered a pattern of increasing frequency as summer approached and decreasing frequency as summer waned. Id. at 114. The violence was not limited to any one section of the country. Id.
¹⁰. See, e.g., Hearings on H. Res. 1100 Before the House Comm. on Rules, 90th Cong., 2d Sess. (1968); Hearings on Riots, Civil and Criminal Disorders Before the Permanent
and commission reports11 investigating the causes of the eruptions and making recommendations12 for the eradication of those causes. Additionally, in tacit recognition that the underlying tensions and frustrations remain, and that further civil disorders are likely to recur, there has also been an emphasis on planning and preparing for their control.13 Numerous proposals have been made, including the passage of local ordinances conferring extraordinary authority—for example, to impose curfews—on local officials in times of civil disorders.14

The curfew, as an instrument of control of civil disorders, is becoming increasingly popular among those charged with the responsibility for the prevention and control of riots.15 Its basic purpose is to keep people off the streets and out of public places during an actual or anticipated disorder. While many public officials consider the curfew an effective tool,16 civil libertarians and concerned

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11. See, e.g., GOVERNOR'S SELECT COMM'N ON CIVIL DISORDER, REPORT FOR ACTION (1968) (Governor Hughes' commission on the New Jersey riots); KERNER COMM'N REPORT, supra note 2; REPORT OF THE CHICAGO RIOT STUDY COMMITTEE TO THE HON. RICHARD J. DALEY (1968) [hereinafter cited as CHICAGO REPORT].

12. See, e.g., KERNER COMM'N REPORT, supra note 2, at 283-315, 389-483; McCONE COMM'N REPORT, supra note 5, at 38-74.

13. Planning responses have included an emphasis on increased fire power and special riot control equipment, see, e.g., Wills, The Second Civil War, ESQUIRE, March 1968, at 71 (Among the responses noted by the author were: gas, antisenior squads to shoot from helicopters, tanks, armored personnel carriers, jeeps with gun mounts, commando police vehicles, assault and machine guns, foams, peppers, invisible dyes, plastic confetti, tranquilizer guns, barbed wire, sound waves which cause persons to lose their bowels); N.Y. Times, March 2, 1968, at 16, col. 3 (Army stockpiling riot-control gear). Special training in riot control for the National Guard and Army has also been proposed, see, e.g., KERNER COMM'N REPORT, supra note 2, at 505; N.Y. Times, Apr. 24, 1968, at 1, col. 2—and recommendations have been made for a federal police force, id., July 31, 1967, at 17, col. 3, 5, mutual aid agreements, id., Aug. 11, 1967, at 1, col. 7, and clarification of federal troup aid procedures, id., Aug. 8, 1967, at 27, col. 4.


15. See, e.g., KERNER COMM'N REPORT, supra note 2, at 525; Graham, supra note 14 (in decade prior to 1967, an average of only five communities per year were placed under curfew); Comment, Judicial Control of the Riot Curfew, 77 YALE L.J. 1560, 1561 n.6 (1968) (curfews were imposed in at least 22 cities during summer of 1967 and in at least 27 cities in the wave of disturbances following the assassination of Dr. Martin Luther King, Jr.).

citizens fear its indiscriminate use in unwarranted situations and its unfair application even in those situations which might actually warrant a curfew. Since the current waves of large-scale civil disorders and the attendant frequent use of curfews are quite recent phenomena, appellate courts have yet to pass on the validity of the curfew in a civil disorder context. This Comment will examine the curfew as an instrument of control of civil disorders and will focus upon its constitutionality—both in the abstract and as applied—and upon the various controls on its use. It is this Comment’s thesis that the riot curfew, when properly administered, does not unduly interfere with the constitutional rights of those upon whom it is imposed.

17. Graham, supra note 14. The Kerner Commission recommended the enactment of special laws applicable only in emergency situations, including those that would authorize a curfew, but recognized that there may be constitutional problems involved:

“[N]or can [the Commission] consider the Constitutional restraints that may be involved in the application of particular laws, such as search and seizure in connection with curfew violations.” KERNER Comm’N REPORT, supra note 2, at 525.

18. The curfew has received judicial scrutiny in three different contexts:

(a) Wartime curfews: Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S. 81 (1943) (curfew order is within the boundaries of the war power in war conditions and under an executive order authorizing measures to prevent espionage and sabotage).

(b) Juvenile curfews: Ordinances prohibiting minors from remaining or loitering upon streets or in public places after the evening curfew hour have been upheld as reasonable regulations, while those prohibiting minors from being in or on any public place or streets after the curfew hour have been unreasonable curtailments of normal or necessary juvenile nighttime activities. Compare People v. Walton, 70 Cal. App. 2d 862, 161 P.2d 498 (App. Dep’t Los Angeles Super. Ct. 1945) and Thistlewood v. Trial Magistrate, 236 Md. 548, 204 A.2d 688 (Ct. App. 1964) (remaining or loitering upon), with Alves v. Justice Court, 148 Cal. App. 2d 419, 306 P.2d 601 (1957) and Ex parte McCarver, 39 Tex. Crim. 448, 46 S.W. 936 (1898) (being in or on). But see City of Eastlake v. Ruggiero, 7 Ohio App. 2d 212, 220 N.E.2d 126 (1966) (curfew prohibiting juveniles from being upon the streets or sidewalks after curfew hour held not unreasonable).

(c) Adult curfews: Portland v. James.—Ore.—, 444 P.2d 554 (1968) (curfew ordinance making it unlawful for any person to roam or be upon any street between the specified hours without having and disclosing a lawful purpose held void for vagueness); Mayor of Memphis v. Winfield, 27 Tenn. (8 Humph) 707 (1848) (municipal ordinance directing the police to arrest all free Negroes found out after 10 p.m. and to hold them in the “calaboose” until morning and imposing a fine of $10 declared void for oppression).

Insofar as they enable authorities to arrest “undesirables” or persons suspected of other offenses, laws prohibiting vagrancy and loitering are similar to curfews and, of course, have been applied to adults. See, e.g., Shuttlesworth v. Birmingham, 382 U.S. 87 (1965); Green v. United States, 386 F.2d 953 (10th Cir. 1967); Fenster v. Leary, 20 N.Y.2d 309, 229 N.E.2d 426, 282 N.Y.S.2d 739 (1967); Seattle v. Drew, 70 Wash. 2d 405, 423 P.2d 522 (1967); Douglas, Vagrancy and Arrest on Suspicion, 70 YALE L.J. 1 (1960); Foote, Vagrancy-Type Law and Its Administration, 104 U. PA. L. REV. 603 (1956); Lacey, Vagrancy and Other Crimes of Personal Condition, 66 HARV. L. REV. 1203 (1953); Sherry, Vagrants. Rogues and Vagabonds—Old Concepts in Need of Revision, 48 CALIF. L. REV. 557 (1960).

The use of the curfew in a civil disorder context has been attacked on the trial court level with conflicting results. Compare State v. Boles, 5 Conn. Cir. 22, 240 A.2d 920 (1967)
I

THE CURFEW AS AN INSTRUMENT OF CIVIL DISORDER CONTROL

Until recently, the use of the curfew in the United States has been largely directed at the control of nocturnal juvenile activities. Directed at protecting the community from juvenile crime and protecting the juveniles themselves from "criminal and immoral influences," juvenile curfew ordinances generally prohibit minors from remaining on the streets or in public places after a stated hour in the evening. Generally enacted under the police power of the municipality, such ordinances are usually intended to be continuous in their application rather than designed to meet temporary crises.

Until its use in the recent civil disorders, the curfew has rarely been imposed upon adults in the United States. The most noted example is the wartime curfew regulations of 1942 which required all persons of Japanese ancestry residing in designated military areas to

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19. The curfew (derived from Old French cuevrefu or "cover fire") is believed to have originated as a regulation in medieval Europe requiring household fires to be covered or extinguished upon the ringing of the town bell at a fixed hour in the evening. The purpose was the prevention of conflagrations arising from the failure to extinguish domestic fires at night in cities constructed largely of timber. After the original purpose became obsolete, the practice of ringing the bell at a fixed hour remained, often as a signal for other municipal purposes. OXFORD DICTIONARY 1263 (J. Murray ed. 1893). But see Cresswell, The Curfew: Its Origin and History, 278 GENTLEMAN'S MAGAZINE 599 (1895). (The word is not derived from French cuevrefu but is the modern misspelled equivalent of some word derived from the Low Latin quadrifurchus or quatuorfurcus meaning four lane ends, crossways, or market square. The word possibly originally applied to the market square bell at Oxford and thereafter applied to other bells. The bell was primarily associated with the custom of announcing the commencement and end of the day at 4 a.m. and 8 p.m.

20. For a comprehensive study of such juvenile curfew ordinances see Note, Curfew Ordinances and the Control of Nocturnal Juvenile Crime, 107 U. Pa. L. Rev. 66 (1958) [hereinafter cited as Juvenile Curfew Ordinances]. See also Dean, Curfew Ordinances and Constitutional Law, 4 LAW NOTES (N.Y.) 107 (1900); Note, 55 Mich. L. Rev. 1026 (1957); Note, 32 Tulane L. Rev. 117 (1957); Note, 1 Villanova L. Rev. 51 (1956).


25. But see Thistlewood v. Trial Magistrate, 236 Md. 548, 204 A.2d 688 (Ct. App. 1964) (temporary juvenile curfew to meet the additional juvenile problems arising from heavy influx of minors into resort city over Labor Day weekend).

be within their place of residence daily between the hours of 8 p.m.
and 6 a.m.\(^{27}\) These regulations, promulgated by the military
commander of the Western Defense Command pursuant to an
Executive order of the President,\(^{28}\) preceded the exclusion and
internment orders and were later upheld as a valid exercise of the
federal war power.\(^{29}\) Other examples include a curfew in Detroit
imposed by the Governor of Michigan following the race riots of June
21, 1943,\(^{30}\) and one imposed in Indiana during a violent labor dispute
in 1955 which eventually led to the imposition of martial law.\(^{31}\) Only
recently, however, have curfews imposed upon adults become
relatively common.

A. Elements of a Typical Emergency Ordinance

Acting under the authority of a direct constitutional grant or a
legislative delegation of the police power, many municipalities\(^{32}\) have
enacted ordinances enabling them to deal with civil disorders.\(^{33}\) These
ordinances are in addition to the emergency powers which may exist

\(^{27}\) See Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320
U.S. 81 (1943); Note, 41 Mich. L. Rev. 522 (1942). For discussion of this and other measures
taken against Nisei during this period see Alexandre, \textit{The Nisei—A Casualty of World War II,}
28 \textit{Cornell L.Q.} 385 (1943); Dembitz, \textit{Racial Discrimination and the Military Judgment: The
Supreme Court's Korematsu and Endo Decisions}, 45 \textit{Columbia L. Rev.} 175 (1945); Rostow, \textit{The
Japanese-American Cases—A Disaster,} 54 \textit{Yale L.J.} 489 (1945); tenBroek, \textit{Wartime Powers of
the Military Over Citizen Civilians within the Country,} 41 \textit{Calif. L. Rev.} 167 (1953).


\(^{29}\) Yasui v. United States, 320 U.S. 115 (1943); Hirabayashi v. United States, 320 U.S.
81 (1943).

\(^{30}\) Note, \textit{Use of Vagrancy-Type Laws for Arrest and Detention of Suspicious Persons,} 59
\textit{Yale L.J.} 1351, 1354 n.12 (1950). As this race riot was the worst riot before Watts, the use of
the curfew there is a significant precedent for its recent use.

\(^{31}\) Note, \textit{Rule By Martial Law in Indiana: The Scope of Executive Power,} 31 \textit{Ind. L.J.}
456 (1956).

\(^{32}\) In an attempt to get a sample rather than a comprehensive view, the author wrote to
30 cities requesting copies of enabling ordinances which have been or could be used to establish
a curfew during a civil disorder. Seventeen responses were received and are on file with the
\textit{California Law Review}. On the basis of those responses the following description is made of
those sections of the ordinances that are directly related to curfews.

