THE CRIMINAL PROCESS DURING CIVIL DISORDERS†

Permissible Powers in Serious Civil Disorders

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I. INTRODUCTION

In Part I of this Article, we described the Riot Commission model of the criminal process as one of “business as usual” with a few exceptions. Neither the goals nor procedures of the criminal process in an emergency differ substantially from the administration of justice in

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THE FOLLOWING CITATIONS WILL BE USED IN THIS ARTICLE:

UNIFORM RULES OF CRIMINAL PROCEDURE (1974) [hereinafter cited as URCP];
AMERICAN BAR ASSOCIATION PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO PRETRIAL RELEASE (1968) [hereinafter cited as ABA STANDARDS RELATING TO PRETRIAL RELEASE];
AMERICAN LAW INSTITUTE, A MODEL CODE OF PRE-ARRAIGNMENT PROCEDURE (Proposed Official Draft 1975) [hereinafter cited as ALI PRE-ARRAIGNMENT CODE];
W. DOBROVIR, JUSTICE IN TIME OF CRISIS (1969) [hereinafter cited as DOBROVIR];
NATIONAL ADVISORY COMMISSION ON CRIMINAL JUSTICE STANDARDS AND GOALS, A NATIONAL STRATEGY TO REDUCE CRIME (1972) [hereinafter cited as NAC STANDARDS];
REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968) [hereinafter cited as CIVIL DISORDERS REPORT] (the Commission will be referred to as the Riot Commission);

1021
non-emergency conditions.\textsuperscript{1} We noted that police, counsel, and courts did not receive high marks when judged by such a standard,\textsuperscript{2} and suggested the need for a different conception of the purposes of the criminal process during serious civil disorders and the adoption of special procedures and practices to accomplish those purposes.\textsuperscript{3}

In this Part, we shall discuss (1) the special powers which we think should be entrusted to civilian authorities during serious civil disorders; (2) the constitutional justification for such powers; and (3)

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F. Wiener, A Practical Manual of Martial Law (1940) [hereinafter cited as Wiener];
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Colista & Domonkos, Bail and Civil Disorder, 45 J. Urban L. 815 (1968) [hereinafter cited as Bail and Civil Disorder];
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Criminal Justice in Extremis: Administration of Justice During the April 1968 Chicago Disorder, 36 U. Chi. L. Rev. 455 (1969) [hereinafter cited as Criminal Justice in Extremis];
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Developments in the Law—The National Security Interest and Civil Liberties, 85 Harv. L. Rev. 1130 (1972) [hereinafter cited as National Security Interest and Civil Liberties];
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Survey, The Long, Hot Summer: A Legal View, 43 Notre Dame Law. 913 (1968) [hereinafter cited as Long, Hot Summer];
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Note, Bail and Preventive Detention During Riots: A Proposal, 35 Brooklyn L. Rev. 417 (1969) [hereinafter cited as Bail and Preventive Detention];
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Note, Riot Control: The Constitutional Limits of Search, Arrest and Fair Trial Procedure, 68 Colum. L. Rev. 85 (1968) [hereinafter cited as Limits on Riot Control];
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Note, Riot Control and the Fourth Amendment, 81 Harv. L. Rev. 625 (1968) [hereinafter cited as Riots and the Fourth Amendment].
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1. See Part I 589-94.


the protection that should be provided to ensure that the powers are not utilized except on occasions justifying departure from the normal criminal process. We shall confine our attention primarily to the subjects of arrest, detention, search and seizure, and prosecutorial discretion. There are obviously other areas that appropriately could be considered, and some will doubtlessly disagree with our selection. The purpose here is not to provide a blueprint for codification. Rather, it is to stimulate a reconsideration of the purposes of the criminal process in serious emergencies, and to provide examples of the types of authority that a legislature might choose to confer upon its executive and judicial authorities if our concept of the different nature of the criminal process in serious disorders is accepted. Initially, it is appropriate to examine briefly some of the state legislation in the area that has been enacted in the wake of the disorders of the last decade.

II. STATE EMERGENCY POWER LEGISLATION

Following the civil disorders of the sixties, several states enacted special legislation setting forth powers that may be utilized to quell a civil disorder. The catalyst for these legislative actions was apparently the report of the Riot Commission. After reviewing the laws that were in permanent force in most states, the Commission observed that "[e]ffective control of a civil disorder may require special laws in addition to the normal complement of penal statutes and ordinances." Although it did not specify what powers should be established by such legislation, it did suggest that the statutory provisions be drawn to "provide for a specific, limited response to a particular problem, rather than wide-ranging emergency powers."

The emergency power statutes that have been enacted are designed to provide specific powers during the period of an emergency. Normal-

4. CIVIL DISORDERS REPORT 290.

5. The Commission, however, suggested two possible powers: the power to seal off areas and the power to impose curfews. Id.

6. Id. Although not referred to by the Commission, a 1965 study had indicated that in only four states were there emergency power statutes, and that each was couched in broad, general language. See Comment, Constitutional and Statutory Bases of Governors' Emergency Powers, 64 Mich. L. Rev. 290, 299 (1965). See also Crum, The National Guard and Riot Control: The Need for Revision, 45 J. Urb. L. 863, 874 (1968).

7. Several of the statutes specifically recite the legislative findings that underlie the provisions enacted. The Maryland statute, for example, provides that

[i]t is hereby declared to be the legislative intent to recognize the Governor's broad power of action in the exercise of the police power of the State to provide adequate control over persons and conditions during such periods of impending or actual public crisis or disaster. The provisions of this section shall be broadly construed to effectuate this purpose. MD. ANN. CODE art. 41, § 15B(a) (Supp. 1971).
ly, they provide that the governor, or another designated official, may proclaim a state of emergency in the area affected by a disturbance. Once the state of emergency has been proclaimed, the official is then provided with a range of powers that may be utilized for the purpose of restoring order. These commonly include the establishment of a curfew, and the prohibition of such activities as ingress or egress from specified buildings or areas, possession or sale of Molotov cocktails or other incendiary devices, possession of firearms and ammunition, sale or dispensation of alcoholic beverages or other commodities, and such other activities as the official may reasonably believe necessary to help protect persons, property, and the public peace. In addition to these


It should be noted that the statutory provisions considered here are obviously intended to deal with civil disturbances, but they are worded in a broad manner to include any type of disaster or emergency that may endanger the well-being of the community. Indeed, at least two of the statutes have recently been amended to include specific provisions to deal with emergencies that may be caused by the continuing energy crisis. See Me. Rev. Stat. Ann. tit. 37-A, § 57(2) (Supp. 1975); Md. Ann. Code art. 41, § 15B(c-1) (Supp. 1974).


9. Although the statutes are normally phrased in terms of providing discretionary power, Florida has adopted both automatic and discretionary measures. The measures which become operative upon the declaration of an emergency include the prohibition of sale, display, or possession (in a public place) of firearms or ammunition, except by authorized law enforcement or military personnel. Fla. Stat. Ann. § 870.044 (Supp. 1975). The discretionary measures are similar to those noted in the text. Id. § 870.045.


In other jurisdictions, legislation has expanded the definition of "riot." Thus, the District of Columbia statute defines riot as a "public disturbance involving an assemblage of five or more persons which by tumultuous and violent conduct or the threat thereof create grave danger of damage or injury to property or persons." D.C. Code § 22-1122 (1973). See also 18 U.S.C. §§ 232(1), 2102(a) (1970). The District of Columbia statute was sustained in United States v. Matthews, 419 F.2d 1177 (D.C. Cir. 1969) (a strong dissent was filed by Judge Wright, id. at 1186); United States v. Jeffries, 45
provisions, which are essentially identical in all of the jurisdictions noted,\textsuperscript{11} two states have added other powers. In North Carolina, authority is provided to stop and frisk persons and search their belongings in the vicinity of the riot\textsuperscript{12} and to obtain warrants for searching automobiles in or approaching the area of the disturbance.\textsuperscript{13} In West Virginia, law enforcement personnel are authorized to enter private dwellings or other buildings when in hot pursuit of a rioter, when in search of a sniper, or when in search of weapons if there is reason to believe that they will be removed before a search warrant can be obtained.\textsuperscript{14} The powers provided in all of these statutory schemes are available only during the period of the proclaimed emergency, and end when it is terminated.\textsuperscript{15} Some jurisdictions have placed specific time limits on the duration of emergency measures, which may be extended only by new proclamations.\textsuperscript{16}

The state emergency power statutes are broadly reflective of the spirit of the Riot Commission recommendations in their identification of

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\item F.R.D. 110 (D.D.C. 1968). Although we confess some difficulty in determining whether all of the extraordinarily broad language of these statutes can meet the tests set forth in \textit{Lewis v. City of New Orleans}, 415 U.S. 130 (1974); \textit{Gooding v. Wilson}, 405 U.S. 518 (1972); and \textit{Papachristou v. City of Jacksonville}, 405 U.S. 156 (1972), we note that the courts have interpreted the federal riot statutes in such a manner as to uphold their constitutionality. See \textit{United States v. Dellinger}, 472 F.2d 340, 354-64 (7th Cir. 1972), \textit{cert. denied}, 410 U.S. 970 (1973); \textit{United States v. Featherston}, 461 F.2d 1119 (5th Cir.), \textit{cert. denied}, 409 U.S. 991 (1972). See notes 21-25 \textit{infra} and accompanying text. It is interesting to compare the broad definition of "riot" in the District of Columbia statute with that in the standard reinsurance contract issued by the Department of Housing and Urban Development. See \textit{Providence Wash. Ins. Co. v. Lynn}, 492 F.2d 979 (1st Cir. 1974). Some of the problems that may be involved in the prosecution of persons for aiding and abetting in the instigation of a riot are considered in \textit{United States v. Rodgers}, 419 F.2d 1315 (10th Cir. 1969).


11. See note 10 \textit{supra}.


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specific measures that may be taken during a civil disorder.\textsuperscript{17} The statutes are, however, both more restrictive and permissive than the recommendations of the Commission. They are more restrictive to the extent that they enact as emergency powers many of the measures that the Commission felt should be enacted only as general laws.\textsuperscript{18} They are more permissive in that they do not limit the discretion of the executive who is responsible for restoring order. The statutes almost invariably state that the enumerated powers are illustrative of the type of measures that may be utilized,\textsuperscript{19} or provide specifically that the executive may prohibit other activities that are reasonably believed to be necessary for the restoration of order.\textsuperscript{20}

The civil disorder conditions that produced the state emergency power statutes also provided the impetus for Congress to expand the federal riot laws.\textsuperscript{21} Although these provisions do not provide the federal executive with additional powers to quell disorders,\textsuperscript{22} they do parallel the state provisions to the extent that they punish some of the same conduct that state executives are given the power to ban during an emergency. Thus, in the Civil Obedience Act of 1968,\textsuperscript{23} criminal penalties are imposed upon a person who, during a civil disorder, teaches or demonstrates the use of, or transports or manufactures, any firearm, explosive, or incendiary device,\textsuperscript{24} or who acts to interfere with public officers who are lawfully engaged in the restoration of order.\textsuperscript{25}

\textsuperscript{17} See note 6 \textit{supra} and accompanying text.
\textsuperscript{18} The Commission, for example, recommended that prohibitions against the possession of incendiary devices (such as Molotov cocktails), interference with emergency personnel, and the sale of firearms be enacted as laws that would be in permanent force. \textit{Civil Disorders Report} 289. The emergency power statutes, as noted at note 10 \textit{supra} and accompanying text, include these powers only during the period of an emergency.
\textsuperscript{22} These powers are considered in Part I 610-36.
\textsuperscript{24} Id. § 231(a)(1)-(2).
\textsuperscript{25} Id. § 231(a)(3). The provisions of section 231 have withstood constitutional challenge on several occasions. See United States v. Featherston, 461 F.2d 1119 (5th Cir.), \textit{cert. denied}, 409 U.S. 991 (1972); United States v. Mechanic, 454 F.2d 849 (8th
In our opinion, these statutory schemes represent a desirable trend towards codification of powers that should be possessed by an executive during times of civil emergency. 26 They are, however, only a beginning.