\(^{33}\) As municipalities are subordinate branches of the state government, \textit{see, e.g.,}
Worchester v. Worchester Consol. Street Ry., 196 U.S. 539, 548-51 (1905); Louisiana \textit{ex rel.}
Folsom v. New Orleans, 109 U.S. 285, 287 (1883), their police power is derived solely from
constitutional or legislative grants, \textit{see, e.g.,} Nance v. Mayflower Tavern, 106 Utah 517, 519-20,
Municipalities in some states have direct constitutional authority to make and enforce within
their boundaries all such local, police, sanitary, and other regulations as are not in conflict with
state laws, \textit{see, e.g.,} \textit{Cal. Const. art. XI, § 11; Idaho Const. art. XII, § 2; Ohio Const. art.
XVIII, § 3}. In the absence of such a grant, the police power of a municipality must originate
from the state legislature. A state legislature may constitutionally delegate its police power to a
municipality to be exercised within the municipal limits, \textit{see, e.g.,} Davis v. Denver, 140 Colo. 30,
on the state executive level. While these ordinances vary in wording, they generally have provisions (1) establishing which municipal officers have the authority to act; (2) requiring the declaration of a state of emergency; (3) enumerating emergency powers; (4) requiring adequate notice of emergency actions; (5) requiring prompt legislative review of the executive's actions; and (6) setting forth penalties for violations of emergency measures.

Generally, the authority to act under the ordinance is vested in the city's executive official, ordinarily the mayor or city manager.

Normally a civil disorder will concern only local officials who because of their knowledge of local conditions are better able to respond to local crimes than are state or federal officials. The Kerner Commission suggested that authority to restrict access to the disorder area, to restrict sales of particular items, and to impose a curfew be delegated to the local operational level. KERNER COMM'N REPORT, supra note 2, at 524-25. See also Ducharme & Eickholt, State Riot Laws: A Proposal, 45 J. URBAN L. 713, 725, 730 (1968) (model provision). If local resources prove inadequate to meet the crisis, however, state and federal officials may become involved, as in the Watts, Newark, and Detroit disorders.

Authority on the state executive level to establish a curfew derives from direct constitutional grants or legislative delegations, which give the governor wide discretion in coping with an emergency. The authority to handle civil disorders and to impose curfews may be implied from several "boiler plate" provisions in state constitutions: (1) Clauses conferring the executive power upon the governor or designating the governor as the chief executive of the state—see, e.g., Ala. Const. art. V, § 113; Cal. Const. art. V, § 1; Ill. Const. art. V, § 6; N.J. Const. art. V, § 1, ¶ 1; N.Y. Const. art. IV, § 1; (2) clauses designating the governor as commander-in-chief of the state military forces—see, e.g., Ala. Const. art. V, § 131; Cal. Const. art. V, § 5; Ill. Const. art. V, § 14; N.J. Const. art. V, § 1, ¶ 12; N.Y. Const. art. IV, § 3; (3) clauses charging the governor with the duty of faithful execution and enforcement of state law—see, e.g., Ala. Const. art. V, § 120; Cal. Const. art. V, § 7; Ill. Const. art. V, § 6; N.J. Const. art. V, § 1, ¶ 11; N.Y. Const. art. IV, § 3; and (4) clauses authorizing the governor to call out the National Guard to enforce the laws, suppress insurrection, and repel invasion—see, e.g., Ala. Const. art. IV, § 131; Ill. Const. art. V, § 14; Md. Const. art. II, § 8; Mich. Const. art. V, § 12.


35. Just as emergency executive authority is delegated from state legislatures to governors, see supra note 34, these ordinances delegate the municipal legislative police power to the city
Before he may exercise any extraordinary powers under the ordinance, the designated official must proclaim the existence of a state of emergency within the city. The ordinance usually prescribes the conditions which warrant the proclamation of a state of emergency, while leaving it to the judgment of the official to determine when such conditions exist. Conditions warranting a proclamation vary but the gravamen is generally the same—"riot or insurrection, or where there is clear and present danger of a riot or insurrection." The term "riot," though often used in these ordinances, is not often defined; however, the state riot laws of the jurisdiction may provide the definition. While the case law interpretations of these state statutes vary, the statutes are basically similar and require a very low threshold of disturbance to constitute a riot. The California provision is fairly typical: "Any use of force or violence, disturbing the peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law, is a riot."


37. See, e.g., Dallas, Tex., Revised Code of Civil and Criminal Ordinances art. IX, § 2-96(a)(1968); Detroit, Mich., Code § 39-1-3.2 (1968); Los Angeles, Cal., Ordinance 97,600, § 3, Jan. 26, 1951; Miami, Fla., Ordinance 7670, § 1, June 13, 1968.


The Dallas ordinance, requiring "an emergency" as the precondition for a proclamation by the mayor, defines "emergency" as a "state of violent civil disorder which causes or threatens to cause loss of life or property in the city," Dallas, Tex., Revised Code of Civil and Criminal Ordinances art. IX, § 2-95(e) (1968). The Detroit ordinance requires a "civil emergency" and defines it as a "riot or unlawful assembly characterized by the use of actual force or violence or any threat to use force if accompanied by immediate power to execute by three or more persons acting together without authority of law." Detroit, Mich., Code § 39-1-3.1(A) (1968).


Therefore, while a proclamation of a state of emergency is almost uniformly required as a precondition to the exercise of emergency powers under these ordinances, the ordinances give wide discretion to the city officials. Fairly minor and localized violence may fulfill the required conditions, and the initial determination of their existence is left to the designated officials. This allows a speedy response from city officials to prevent a relatively small incident from growing into a widespread disorder. It also, however, increases the opportunity for the abuse of emergency powers.

Once the existence of a state of emergency is declared, the ordinance confers upon the designated official a variety of extraordinary powers which he may use in his discretion to deal with the disorder. The powers conferred are normally very broadly defined: "[H]e shall have broad powers to protect life and property, to suppress any public disturbance, and to restore and maintain public peace. Such powers shall be coextensive with the necessities of the emergency . . . ." or "to make and issue rules and regulations on matters reasonably related to the protection of life and property . . . ."

In addition to these broad grants of power, the ordinances usually enumerate the types of regulations which the designated official is empowered to use. Such enumerations typically include the power to establish a curfew, to designate the boundaries of the disorder area and to restrict or prohibit the movement of persons into or from such area, and to restrict or prohibit the sale, gift, or

42. See, e.g., KERNER COMM'N REPORT, supra note 2, at 525; JANOWITZ, SOCIAL CONTROL OF ESCALATED RIOTS 13 (1968); Eye Witness Report of a Civil Disorder, THE POLICE CHIEF, May 1968, at 41-44.


44. DALLAS, TEX., REVISED CODE OF CIVIL & CRIMINAL ORDINANCES art. IX, § 2-98 (1968).


These two ordinances provide further that the city manager will have complete authority over the city and authority to exercise within the city limits all police power vested in the city by the constitution and general laws of the state. Berkeley, Cal., Ordinance 3216-N.S., § 6(f), Oct. 2, 1951; RICHMOND, CAL., MUNICIPAL CODE ch. 2.20, § 2.20.060(E) (1963). Section 38791 of the California Government Code (West 1968) provides that: "By ordinance the legislative body of a city may provide for a chief executive who, during periods of great public calamity . . . shall have complete authority over the city and the right to exercise all police power vested in the city by the Constitution and general laws."


47. E.g., DALLAS, TEX., REVISED CODE OF CIVIL & CRIMINAL ORDINANCES art. IX, § 2-98(e) (1968); Miami, Fla., Ordinance 7670, § 4(e), June 13, 1968.
transportation of alcoholic beverages, inflammable liquids, firearms, ammunition, or explosives and to close businesses which deal in such items. Within these enumerated areas the designated official may usually promulgate regulations of whatever scope and duration he deems proper under the circumstances. Under these ordinances, therefore, the designated official is granted a large and varied arsenal of extraordinary powers and virtually unlimited discretion as to its employment.

Rules and regulations promulgated under these ordinances in times of civil disorder radically alter definitions of unacceptable behavior. Considerations both of fairness to those expected to abide by the new rules and of the effectiveness of the rules in quelling disturbances therefore require prompt and effective promulgation of the state of emergency and the regulations made pursuant thereto. Many of the ordinances themselves explicitly provide for such dissemination. They generally require that copies of the proclamation and regulations be delivered or made available to the press, radio, and television. Nothing short of radio and television announcements, possibly together with the use of mobile sound trucks throughout the city, will adequately inform the public of the new regulations. Speed is of the essence. Under most of the ordinances, the riot regulations become effective immediately upon their promulgation. Notification delays raise the likelihood of arrest and harassment of many engaged in their normal daily routines who are unaware of the new rules.

49. See, e.g., Akron, Ohio, Ordinance 640-1968, § 2, July 18, 1968; DALLAS, Tex., Revised Code of Civil & Criminal Ordinances art. IX, § 2-98 (1968). One ordinance allows a curfew to be imposed only upon juveniles, and the terms of the curfew are set in the ordinance. ATLANTA, Ga., Code of Ordinances § 20-6.1 (1967).
50. The Kerner Commission anticipated the problem of notice by encouraging authorities to ensure that curfews are announced to all who may be affected by their terms. KERNER COMM'N REPORT, supra note 2, at 525.
51. E.g., DALLAS, Tex., Revised Code of Civil & Criminal Ordinances art. IX, § 2-99 (1968); Los Angeles, Cal., Ordinance 97,600, § 3, Jan. 26, 1951. Some also require the filing of copies with the city clerk or secretary—see, e.g., DALLAS, Tex., Revised Code of Civil & Criminal Ordinances art. IX, § 2-99 (1968); Miami, Fla., Ordinance 7670, § 5, June 13, 1968, or the posting of copies in public places—DALLAS, Tex., Revised Code of Civil & Criminal Ordinances art. IX, § 2-99 (1968).
52. Sound trucks were used to announce a city-wide curfew on August 7, 1968 in Rahway, N.J. following a near clash the preceding evening between white and black youths. N.Y. Times, Aug. 8, 1968, at 14, col. 4.
53. The Office of the Superintendent of the Detroit Police Department anticipated problems of this nature in a memo to all members of the Department (on file with the California Law Review):

"Enforcement of orders issued by the Mayor under the [civil emergency] ordinance will
Notice is a continuing problem, furthermore, for changing conditions may require flexibility in the curfew's scope, and any such adjustments must be communicated to the people.  

In conferring upon the designated official the authority to proclaim a state of emergency and to issue regulations thereunder, the legislative bodies of these municipalities have delegated part of their legislative powers to the city executives. Under many of the ordinances the delegation is absolute; the executive is authorized to act without seeking confirmation from the legislative body. Some ordinances, however, provide for a form of legislative review of the executive's decision to act under the ordinance, requiring that the executive initially request a declaration of a state of emergency from the city's legislative body or seek confirmation of his own declaration shortly after it is made. Several of these ordinances also provide for a legislative review of the regulations promulgated by the executive. Even those ordinances which provide for legislative review, however, allow the executive to make rules and regulations in the interim between the proclamation of a state of emergency and the legislative consideration. If the city council does not confirm the executive's interim regulations, it is not clear from the ordinances whether the require discretion. Police action should be limited to verbal warnings in cases where citizens or businesses violate the orders because they are unaware that a state of emergency has been declared. Judicious enforcement is particularly important during the early stages of an emergency when it is very probable that many persons have not heard of a curfew and other conditions."

54. See Chicago Report, supra note 11, at 57.
56. The Berkeley ordinance requires the city manager, as "Director of Civil Defense and Disaster," to initially request the city council to proclaim the existence or threatened existence of a disaster if the council is in session; if the council is not in session, the city manager is empowered to issue such a proclamation subject to confirmation by the city council at the "earliest practicable time." Berkeley, Cal., Ordinance 3216-N.S., § 5(a), Oct. 2, 1951. See also Richmond, Cal., Municipal Code ch. 2.20, § 2.20.060(A) (1963). The Miami ordinance provides that as soon as practicable after the city manager's declaration of an emergency, the legislative body of the city must immediately convene for the purpose of determining whether or not an emergency exists, that their finding is conclusive, and that upon a finding that no emergency does in fact exist, the ordinance is inoperative. Miami, Fla., Ordinance 7670, § 2, June 13, 1968.
regulations are void ab initio and the prosecutions thereunder are retroactively stricken.\(^{58}\)

The ordinances generally define what constitutes a violation thereunder and provide for the punishment of violators. Two types of violations are common: (1) the doing\(^{59}\) of any act prohibited by the rules and regulations made pursuant to the proclamation of a state of emergency;\(^{60}\) and (2) the willful hindrance, obstruction, or delaying of law enforcement officers, firemen, or military personnel in the performance of their duties.\(^{61}\) Penalties for violations vary among the ordinances. Fines range from no minimum\(^{62}\) to a minimum of 100 dollars\(^{63}\) and a maximum of 100 dollars\(^{64}\) to 500 dollars\(^{65}\). Imprisonment maxima range from 30 days\(^{66}\) to six months.\(^{67}\) The

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58. E.g., Berkeley, Cal., Ordinance 3216-N.S., § 6(a), Oct. 2, 1951.


60. See, e.g., Akron, Ohio, Ordinance 640-1968, § 5, July 18, 1968; Berkeley, Cal., Ordinance 3216-N.S., § 10(b), Oct. 2, 1951; Birmingham, Ala., Ordinance 67-32, §§ 2, 4, 5, July 25, 1967; Dallas, Tex., Revised Code of Civil & Criminal Ordinances art. IX, § 2-100(a)(b)(d)(l) (1968); Los Angeles, Cal., Ordinance 97,600, § 12(2), Jan. 26, 1951; Miami, Fla., Ordinance 7670, § 9, June 13, 1968; Philadelphia, Pa., Code § 10-819(3) (1967); Richmond, Calif., Municipal Code ch. 2.20, § 2.20.090(B) (1963). The Berkeley, Los Angeles, and Richmond ordinances limit this type of violation to acts which give or are likely to give assistance to the enemy; imperil the lives of inhabitants of the city; or prevent, hinder or delay the defense or protection thereof.


64. Akron, Ohio, Ordinance 640-1968, § 5, July 18, 1968.


Despite these penalty provisions, prosecutions for curfew violations are infrequent. During the Berkeley disorder of June 28-July 3, 1968, 115 persons were arrested for curfew violations, yet only 15 complaints were filed as a result of the arrests. City Manager Report No. 68-40, Appendix, at 1 (Aug. 22, 1968) (mimeo on file with the California Law Review) [hereinafter
ordinances provide for either fine or imprisonment or both. The ordinances are powerful tools in the hands of city officials responsible for maintaining order within their municipalities. Under them, the designated officials are authorized to invoke, largely at their discretion and with relative ease, extraordinary powers to deal with civil disorders. With the rise in the number of civil disorders, the invocation of these powers is not infrequent.

B. Implementing the Curfew

A curfew is a prohibition from the streets and public places of all or designated classes of persons in all or part of designated geographical areas during all or certain designated hours of the day or night. The basic purpose of a curfew is to keep people off the streets and out of public places during an actual or anticipated civil disorder. The curfew should achieve several objectives: Protect from injury either those who otherwise would enter the area unaware of the disorder or nonparticipating onlookers; protect those in the area from vigilante action; reduce both pedestrian and vehicular traffic which hinders police and firefighting mobility; prevent or reduce cited as Hanley Report]. This suggests that officials were more concerned with clearing the streets and cooling people off during the disorder than with punishing offenders.


69. "[A]n order or regulation [requiring the] withdrawal of persons ( . . . juveniles, military personnel, or other specified classes) from the streets or the closing of business establishments or places of assembly at a stated hour [usually] of the evening." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (P.B. Gove ed. 1961).

70. A cordon established to contain the disorder could serve to exclude those who may enter a disorder area unaware of the problem. The Kerner Commission recommended ordinances permitting such areas to be sealed off immediately: "In the early stages of some disorders, failure to seal off some streets had tragic consequences. Unsuspecting motorists drove headlong into barrages of bricks, stones and bottles, cars were set afire, and occupants were beaten." KERNER COMM'N REPORT, supra note 2, at 525. See also id., at 44-45, 94; R. CONOT, RIVERS OF BLOOD, YEARS OF DARKNESS 59-61, 66, 74, 178, 188-90 (Bantam ed. 1967).

Such a cordon, however, would be of no protection to onlookers already within the area who may be subjected to the same treatment or hit by stray bullets from whatever sources. A curfew, confining persons to their homes, would protect them from such injuries.

71. Vigilante activities frequently occur in civil disorders. During the New Haven riot of August 1967, police constructed roadblocks in the riot area, stopped passing cars, and searched some of them in an effort to curb vigilante activities. N.Y. Times, Aug. 23, 1967, at 32, col. 3. Several shotgun-toting whites were arrested while trying to find a way into Newark after curfew hours. N.Y. Times, July 16, 1967, at 54, cols. 1-2. During a curfew in Peekskill, N.Y., six white youths were found carrying three loaded shotguns, a three-foot sword, and assorted knives. N.Y. Times, July 29, 1967, at 10, col. 1. See also KERNER COMM'N REPORT, supra note 2, at 39, 525; Wills, The Second Civil War, ESQUIRE, March 1968, at 75.

72. Very often during a disorder, curiosity-seekers—both resident and nonresident—pour into the streets, add to the confusion, and hamper the mobility of police and firemen. Cyrus Vance reports that during the Detroit riot of 1967, "The lifting of curfew . . . was withdrawn
congregations of people which can engender mob psychology and a carnival atmosphere, the "head of steam" which is difficult to end once begun; prevent or reduce generally the number of incidents requiring police action in the curfew area; and allow police to administer within a defined area a rule which is easy to apply. Officials may have any one or all of these objectives in mind as they formulate their curfew strategy.

There are four basic variables in the establishment of a riot curfew: (1) Geographic scope; (2) persons affected; (3) hours; and (4) method of enforcement. The geographic scope of curfew regulations has varied greatly. Mayor Henry Maier quickly imposed a citywide curfew during the early hours of the Milwaukee disorder which extended from July 30 to August 2, 1967. Residents were confined to their homes and vehicular traffic was prohibited; the entire city was

later that day . . . because of the congestion caused by 'spectators, gawkers and photographers' in the damaged areas." Vance Report, supra note 16, at 22.

Berkeley City Manager William Hanley reported to the city council on the disorder in Berkeley in June-July 1968:

"Sightseers, anxious to 'make the scene,' were continuing to pour in from all directions and, coupled with normal traffic, were choking off the mobility that was essential to deal with the roving bands outside the curfew area. With extreme reluctance . . . I extended the curfew to the entire City so that we could stem the tide of incoming traffic out of the periphery of the City. The action was effective. Traffic was markedly reduced and emergency vehicles were enabled to respond promptly and effectively." Hanley Report, supra note 67, at 9.


The curfew appears to have been most effective in preventing widespread disorder when it was imposed early before potential rioters had a chance to gather. See N.Y. Times, Aug. 1, 1967, at 1, col. 4 (Milwaukee, 1967); id., Apr. 6, 1968, at 22, col. 7 (Detroit, 1968). In disorders in which the curfew was established at a late stage when crowds had already gathered the curfew was relatively ineffective. See N.Y. Times, July 24, 1967, at 1, col. 6 (Detroit, 1967); id., July 15, 1967, at 1, col. 7 (Newark, 1967).

74. By reducing the number of persons and vehicles outside through voluntary compliance the curfew necessarily reduces the number of incidents requiring the attention of law enforcement officials. In November 1968, the mayor of Newark, N.J. reacted to a work slowdown staged by police and firemen by declaring a state of emergency and a curfew in an attempt to reduce the demand on limited resources. N.Y. Times, Dec. 1, 1968, at 84, col. 3. Such a practice is to be condemned; administrative convenience is an insufficient interest to support restrictions on the freedom of movement.

75. Mayor Maier of Milwaukee reported that the stringent curfew imposed by him on July 31, 1967 made the job of the police and National Guard easier by allowing them to consider any unidentified car or person outside to be in violation of the curfew and thus subject to "riot control treatment." N.Y. Times, Aug. 2, 1967, at 17, col. 1. See also id., Apr. 7, 1968, at 1, col. 8 (Washington, D.C. 1968).

76. KERNER COMM'N REPORT, supra note 2, at 525.
THE RIOT CURFEW

sealed off from traffic; all businesses were closed throughout the city; no mail was delivered during the 26-hour period of the curfew. The city was virtually motionless.\textsuperscript{77} One report hailed this drastic curfew—designed to prevent the initial violence from mushrooming as in Detroit and Newark—as the "most effective yet in halting civil disorder in the summer of racial violence."\textsuperscript{78} While the second night of disorder in many cities has been worse than the first, there was calm in Milwaukee. Property damage was relatively light compared to Detroit and Newark, but it is estimated that the economic loss caused by the citywide restrictions on industry and business mounted into millions of dollars.\textsuperscript{79} Asked how often a city can stand complete paralysis, Mayor Maier replied, "How many times can a city take a riot?"\textsuperscript{80}

An initial curfew is generally not citywide in scope, but is limited to the areas surrounding the initial outbreaks of violence or threatened violence,\textsuperscript{81} evidently in an attempt to prevent unnecessary inconvenience and disruption for those living outside the riot area.\textsuperscript{82} Such limited area curfews are often later extended citywide, however, as a precaution against the spread of the disorder into other areas. In Syracuse, New York, for example, violence erupted on August 16, 1967, in two areas of the city; in the afternoon of the 17th the mayor announced an 8 p.m. curfew in just the two areas—about five square miles in all—that bordered on downtown Syracuse. Later that day, upon the request of the police, to prevent the violence from spreading the mayor established a citywide curfew from 9:10 p.m. to 6 a.m.\textsuperscript{83}

A second curfew variable concerns the types of persons whose activities are being restricted. Depending upon the type of danger

\textsuperscript{77} N.Y. Times, Aug. 1, 1967, at 1, col. 4.
\textsuperscript{78} Id.
\textsuperscript{79} Id., Aug. 4, 1967, at 12, col. 3. See also KERNER COMM'N REPORT, supra note 2, at 358; N.Y. Times, Apr. 12, 1968, at 20, col. 7 (Memphis).
\textsuperscript{80} N.Y. Times, Aug. 2, 1967, at 17, col. 2. Mayor Washington imposed a citywide curfew in Washington, D.C. on April 5, 1968 which was ineffective until President Johnson sent in the National Guard and Army to help enforce it. Once there were enough troops to enforce it, the curfew, though unpopular, worked well in keeping the streets clear. N.Y. Times, Apr. 6, 1968, at 1, col. 8; id., Apr. 7, 1968, at 1, col. 8; id., Apr. 9, 1968, at 36, col. 3.
\textsuperscript{82} See text accompanying notes 156-60 infra for a discussion of the choice of the area in relation to equal protection. The Kerner Commission warns that, "Unless care is used, the curfew itself may enable criminal elements to close down a town with minimum effort." KERNER COMM'N REPORT, supra note 2, at 525.
\textsuperscript{83} N.Y. Times, Aug. 18, 1967, at 1, col. 2. A similar pattern occurred in Newark, N.J. N.Y. Times, July 16, 1967, at 1, col. 8. See also text accompanying notes 146-55 infra (Berkeley).
forseen and its source, the official promulgating the curfew regulations may restrict all persons to their homes, with some exceptions, or may restrict only a certain class of persons such as juveniles. The Milwaukee curfew of July 31, 1967, is again an example of the more stringent curfew, restricting all persons to their homes, except for doctors, nurses, and others performing essential services. The curfew was lifted briefly twice within its 26-hour duration to allow persons outside of the immediate riot area to shop for groceries and to permit residents in the area to buy milk from the National Guard. Uniformly excluded, of course, even from such restrictive curfews are law enforcement personnel and firemen.