An additional provision of the 1968 enactment made it unlawful to travel in, or use, interstate commerce with intent to incite, organize, or participate in a riot. 18 U.S.C. § 2101 (1970). It has also been held to be constitutional. See United States v. Dellinger, 472 F.2d 340 (7th Cir.), cert. denied, 410 U.S. 970 (1973). Doubts about its constitutionality had been raised in early commentary. See Note, The Federal Riot Act and the First Amendment, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 393 (1970).


26. It is significant that codification of the powers which may be exercised in times of civil emergency is a common pattern in other parts of the free world. The labels that have traditionally been placed upon the emergency powers of the government have differed between the common and civil law countries, though the powers and procedures have been quite similar. In the common law countries, the basic institution has been martial rule or martial law, based on a flexible concept of necessity, see Part I 605 n.66, and, historically, not based upon statutory provision. In France, on the other hand, the basic emergency institution has been the state of siege, which differs from the strict common law model in that it attempts to define by statutory provision the legally permissible emergency action. See Friedrich & Sutherland, Defense of the Constitutional Order, in STUDIES IN FEDERALISM 676, 678-79 (Bowie & Friedrich eds. 1954).

The emergency power institutions in the common law countries are best illustrated by England. As already noted, it has generally been assumed that martial law or rule was, and is, the normal method of responding to civil emergencies. While it is true that that model was frequently utilized, it was also common for the Parliament to make statutory provision for dealing with emergencies. Thus, it has been observed that the theory and practice of emergency government throughout most of English history were: a minimum of statutory provision for situations of national danger; action by Parliament itself . . . to meet any serious crisis that had arisen; and, where Parliament was unable to function, independent executive action based upon the royal prerogative or the common law. Such executive action usually took the form of martial law, the basic English institution of constitutional dictatorship. C. Rossiter, CONSTITUTIONAL DICTATORSHIP 136 (1948).

See also J. Eaves, EMERGENCY POWERS AND THE PARLIAMENTARY WATCHDOG: PARLIAMENT AND THE EXECUTIVE IN GREAT BRITAIN 1939-1951 (1957). The pattern was significantly altered in 1920, however, when the Emergency Powers Act of 1920 was adopted, 10 & 11 Geo. 5, c. 55, as amended by the Emergency Powers Act 1964, c. 38; see 38 HALSBURG'S STATUTES OF ENGLAND 289-91 (3d ed. 1972). The Emergency Powers Act provides the Crown with considerable authority during a civil disturbance and is quite similar to the state emergency power statutes that are considered in the text. Thus, it provides that a state of emergency may be declared when it appears that events will, in essence, deprive the community of the essentials of life. Emergency Powers Act of 1920, 10 & 11 Geo. 5, c. 55, § 1(1). Such a declaration may not continue for more than one month, and if Parliament is not in session when it is declared, and if it shall not
otherwise convene within five days, it must be ordered to convene within a five day period. Id. § 1(2). During the emergency, the Crown may promulgate regulations and confer upon subordinate officers "such powers and duties as His Majesty may deem necessary for the preservation of the peace, for securing and regulating the supply and distribution of food, water, fuel, light, and other necessities, for maintaining the means of transit or locomotion, and for any other purposes essential to the public safety and the life of the community." Id. § 2(1). Although it is clear that the Emergency Powers Act of 1920 was designed to protect against labor strife, see Rossiter, supra, at 173-74, it is a statutory scheme that is available for much broader use, and, as noted, quite similar to the schemes that presently prevail in many of our states. It need not, however, be the only statutory authority that will be available to deal with civil emergency in the realm. Thus, when the disorders in Northern Ireland reached a point where control was difficult, Parliament passed the Northern Ireland (Emergency Provisions) Act 1973, c. 53, 43 Halsbury's Statutes of England 1235 (Supp. 1973), which, inter alia, provided law enforcement personnel with broad powers of arrest, detention, and search and seizure which were not otherwise authorized. Finally, it might be observed that the English Act of 1920 was, at the time of its adoption, roughly similar to laws then (and now) in force in many civil law countries—a fact that was not specifically considered by Parliament, which was then more concerned with resolving a bitter strike in the coal mines. Rossiter, supra, at 173.

The powers of the executive to deal with civil emergencies in the other common law countries are similar, though in some the powers entrusted to the executive greatly exceed those of the English Act. In Canada, for example, the War Measures Act, Can. Rev. Stat. c. W-2 (1970), authorizes the issuance of a proclamation in the event of "war, invasion or insurrection," id. § 2, and gives the Governor in Council the power to issue such orders and regulations "as he may . . . deem necessary or advisable for the security, defence, peace, order and welfare of Canada . . .," id. § 3(1). This power enables the Governor in Council to suspend the Bill of Rights entirely, id. § 6(5), and when it is kept in mind that Canada has been subject to the War Measures Act for some forty percent of its history, see Marx, The Emergency Power and Civil Liberties in Canada, 16 McGill L.J. 39, 40 (1970), it is apparent that the statute confers a rather broad range of power upon the executive. The use of the War Measures Act in 1970 to deal with terrorists is described in McGonagle, Emergency Detention Acts: Peacetime Suspension of Civil Rights—with a Postscript on the Recent Canadian Crisis, 20 Cath. U.L. Rev. 203, 233-36 (1970). See generally Friedrich & Guttman, The Federal Executive, in Studies in Federalism, supra, at 63, 88-93. In India, the Defence of India Act of 1962 contains a quite similar basic statutory scheme, see generally H. Doabia & T. Doabia, The Law of Preventive Detention in India and the Defence of India Act 1962 (1963); B. Dutt & B. Beotra, The Defence of India Act, 1962, and Rules (1966); B. Singh, Annotated the Defence of India Act, 1962 (2d ed. 1966), as does the South African Public Safety Act of 1953. See generally E. Brooke & J. Macaulay, Civil Liberty in South Africa (1958); McGonagle, supra, at 215-27; Mathews & Albino, The Permanence of the Temporary—An Examination of the 90- and 180-day Detention Laws, 83 S. Afr. L.J. 16 (1966). The Australian system is discussed in Friedrich & Sutherland, supra, at 694-97.

In France, the emergency powers of the government are specified by the so-called état de siège (state of siege), which is a product both of legislative activity and the general history of France. See Rossiter, supra, at 79. As it is presently used, état de siège may be traced to the birth of the Second Republic, and the enactment of the law of August 9, 1849, which gave the legislature power to declare état de siège in case of an imminent threat to the internal or external security of the nation. In the constitution of 1852, which established the Empire, the power was entrusted to the Emperor, with the Senate as an advisor. In the years that followed, the institution was used indiscriminately. In order to conform the institution to other changes in the constitutional laws adopted
We believe that civil law enforcement authorities and the courts should be granted additional powers not normally permitted in the criminal

in 1875, a new law on the subject was enacted on April 3, 1878 (the Third Republic), which provided that the état de siège "can only be declared in the event of imminent danger resulting from a foreign war or an armed insurrection." Rossiter, supra, at 82. The declaration may be made only by a "law"—that is, by legislative action—unless the legislature is not convened, in which event it must be convened within two days. In addition, the declaration must be limited in duration and designate the areas to which it is to apply. Id. at 88. The effect of the declaration, however, continued to be governed by the law of 1849, which provided that the powers of the police would pass to the military, that military courts could take jurisdiction "over crimes and offenses against the safety of the Republic," and authorized broad search, deportation, censorship, and confiscation powers. Id. at 83. The emergency power provisions in other continental countries are reviewed in Friedrich & Sutherland, supra, at 699-707 (Germany and Switzerland). The distinguishing characteristics of the civil law état de siège, then, are that it is thoroughly regulated by statute, utilizes a system of parliamentary supremacy, and involves only a transfer of power from the civil to the military establishment, as opposed to a more general expansion of power. Since it is a legislative creature, moreover, complaints about its use are determined by legislative action, not judicial action, as is the familiar means of review in common law countries.

Since 1958, authority has been granted for état d'urgence. In May of that year, before enactment of the new Constitution, the Parliament declared an état d'urgence for the entire territory of metropolitan France. Decree of May 17, 1958 [1958] J.O. 4734, [1958] D.L. 213. It was followed by the enforcement decree adopted on the same day by the Council of Ministers. The Minister of Interior was charged with the execution of the law. A separate decree of the same day extended the jurisdiction of courts-martial over all crimes against the internal security of the state, armed rebellion, or participation in a conspiracy to commit crimes, interference with road traffic, homicide, designated offenses against persons and property, and all offenses against national defense. The Ministers of Justice and National Defense were charged with the execution of the decree. A Tribunal de Cassation des Force Armees was established to review appeals from courts-martial. [1958] Recueil Sirey 174. The état d'urgence militaire apparently differs from état de siège in that the control of the armed forces and review of military proceedings is retained by civilian authorities under the Council of Ministers and the President of the Republic.

The état de siège is compared and contrasted with martial law-type powers in Friedrich & Sutherland, supra; Kelly & Pelletier, Theories of Emergency Government, 11 S.D.L. Rev. 42, 55-58 (1965); Radin, Martial Law and the State of Siege, 30 Calif. L. Rev. 634 (1942).

The institutions of emergency power in much of the free world are similar, at least to the extent of providing a basic statutory framework within which the powers are utilized under emergency conditions. We do not suggest, however, that they should be used, either generally or specifically, as a model upon which to build statutory schemes in this country for several reasons. The first is that the legal systems of other countries are not based upon constitutional principles identical to our own, with the result that the various statutory emergency schemes would not be reflective of the values and principles of the United States Constitution that must guide any statutory scheme in this country. In addition, the emergency institutions in each country are a product of both legislative judgments and its own idiosyncratic history. Finally, the relationship between emergency power and the more general requirements of each country's legal system is not sufficiently well understood on a broad comparative basis to facilitate the distillation of normative principles that could be utilized for the construction of a model system of emergency power in western political democracies, even if the Constitution permitted it.
process under non-emergency conditions. Once a decision is made concerning which powers are appropriate and permissible, and which are not, the statutory provisions should then be made equally applicable to military and civilian authorities.