Where officials have seen juveniles as the major actual or threatened source of violence, they have established curfews restricting solely the activities of this group. Anticipating a large influx of minors over the Labor Day weekend of 1963, the resort city of Ocean City, Maryland, established a four-day curfew prohibiting persons under 21 years of age from remaining on the streets of the town from 12:01 a.m. to 6 a.m. Temporary juvenile curfews have also been established in Toledo, Chicago, and Providence, where officials felt that juveniles presented the real danger. If violence has already begun, however, such curfews do not protect innocent bystanders or motorists.

A third curfew variable concerns the hours of its imposition. While curfews generally have been imposed in the evening hours, this too depends upon the city officials' assessment of the problem and their objectives. The initial Milwaukee curfew on July 31, 1967, was instituted as a 24-hour citywide curfew; the surrounding suburbs ordered nightlong curfews only. After 26 hours, the curfew was lifted.

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84. Exceptions for those on "legitimate business" may be made as the curfew is enforced rather than on the face of the regulation. See text accompanying notes 173-76 infra.
86. Id. at 18, col. 3.
87. The curfew is reported in Thistlewood v. Trial Magistrate, 236 Md. 548, 550-52, 204 A.2d 688, 690, (Ct. App. 1964) which upheld it as a reasonable restriction. It is important to note that while called a curfew, the regulation proscribed remaining rather than presence or passage on the streets, and in that respect it was an antiloitering regulation.
88. N.Y. Times, July 28, 1967, at 13, col. 2 (a 9 p.m. to 6 a.m. curfew on July 25 for those under 21). Following two nights of violence attributable to youths, city officials of Toledo imposed another 9 p.m. to 6 a.m. curfew for those under 21, N.Y. Times, Sept. 16, 1968, at 31, col. 1, which remained in effect for seven weeks, N.Y. Times, Nov. 10, 1968, at 60, col. 4.
89. N.Y. Times, Apr. 7, 1968, at 63, col. 1 (7 p.m. to 6 a.m. curfew for those under 21).
90. Id., Aug. 3, 1967, at 16, col. 5 (9 p.m. to 6 a.m. curfew for juveniles except those with "legitimate business"). See also id., Aug. 9, 1968, at 36, col. 1 (Rahway, N.J.); id., July 31, 1968, at 28, col. 4 (Peoria, Ill.).
on August 1. As a precaution against a renewal of the violence, a 7 p.m. to 5:30 a.m. citywide curfew was reestablished and continued until August 4 when the curfew was further relaxed and begun at 9 p.m. Hence, as the danger subsided the curfew hours were relaxed, reducing the disruption of daytime activities while preventing a recurrence of violence thought more likely to occur in the dark hours.

The 26-hour Milwaukee curfew, while evidently very effective, was also extremely disruptive of business. Cyrus Vance, special assistant to the Secretary of Defense during the Detroit riots, suggested that the early imposition of 24-hour curfews in the localities of major violence may afford better control than was achieved with the later, more restricted curfews in Detroit and Newark. But he warned that such a curfew raised two major problems—the distribution of food and the movement to and from work of essential operating personnel necessary to keep the city functioning. The solution of these problems presented tasks of such a magnitude as to make a continuous curfew impracticable for more than 48 hours.

The fourth and perhaps the most important variable is the method of enforcement of the promulgated curfew. The method of enforcement, involving all three of the other variables—geographic scope, persons affected, and hours—ultimately determines its impact upon the community. An announced 24-hour citywide curfew, confining all residents to their homes may, for a variety of reasons, be less burdensome on most people than is at first apparent. With limited enforcement personnel, an official may establish such a curfew, relying upon voluntary compliance in minimum danger areas and concentrating his enforcement efforts in those areas in which the violence or threatened violence is greatest. If concerned mostly with congregations of people, the officials may enforce the curfew as an antiloitering regulation, allowing passage for “legitimate” reasons and arresting only those remaining or repeatedly seen on the streets.

At the other extreme is the case where the curfew is enforced as announced—absolute confinement to residences. Such was the case in

94. See Kerner Comm'n Report, supra note 2, at 123 (day-night cycles of violence).
95. See note 79 supra and accompanying text.
98. For a discussion of such procedures and possible constitutional problems involved see text accompanying notes 173-76 infra.
Trenton, New Jersey, following the assassination of Dr. Martin Luther King, Jr. An earlier curfew having failed to curb the violence, the governor and mayor warned that anyone outside his home would be arrested immediately. The 9 p.m. to 6 a.m. curfew was so strictly enforced that violators could hardly walk a block before police moved in and summarily whisked the violator off to jail.

The curfew is a flexible and effective device in coping with civil disorders. It may be as specific or as general in terms of geographical scope, hours, and persons affected as the officials think the situation warrants. Having learned from experience, local and state officials now appear to favor the early imposition of a curfew to prevent scattered violence from becoming major disorders.

99. For an account of this curfew see N.Y. Times, Apr. 10, 1968, at 1, col. 7; id., Apr. 11, 1968, at 1, col. 7; id., Apr. 12, 1968, at 18, col. 1; id., Apr. 13, 1968, at 11, col. 8.

100. A few of those responding to the author's letters gave opinions as to the efficacy of the curfew:

"The curfew was the most effective single legal tool for restoring peace in Akron. During one of the days of disturbance here [July 1968], the curfew was not imposed because of the relative calm of the previous night. Without the curfew, violence again erupted on a massive scale. Upon its reimposition, we were again able to control the situation." (Letter from S.J. Nostwich, Assistant Director of Law, Akron, Ohio, to the author on file with California Law Review).

"[T]he Independent Association of Chiefs of Police has issued a statement wherein it is said that the curfew is the most effective tool in quelling a riot disturbance. Our investigations in Baltimore and Washington, D.C. also revealed this to be true." (Letter from N.A. Bickley, City Attorney, Dallas, Texas, to the author, on file with California Law Review).

"There is no report which has attempted to assess the positive effects of a curfew as an instrument of control; however, the tremendous reduction in vehicular and pedestrian traffic during the hours of curfew certainly reduced the incidence of criminal activity and expedited the task of patrolling forces." (Letter from C. Grubb, Inspector, Research and Development Bureau, Department of Police, Detroit, Michigan, to the author on file with the California Law Review).

See also KERNER COMM'N REPORT, supra note 2, at 525; Washington Report, supra note 16, at Statements of Mayor and Mr. Vance; Vance Report, supra note 16, at 59-60. In assessing the effectiveness of official actions taken in the Milwaukee disorder, Mayor Maier stated, "The curfew has been a good, immediate cooling-off device." N.Y. Times, Aug. 2, 1967 at 17, col. 1.


The Detroit experiences seem to verify the efficacy of an early curfew in averting a major disorder. The violence in the first Detroit disorder of July 1967 began early in the morning of July 23; the curfew was not imposed until 9 p.m. that evening. In the interim, a carnival atmosphere developed despite the efforts of police and the National Guard, and the rioting continued uncontested through the night despite the curfew. An American Tragedy, 1967—Detroit, NEWSWEEK, Aug. 7, 1967, at 18-19; N.Y. Times, July 24, 1967, at 1, col. 6; id., July 26, 1967, at 1, col. 7. In contrast, on April 5, 1968, Mayor Cavanagh declared a state of emergency and imposed an 8 p.m. to 5 a.m. curfew after only scattered violence during the afternoon. N.Y. Times, Apr. 6, 1968, at 22, col. 7. Even those streets that had been the center of the July 1967 rioting were deserted, and the curfew was reported as completely effective. Id.,
II
CURFEWS AND CONSTITUTIONAL RIGHTS: INHERENT PROBLEMS

If few doubt the curfew’s effectiveness in controlling civil disorders, many question its constitutional validity.\(^{102}\) Crucial for the examination of the constitutional issues is the identification of the individual’s interest that is curtailed by the curfew. The curfew is a restriction on movement. Therefore, all those activities which effectively depend upon the ability to move about freely are necessarily affected, including speech and assembly. The riot curfew, as employed in the recent waves of disorders, however, is not an invalid restriction on these enumerated first amendment rights. The restrictions on speech and assembly are generally only incidental to those imposed on movement.\(^{103}\) In addition, these incidental restrictions go only to the time, place, and manner of speech\(^{104}\) and not to its content. Curfews are generally imposed in the evening, leaving the individual completely free to exercise his first amendment rights during the day.\(^{105}\) The riot curfew is a temporary emergency measure, and therefore the incidental time, place, and manner restrictions imposed on freedom of speech and assembly could not be characterized as a constant inhibition on the free exercise of those rights.

This is not to say, however, that the curfew may never impossibly inhibit these rights. City officials, for example, could

Apr. 7, 1968, at 63, col. 7. Mayor Cavanagh stated from experience, “It is better to overreact than to underreact.” Id., Apr. 6, 1968, at 22, col. 7.

Originating in the Milwaukee disorder of July 30-31, 1967, this strategy has been successful in other cities as well. See, e.g., N.Y. Times, Apr. 7, 1968, § 1, at 1, col. 8 (5:30 p.m. curfew imposed in Washington, D.C. hours after the assassination of Dr. Martin Luther King, Jr.); id., Apr. 5, 1968, at 1, col. 8 (curfew imposed in Memphis hours after the assassination of Dr. Martin Luther King, Jr.); id., Aug. 21, 1967, at 1, col. 2 (violence began evening of the 19th and an 8 p.m. curfew was imposed in New Haven the next night); id., Aug. 18, 1967, at 1, col. 2 (violence began evening of the 16th and an 8 p.m. curfew was imposed in Syracuse the next night).


103. A law which primarily regulates conduct while indirectly affecting speech can be upheld if the effect on speech is minor in relation to the need for control of the conduct. See, e.g., Cameron v. Johnson, 390 U.S. 611, 616-17 (1968); Cox v. Louisiana, 379 U.S. 559, 563-64 (1965); Konigsberg v. State Bar, 366 U.S. 36, 50-51 (1961); Barenblatt v. United States, 360 U.S. 109, 141-42 (1959) (dissenting opinion).


105. In a continuous 24-hour curfew, the restrictions on speech, while incidental, would no longer be as to time, place, and manner, but would constitute a complete prohibition. As such,
effectively destroy a disfavored group's scheduled rally by imposing a
general or limited curfew and thereby denying the group an audience.
Were it challenged in injunctive proceedings, however, such a curfew
would probably fail. Even were the city officials able to demonstrate
clearly that the scheduled speech threatened an immediate serious evil
which the city had a right to prevent, the means chosen to avoid
that evil—the curfew—would probably fail as unconstitutionally
overbroad. The city could protect its valid interest by an alternative
means which would both impose less severe restrictions on the liberties
of the speakers and avoid any restrictions on unrelated persons. The
curfew discussed above, ungrounded in any showing of a possibility of
generalized violence, is easily distinguished from common experience
where the curfew is aimed at movement, not speech or assembly. As it
is freedom of movement which is purposefully and effectively
restricted by the riot curfew, the inquiry should center around the
constitutional status of that freedom.

Freedom of movement finds no express protection in the
Constitution. The United States Supreme Court, however, has
characterized it variously as a constitutional right inhering in the
nature of a federal system of government, or guaranteed by the

the restrictions might be a much litigated issue; because of their limited feasibility, however, such curfews are but a limited threat. See text accompanying notes 96 supra.

106. Injunctive relief, however, could in some instances be inadequate. A curfew imposed
immediately before and revoked immediately after the proposed speech could bar any audience
and because of the time element prevent any injunctive relief. There, a rescheduling of the rally
coupled with a court order enjoining the imposition of any curfew based solely on the speech
may be the only remedy available. As the curfew is a clumsy and indiscriminate device, its
employment for such a purpose is improbable.