III. Arrests, Curfews, Stops, Frisks, Searches and Seizures, and Documentation

A. Arrests

The law of arrest in many jurisdictions is inadequate to deal with the problems presented by civil disorders. Although the Constitution apparently permits a peace officer to arrest without a warrant whenever he has probable cause to believe that the person arrested has committed an offense, state law is frequently more restrictive. It commonly limits the power to arrest without a warrant for misdemeanors to breaches of the peace or offenses committed in the presence of an arresting officer, and some states place additional limitations upon the authority of an officer to arrest without a warrant for a felony. Several jurisdictions also deny police officers the authority to refrain from arresting persons who commit an offense in their presence or to release any person who

27. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 113 (1975); Henry v. United States, 361 U.S. 98, 100 (1959); LaFave, Warrantless Searches and the Supreme Court: Further Ventures Into the 'Quagmire,' 8 CRIM. L. BULL. 9, 20 (1972).


29. In Georgia, for example, it is provided that

if the offense is committed in his presence, or the offender is endeavoring to escape, or for other cause if there is likely to be a failure of justice for want of an officer to issue a warrant. GA. CODE ANN. § 27-207 (1972).

The law in North Carolina governing felony arrests was substantially the same, N.C. GEN. STAT. § 15-41 (1953), until recently changed to permit felony arrests upon probable cause. Id. § 15A-401(b) (1975).

30. See ARK. STAT. ANN. § 19-1705 (1968); ILL. ANN. STAT. ch. 125, § 82 (Smith-Hurd Supp. 1975); IND. STAT. ANN. § 18-1-11-7 (1974); IOWA CODE ANN. § 743.4 (Supp. 1975); NEB. REV. STAT. § 29.401 (1964); WI. STAT. ANN. § 62.09(13) (Supp. 1975). In the District of Columbia, failure to make an arrest for an offense committed in the officer's presence is a criminal offense. D.C. CODE ANN. § 4-143 (1973). See also State v. Lombardi, 8 Wis. 2d 421, 99 N.W.2d 829 (1959). A provision requiring that officers arrest anyone committing an offense in their presence can be particularly troublesome in dealing with minor disputes where an arrest may have racial overtones and in dealing with street gatherings. See U.S. PRES. COMM. ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 104-06 (1967); CIVIL DISORDERS REPORT 164-65. The problem is discussed in ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE URBAN POLICE FUNCTION 117-21 (1972).
has been arrested, while notice of authority and purpose is commonly required in statutory authorizations for forcible entry to make arrests. In addition, it has recently been proposed that nighttime arrests on private premises should be permitted only in special circumstances.

The arrest powers of law enforcement personnel should be clarified, and expanded where necessary, during serious civil disorders, and the discretion that is conferred should be the subject of explicit departmental rules and guidelines. In considering the power and latitude that should be entrusted to the police during a civil disorder, it is essential to keep in mind the nature of the situation the officers will confront. In any mass disturbance there will be numerous occasions where a person is apprehended for a curfew violation though the arresting officer knows that the person is not involved in the disturbance or any other criminal activity. Similarly, offenders will be brought to the stationhouse, where

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31. See W. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 172-74 (1965); STANDARDS RELATING TO PRETRIAL RELEASE 31-38.

32. See, e.g., 18 U.S.C. § 3109 (1970), which provides that an "officer may break open any outer or inner door or window of a house . . . to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance . . ." The state statutes are collected in ALI PRE-ARRAIGNMENT CODE Appendix XI. All but three of the statutes follow the wording of section 3109 closely. Id. at 312. Some jurisdictions provide authority for omission of the warning in specified types of emergencies by statute, see, e.g., N.Y. CRIM. PROC. LAW § 120.80(4) (1971), or court decision, see People v. Maddox, 46 Cal. 2d 301, 294 P.2d 6 (1956); People v. Martin, 45 Cal. 2d 755, 290 P.2d 855 (1955); People v. Baca, 197 Cal. App. 2d 362, 17 Cal. Rptr. 204 (1961); People v. Ker, 195 Cal. App. 2d 246, 15 Cal. Rptr. 767 (1961), aff'd 374 U.S. 23 (1963); People v. Macias, 39 Ill. 2d 208, 234 N.E.2d 783 (1968), cert. denied, 393 U.S. 1066 (1969); People v. Floyd, 26 N.Y.2d 558, 260 N.E.2d 815 (1970); State v. Young, 176 Wash. 2d 212, 455 P.2d 595 (1969). Even in jurisdictions which follow the emergency rule, however, courts have been reluctant to dispense with knock and announce requirements. See, e.g., People v. De Santiago, 71 Cal. 2d 18, 453 P.2d 353, 76 Cal. Rptr. 809 (1969); People v. Gualindì, 21 Ill. App. 3d 992, 316 N.E.2d 195 (1974); State v. Beason, 534 P.2d 44 (Wash. 1975). But in other jurisdictions, the necessity that will justify omission of notice of authority and purpose is very narrow, for example, where "there is reasonable cause to believe that giving of such notice would present a clear danger to human life." N.C. GEN. STAT. § 15A-401(e) (1) (c) (1975). But cf. State v. Watson, 19 N.C. App. 160, 198 S.E.2d 185 (1973). Congress has recently repealed the broad authority previously given to dispense with notice of authority and purpose in the District of Columbia. Pub. L. No. 93-481, 88 Stat. 1455 (October 26, 1974). See generally Note, No-Knock and the Constitution: The District of Columbia Court Reform and Criminal Procedure Act of 1970 (A Critique and Proposed Alterations), 55 MINN. L. REV. 871 (1971); Note, Announcement in Police Entries, 80 YALE L.J. 139 (1970).

33. See ALI PRE-ARRAIGNMENT CODE § 120.6(3), quoted at note 40 infra. See also United States v. Mapp, 476 F.2d 67, 73-74 (2d Cir. 1973) (warrantless nighttime entry and arrest justified by exigent circumstances); Dorman v. United States, 435 F.2d 385, 391-94 (D.C. Cir. 1970); cf. URCP 222 (citations); FED. R. CRIM. P. 4(b)(1) (warrants).
their demeanor, background, and absence of a criminal record will make it clear to a precinct officer or prosecutor that it is unlikely that any criminal conduct would have occurred in the absence of the opportunity provided by the disorder, and that no future criminal activity is likely to occur. If processed, such a case will probably be nolle prossed at a later time, and if not dropped, the defendant will probably be acquitted, or placed on probation if convicted. Existing requirements that police officers arrest everyone committing an offense in their presence, and prohibitions against the release of arrested persons without a judicial imprimatur, even where new evidence has established that probable cause does not exist, reflect an understandable concern that broadened discretion might encourage harassment, discriminatory enforcement, or corruption which would be invisible to the courts. However, in a civil disorder, the spontaneity, limited duration, and number of people involved, when combined with the probability that police will be functioning in groups, rather than individually, greatly reduce the danger of harassment or corruption. The need for discretion is much greater because of the number of people involved, the finite capacity of jails even when backup confinement facilities are used, and the fact that many, if not most, people arrested have not in the past and will not in the future violate the criminal law. Finally, there may be no need to take persons into custody or hold them to answer a criminal charge if there is no likelihood that prosecution will occur.

Under these circumstances, we believe that an officer should not be required to arrest if he thinks that an admonishment will accomplish the law's objectives, and that no useful purpose will be served by taking the person into custody. He should also be authorized to issue a citation in


35. See notes 232-40 infra and accompanying text.

36. As Professor LaFave has pointed out in a more general context, "[The law which defines when a police officer can make an arrest has developed with almost no
lack of arrest, thus permitting the offender to remain at liberty, but still accomplishing the required documentation, and avoiding the necessity of leaving the streets where his presence may be needed. After initial arrest, an officer should also be authorized to release the arrestee by the issuance of a citation if he believes that continued custody is unnecessary, and to make the release unconditional if he determines that there is no longer reasonable cause to believe that the person arrested committed the offense. The arrestee should be permitted to forfeit collateral for those offenses for which no useful purpose will be served by court appearance. In addition, prosecutors should screen those detained by the police and release those who pose no danger of committing further offenses during the disorder. In short, the only offenders who should be brought before a judge are those who have not been released by the exercise of police or prosecutorial discretion. Control over the exercise of this discretion should be accomplished by promulgation of rules and regulations to guide its exercise.

The arrest powers of the police during civil disorders should also include the authority to arrest without a warrant for any offense when

37. Few existing statutes have the desired flexibility. Those which authorize release on citation frequently exclude all felonies. See, e.g., CAL. PENAL CODE § 853.6 (West Supp. 1975); N.C. GEN. STAT. § 15A-302 (1975). Some reform proposals would require issuance of a citation for certain minor offenses, which would also be undesirable in a serious civil disorder. See STANDARDS RELATING TO PRETRIAL RELEASE §§ 2.1, 2.2, 2.3(a); NAC STANDARDS, CORRECTIONS § 4.3. See also NAC STANDARDS, COURTS § 4.2; NAC STANDARDS, POLICE §§ 1.3, 4.3; URCP 221a. A highly desirable degree of flexibility would be provided under section 120.2 of the ALI Pre-Arraignment Code, which would permit the issuance of a citation in lieu of arrest or after arrest subject to regulations. The Riot Commission recommended an expanded use of citations and summons. CIVIL DISORDERS REPORT 189.

38. The ALI Pre-Arraignment Code, for example, provides, in pertinent part, as follows:

An officer shall promptly release from his custody any person who has been arrested without a warrant, if at any time prior to the appearance of such person at a police station the officer determines that he no longer has reasonable cause to believe that the arrested person has committed a crime for which such arrest is authorized. Id. § 120.9(2).

It also provides that

If the police officer concludes that there is no reasonable cause to believe that the arrested person has committed a crime, and no indictment, information or complaint charging such person with a crime has been returned or issued, the police officer shall order the arrested person released forthwith. Id. § 130.2 (1)(a).

See also CALIF. PENAL CODE § 849(b) (West Supp. 1975); Feeney, Citation in Lieu of Arrest: The New California Law, 25 VAND. L. REV. 367 (1972).

39. See notes 232-40 infra and accompanying text.
probable cause exists. Strong reasons may also be present, where probable cause for arrest exists, for permitting an officer to enter a private dwelling at night without a warrant, and for dispensing with the normal requirement of notice of authority and purpose in a broader range of cases than would be justifiable under normal conditions.  

More serious problems are presented if serious consideration is given to enlarging the powers of police to arrest when they have no probable cause to believe that any offense has been committed, but have ample reason to believe that one or more persons are about to commit an offense. Should an officer have the power to arrest a person during a civil disorder when there is reasonable cause to believe that an offense will soon be committed? Obviously, such power does not normally exist

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40. Some latitude in this regard would be permitted if the proposals of section 120.6 of the ALI Pre-Arraignment Code were enacted:

(2) **Entry Without Prior Demand.** The demand to be admitted required by subsection (1) [notice of authority and purpose], need not be made, if the officer has reasonable cause to believe that a person whom he is authorized to arrest for a felony or a misdemeanor is present on such premises, and that if such demand were made,

(a) the person to be arrested would escape; or

(b) the officer would be subject to harm in effecting the arrest; or

(c) any person would be harmed, or evidence destroyed, or property damaged or lost.

(3) **Special Restrictions on Arrests at Night.** No law enforcement officer shall seek to enter any private premises in order to make an arrest between 10 p.m. and 7 a.m. unless

(a) he is acting under a warrant of arrest and the warrant authorizes its execution during such hours, or

(b) he has reasonable cause to believe that such action is necessary to prevent

(i) the escape of a person to be arrested for a crime involving serious bodily harm or the threat or danger thereof, or

(ii) harm to any person, destruction of evidence, or damage to or loss of property.

The problem with this proposal in the context of a serious disorder is the necessity that the officer have "reasonable cause to believe," defined elsewhere as "a basis for belief in the existence of facts which, in view of the circumstances under and the purpose for which the standard is applied, is substantial, objective, and sufficient to satisfy applicable constitutional requirements." *Id.* § 120.1(2). Unless "reasonable cause to believe" is watered down to the point where it is less restrictive than the traditional meaning of "probable cause," see Beck v. Ohio, 379 U.S. 89 (1964); Draper v. United States, 358 U.S. 307 (1959), there will be frequent cases where there is probable cause to arrest and probable cause to believe that the person to be arrested is within a particular building, but less than probable cause to believe that entry at night is necessary to prevent escape, or that entry with notice would subject the officer to harm. In the fluid conditions of a serious disorder, it seems more appropriate that the necessity of probable cause be reserved for the issues of whether the person to be arrested has committed a crime and is within the premises, and the more lenient standard of "reasonable suspicion" be utilized for the qualifying circumstances that will permit entry at night or without notice. See, e.g., ALI Pre-Arraignment Code § 110.2; ABA Standards Relating to Pretrial Release § 2.2; NAC Standards, Corrections § 4.3; NAC Standards, Courts § 4.2; URCP 211(a).
for good reasons. The law usually does not punish intent alone; conduct must at least reach the level of an attempt, endeavor, solicitation, or conspiracy before the criminal law is violated. The police should not have authority to arrest for conduct which, if not innocent, is at least not criminal. If such authority did exist, presumably the arrested person would be entitled to immediate release, because the police would have an obligation to bring him before a magistrate who would in turn be required to release him in the absence of a charge of violation of law. Despite the policeman's duty to prevent crime, his constitutional power to restrict liberty in advance of criminal conduct is limited to the power to stop and frisk, and then only in certain circumstances. These theoretical objections seem equally valid during emergency conditions.

There are also practical objections to restricting liberty in advance of criminal conduct. The risk of arresting the innocent is always present, but the degree of risk is small when the officer has observed the defendant in flagrante delicto, considerable when he arrests without a warrant upon probable cause, and extreme when he must estimate the likelihood, not that an offense has been committed and that the arrestee committed it, but that he is about to do so. Too many innocent persons would undoubtedly be drawn into a net of these dimensions. It is even less defensible to arrest persons where there is no probable cause to believe that they have committed or are about to commit acts prohibited by law.

It could, however, be argued that an exception should be made for civil disorders. Certainly the problem is greater in magnitude when large groups of people are milling around and there is a common design to obstruct the operation of the government. In such a situation, there may be only a brief and ambiguous interval between a demonstration protected by the first amendment and an unlawful disturbance which exceeds the suppression capability of the local police. There will also be


43. This is the evil that was apparently present in the arrests during the 1971 Washington May Day demonstrations. See Sullivan v. Murphy, 478 F.2d 938 (D.C. Cir.), cert. denied, 414 U.S. 880 (1973).

44. The sophistication of the problem is suggested by the language of the 1972 Uniform Public Assembly Act:

§ 16. [Management of Public Assembly]
occasions where law enforcement officers may have a good faith belief that it is necessary to take persons into custody and detain them in order to restore order in a strife-torn city, but have no probable cause to believe that an offense has been committed.

Nevertheless, we think it unnecessary, unwise, and unconstitutional to provide such broad powers to the police. The practical problems faced by police in a civil disturbance can be dealt with more effectively, and with less danger to civil liberties, by expanding the range of conduct which is unlawful during such an emergency. Through such a process, arrest powers will be expanded automatically as the range of conduct declared unlawful is itself expanded. In substance, a decision to broaden the coverage of the criminal law in civil disorders means that many of the decisions concerning whether persons should be taken into custody for conduct not ordinarily punishable are shared by the legislature rather than depending entirely upon the discretion of the officer on the street. Recent statutes and proposals—for example, prohibiting possession of incendiary devices,\textsuperscript{45} and making it a crime to refuse to vacate certain premises\textsuperscript{46} or to disperse when ordered to do so—reflect this approach.

(a) Consistent with terms of the permit, a person granted a permit to hold a public assembly is entitled to determine the order of events of the public assembly.

(b) The political subdivision shall take all necessary steps by the provision of necessary personnel, equipment, materials, and facilities to assure freedom to exercise rights of free speech and peaceable assembly and prevent persons from interfering with or disrupting the conduct of a public assembly for which a permit has been issued.

(c) If the highest ranking law enforcement officer in charge determines that a public assembly for which a permit has been granted is not proceeding as authorized and that there is a substantial impairment of normal use of a public place not authorized by the permit or that there is imminent or existing danger that substantial harm to the public health or safety will occur, he shall marshal available resources to obtain compliance with the permit. He shall take appropriate steps to control any interference with or disruption of the conduct of the public assembly. He shall communicate with representatives of the person holding the public assembly to obtain their assistance. If, after taking these measures, the highest ranking law enforcement officer in charge determines that the public assembly cannot continue as authorized because of an imminent or existing danger that substantial harm to the public health or safety will occur, he shall limit the public assembly or otherwise impose conditions upon its conduct to the extent reasonably necessary to remove the danger. If the emergency measures taken and those that may reasonably be taken do or would not remove the imminent or existing danger, the highest ranking law enforcement officer in charge may postpone or cancel the public assembly and, if necessary, disperse the participants and bystanders.

(d) If a public assembly is held for which no permit has been granted and which substantially harms public health or safety or substantially impairs normal use of a public place, law enforcement and health officers shall take only those steps reasonably necessary to remove the substantial harm or impairment. However, if necessary to remove an imminent or existing danger of substantial harm to the public health or safety, the highest ranking law enforcement officer in charge may cancel the public assembly and disperse the participants and bystanders. 13 U.L.A. 481, 494-95.

\textsuperscript{45} See note 10 \textit{supra}.

\textsuperscript{46} See, e.g., \textsc{La. Rev. Stat. Ann.} § 328(c) (1974) (prohibiting failure to leave
The general law of conspiracy, rarely invoked in civil disorders, provides an additional basis for criminal charges.\footnote{47}

B. Curfews

Of particular importance is authority to impose curfews—prohibitions against mere presence on the streets in designated areas during certain hours for everyone not falling within limited exceptions.\footnote{48} Recent state statutes have uniformly granted such authority.\footnote{49} The imposition of a curfew may be ineffective as a technique to dissuade rioters from pursuing their unlawful objectives, but it may encourage citizens not involved in a disturbance to remain at home. If innocent bystanders are on the streets, they may be indistinguishable from potential rioters looking for others with whom to band together for unlawful purposes, and thus contribute to the problems faced by the police in their attempts to restore order. In addition, a curfew provides an instant basis for arrest of persons who are in the proscribed area either afoot or in vehicles,\footnote{50} an easily provable offense in the event of trial, and should

\footnote{47. Some disorders do not arise out of agreements to commit unlawful acts, but others suggest the possibility that the law of conspiracy may have been violated either before or during the disorder.}
\footnote{48. See generally Dobrovir 5-11; Frese, The Riot Curfew, in The Law of Dissent and Riots (M. Bassiouni ed. 1971) (reprinted from 57 Calif. L. Rev. 450 (1969)) (describing the varied uses of the curfew in the disorders of the past decade); National Security Interest and Civil Liberties 1304-07; Comment, Martial Law, 42 S. Cal. L. Rev. 546, 556-59 (1969); Note, Judicial Control of the Curfew, 77 Yale L.J. 1560 (1968) (detailing the criticisms that may be leveled against the use of a curfew as a riot control measure). The tactical use of the curfew is described in R. Applegate, Riot Control—Material and Techniques 43, 64-65 (1969); R. Momboisse, Riots, Revolts and Insurrections 406-07 (1967).
\footnote{49. A typical statute, for example, provides for}
\footnote{50. The arrest would, of course, be based upon the violation of the curfew, which is
justify a search incident to an arrest.\footnote{61}

Curfew orders, as well as curfew enabling statutes and ordinances, have been challenged on the grounds of inadequate notice,\footnote{62} interference with the constitutionally protected right to travel,\footnote{63} and infringement of first amendment rights.\footnote{64} The courts, however, have generally denominated a misdemeanor. See, e.g., FLA. STAT. ANN. § 870.048 (Supp. 1974); MD. ANN. CODE art. 41, § 15(B)(g) (1971); N.M. STAT. ANN. § 40A-20-4.5 (1972); OKLA. STAT. ANN. tit. 21, § 1321.6 (Supp. 1974). See Limits on Riot Control 99.

The strict enforcement of curfew laws has also been criticized. Thus, it has been observed that police in the Washington, D.C. riot of April, 1968, “made use of the curfew as a mass arrest device for controlling the civil disorder and charged defendants with curfew [violations on a] wholesale [basis] because this was a convenient way of clearing the streets.” \cite{Dobrov民 6. See also Note, supra note 48.}

51. See United States v. Robinson, 414 U.S. 218 (1973); Gustafson v. Florida, 414 U.S. 260 (1973); State v. Dobbins, 277 N.C. 484, 178 S.E.2d 449 (1971); Ervin v. State, 41 Wis. 2d 194, 163 N.W.2d 207 (1968). \textit{But cf.} People v. McKelvy, 23 Cal. App. 3d 1027, 100 Cal. Rptr. 661 (1972); Leven v. United States, 260 A.2d 681 (D.C. App. 1970) (invalidated search that took place following a curfew arrest, but which was conducted after defendant had been escorted to precinct station); ALI PRE-ARRAIGNMENT CODE § 230.2, at 522 (prohibiting searches incident to an arrest for offenses not justifying the imposition of confinement, traffic offenses, or other misdemeanors, “the elements and circumstances of which involve no unlawful possession or intentionally or recklessly dangerous conduct”).

Prior to Robinson and Gustafson, the authorities were divided, but the majority probably would have precluded a full search following arrest for a traffic, petty, non-violent, or non-possessory misdemeanor offense. \textit{Id.} at 523; People v. Marsh, 20 N.Y.2d 98, 228 N.E.2d 783, 281 N.Y.S.2d 789 (1967). Since Robinson and Gustafson, state courts have split on whether, under state law, such a search should be permitted. See, e.g., People v. Brisendine, 13 Cal. 3d 528, 531 P.2d 1099, 119 Cal. Rptr. 315 (1975); State v. Kaluna, 55 Hawaii 361, 367, 520 P.2d 51, 57 (1974) (refusing to follow Robinson); State v. Florance, 527 P.2d 1202, 1209-10 (Ore. 1974) (collecting authorities following Robinson). See also Hughes v. State, 530 P.2d 1052 (Okla. Crim. App. 1975). A Colorado court has suppressed as evidence hashish found in the clothing of a minor arrested for a curfew violation under non-emergency conditions. \textit{In re People}, 32 Colo. App. 79, 506 P.2d 409 (1973).