107. The freedoms of speech and assembly are not absolute and may be constitutionally
restricted where they present a grave threat to a compelling state interest. See, e.g., Konigsberg
v. State Bar, 366 U.S. 36, 50 (1961); Barenblatt v. United States, 360 U.S. 109, 125-134
(1959); Dennis v. United States, 341 U.S. 494, 509 (1951); American Communication Assn.,

108. "[E]ven though the governmental purpose be legitimate and substantial, that purpose
cannot be pursued by means that broadly stifle fundamental liberties when the end can be more
narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less
drastic means for achieving the same basic purpose." Shelton v. Tucker, 364 U.S. 479, 488
(1960). See, e.g., Elferbrandt v. Russell, 384 U.S. 11, 18-19 (1966); Aptheker v. Secretary of

both access by federal officials and citizens to its offices and the federal government's ability to
transport troops through any state be free from state interference. Id. at 43-44. Finding a
Nevada tax imposed upon railroad and stage companies for every passenger transported out of
the state to be inconsistent with this right to free interstate travel, the Court held that the states
lacked the power to levy such a tax. Id. at 48-49. The opinion was rendered before the passage
of the fourteenth amendment, and therefore the right asserted was of necessity applicable against
the states independent of the subsequent privileges and immunities clause of that amendment.
privileges and immunities clause of the fourteenth amendment,\textsuperscript{110} by the commerce clause,\textsuperscript{111} and by the due process clause of the fifth amendment.\textsuperscript{112} In \textit{Kent v. Dulles},\textsuperscript{113} a case concerned with the authority of the Secretary of State to deny passports to applicants on the basis of their beliefs and associations, the Court held that the right to travel is a liberty protected by the due process clause of the fifth amendment.\textsuperscript{114} While dealing specifically with extranational travel, the Court in \textit{Kent} did not distinguish such travel from interstate and intracity movement, stating:

[H]ow deeply engrained in our history this freedom of movement is. Freedom of movement across frontiers in either direction, and inside frontiers as well, was a part of our heritage. Travel abroad, like travel within the country, may be necessary for a livelihood. . . . Freedom of movement is basic in our scheme of values.\textsuperscript{115}

Justices Douglas and Goldberg, in a dissent to \textit{Zemel v. Rusk},\textsuperscript{116} a later extranational travel case, appear to have read the \textit{Kent} holding as equating “travel” with freedom of movement in general, stating: ‘‘We held in \textit{Kent v. Dulles} . . . that the right to travel overseas, as well as at home, was part of the citizen’s liberty under the Fifth Amendment.’’\textsuperscript{117}

\textsuperscript{110} Edwards v. California, 314 U.S. 160, 178 (1941) (concurring opinion) (interstate travel); Twining v. New Jersey, 211 U.S. 78, 97 (1908) (interstate travel); Williams v. Fears, 179 U.S. 270, 274 (1900) (interstate travel); Hague v. CIO, 101 F.2d 774, 780-81 (3d Cir. 1939), \textit{modified, and as modified afq’d}, 307 U.S. 496 (1939) (intracity movement).

\textsuperscript{111} See Edwards v. California, 314 U.S. 160, 177 (1941) (California statute making it a misdemeanor for anyone knowingly to bring or assist in bringing into the state a nonresident indigent held not a valid exercise of the state’s police power as it imposed an unconstitutional burden upon interstate commerce). \textit{See also} United States v. Guest, 383 U.S. 745, 758-59 (1966) (interstate travel).

\textsuperscript{112} Kent v. Dulles, 357 U.S. 116, 125 (1958) (right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the fifth amendment) (extranational travel). \textit{See United States v. Laub}, 385 U.S. 475, 481 (1967); \textit{Zemel v. Rusk}, 381 U.S. 1, 14 (1965); Aptheker v. Secretary of State, 378 U.S. 500, 505-06 (1964); Lynd v. Rusk, 389 F.2d 940, 944 (D.C. Cir. 1967). As there are no grounds for distinguishing the “liberty” protected by the due process clauses of the fifth and the fourteenth amendments, by implication the right to free movement would also be protected against unwarranted state interference by the fourteenth amendment.

\textsuperscript{113} 357 U.S. 116 (1958).

\textsuperscript{114} \textit{Id.} at 125-27.

\textsuperscript{115} \textit{Id.} at 126. Similarly, in Hague v. CIO, 101 F.2d 774, 780 (3d Cir. 1939), the court relied upon the right to interstate travel in stating that, “Individuals coming into or going about a city upon their lawful concerns must be allowed free locomotion upon the streets and public places.”

\textsuperscript{116} 381 U.S. 1 (1965).

\textsuperscript{117} \textit{Id.} at 23 (emphasis added). In \textit{Zemel}, the Court upheld the authority of the Secretary of State under the Passport Act of 1926, 22 U.S.C. § 211a (1964), to refuse to validate a passport for travel to Cuba, a “restricted area.” Justices Douglas and Goldberg dissented on grounds of overbreadth.
Nor is there any reason to differentiate among intracity, interstate, and extranational travel in terms of the individual's interests which inhere in his ability to move about freely. All three have "large social values:"

The abilities to make a livelihood, to gather and disseminate information, to do what one pleases, and to go where one likes are all fundamental values dependent upon freedom of intracity, interstate, and extranational movement alike. The curfew, of course, is primarily and most directly a curtailment of intracity movement rather than interstate or extranational travel. However, the fact that the Court has not drawn distinctions among the three but has treated freedom of movement generally indicates that a due process analysis of the riot curfew is proper.

Different tests are employed under the due process clause in reviewing the validity of governmental regulations, depending upon the nature of the liberty involved. With regard to the restriction of economic interests, due process requires that the regulations have a real and substantial relation to a legitimate legislative purpose and not be discriminatory.119 Liberties specifically enumerated in the first amendment are accorded a "preferred status," however. Restrictive legislation dealing with rights peripheral to the enjoyment of first amendment guarantees must be narrowly drawn to meet a precise evil.120 Where conflict between these guarantees and legitimate state regulation cannot be so avoided, the Court engages in a balancing test, concentrating on the relevant interests, individual and governmental, and requiring a grave threat to a compelling state interest to tip the scale in favor of governmental regulation.121 In

122. See, e.g., Konigsberg v. State Bar, 366 U.S. 36, 52-53 (1961); Barenblatt v. United States, 360 U.S. 109, 125-34 (1959); Dennis v. United States, 341 U.S. 494, 509 (1951); American Communication Assn., CIO v. Douds, 339 U.S. 382, 400 (1950). Several members of the Court have argued that this balancing approach was originally used only where legislation regulated conduct with consequent incidental limitations on first amendment freedoms. There a sufficiently important governmental interest could justify the incidental limitations. They argue that now, however, the Court improperly is balancing even where there is a direct abridgement of first amendment freedoms. See, e.g., Konigsberg v. State Bar, 366 U.S. 36, 62-71 (1960) (dissenting opinion).
order to determine which of these tests will be applied, the courts must determine the nature of the right of free movement. In a series of cases dealing with extranational travel, the Supreme Court has refused to consider the freedom of movement as a first amendment right.\(^\text{123}\) It has, however, recognized the fundamental nature of that freedom and has accorded it protection similar to that received by rights implicitly covered in the first amendment.

While establishing in *Kent v. Dulles*\(^\text{124}\) that the right to travel is protected by the fifth amendment due process clause, the Court did not decide the extent to which it could be curtailed.\(^\text{125}\) As Congress had not explicitly provided the Secretary of State authority to withhold passports to citizens because of their beliefs or associations, the Secretary could not employ that standard to restrict the citizen’s right of free movement.\(^\text{126}\) In *Aptheker v. Secretary of State*,\(^\text{127}\) the Secretary had revoked Aptheker’s passport under section 6 of the Subversive Activities Control Act of 1950,\(^\text{128}\) which made it unlawful for a member of a registered communist organization with knowledge or notice of the registration to apply for a passport or a renewal thereof or to use or attempt to use such a passport. The Court declared section 6 unconstitutional on its face for it too broadly and indiscriminately restricted the right to travel. When dealing with the constitutional right to travel, as with the enumerated first amendment rights, “precision must be the touchstone of legislation so affecting basic freedoms.”\(^\text{129}\)

In *Zemel v. Rusk*,\(^\text{130}\) the Court upheld the Secretary’s authority to determine that United States citizens’ travel to particular areas would be inimical to the nation’s foreign relations and to refuse to validate passports for travel to and within those areas, despite the fact that such a refusal acts as a substantial deterrent to travel to those areas.\(^\text{131}\) The Secretary had refused to validate Zemel’s passport for travel to Cuba, which had been eliminated from the area for which

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123. Zemel v. Rusk, 381 U.S. 1, 16-17 (1965).
125. Id. at 127.
126. Id. at 130. In *Kent*, the Secretary of State had denied passports to the petitioners because of their alleged communistic beliefs and associations and their refusal to file affidavits concerning present or past membership in the Communist Party. Id. at 117-20.
130. 381 U.S. 1 (1965).
131. The Court did not deal, however, with the question of whether a person could be prosecuted for travel to such restricted areas without a validated passport. Id. at 18-20.
passports were not required following a break in diplomatic relations with that country. Stating that, "[T]he fact that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited," the Court upheld the travel ban to Cuba based upon the State Department's determination that such a ban was necessary to avoid "subversion" and "dangerous international incidents."

The Zemel opinion is important in two respects. First, it put to rest the argument that freedom of movement is a first amendment right. The Court rejected Zemel's argument that the refusal to validate his passport for travel to Cuba denied him rights guaranteed by the first amendment in that it restricted his ability to gather information. To the extent the refusal to validate passports for Cuba was an inhibition, it was an inhibition of action; the "right to speak and publish does not carry with it the unrestrained right to gather information."

Secondly, although it rejected Zemel's first amendment argument, the Court appeared to balance, looking both to the extent of the restriction imposed and to the extent of the necessity for the restriction. While recognizing that a refusal to validate a passport for a given area acts as a deterrent to travel to that area, the Court found the restriction to be supported by the "weightiest considerations of national security." As the right to travel is closely related to first amendment liberties, the Court did not apply the lesser standard of review used when only economic interests are involved. It required instead a compelling governmental objective to support the restriction. This requirement is consistent with its earlier characterization of that freedom as "basic in our scheme of values." Not only must the government's objective in restricting movement be compelling, but

132. Id. at 14.
133. Id. at 14-15.
134. Id. at 16.
135. Id. This distinction between conduct related to speech and pure speech is not new. See, e.g., Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 173 (1961) (dissenting opinion); Teamsters Local 695 v. Vogt, Inc., 354 U.S. 284, 289 (1957).
136. 381 U.S. 1, 17 (1965).
137. Id. at 14.
138. Id.
139. Id. at 16. Justice Douglas, while agreeing that travel is more than speech, that it is speech "brigaded" with conduct and therefore regulable for the protection of society, argued in his dissent that the restrictions swept too broadly in the absence of some clear countervailing national interest. Id. at 26.
140. See id. at 16.
those restrictions must also bear a direct and material relation to the achievement of that objective. Hence, while the Court has refused to consider the freedom of movement as a first amendment right, it has recognized the fundamental nature of that freedom and in judging encroachments upon it has applied a test very similar to that employed in reviewing restrictions upon rights implicitly covered in the first amendment.

_Zemel_ established that to be consistent with due process, governmental restrictions on the freedom of movement must bear a direct and material relation to the achievement of a compelling governmental objective. A city faced with the immediate prospects of a civil disorder, with all that has meant in terms of deaths, injuries, and destruction, would have little difficulty in establishing such a compelling interest. Nor would it be difficult to demonstrate that unlimited movement into, within, or from a disorder area would directly and materially threaten the safety and welfare of persons and property within the area and interfere with the city’s attempt to prevent or to control the disorder. The riot curfew, therefore, would generally be a constitutionally valid restriction on the freedom of intracity movement.

142. Both the majority and Justice Douglas in his dissent drew analogies to domestic crises such as flood, fire, or pestilence, during which travel to or from areas so ravaged may legitimately be restricted or banned "when it can be demonstrated that unlimited travel to the area would directly and materially interfere with the safety and welfare of the area . . . ” 381 U.S. at 15-16, 25.