In a state which under normal conditions precludes a search incident to an arrest for minor offenses where “exceptional circumstances” are absent, there is a special need for broader authority during some kinds of serious civil disorders. In riots such as those that occurred in 1967 and 1968, it may be virtually impossible to determine which curfew violators are armed and dangerous. See Part I 582-85.

52. See, e.g., State v. Boles, 5 Conn. Cir. 22, 240 A.2d 920 (1967) (where it was held that notice by radio, wire-service, and newspaper was sufficient). Most statutes providing for curfew imposition require adequate notice. See note 49 supra.

53. See, e.g., United States v. Chalk, 441 F.2d 1277, 1283 (4th Cir.), \textit{cert. denied}, 404 U.S. 943 (1971); Glover v. District of Columbia, 250 A.2d 556 (D.C. App. 1969). Such attacks have generally been based upon Aptheker v. Secretary of State, 378 U.S. 500 (1964). The fact that these attacks have failed is not surprising when it is considered that in \textit{Zemel} v. \textit{Rusk}, 381 U.S. 1 (1965), the Supreme Court observed that the right to travel may be infringed in times of necessitous emergency. \textit{Id.} at 15.

CIVIL DISORDERS

upheld the public authority to impose such restraints during a civil disorder.\textsuperscript{55}

C. Protective Zones

A variation of the curfew concept is reflected in proposals which would authorize an executive official to establish protective or "public safety zones" into which entrance would be prohibited. These proposals are designed to ameliorate some of the problems posed by the inability to control large crowds—which may include members who contemplate violence or "peaceful" violations of law such as blocking traffic on streets and bridges or ingress and egress to buildings—and particularly the difficulty distinguishing the potential law breaker from the casual observer. Some jurisdictions have sought to deal with these problems by statutes which authorize law enforcement officers to order a crowd to disperse,\textsuperscript{68} but the technique both threatens the right of citizens to assemble peacefully and is difficult to enforce effectively.

\textsuperscript{55} The approach that has been taken by the courts to curfews imposed during a civil disorder is reflected in Ervin v. State, 41 Wis. 2d 194, 163 N.W.2d 207 (1968), where the court stated that

[i]t]he purpose and result of the mayor's curfew proclamation was not to destroy freedom of movement, but to restore it . . . . The temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority. To argue contrariwise is to give to a mob a power to oppress that under our Constitution is not given to the state itself. The Constitution protects against anarchy as well as tyranny. \textit{Id.} at 201-02, 163 N.W.2d at 211.


\textsuperscript{56} \textit{See}, e.g., FLA. STAT. ANN. § 870.04 (Supp. 1975) (authorizing an order to disperse "any number of persons . . . unlawfully, riotously or tumultuously assembled"); W. VA. CODE ANN. § 61-6-1 (Supp. 1975) (imposing the duty upon mayors, police, and sheriffs "to go among, or as near as may be with safety, to persons riotously, tumultuously, or unlawfully assembled, and in the name of the law command them to disperse").
The concept of a "protective zone" is designed to alleviate these difficulties. Under one such proposal, police and fire officials would be authorized to establish and maintain temporary public safety zones with reasonably identifiable boundaries whenever it appeared that a need existed to provide access for fire, police, ambulance, utility repair, or other emergency vehicles; to ensure adequate space and freedom of movement for the prompt performance of official duties at the scene of any crime, fire, explosion, wreck, or other emergency situation; or to facilitate the movement of pedestrian or vehicular traffic. Officials could close a zone to vehicular or pedestrian traffic, permit access only to authorized persons or vehicles, order persons and vehicles to leave public areas within the zone within a reasonable time, or prohibit three or more persons from congregating within a zone, in any manner reasonably calculated to communicate the boundaries of the zone and the conditions imposed. Presence within a zone in violation of any condition imposed would be a minor offense, and the act of entering the prohibited area would constitute an offense authorizing arrest without a warrant. Any motor vehicle found within the zone could be impounded, and any vehicle abandoned within a zone would be subject to forfeiture. This concept of an executive authority to limit freedom of movement, even if pursuant to statutory authorization, obviously raises first amendment questions, but the curfew decisions would seem to be ample precedent for sustaining such an approach to crowd control during serious disorders.


57. A bill incorporating these provisions to authorize the temporary establishment of protective zones in the District of Columbia was drafted in 1971 within the Department of Justice, but was apparently never introduced in Congress. See also KAN. STAT. ANN. § 48-1801 (Supp. 1974) (authorizing the "designation of specific zones within the area in which occupancy and use of buildings and ingress and egress of persons and vehicles may be prohibited or regulated"); MD. ANN. CODE art. 41, § 15B(c) (1971); TEX. REV. CIV. STAT. art. 5890e, § 3 (Supp. 1974) (authorizing the "designation of specific zones within the area in which, under necessitous circumstances, the occupancy and use of buildings and vehicles may be controlled" and the "control of the movement of persons or vehicles into, within, or from those designated areas"); Riot Control Legislation 160-61. See note 10 supra and accompanying text. Any such provision must contain sufficient guidelines and standards to ensure that it cannot be used to interfere with the exercise of first amendment rights. Washington Mobilization Comm. v. Cullinane, 400 F. Supp. 186 (D.D.C. 1975).

58. See notes 48-55 supra and accompanying text.
D. Stops and Frisks

During a civil disorder, one of the most important tasks of law enforcement personnel will be to prevent armed persons in the area of the disorder from joining with others to engage in unlawful conduct. Thus, there may be on occasion a legitimate need for an expanded power to stop and frisk in the area of the riot. The opinions of the Supreme Court in the stop-and-frisk area provide a substantial basis for such authority.

In Terry v. Ohio, the Court sustained the admission into evidence of a pistol revealed as the result of the stopping and the patting down of the outer garments of a suspect who had been surreptitiously "casing" a jewelry store. On its facts, the decision is limited to a stop and frisk where the officer had reason to believe that he was dealing with an armed and dangerous individual and had a reasonable ground to suspect that "criminal activity was afoot." In Adams v. Williams, a stop and frisk of a person suspected of possessing narcotics was sustained where police had acted on the basis of a tip from an informant—whose reliability had not been established—that the suspect was armed. Adams suggests that the quality of evidence needed to justify a stop and frisk of someone who is suspected of being about to commit an offense will not be subjected to rigorous judicial scrutiny. The language of both Adams and Terry is broad enough to permit a stop and frisk of someone who is reasonably suspected of being armed and dangerous and of having committed an offense at some earlier time, and perhaps the stopping of a person who is reasonably suspected of having been present at the time of an offense. It probably does not justify the stopping of a person who is not reasonably suspected of having committed, being about to commit, or having been present at the commission of an offense, nor the frisk of a person when there is no reason to believe that he may be armed.

59. See generally Limits on Riot Control 100-03; Riot Control Legislation 166.
60. 392 U.S. 1 (1968).
61. Id. at 22-23, 30.
64. See ALI Pre-Arraignment Code § 110.2.
The use of a stop and frisk type power during a civil emergency was adjudged in *United States v. Williams*, a district court case which arose during the Wounded Knee disturbance in 1973. The stopping occurred as the defendant approached a roadblock outside the village of Wounded Knee. Williams was detained and informed that his car would be searched, although he refused to give his consent and was not free to leave the scene without submitting to the search. FBI agents removed the contents of his car and spread them upon the highway, discovering in the process a small amount of marijuana. The defendant moved to suppress the marijuana in the prosecution which followed. The district court held that a stop and frisk was a reasonable procedure under the emergency conditions present at Wounded Knee but that the scope of the search of this defendant's belongings was too broad. The roadblock was justified by the occupation of the village and the violence that had been associated with it, and the need to protect the officers and others in the general area from the threat of physical danger. The danger posed by efforts to resupply the insurgents also gave the officers authority to conduct "limited searches for the purpose of denying the occupants of Wounded Knee those supplies that were vital to the continuance of the insurrection"; however, it did not justify the extensive search of the defendant's car. When the FBI agents at Wounded Knee produced no evidence to justify probable cause to arrest the defendant, "he should have been allowed to leave the roadblock without the total search he experienced."

In reaching this conclusion, the court relied upon the airport search cases which have indicated that a suspect may avoid a stop and frisk procedure by withdrawing from his attempt to board an aircraft. The analogy is not, however, altogether persuasive. In the airport search cases, the object is to prevent weapons or explosives from being taken aboard airplanes; when a suspect turns away that object is achieved. In the Wounded Knee type situation, on the other hand, the object is to prevent ammunition and supplies from reaching the insurgents, which

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66. 372 F. Supp. 65 (D.S.D. 1974). Although *Williams* did not as such involve a stop and frisk, the court analyzed the roadblock search on a stop-and-frisk basis.
67. *Id.* at 66. Specifically, the court observed that the existence of a general insurrection or mass riot has an effect upon the reasonableness requirements of the Fourth Amendment. A riot is a situation that presents a clear danger to the populace and the police themselves and requires the unusual exercise of police power which courts should not easily or lightly interfere with. *Id.*
68. *Id.* at 67.
69. *Id.*
70. *United States v. Miner*, 484 F.2d 1075 (9th Cir. 1973); *United States v. Davis*, 482 F.2d 893 (9th Cir. 1973). See note 89 *infra.*
the court held to be permissible as a basis for the roadblock and limited stop and frisks. The court itself noted, however, that the roadblocks had not been successful in stemming the flow of these items. If the permissible object of the procedure was to intercept ammunition and weapons, then it would be difficult to accomplish without searching automobiles stopped at the roadblock. One would hardly anticipate that the driver would emerge with those items on his person. The court's own logic would seem to support the proposition that the permissible purpose of the search should have justified a search of the car, though not necessarily as broad as the one actually conducted.

In a civil disorder where a curfew is in force, there may be little need for any stop and frisk, inasmuch as the mere presence of the person on the street constitutes the offense that justifies the arrest and the search. When a curfew is not in force, however, the luxury of the lengthy surveillance which characterized Terry, or even the uncorroborated tip of an informer as in Adams, will rarely be possible, and, depending upon the conditions, there may be a need to stop anyone found on the street in a riot area and perform a limited search of his outer garments. On occasion there may also be a reasonable suspicion that the person frisked is armed and dangerous, and has committed or is about to commit a crime. In other circumstances, there may not be such a factual predicate, except to the extent that the officer suspects everyone on the public streets in the area of the riot of possible criminal conduct. One recent statute faced these problems directly and authorized an officer to stop and frisk any person in an area contiguous to a riot when he has reasonable grounds to believe that the person is, or may become, unlawfully involved in the riot. While the language of the statute is inescapably broad, it seems nevertheless to be within the bounds of the Constitution, inasmuch as the rationale of Terry suggests that the limited intrusion by the stop and frisk may be

71. See notes 67-68 supra and accompanying text.
73. A similar situation was present in United States v. Chalk, 441 F.2d 1277 (4th Cir.), cert. denied, 404 U.S. 943 (1971), where an auto was stopped during a curfew. When the driver stepped out of the auto, an officer saw the butt end of a shotgun, and then proceeded to pull the stock and trigger mechanism of a twelve-gauge shotgun from the floor behind the front seat. The search was upheld, as was a subsequent search that uncovered other, similar items. 441 F.2d at 1279-80. The facts in Chalk are, of course, distinguishable from those in Williams, since in the latter case the officers did not observe weapons or ammunition in the auto as the defendant alighted.
74. See note 51 supra and accompanying text.
75. See Limits on Riot Control 100, 102-03.
justified by the significant government interest sought to be vindicated.\(^7\)

In the context of the civil disorder, the indignity of the stop and frisk seems minor compared to the importance of assuring that armed persons are not on the streets.\(^8\) In a sense, it is a lesser restriction than a curfew, which subjects an unarmed person on the streets to arrest, a potentially broader search, and imprisonment. The intrusion is certainly far less than the more lengthy detention of persons suspected of contributing to the disorders permitted by \textit{Moyer} and \textit{Sterling}.\(^9\)

\section*{E. Searches and Seizures}

The fourth amendment's provisions, which prohibit unreasonable searches and seizures, declare that warrants shall not issue except upon probable cause, and require particularity in the description of the premises to be searched and objects to be seized,\(^8\) have resulted in something less than an unambiguous line of Supreme Court interpretations.\(^8\) The

\begin{quotation}
\begin{footnotesize}
\footnotesize{77.} 392 U.S. at 20-24. That the North Carolina statute does not simply codify \textit{Terry} is plain, inasmuch as it allows the officer to make a search of any belongings in the possession of the individual even though he may not be endangered himself, N.C. GEN. STAT. § 14-288.10(a) (1969), a procedure that would seem to contravene the holding in \textit{Sibron} v. New York, 392 U.S. 40, 64-66 (1968). Although it may be argued that the North Carolina scheme is thus too broad and is, therefore, unconstitutional, the language of the Fourth Circuit in \textit{United States v. Chalk}, upholding the constitutionality of the other aspects of the North Carolina legislation, suggests that it is a permissible exercise of legislative authority, 441 F.2d at 1280, at least where it can be shown that it was necessary to achieve the purpose of the stop. See notes 66-73 supra and accompanying text.

\footnotesize{78.} Thus, it has been suggested that the police should be able to "stop and question people in the riot area fairly freely." \textit{Limits on Riot Control} 100-03. See note 55 supra.

\footnotesize{79.} \textit{See} Part I 636-55. See notes 241-60 \textit{infra} and accompanying text.

\footnotesize{80.} U.S. CONST. amend. IV:

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

\footnotesize{81.} Thus, in \textit{Coolidge v. New Hampshire}, 403 U.S. 443 (1971), the Court observed that "[t]he decisions of the Court over the years point in differing directions and differ in emphasis. No trick of logic will make them all perfectly consistent." \textit{Id.} at 483. Much of the confusion is the result of a failure to determine authoritatively and consistently whether the warrant clause and the reasonable search clause are dependent or independent of each other. \textit{Player}, \textit{Warrantless Searches and Seizures}, 5 GA. L. REV. 269 (1971). As Professor Bacigal has pointed out,

[one theory views the clauses as dependent and complementary; thus making warrantless searches unreasonable except in emergency situations when resort to a magistrate is impossible. The second theory views the warrant and reasonableness clauses as independent and severable; thus searches without a warrant are judged solely by the standard of reasonableness, and the failure to obtain a warrant is not relevant. Bacigal, \textit{The Emergency Exception to the Fourth Amendment}, 9 U. RICHMOND L. REV. 249, 257 (1975).]}
\end{footnotesize}
\end{quotation}
exact relationship between the warrant clause and the clause assuring security from unreasonable searches and seizures is only one area in which definitive decisions have not yet been rendered.\footnote{82} Certain principles do, however, seem to be reasonably clear. Although a search warrant supported by probable cause should, in theory, be the normal method of proceeding,\footnote{83} a search without a warrant may be reasonable where valid consent has been procured,\footnote{84} where it is incident to a valid arrest,\footnote{85} where a search for an offender or weapons was performed while in "hot pursuit,"\footnote{86} where there is probable cause for believing that a moving automobile or one which is likely to be moved contains matter subject to seizure,\footnote{87} where what are often called "inventory searches" are undertaken,\footnote{88} and in certain other unusual situations.\footnote{89} The the-

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\footnote{82}{See Irons, The Burger Court: Discord in Search and Seizure, 8 U. Richmond L. Rev. 433 (1974); LaFave, supra note 27.}


\footnote{86}{Warden v. Hayden, 387 U.S. 294, 298-300 (1967).}


\footnote{89}{These situations include border searches, United States v. Brignoni-Ponce, 95 S. Ct. 2574 (1975); United States v. Ortiz, 95 S. Ct. 2585 (1975); Almeida-Sanchez v. United States, 413 U.S. 266 (1973); regulatory searches of licensed premises, United States v. Biswell, 406 U.S. 311 (1972); welfare inspections, Wyman v. James, 400 U.S. 309 (1971); scientific tests and intrusion into the body, Cupp v. Murphy, 412 U.S. 291 (1973); Schmerber v. California, 384 U.S. 757 (1966); custodial searches, ALI PRE-ARRAIGNMENT CODE § SS 230.6; United States v. Edwards, 415 U.S. 800 (1974); plain

The most prominent contemporary example of an exigent situation which has given rise to a limited type of search that need not comply with the usual warrant requirements involves so-called "airport searches" conducted in an effort to preclude the hijacking of commercial aircraft. The need for such security measures has been described as follows:

Airplane hijacking, the unlawful seizure and diversion of aircraft to unscheduled destinations, is a contemporary phenomenon with potentially catastrophic consequences. The high incidence of air piracy—jeopardizing passengers' lives, threatening commercial airlines' personnel and property, wreaking substantial economic loss upon both, and inhibiting citizens' exercise of the constitutional right to travel—has demonstrated civil aviation's need for security measures. United States v. Cyzewski, 484 F.2d 509, 511 (5th Cir. 1973), cert. denied, 415 U.S. 902 (1974).

In response to this need, security measures have been adopted for all commercial flights, which are designed to preclude a would-be hijacker from taking weapons or explosives aboard an aircraft.

The constitutionality of the measures has produced considerable decisional authority. The basic issue has been whether the search and seizure rules of the fourth amendment will permit a warrantless search for air security purposes. As a very broad proposition, the courts have clearly concluded that the normal airport search need not comply with the warrant requirements. This view is most aptly illustrated by United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971), which was the first of the so-called "airport search" cases, where two passengers had been identified as meeting the "profile" of a potential hijacker, had activated an electronic magnetometer metal detection device, and had failed to produce adequate identification upon request. When requested by two United States Marshals, the two again activated the magnetometer, and one disclosed that an erroneous name appeared on his ticket. The passengers were then escorted to a private area, where a pat down revealed "a hard object about 4 inches wide, 6 inches long, and three-quarters of an inch deep" under one man's clothing, which turned out to be narcotics instead of a weapon. When the two sought to suppress the narcotics so discovered in a subsequent prosecution, the court held that the procedures utilized met all fourth amendment requirements. It specifically approved use of the magnetometer, id. at 1085-86, and concluded that the pat down ("frisk") was within the requirements of Terry v. Ohio. The court referred to the language in Terry indicating that the frisk could be made for the purpose of protecting the officer making the search and "others" from possible danger, id. at 1097, and observed that

[j]e know that the frisk is conducted in private with as much courtesy as the circumstances permit and that those who are frisked and allowed to go on their way generally welcome the protective measures taken in their behalf rather than resent them. The substantial interest in preserving the integrity and safety of air travel by preventing hijacking is obvious. In light of the circumstances, a 6% danger of arms suffices to justify a frisk. Id.

Terry has been followed with similar results in many other cases. United States v. Clark, 498 F.2d 535 (2d Cir. 1974); United States v. Dalpiaz, 494 F.2d 374 (6th Cir. 1974); United States v. Crain, 485 F.2d 297 (9th Cir. 1973); United States v. Skipwith, 482 F.2d 1272 (5th Cir. 1973); United States v. Doran, 482 F.2d 929 (9th Cir. 1973); United States v. Legato, 480 F.2d 408 (5th Cir., cert. denied, 414 U.S. 979 (1973); United States v. Moreno, 475 F.2d 44 (5th Cir., cert. denied, 414 U.S. 840 (1973); United States v. Riggs, 474 F.2d 699 (2d Cir., cert. denied, 414 U.S. 820 (1973); United States v. Slocum, 464 F.2d 1180 (3d Cir. 1972); United States v. Bell, 464 F.2d 667 (2d Cir., cert. denied, 409 U.S. 991 (1972); United States v. Epperson, 454 F.2d 769 (4th Cir., cert. denied, 406 U.S. 947 (1972); United States v. Lindsey, 451 F.2d
ories underlying these various exceptions to the warrant requirement lack symmetry. In several factual situations where warrantless searches have been sustained, "reasonableness" has been predicated upon the theory that the exigencies of the situation make the course of action imperative—a rationale which has also been utilized to dis-

701 (3d Cir. 1971), cert. denied, 405 U.S. 995 (1972); United States v. Mitchell, 352 F. Supp. 38 (E.D.N.Y. 1972), aff'd without opinion, 486 F.2d 1397 (2d Cir. 1973). Other cases have reached the same conclusion relying upon the administrative search rationale of Camara v. Municipal Court, 387 U.S. 523 (1967). See United States v. Davis, 482 F.2d 893 (9th Cir. 1973). Although the courts have for the most part clearly indicated that the narrow limits in Terry must be carefully followed, some have written opinions that are very broad in doctrinal base and do not tie the result to the narrow limits of Terry. Thus, in United States v. Edwards, 498 F.2d 496 (2d Cir. 1974), Judge Friendly referred to his earlier concurring opinion in United States v. Bell, 464 F.2d at 674-75, in which he said that the airport searches were justified by the danger of hijacking alone, so long as conducted in good faith and with reasonable procedures.

Notwithstanding this broad approval of airport search procedures without warrants, the courts have been sensitive to the limited purposes of the airport search, and where those needs have been exceeded, courts have required the searches to meet ordinary fourth amendment standards. See United States v. Albarado, 495 F.2d 799 (2d Cir. 1974) (pat down occurred too soon in procedure); United States v. Moore, 483 F.2d 1361 (9th Cir. 1973) (could not search luggage after denial of boarding); United States v. Kroll, 481 F.2d 884 (8th Cir. 1973) (continued search after it was known that the accused had neither explosives nor weapons); United States v. Ruiz-Estrella, 481 F.2d 723 (2d Cir. 1973) (no circumstances to justify pat down); United States v. Meulener, 351 F. Supp. 1284 (C.D. Cal. 1972) (could not search baggage).


90. Thus, the search incident to an arrest has been traditionally justified on the grounds of protecting the officer from the possibility that the arrestee is armed, preventing the destruction of evidence, or furnishing appropriate custodial care. ALI PRE-ARRAIGNMENT CODE § 230.1. But cf. Gustafson v. Florida, 414 U.S. 260 (1973), (permitting full search following an arrest for a traffic offense apparently without regard to the purpose of the search). The conceptual basis for consent searches has been unclear since Schneckloth v. Bustamonte, 412 U.S. 218 (1973), in which the Court apparently rejected the theory that consent searches are based on "waiver" of the constitutional rights to be free from warrantless searches. In addition, the rationale for custodial searches of arrested persons and "inventory" searches of vehicles is less clear than ever after United States v. Edwards, 415 U.S. 800 (1974), and Cady v. Dombrowski, 413 U.S. 433 (1973).