Significantly, the Court entered into a balancing even though the Secretary’s action was only a deterrent and not a total prohibition, with criminal sanctions, of travel to Cuba. In United States v. Laub, 385 U.S. 475, 487 (1967), the Court was faced with a criminal statute, section 215(b) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1185 (b) (1964), which the State Department argued required the traveler to bear a validated passport for travel to the country for which he departs or from which he returns. In rejecting this argument, the Court narrowly construed the sections in question and held that they prohibited only leaving and entering the United States without a valid passport and that area restrictions upon the use of an otherwise valid passport are not criminally enforceable under section 215(b). See generally Travis v. United States, 385 U.S. 491 (1967); Lynd v. Rusk, 389 F.2d 940 (D.C. Cir. 1967) (Secretary of State may only condition issuance or renewal of a passport upon applicant’s assurances that he will not use in or take to the restricted area a passport, not upon assurances that he will not travel to the designated areas. Congress has only given the Secretary authority to control travel of the passport, not of the person). While the Court has narrowly construed congressional restrictions on freedom to travel, consistent with its notion that freedom of movement is a fundamental right, the Court has not taken the position that an absolute ban on travel to certain areas by Congress would be constitutionally invalid.

143. The Senate Subcommittee on Investigations studied 66 riots occurring from 1965 through 1967 and found that there were 125 deaths, 3,149 injuries, and an estimated $712 million financial loss. In 1966, 20 riots caused 10 deaths, 467 injuries and $10.2 million financial loss. _Hearings on Riots, supra_ note 10, at 15.

144. In _Zemel_, the Court upheld the Secretary’s refusal to validate a passport for travel to
Not every curfew imposed for whatever purpose could meet the test which emerges from Zemel. The examination must necessarily be made on a case by case basis, and the degree of protection which this test affords to the freedom of intracity movement will ultimately depend upon the willingness of the courts to gauge the reality of the threat to the compelling state interest.145

III
CURFEWS AND CONSTITUTIONAL RIGHTS:
PROBLEMS INVOLVING APPLICATION

A. The Berkeley Experience

Although in the proper circumstances curfews may be constitutionally valid, curfews in their application are not always free from constitutional infirmities. The Berkeley experience illustrates several of the problems involved in any use of the curfew.146 On Friday, June 28, 1968 at 8 p.m. a coalition of local activist organizations staged a rally147 near the corner of Haste and Telegraph Streets in Berkeley. The activists had received a sound amplification permit but had not applied for a rally permit, insisting that they had a constitutional right to hold a rally in the streets without a permit.148 As the crowd grew, it began to spill into the street, impeding traffic. At 9 p.m. the police declared the assembly unlawful and ordered the crowd to disperse. Crowd control units were unsuccessful in dispersing the crowd, and after warnings that a chemical agent would be used, the police released tear gas around 10 p.m. A night of violence ensued in a 120 block area south of the University of California campus.149

Saturday was relatively quiet, but a regrouping of activists began late in the afternoon. By 11 p.m. the activists had constructed

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145. See note 202 infra and accompanying text.
146. The Berkeley situation was unique in that it was not a racial or ghetto riot; the curfew problems, however, were not unique.
147. The rally ostensibly was held to show support for the student protests being staged in France. City officials felt that this purpose was ancillary to a dominant purpose of forcing a confrontation between the activists and the police. See Hanley Report, supra note 67, at 2.
149. Id., June 29, 1968, at 1, col. 7. There were eight injuries, four of which were sustained by police officers; nine reported fires; 18 false alarms; one looting; one bomb threat; numerous incidents of rock throwing; one smashed window; and 12 arrests. Hanley Report, supra note 67, Appendix, at 3.
barricades completely blocking the street near the site of the previous night's rally and began a street demonstration. Having declared it to be an unlawful assembly, the police again dispersed the crowd with tear gas. Another night of violence ensued in the area. The level of violence was considerably higher than that of the previous night.\footnote{150}

Early Sunday morning the acting city manager of Berkeley, pursuant to Berkeley's Civil Defense and Disaster Ordinance, proclaimed a state of emergency existing in the south campus area of the city and announced a curfew for the area to begin that night at 7 p.m.\footnote{151} By 7:30 that evening violence had again erupted but this time outside of the curfew area. At 8:55 p.m. the acting city manager extended the curfew to include the entire city,\footnote{152} and the police established traffic control points at the principal entranceways to the city.\footnote{153}

Officials maintained the curfew again Monday night and lifted it on Tuesday.\footnote{154} In its next regular meeting, the Berkeley City

\begin{footnotes}
\item[150] Berkeley Daily Gazette, July 1, 1968, at 1, col. 7. There were 46 reported injuries, 17 of which were sustained by police officers; eight fires; 20 false alarms; four lootings; three bomb threats; numerous smashed windows; an increased number of rock throwing incidents; and 17 arrests. Hanley Report, \textit{supra} note 67, Appendix, at 6.
\item[151] Berkeley Daily Gazette, July 1, 1968, at 1, col. 1 (proclamation of a state of emergency and curfew regulations). The authority to issue the proclamation and curfew regulations is derived from the Berkeley Civil Defense and Disaster Ordinance 3216-N.S., Oct. 2, 1951 and is similar to those discussed at text accompanying notes 32-67 \textit{supra}. The ordinance was enacted pursuant to authority delegated to California cities under \textsc{Cal. Mil. & Vet. Code} § 1571 (West Supp. 1968).
\item[152] Berkeley Daily Gazette, July 1, 1968, at 2, col. 1.\footnote{Mr. McCormack, Assistant to the City Manager of Berkeley reported that as of June 30, 1968 there had been two nights of violence, and police intelligence indicated that the disorder was likely to continue. Interview with Mr. McCormack, Assistant to the City Manager of Berkeley, in Berkeley, Oct. 10, 1968. City officials felt that something dramatic had to be done to compensate for the city's inability to amass large numbers of police on a continuing basis despite mutual aid agreements with surrounding cities. It was hoped that the curfew would freeze the situation and allow a restoration of order. \textit{Id}.}
\end{footnotes}
Council confirmed retroactively the proclamation of a state of emergency and the curfew regulations made and terminated pursuant thereto by the city manager and acting city manager.\footnote{155. Minutes of the Regular Meeting of the Berkeley City Council, July 2, 1968, at 1 (mimeo on file with the \textit{California Law Review}). The Berkeley ordinance requires the city council to confirm “at the earliest practicable time” both the city manager’s proclamation of a state of emergency and any regulations made pursuant thereto. Berkeley, Cal., Ordinance 3216-N.S., §§ 5(a), 6(a), Oct. 2, 1951. The curfew had been in effect for two nights before the city council met at a regularly scheduled meeting on July 2.}

\textit{B. The Question of Equal Protection}

In the use of a curfew in preventing or controlling a civil disorder, the choice of the area in which the curfew restrictions are imposed, the choice of the persons it is to affect, and the application of those restrictions within that area raise separate equal protection issues. That presented by the first choice involves few problems; however, the latter two raise substantial difficulties.

Having made the decision to employ a curfew, the Berkeley officials, as has been the case in many civil disorders,\footnote{156. See notes 81-83 \textit{supra} and accompanying text.} at the outset decided to limit its restrictions to a delineated area of the city, hoping to minimize its effect upon those not involved in the disorder. As originally promulgated, the curfew was imposed only in the south campus and campus area of the city where the violence was originally centered. As the fourteenth amendment prohibits the state from denying to any person within its jurisdiction the equal protection of the laws and as the city officials are denying freedom of movement by law to some persons and not to all, the issue arises whether those in the limited curfew area are being denied equal protection of their rights.

The equal protection guaranty prohibits the arbitrary selection of a class of individuals for the imposition of a special burden and requires as a minimum that legislative classifications be rationally related to a legitimate governmental purpose.\footnote{157. \textit{Loving v. Virginia}, 388 U.S. 1, 8-9 (1967); \textit{Rinaldi v. Yeager}, 384 U.S. 305, 308-09 (1966).} In the area of economic regulations, the equal protection guaranty is satisfied if there is any rational basis for legislative classifications, in which case the courts defer to the wisdom of the legislature.\footnote{158. \textit{Loving v. Virginia}, 388 U.S. 1, 9 (1967); \textit{Allied Stores of Ohio, Inc. v. Bowers}, 358 U.S. 522, 527-28 (1959); \textit{Railway Express Agency, Inc. v. New York}, 336 U.S. 106, 110 (1949).} Where fundamental rights and liberties are asserted, however, classifications which might invade or inhibit them are closely examined and carefully
confined. Equal protection does not require that all persons be dealt with identically, but rational grounds must exist for the distinction between those within and those without the designated class.

The decision to impose a curfew in Berkeley originally only in the campus and south campus area involved a general classification as to whom the restriction would apply. The curfew did not limit those outside the area having no need to enter. As this determination was based on the fact that the violence of the previous two nights and its apparent source were confined to that area, the imposition of the curfew in this area alone was neither arbitrary nor capricious but bore a rational relation to the city's legitimate objective of restoring order within and confining the disorder to the south campus area. When the violence spread and the traffic congestion grew throughout the city, however, this original classification was no longer rational, and the city officials expanded the curfew and applied it citywide. The imposition of curfew restrictions in a limited area of a city during a civil disorder is generally based upon a reasonable determination that the area chosen presents the problems which the curfew is designed to eliminate or minimize; it therefore does not create a discrimination which violates the equal protection guaranty.

The choice of a particular class of persons whose movement is to be restricted by the curfew presents another equal protection issue. May a riot curfew be imposed only upon minors or blacks consistent with equal protection? Courts have long recognized juveniles as a class of persons in whose welfare the state has a peculiar interest. The state's authority over juvenile activities is broader than over like activities of adults, and juveniles are properly the subject of legislation peculiarly applicable to them when necessary for their protection. A riot curfew limited only to juveniles and designed both

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to protect their safety and to prevent them from becoming involved in criminal activities during a disorder therefore would be rationally related to the protection of the state's valid interest in its youth. While the motivation for such limited curfews may more often be the protection of the community from its juveniles, this is inseparable from the state's interest in preventing juveniles from becoming involved in criminal activities.

A riot curfew imposed solely upon blacks, however, presents a more difficult equal protection problem. Classifications based upon race are "constitutionally suspect" and subject to the "most rigid scrutiny." Legislation drawn along racial lines, even though enacted pursuant to a valid state interest, bears a heavy burden of justification and will be upheld only if necessary, and not merely rationally related, to the accomplishment of a permissible state policy. A curfew limited only to blacks assumes that blacks are the sole source of trouble during the disorder. In view of white vigilante activities in previous disorders, this assumption would be difficult to sustain. Even were this true, however, curfew restrictions imposed upon blacks only are not necessary. They are not even rationally related to the accomplishment of the several objectives which justify the use of a curfew in a civil disorder. Several objectives of the riot curfew require that it be applied to all alike within the curfew area: The protection of those uninvolved in the disorder; the minimization of the number of incidents requiring police attention generally; the alleviation of congestion which hampers police and firefighting mobility; and the reduction of the number of persons on the streets to facilitate the identification of those actively engaged in the disorder. Therefore, it is unlikely that a city could ever demonstrate a necessity for limiting curfew restrictions to blacks. Indeed, a colorblind curfew could more adequately accomplish the city's objectives.