91. This seems true of the hot pursuit, airport, and border search cases, and is the stated explanation of the vehicle search cases. But see Chambers v. Maroney, 399 U.S. 42 (1970). It has been stated that these jealously and carefully drawn exceptions exist only where the exigencies of the situation make the course imperative—that is, when "the burden of obtaining a warrant is likely to frustrate the [legitimate] governmental
pense with normal requirements of notice of authority and purpose in
the execution of a warrant, in the installation of a device for electronic
surveillance pursuant to a warrant, and the dispensation from the
necessity of probable cause for permissible stops and frisks.

In the emergencies characteristic of some kinds of civil disorders,
there is good reason for state laws relating to searches, like those
authorizing arrests, to be as broad as the Constitution will permit. Rules
which greatly limit permissible consent searches, or impose additional
requirements for nighttime searches, should not apply in serious civil
disorders. Provisions should also be made to dispense with the necessity
of notice of authority and purpose where there is reasonable cause to
believe that the normal notice would endanger successful accomplish-
ment of the search or endanger the officer or some other person, if
such exceptions are not already authorized by statute or decisional law.

The more serious search and seizure issues during an emergency
caused by a civil disorder are whether it is constitutional, and if so,
whether it is desirable to (1) further expand the circumstances when,
assuming the existence of probable cause, a search of premises may be
conducted without a warrant; (2) modify normal requirements of par-

92. See Ker v. California, 374 U.S. 347 (1967); Blakey, The Rule of Announcement
499 (1964).

93. See Katz v. United States, 389 U.S. 347, 354-56 (1967); Osborn v. United


95. See, e.g., State v. Hall, 264 N.C. 559, 142 S.E.2d 177 (1965) (prohibiting search
of residence of suspected husband upon consent of the wife).

96. State statutes requiring daytime searches as a rule are collected in ALI PRE-
ARRAIGNMENT CODE 512-13. A broad exception such as that contained in § SS 220.2(3)
of the Code would probably be an adequate, but more unwieldy, substitute for permitting
searches with a warrant at anytime during a serious civil disorder:

Upon a finding by the issuing authority of reasonable cause to believe that the
place to be searched is difficult of speedy access, or that the objects to be seized
are in danger of imminent removal, or that the warrant can only be safely or
successfully executed at nighttime, or under circumstances the occurrence of
which is difficult to predict with accuracy, the issuing authority may, by appro-
priate provision in the warrant, authorize its execution at times other than those
specified.

97. See ALI PRE-ARRAIGNMENT CODE § SS 220.3, at 513-15 (notice not necessary
where it would endanger execution of the warrant). Present law in some states provides
no exception for the execution of a search warrant even where exceptions are permitted
for entries to arrest without a warrant. See N.C. GEN. STAT. §§ 15A-249, -401(e)(1)(c)
(1973).
ticularity in designating premises to be searched or objects to be seized in order to permit limited area searches; and (3) broaden the authority to establish roadblocks and search vehicles. A more fundamental question is whether probable cause should be a prerequisite to a lawful search in serious civil disorders when there are reasonable grounds to suspect that objects subject to seizure are present in a dwelling or vehicle.

1. Emergency Searches Without a Warrant for Weapons and Similar Devices. Initially, it is important to determine when, if ever, a search of premises without a warrant should be justified in a serious civil disorder. Officers in "hot pursuit" clearly have authority to enter premises to search for an offender or weapons. A recent West Virginia statute has gone so far as to authorize the authorities charged with suppressing a riot to enter premises without a warrant when in fresh pursuit of a rioter, in search of a sniper who has fired therefrom, or in search of armaments stored therein, where there is "reason to believe" that those persons or things would be gone before a search warrant could be obtained.

The authority of a law enforcement officer who is not in hot pursuit to search premises without a warrant during a serious urban disorder is less than clear. The state's interest in such searches is obvious—to assist in the restoration of order and the protection of persons and property. But Camara v. Municipal Court suggests that justification in terms of reasonableness may not be enough unless the state can also establish that the burden of obtaining a warrant is likely to frustrate the governmental purpose, and the Supreme Court has imposed a much stricter requirement for search of premises, even where there is arguably an emergency, than it has for searches of persons or vehicles. In some cases, the state will not be able to make such a showing, even assuming the immediate unavailability of a magistrate, because the nature of the objects sought to be seized may be such that they are unlikely to be moved, or there may be no urgency to act until the disorder has subsided. In other cases, however, the state may be able to make a compelling case, as when the objects sought are weapons or other things

100. 387 U.S. 523 (1967).
101. Id. at 533.
likely to be used to injure persons or to damage or destroy property, and where there is reason to believe that the delay required to obtain a warrant will result in their removal or use.\textsuperscript{105} In the fluid conditions of a riot, weapons and incendiary devices are more likely to be used than hoarded, and magistrates are not readily accessible to police on the streets who are faced with the decision of whether to take preventive action or risk additional damage, injury, and death. In such circumstances, prompt action is required and should be permitted. Statutes should, therefore, expressly authorize a search without a warrant for any objects that are capable of injuring persons or damaging or destroying property when there is probable cause to believe that they will be found on designated premises, and that they will be used or removed before a warrant can be procured.\textsuperscript{106}

It is of interest to note that the American Law Institute has recommended a narrow emergency house search provision that is not limited to civil disorders:

An officer who has reasonable cause to believe that premises or a vehicle contain

(1) individuals in imminent danger of death or serious bodily harm; or

(2) things imminently likely to burn, explode, or otherwise cause death, serious bodily harm, or substantial destruction of property; or

(3) things subject to seizure . . . which will cause or be used to cause death or serious bodily harm if their seizure is delayed,

may, without a search warrant, enter and search such premises and vehicles, and the individuals therein, to the extent reasonably necessary for the prevention of such death, bodily harm, or destruction.\textsuperscript{107}


\textsuperscript{106} Such authority would be narrower than the present power to conduct car searches in non-emergency conditions. See Cardwell v. Lewis, 417 U.S. 583 (1974); Chambers v. Maroney, 399 U.S. 42 (1970).

\textsuperscript{107} ALI PRE-ARRAIGNMENT CODE § SS 260.5; see Mascolo, The Emergency Doctrine Exception to the Warrant Requirement Under the Fourth Amendment, 22 BUFFALO L. REV. 419 (1973). Mr. Mascolo defines the emergency doctrine exception as follows:

Law enforcement officers may enter private premises without either an arrest or a search warrant to preserve life or property, to render first aid and assistance, or to conduct a general inquiry into an unsolved crime, provided they have reasonable grounds to believe that there is an urgent need for such assistance and protective action, or to promptly launch a criminal investigation involving a substantial threat of imminent danger to either life, health, or property, and provided, further, that they do not enter with an accompanying intent to either arrest or search. If, while on the premises, they inadvertently discover incriminating evidence in plain view, or a result of some activity on their part that bears a material relevance to the initial purpose for their entry, they may lawfully seize it without a warrant. \textit{Id.} at 426-27.
This proposal was designed for emergencies which occur during routine law enforcement activities, and the limitations were expressly designed to be narrower than the existing law authorizing vehicle searches, in order to minimize doubts concerning the constitutionality of entering dwellings without a warrant caused by the *Agnello*\(^{108}\) and *Vale*\(^{109}\) decisions.\(^{110}\)

In a civil disorder, if there is reason to believe that objects capable of endangering life or destroying property are present in a dwelling, and there is probable cause to believe that they will be used or moved in the near future, police should be authorized to enter, search, and seize them.\(^{111}\) In such cases, the danger of frustrating the seizure by the necessity of a warrant application is always present. The danger of frustration is increased by the need for keeping the maximum number of officers on the street.\(^{112}\) In such circumstances, the reasonableness of the

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\(^{110}\) See ALI Pre-Arraignment Code 553.

\(^{111}\) There is always the possibility that such authority might be abused and used as a pretense for a search that would reveal other seizable items in “plain view.” Cf. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). Even where bona fide grounds for an emergency search exist, it may be appropriate to limit the seizure authority to the dangerous substances the presence of which justified the warrantless search, prohibiting seizure of evidence of crime or contraband of a different nature. See *People v. Sibron*, 18 N.Y.2d 603, 219 N.E.2d 196, 272 N.Y.S.2d 374 (1966) (Van Voorhis, J., dissenting), rev’d 392 U.S. 40 (1968); *Amsterdam, Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 437 (1974) (stop and frisks); cf. *ILL. REV. STAT. ch. 38, § 84-4* (airport searches); *N.C. GEN. STAT. 15A-279(d)* (1975) (non-testimonial identifications). Prohibition of seizure of non-dangerous instrumentalities might also ban testimony of observations made possible as a result of the warrantless search.

\(^{112}\) In Barton v. Eichelberger, 311 F. Supp. 1132 (M.D. Pa. 1970), aff’d, 451 F.2d 263 (3d Cir. 1971), for example, the court upheld a search without a warrant during a substantial disorder in York, Pennsylvania, when the police learned of a sniper in a certain block. They obtained a warrant to search five designated dwellings for weapons. After unsuccessfully searching the five dwellings, the police concluded that the sniper was in an adjoining building for which they had no warrant. They entered the building, arrested him and seized the weapons. The court upheld the action on the grounds that “exceptional circumstances were present requiring immediate entry . . . before . . . a
searches would be supported by the theory of the hot pursuit and the moving vehicle cases, buttressed by the authority of the martial law cases.

We are aware that others who recognize the necessity of less stringent limitations upon searches in serious domestic disorders, nevertheless oppose any blanket authority to dispense with warrants in specified emergencies. One view prefers to consider each action "in light of the specific emergency presented," taking into account "the urgency of the interest asserted and, in view of that interest, the urgency of the specific action undertaken," balancing "both against the private interest invaded." A second view would expand the concept of probable cause by equating it with a "showing of reasonableness under the circumstances."

We think that express authority to act in all cases falling within the statutory emergency exception is more desirable than proceeding on a case by case basis for several reasons. First, the absence of statutory authority to enter requires that police engage in a sophisticated balancing of competing values in the context of a need for prompt action. While the problem exists in any case where an officer determines to proceed without a warrant, it is considerably less desirable when immediate action may be required. Second, a statutory definition tends to discourage abuses by implicitly instructing police that a warrant will be required in cases not covered by the statute, and not permitted under normal conditions. Third, a case by case determination by magistrates in an emergency invites a loose interpretation of probable cause that may survive the termination of the emergency.

warrant could have been obtained." Id. at 1152-53. See T. Taylor, Two Studies in Constitutional Interpretation 47-49 (1969).