A separate equal protection issue arises where the curfew restrictions are enforced unevenly within the curfew area. While the

166. Loving v. Virginia, 388 U.S. 1, 11 (1966); McLaughlin v. Florida, 379 U.S. 184, 196 (1964). Justices Stewart and Douglas, concurring in McLaughlin, could not "conceive of a valid legislative purpose under our Constitution for a state law which makes the color of a person's skin the test of whether his conduct is a criminal offense." Id. at 198.
167. See note 71 supra.
168. Cf. McLaughlin v. Florida, 379 U.S. 184, 196 (1964). The sad and damning presence of black ghettos in urban America has probably made curfews limited on their face to blacks unnecessary. A curfew limited to the ghetto only, however, has much the same effect, especially if it is discriminatorily enforced. There is a difference between a curfew based on its face on race
equal protection guarantee allows for proper classifications, the law
must operate alike on all members of the class to which the legislation
applies—to all those similarly situated. 169 This aspect of the equal
protection guarantee is often violated in a curfew situation. As the
curfew is a broad net, there are often many violators of the
restrictions. Police, however, are often unable or unwilling to
completely utilize the sweeping arrest authority conferred upon them
by the curfew regulations. Inadequate manpower and facilities creates
the likelihood of an unequal application of that authority with the
brunt of it being borne by those most vulnerable and the objects of
the policemen’s latent prejudice and hostility—the poor, the black, the
young, the unconventional. 170

While police discretion often exists and discriminatory
application is always a danger, the likelihood of such enforcement of
the riot curfew is particularly high during a civil disorder. The looting
and destruction which surround the police lend superficial support to
and reinforce their latent prejudices. The white police are often afraid,
and fear most of all those they understand the least—the blacks.
What authority and power the police do have, therefore, is most likely
to be used against the blacks. Enforcement of the curfew along racial
lines not only violates the equal protection guaranty, it can also
exacerbate an already deteriorating situation. Such enforcement does
not go unnoticed by ghetto residents and could serve to reinforce what
is already suspected: that the curfew is just another repressive device
to be used solely against blacks. 171

and one which affects all alike within the curfew area, however, and as officials have not
hesitated to extend curfews citywide if the violence threatens to spread, it is difficult to impute to
them the motive which underlies “invidious discrimination.” “Invidious
discrimination”—discrimination not bearing at least a rational relation to a legitimate legislative
purpose—is forbidden by the equal protection clause of the fourteenth amendment. McLaughlin

169. Truax v. Corrigan, 257 U.S. 312, 332-33 (1921); Barbier v. Connolly, 113 U.S. 27,
32 (1883); In re Anderson, 69 A.C. 638, 679, 447 P.2d 117, 144, 73 Cal. Rptr. 21, 48 (1968)
(dissenting opinion).

170. In a curfew imposed in Richmond, California just prior to that in Berkeley, for
example, there was evidence that it was enforced against blacks but not against whites; white
curfew violators were told to go home, blacks were arrested. ACLU News; Aug. 1968, at 1, col.
2 (San Francisco). It was also reported that the curfew in Washington, D.C. was enforced more

171. Referring to the recently enacted Dallas local disturbance ordinance, the City
Attorney of Dallas states: “The Negro community considered this to be a law aimed directly at
them, the same as though we had written into it that only Black people would be affected by it.
This is not so, but this is the reaction obtained in many communities in cases like this.” Letter
from N.A. Bickley, City Attorney of Dallas, to author, Sept. 17, 1968 (on file with the
California Law Review).
It is difficult to formulate an appropriate standard to guide police discretion in enforcing the riot curfew. To say that arrests for curfew violation should be made only where the police have reason to believe that there has been another and different criminal violation is in effect to abandon the due process requirement of probable cause. If probable cause exists for an arrest for the other violation, the curfew adds nothing, and the arrest should be made on that basis. Otherwise, the officer is in effect arresting on suspicion only.\footnote{172}

The standard used to guide police discretion in making curfew arrests in the Berkeley disorder was similarly inappropriate. As announced, the curfew prohibited all persons from being upon the public streets, avenues, parks, or other public places, or upon unimproved private real property within the south campus area.\footnote{173} As applied, the curfew was a prohibition from the streets of those without "legitimate business." Persons were stopped and questioned as to their purpose for being on the streets. Those who could not give an adequate account or who were seen more than once by the police were arrested for curfew violations.\footnote{174} This "legitimate business" standard was really no standard at all. The police officer's discretion was virtually unlimited, and the curfew was therefore susceptible to arbitrary enforcement. Authorities could arrest suspects without obtaining enough evidence of an identifiable offense to make a proper arrest or secure a conviction. The curfew became a tool by which authorities could arrest on suspicion only.\footnote{175} If either of the two standards discussed above are used, the curfew is in effect being employed as an administrative shortcut to avoid the requirements of constitutional due process.\footnote{176}

\footnote{172}{Cf. Portland v. James, \textit{\textit{Ore.}} 444 P.2d 554, 555-56 (1968).} \footnote{173}{Berkeley Daily Gazette, July 1, 1968, at 1, col. 1. The curfew contained the usual exceptions for law enforcement, firefighting, and civil defense personnel.} \footnote{174}{Interview, \textit{\textit{supra}} note 151.} \footnote{175}{Mr. McCormack, Assistant to the City Manager of Berkeley, stated that there was a desire not to hit unnecessarily hard those "not involved" in the disorder and that this meant that "suspicious types" would bear the brunt of the curfew. Officers were told to arrest "those causing trouble," not to use a finemeshed net. Interview, \textit{\textit{supra}} note 151.} \footnote{176}{A curfew purporting to prohibit from the streets those without having and disclosing to an officer a legitimate purpose would be invalid as unconstitutionally vague. Procedural due process requires ascertainable standards of guilt, so that men of reasonable understanding are not required to guess at the meaning of an enactment. Winters \textit{v. New York}, 333 U.S. 507, 515-16 (1948). A law must give fair notice of what acts will be punished and if an ordinance imposes sanctions authorized by language that is doubtful or vague it violates fundamental concepts of justice and due process. Portland \textit{v. James, \textit{\textit{Ore.}}}, 444 P.2d 554, 557 (1968); Seattle \textit{v. Drew}, 70 Wash. 2d 405, 408, 423 P.2d 522, 524 (1967). Such a curfew would contain no standards by which the citizen could know whether his presence on the streets was legal or illegal. The legality of a person's action would depend upon the opinion of a policeman. Cf. Cox}
Several considerations indicate that a full enforcement policy—the removal of all police discretion—would be appropriate. First, the curfew is an emergency measure often justified on the grounds that the ordinary criminal laws are inadequate to deal with the riot situation and that officials need this additional tool to clear the streets not only of those actually causing trouble but also of those who by their presence add to the riot potential and whose lives are endangered by the situation. If this is the case, there is no justification for the uneven application of the restrictions.

Secondly, full and even enforcement insures that the curfew will be used only in those situations where it is clearly warranted. Where its burdens fall equally upon a community, including those whose voices are heeded in the city council chambers, the political control over the riot curfew is enhanced.\(^1\)

Thirdly, a strictly and evenly enforced curfew is the most likely to generate voluntary, if bitter, compliance. To be sure, a policy of full enforcement involves a large allocation of already strained manpower and monetary resources. Reacting to and perhaps adding to the causes of the recent waves of civil disorders, however, cities have found the resources for increased mechanization and firepower.\(^2\) Allocations toward a policy of full enforcement not only provide a less drastic and more just means of quelling disorders, but could also obviate the need for increased firepower altogether. Minimally, such a policy would minimize equal protection problems arising from the uneven application of the curfew and would prevent its use as an administrative tool to circumvent the due process requirement of probable cause for arrest.

\section*{C. The Question of Unlawful Searches and Seizures}

Searches and seizures present another serious problem in the application of curfews. During curfews it is not uncommon for enforcement personnel to search individuals and vehicles for weapons and for contraband.\(^3\) This raises the issue whether these searches, in

\footnotesize
\begin{itemize}
\item v. Louisiana, 379 U.S. 559, 579 (1965) (concurring opinion); Shuttlesworth v. City of Birmingham, 382 U.S. 87, 90 (1965); Portland v. James, supra; Seattle v. Drew, supra.
\item 177. See notes 198-201 infra and accompanying text.
\item 178. See note 13 supra and accompanying text.
\item 179. See, e.g., N.Y. Times, Aug. 23, 1967, at 1, col. 2 (New Haven); id., July 15, 1967, at 1, cols. 6-8 (Newark); id., July 29, 1967, at 10, col. 1 (Peekskill, Ill.).
\end{itemize}

During the Berkeley curfew, officials established traffic control points on the periphery of the city. These were informational only, however, as they were manned largely by civilian employees of the city. Searches were not made of cars entering the city, but police were informed of "suspicious" vehicles. Interview, supra note 151.
both their instigation and scope, comply with the protections of the fourth amendment.\textsuperscript{180}

Normally, a search conducted without a warrant is unreasonable,\textsuperscript{181} except where incident to a valid arrest\textsuperscript{182} or where there is probable cause to arrest and the police are in hot pursuit.\textsuperscript{183} These exceptions are justified as necessary to prevent escape of the suspect, to protect the arresting officers, to prevent destruction of the fruits of or implements used to commit the crime, or to find evidence of the crime. The scope of such searches includes the person of the accused,\textsuperscript{184} things under the accused's immediate control,\textsuperscript{185} and to an extent depending upon the circumstances of the case, the place where he is arrested.\textsuperscript{186} Where an officer, acting as a reasonably prudent man in the circumstances, has an articulable reason to believe that he is dealing with an armed and dangerous man, he may make a reasonable search for weapons for his safety or that of others, regardless of whether he has probable cause to arrest the individual for a crime.\textsuperscript{187} As the sole justification of such a search is the protection of the officer and those nearby, it must be limited in scope to an intrusion reasonably designed to discover weapons.\textsuperscript{188} A self-protective search must begin with a limited pat-down of the suspect's outer garments for concealed objects which might be used as weapons, and failing discovery of such objects the search must end.\textsuperscript{189}

\textsuperscript{180} The fourth amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and requires that "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." U.S. CONST. amend. IV. The fourth amendment is applicable against the states as well as the federal government. Mapp v. Ohio, 367 U.S. 643, 655 (1961).

\textsuperscript{181} Jones v. United States, 357 U.S. 493, 499 (1958).


\textsuperscript{183} Warden v. Hayden, 387 U.S. 294, 298-300 (1967). Police may also search without a warrant where there is free consent to a search by someone with authority to give consent, as such a search could not be called unreasonable. See Maxwell v. Stephens, 348 F.2d 325, 336 (8th Cir. 1965); United States v. Bialeck, 255 F. Supp. 268, 269 (E.D. Pa. 1966).

\textsuperscript{184} Agnello v. United States, 269 U.S. 20, 30 (1925); Weeks v. United States, 232 U.S. 383, 392 (1914).


\textsuperscript{187} Terry v. Ohio, 392 U.S. 1, 27 (1968).

\textsuperscript{188} Id. at 29.

The principal problem related to searches of individuals and vehicles during riot curfews is that of the use of the exception of searches incidental to a lawful arrest\textsuperscript{190} to facilitate a fishing expedition to uncover evidence of other crimes. Assuming a properly administered curfew,\textsuperscript{191} there will be many lawful arrests for curfew violations which will give rise to authority for searches of some nature; the issue is one of delimiting the proper scope of such searches. As enforcement personnel are interested in uncovering violation of regulations regarding the sale and possession of liquor, firearms, and explosives which normally accompany curfews as well as evidence of looting, the pressure for expansion of the scope of warrantless searches will be great. It is clear that enforcement personnel making an arrest for curfew violation may at least make a limited pat-down of the arrestee for objects which might be used as weapons against the arresting officers. The exception for searches incidental to arrest to prevent the escape of the arrestee would also support such a search of the person.

The courts must limit the scope of searches incident to arrests to the purposes for which this exception to the warrant requirement was created. The search must be incidental to the crime for which the arrest is made, that is, limited to a search for the fruits or instruments of the crime providing the basis for the arrest.\textsuperscript{192} Were the exception not so limited, arrests for minor violations would justify general searches to produce evidence of unrelated crimes, and the fourth amendment's protection against unreasonable searches and seizures would be a nullity.\textsuperscript{193} In a curfew, therefore, the scope of a search incidental to an arrest for a curfew violation would be limited to a search for weapons which could be used against the arresting officer to effectuate an escape, for there are no fruits or instruments of a curfew violation. Mere presence on the street constitutes the crime.\textsuperscript{194}

\textsuperscript{190} If the riot curfew is unconstitutionally vague or violative of equal protection, the arrests under it would be invalid, and the searches made pursuant to the arrests would therefore also fall. See United States v. Rabinowitz, 339 U.S. 56, 60 (1949).

\textsuperscript{191} See text accompanying notes 176-78 supra.

\textsuperscript{192} Agnello v. United States, 269 U.S. 20, 30 (1925); Carroll v. United States, 267 U.S. 132, 158 (1924); N. Sobel, CURRENT PROBLEMS IN THE LAW OF SEARCH AND SEIZURE (1964).


\textsuperscript{194} This limitation upon the scope of searches incident to arrests for curfew violations would apply alike to pedestrians and to those in vehicles. While officers could search the area
Assurance, through the exclusion doctrine in the courts, that the scope of searches incidental to arrests for curfew violations will not be expanded to include general, nonincidental searches to produce evidence of unrelated crimes would reduce the likelihood of officials using curfews as a subterfuge to avoid the fourth amendment. 185

Even where the curfew is properly administered under a full-enforcement policy, the police may have valid reasons not to arrest in certain instances and yet, due to the emergency, may fear the importation of weapons into the disorder area. For example, residents of the curfew area who were not present when the curfew was imposed would certainly be allowed to return to their homes but may be unwilling voluntarily to submit to a general search of their vehicle for weapons. In such instances a balancing approach, whereby the seriousness of the suspected crime and the degree of reasonable suspicion on the part of enforcement personnel are balanced against the magnitude of the invasion of personal security and property rights, could perhaps justify such searches as reasonable under the circumstances, 186 based upon a notion of general probable cause. 187 A routine search of all vehicles legitimately entering the area, based upon a warrant issued after such a balancing, would reduce the likelihood of harassment.

IV
CONTROL OF THE RIOT CURFEW

While the curfew is an effective device in the prevention or control of civil disorders, it changes fundamentally the lives of those under the arrestee's immediate control, they would have no authority to conduct a general search of a curfew arrestee's vehicle without a warrant. Once the arrestee is taken into custody, the contents of the car are no longer subject to destruction by him. Hence, the rationale underlying the exception to the warrant requirement is no longer present. See, e.g., Preston v. United States, 376 U.S. 364, 367-68 (1964); Carroll v. United States, 267 U.S. 132, 153 (1924); Rent v. United States, 209 F.2d 893, 899 (5th Cir. 1954). Enforcement officials, upon a showing of probable cause to a magistrate, could then and only then, obtain authority, through the warrant procedure, to search the auto for evidence of other offenses. Only through such a limitation on the scope of searches incident to arrests for curfew violations could the fourth amendment protections have any meaning during a curfew.


THE RIOT CURFEW

upon whom it is imposed. It abruptly restricts their freedom of movement and all the activities which depend upon movement—business, use of property, recreation, pleasure, speech, and education. While justified under proper emergency circumstances, the riot curfew may be abused. Political and judicial controls, however, give some assurance that the curfew will be used only when the circumstances warrant.

The fact that the curfew is a drastic measure may be the key to its control. The curfew is an unpopular measure, not only with those who but for it would be engaged in violence but also with those whom it affects despite their disinclination to join in the disturbance. In a strictly enforced curfew, no one is allowed on the streets. Even those who deplore looting, burning, shooting, and bombing are confined to their residences, unable to visit, to use their property, to work, to satisfy their curiosity, or to take a walk. Business and industrial losses are substantial.\textsuperscript{198} The community will surely give careful consideration to the justifications given by city officials and will remember at the next election those officials who impose such restrictions under doubtful circumstances. Nor is this diluted when the person empowered to establish a curfew in an emergency is an appointed rather than an elected official—for example, a city manager. The pressures upon such a person may be even greater, for in contrast to an elected official whose removal from office must wait the next election, the city manager serves at the pleasure of the city council.\textsuperscript{199}

The facts that the riot curfew may be and generally is limited to a particular area of the city—very often the black ghetto—which reduces the general citywide inconvenience, and that those restricted may lack substantial political power undermine the argument that political pressures will substantially control the abuse of the riot curfew. However, strategic concerns serve as checks on the unwarranted use of the curfew even in these areas. While city officials now appear to favor early curfews,\textsuperscript{200} fear that the curfew may be counterproductive is likely to restrain precipitous action. A curfew restriction quickly imposed in a particular area may only increase the

\textsuperscript{198} See note 79 \textit{supra} and accompanying text; \textit{N.Y. Times}, Apr. 12, 1968, at 20, col. 7 (business suffered during Memphis curfew).

\textsuperscript{199} The office of the Berkeley city manager was not insensitive to its position during the disorder there. It was in telephone contact with the council members individually before the proclamation of a state of emergency and the curfew to assure that the action had council support. \textit{Interview, supra} note 151.

\textsuperscript{200} See text accompanying notes 101 \textit{supra}. 
tension. Those in the area who feel that the curfew was imposed without restraint may, on a hot summer evening, join in a massive violation, creating precisely the situation the curfew was designed to prevent. The political and strategic controls of the riot curfew, therefore, are substantial.

A court, removed from the pressures and responsibilities which bear upon city officials during an actual or threatened disorder, is not particularly competent to second-guess those officials. Hence, the role of the courts in controlling the decision to impose a curfew is likely to be limited to the prevention of clear abuses of executive authority. Their role in controlling its application, however, should be substantial.

201. When confronted with Mayor Lee's (New Haven) late but strictly enforced curfew, a resident accused him of overreacting, complaining, "If they'd just get rid of this damn curfew, there'd be no sweat. We don't mean trouble, but who wants to stay inside when it's hot?" N.Y. Times, Aug. 23, 1967, at 32, col. 3.

202. Courts have used a more rationality standard in reviewing executive decisions to impose martial law—a measure similar to, but in terms of civil liberties, more onerous than the imposition of a curfew by civil authorities. Illustrative is Powers Merchandise Co. v. Olson, 7 F. Supp. 865 (D. Minn. 1934); where a federal district court in a suit by certain truck owners to enjoin state officers from interfering with the movement of their trucks upheld a proclamation of martial law by the governor of Minnesota during a truck driver's strike. The court did inquire into the justification of and necessity for calling in troops and proclaiming martial law and was of the opinion that the governor may have been using martial law as a means to coerce the owners into a settlement, but in the absence of "clear and convincing proof" that the executive was abusing his power, it was unwilling to grant relief. Id. at 869. The governor was given wide discretion in determining the means to be used to restore law and order. Id. Only arbitrary and capricious acts and those having no relation to the necessities of the situation could be enjoined. Id. at 868. In gauging the necessities of the situation, the court, finding the problem to be an "intensely practical one," was unwilling to second-guess the executive whose duty it was to enforce the law. Id.

See also Sterling v. Constantin, 287 U.S. 378 (1932). There the Texas Railroad Commission, charged with making rules to prevent waste in oil production, sought to restrict the production of oil by certain owners of interests in oil and gas leaseholds in Texas. Alleging the restriction to be arbitrary and violative of due process, the owners obtained a temporary order from a federal district court restraining the Commission from limiting their production below a certain amount, pending a full hearing. The Commission complied, but the Governor of Texas had already proclaimed a state of insurrection and declared martial law in the territory in which these particular wells were located. The military then proceeded to enforce the production limitations. The federal district court enjoined the governor and military commander from enforcing their executive or military orders regulating the production of oil from the wells. On appeal the United States Supreme Court affirmed the final judgment of the district court. The case, however, is not authority for the proposition that the courts will exert substantial control over executive decisions in emergencies, for both the purpose of the Governor and the complete lack of necessity in terms of an actual or threatened violent uprising were more than evident. The Court did not even consider the proper scope of executive determinations of the necessity for proclamations of a state of emergency. It recognized that "measures, conceived in good faith, in the face of [an] emergency and directly related to the quelling of [a] disorder or the prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace." Id. at 400. But the Court was unwilling to allow the Governor by executive fiat to oust the courts of jurisdiction and avoid proper judicial procedure in the determination of the proper regulation of oil production. Having found a clear abuse of executive authority, the
The courts should freely entertain applications for injunctive relief based upon allegations that as imposed the curfew violates equal protection or that it is being used merely as an administrative circumvention of the due process requirement of probable cause in an effort to clear the streets of "troublemakers" or "undesirables." Such incursions upon constitutional protections made under the guise of otherwise legitimate exercises of the city's police power are not difficult to detect. In Berkeley, for example, during a two-night, citywide curfew affecting well over 110,000 persons there were only 115 arrests for curfew violations. Therefore, either there was close to unanimous voluntary compliance, or the curfew was being very selectively enforced. The latter was in fact the case. Such selective enforcement could only be based upon suspicion of other criminal activity or hostility towards the particular individual, both of which are completely unacceptable. Upon such a showing, the courts should not hesitate to dismiss charges for curfew violations, to enjoin the enforcement of the curfew, requiring city officials to rescind it or make it entirely voluntary, or to order city officials to fully enforce the curfew as an emergency measure rather than as an administrative circumvention of the due process requirement of probable cause for arrest. In addition, the courts must assure that the curfew comports with substantive and procedural due process with the regulations clearly defined and adequate notice given to those expected to abide by them.

CONCLUSION

As the curfew is a drastic device which effectively curtails the fundamental freedom of movement, its use has aroused the fears of many. Freedom of movement, which is protected by the due process clauses, is not absolute, however, and when the state can demonstrate a compelling reason, movement may be reasonably regulated. Such a compelling reason for the use of the curfew is the control of civil disorders which threaten the existence of the state. Political pressures and strategic concerns provide substantial assurance that the riot

Court did not hesitate to uphold the district court's injunction.

See generally Moyer v. Peabody, 212 U.S. 78 (1909) (governor's declaration that a state of insurrection exists is conclusive of that fact and imprisonment for 2½ months under the order of a governor of a state, without sufficient reason, but in good faith, in the course of putting down an insurrection does not deprive the person imprisoned of his liberty without due process of law).

203. The population figure for Berkeley in 1960 was 111,268. WORLD ALMANAC 606 (L. Long ed. 1969).

204. Hanley Report, supra note 67. Only 15 complaints were ultimately filed as a result of the 115 arrests for curfew violation. Id.

205. See note 175 supra.
curfew will be used only where there is a necessity for such a broad and grave measure.

The riot curfew, however, may too easily become an administrative device to circumvent due process requirements of probable cause for arrests and is peculiarly subject to selective enforcement, thus violating the constitutional right to the equal protection of the laws. Therefore, while the riot curfew cannot be condemned outright, it must in each instance be carefully scrutinized to assure that it is employed in a manner faithful to these constitutional guaranties and to those ends which justify its use. A full enforcement policy, removing police discretion in arrests for curfew violations, would not only provide this assurance but would also enhance the political controls over its use.

Curfew-authorizing ordinances could and should provide additional assurances that the riot curfew is both fairly administered and imposed only where justified. Such ordinances should include the following essential elements: (1) A designation of officials authorized to act thereunder; (2) a requirement that the official initially request a declaration of emergency from the city's legislative body if practicable or subsequent confirmation at the earliest practicable time of both such a declaration by the official and regulations made pursuant thereto; (3) an enumeration and definition of those circumstances which warrant the declaration of an emergency, requiring a substantial threshold for the invocation of the extraordinary powers; (4) an explicit enumeration of powers which the official is authorized to invoke; (5) a requirement that officials provide for immediate and widespread dissemination of the declaration and regulations made pursuant thereto; (6) a requirement of full enforcement within the curfew area; and (7) a provision for penalties for willful violations. These basic elements would provide some assurance that riot curfews will be used only in those situations in which they are warranted, that they will be evenly and fairly applied, and that those expected to abide by the temporary regulations will be adequately informed.

206. The Miami ordinance by a serious of conjunctive phrases leaves little doubt as to what circumstances the city's commission contemplated in delegating the extraordinary authority:

"Whenever the City Manager determines that there has been an act of violence or a flagrant and substantial defiance of or resistance to a lawful exercise of public authority, and that, partly on account thereof, there is reason to believe that there exists a clear and present danger of a riot or other general public disorder, widespread disobedience of the law, and substantial injury to persons or to health, safety, welfare or protection of persons, or damage to property, all of which constitutes a threat to public peace or order and to the general welfare of the city or a part or parts thereof, he may declare that a state of emergency exists within the city or any part thereof." Miami, Fla., Ordinance 7670, § 1, June 13, 1968.
The riot curfew, of course, is not the solution to the evils which continue to plague urban America. If imposed unjustifiably or administered unevenly it may contribute heavily to the frustration and despair already rampant in American cities. At best it may minimize the loss of life and destruction common in civil disorders while honest and urgent efforts are made to alleviate social injustice and despair.

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