114. See authorities cited in note 87 supra.
115. See notes 241-57 infra and accompanying text.
116. Riots and the Fourth Amendment 626.
117. Limits on Riot Control 98.
118. This possibility is rather clearly indicated by the number of warrants that have been granted in domestic wiretap cases under Title III of the Omnibus Crime Control and Safe Streets Act of 1968. 18 U.S.C. §§ 2510-20 (1970). Thus, it has been reported that virtually all of the applications submitted were approved between 1970 and 1973. See Administrative Office of the U.S. Courts, Reports on Applications for Orders Authorizing or Approving the Interception of Wire or Oral Communications (1968-73). See also Hearings Before the House Subcomm. on Courts, Civil Liberties, and the Administration of Justice of the House Comm. on the Judiciary, 93d Cong., 2d Sess. 124 (1974) (total number of applications between June, 1968, and December, 1972, was 2,751, and the total number of authorizations in the same period was 2,744); Pulaski, Authorizing Wiretap Applications Under Title III: Another Dissent to Giordano and Chavez, 123 U. Pa. L. Rev. 750, 755 n.13 (1975). This frequency of
suggest that the Court is proceeding to categorize general circumstances justifying dispensation with a warrant, rather than determining each case on its specific facts.\textsuperscript{119} Such an approach invites a legislative statement of when a warrant should not be necessary.\textsuperscript{120}

2. \textit{Particularity Requirements}. The exact meaning of the "particularity" requirement of the fourth amendment is unclear,\textsuperscript{121} but its objective seems to be the avoidance of the pernicious features of a general warrant by removing from the executing officer's discretion the question of where he may search and what he may seize.\textsuperscript{122} This is accomplished by specifying the precise permissible scope of a search in the language of the warrant.\textsuperscript{123}

The requirement of particularity as to \textit{objects} to be seized involves the same general problems in both emergency and non-emergency situations. It seems necessary unless "general" searches are to be tolerated, and, in addition to the historical evidence that the fourth amendment was specifically designed to eliminate such searches, no strong case can be made that their value to the state balances the infringement upon privacy which would accompany them.\textsuperscript{124} The public interest is protected adequately by the doctrine which permits seizure of any object not named in the warrant which is discovered inadvertently during and within the scope of search authorized by a warrant.\textsuperscript{125}

approval is only one of the criticisms that has been directed toward the warrant requirements for eavesdropping. See E. LAPIDUS, EAVESDROPPING ON TRIAL 72-93 (1974); T. TAYLOR, supra note 112, at 85-91. See also United States v. Giordano, 416 U.S. 505 (1974); United States v. Chavez, 416 U.S. 562 (1974); United States v. United States Dist. Court, 407 U.S. 297 (1972).


\textsuperscript{120} See Platte, A Legislative Statement of Warrantless Search Law: Poaching on Sacred Judicial Preserves?, 52 OR. L. REV. 139 (1973).

\textsuperscript{121} "[N]o 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.


\textsuperscript{123} Steele v. United States, 267 U.S. 498, 503 (1925) ("It is enough if the description is such that the officer with a search warrant can with reasonable effort ascertain and identify the place intended.").

\textsuperscript{124} See Cook, supra note 122, at 515-16.

The requirement of particularity in designating the premises to be searched raises different issues. The problem is particularly acute when multi-dwelling or multi-office buildings are involved. Unless there is probable cause to search the entire building, it is necessary that the warrant specifically indicate the premises to be searched. During a civil disorder, however, the information available may not support the belief that objects subject to seizure will be found in more than one apartment. Instead, there may be moral certitude that a cache of weapons or incendiary devices is hidden in an apartment house, but no probable cause to believe that they will be found in all or any particular apartments or that the occupants of the apartment house are acting in concert. The general law of search and seizure would not permit a search of all or any of the apartments—an area search—without a warrant, nor would it permit a warrant to be issued in the absence of information identifying the apartment where the cache is thought to be secreted.

During a civil disorder there may be compelling reasons for permitting a search of all apartments or any individual apartments in such circumstances because of the need to prevent use of potential instrumen-


128. The rule was expressed concisely in United States v. Poppitt, 227 F. Supp. 73, 76 (D. Del. 1964):

When a warrant directs the search of a multiple occupancy apartment or building, without identifying the particular apartment or room to be searched, the validity of . . . the warrant will depend upon whether probable cause for so describing the premises is shown in the affidavit. A search warrant may validly direct the search of an entire building if probable cause is shown for searching each separate apartment, or for believing that the entire building is actually being used as a single unit . . . .

talities of violence. Under different circumstances, there may be an equal need to search different houses within a limited area. Such searches would be adjudged "reasonable" under the martial law authorities.

There is also statutory precedent to justify such searches. In Title III of the Omnibus Crime Control and Safe Streets Act of 1968, Congress relaxed the particularity requirement for warrants authorizing electronic surveillance. The extraordinary circumstances asserted as justification for such warrants are clearly of a lesser order than the emergency involved in locating and confiscating weapons during a civil disorder.

A less persuasive case can be made by analogy to the relaxation of the particularity requirement in the inspectorial searches permitted by Camara v. Municipal Court. Like the search to ascertain the existence...
of conditions dangerous to health and safety in Camara, the principal purpose of the search during a civil disorder should not be to uncover evidence to be admitted against a lawbreaker at trial. Rather, the principal purpose would be to prevent the use of weapons to exacerbate the disorder and endanger persons and property. Violations of law may also be uncovered in an inspectorial search, and evidence establishing such violations may be seized. Unlike the inspectorial search, however, where violations uncovered are likely to be minor offenses usually punishable only by fine, criminal prosecution with the possibility of substantial punishment will be likely in the riot search unless an arbitrary rule excluding the admission of evidence is imposed. 134

The Court then addressed the need for, and the standards for issuing, a warrant. A warrant would issue, it said, if there were a valid public interest, based upon reasonable standards, to justify the intrusion. Id. at 538-39. The reasonableness standard, however, would not require specific knowledge of particular dwellings, as would be the case in normal criminal cases, since the warrant procedure is designed to guarantee that the governmental decision to search private property is based on a reasonable governmental interest:

Having concluded that the area inspection is a "reasonable" search of private property within the meaning of the Fourth Amendment, it is obvious that "probable cause" to issue a warrant to inspect must exist if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon passage of time, the nature of the building (e.g., a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling. Id. at 538.

See Riots and the Fourth Amendment 628-30; Limit on Riot Control 94-98.

The Court recognized that there would be no need for a warrant in emergency situations where "compelling urgency" necessitated immediate action. 387 U.S. at 539. The authority of Camara in the context of a serious civil disorder is doubtful in view of the Court's observation that inspectoral searches were not "personal in nature" nor "aimed at the discovery of evidence of crime." Id. at 537. See Denenberg, Administrative Searches and the Right to Privacy in the United States, 23 INT. & COMP. L.Q. 169 (1974); LaFave, Administrative Searches and the Fourth Amendment: The Camara and See Cases, 1967 SUP. CT. REV. 1; Sonnenreich & Pinco, The Inspector Knocks: Administrative Inspection Warrants Under an Expanded Fourth Amendment, 24 S.W.L.J. 418 (1970); Note, Administrative Search Warrants, 58 MINN. L. REV. 607 (1974).

134. See note 111 supra. A particularly strong argument can be made for a prohibition against seizure or for an exclusionary rule for evidence unrelated to the civil disorder which is observed in the homes of persons uninvolved in the disorder which are searched pursuant to these extraordinary powers. The privacy of an uninvolved citizen has been invaded and contraband or evidence of crime in general is unrelated to the justification for the invasion. Such an approach has been rejected in the airport search cases. See United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971). Likewise, there is good reason to require the return of dangerous weapons after the disorder has subsided if possession of such weapons is not prohibited by law, and the municipality should be prepared to assume liability for any damage to property that results from area
Although the teaching of *Camara* does not clearly resolve the area warrant question, it has been interpreted as an indication that legislation authorizing such warrants would be permissible. Thus, in *United States v. United States District Court*, the Supreme Court held that domestic security eavesdropping must be conducted in accordance with the warrant requirements of Title III of the Omnibus Crime Control and Safe Streets Act of 1968, but that the warrant requirements could be altered to ensure that the legitimate governmental interests in such surveillance would be protected. Specifically, it noted that there were substantial distinctions between ordinary criminal surveillance and domestic security surveillance, and that "the focus of domestic surveillance may be less precise than that directed against more conventional types of crime." The Court then considered the principles it had earlier identified in *Camara*, and concluded that

Congress may wish to consider protective standards for [domestic security] which differ from those already prescribed for specified crimes in Title III. Different standards may be compatible with the Fourth Amendment if they are reasonable both in relation to the legitimate need of Government for intelligence information and the protected rights of our citizens. For the warrant application may vary according to the governmental interest to be enforced and the nature of citizen rights deserving protection. In other words, the Court reaffirmed the necessity for a warrant, but clearly suggested that Congress could provide lesser standards for the issuance of a warrant if the governmental interests in question differed substantially from those in ordinary criminal circumstances. In the civil disorder context, the Court's language would provide additional support for the conclusion that area warrants may be properly issued, at least where there has been a legislative specification of the showing that must be made for their issuance.

Justification for an area search may depend upon the objects sought to be seized. There may be no more need to search for information concerning a criminal offense already committed, the fruits of searches. To the extent possible, hardship should be borne by the community, not the individual.

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137. 407 U.S. at 322.
crime, or things otherwise unlawfully possessed in a riot than in non-emergency conditions. But a search for weapons or other things likely to be used as a means of injuring persons or damaging or destroying property is quite a different matter. Only where the objects to be seized are of a nature that justifies emergency power should authority be granted to dispense with the normal requirement of particularity.

Even if a limited area search can be justified, there is an obvious problem involved in determining how wide an area may be searched. An extensive area search will raise an issue of the existence of probable cause as well as the problem of satisfying the requirements of particularity. In some cases, the two may be separate, but a search of an extensive area on the grounds that there is probable cause to believe that something will be found somewhere involves both issues—as in the search during a civil disorder of every house in a black section of Plainsfield, New Jersey, by National Guardsmen in 1967, and the infamous search of more than 300 homes in a black section of Baltimore over a period of nineteen days in an effort to find the slayers of two policemen.

A search of an apartment house, three row houses, or even a city block pursuant to a properly obtained warrant is, of course, quite different from house to house searches of an entire section of the city without a warrant. The interposition of a magistrate provides a judgment that is more detached as compared with that of law enforcement officers acting under severe pressure. More importantly, the basis for the extraordinary action is recorded in advance of the search, a procedure which will reduce the danger of a highly fallible post hoc reconstruction of the events known before the search if the search proves

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139. CIVIL DISORDERS REPORT 45; N.Y. Times, July 20, 1967, at 1, col. 8. A mass search of houses without a warrant was conducted following a report that forty-six carbines had been stolen from a nearby arms manufacturing plant and distributed to youths who had fired at a police station.

140. Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966). The searches were based solely on informant tips and produced “a series of the most flagrant invasions of privacy ever to come under scrutiny in a federal court.” Id. at 201.

141. In making this suggestion, we do not suggest that most magistrates are likely to deny authority to search in any but the most clear-cut cases of abuse. See note 118 supra. We also recognize the apparent inconsistency in our advocacy that warrants be required and that decisions be made on a case by case basis using the criterion of “reasonableness” in area searches and roadblocks, while at the same time we urge that authority be granted for searches without a warrant in specially limited emergencies. The rationale for this difference is (1) the particular danger of frustration, which justifies dispensation of the warrant requirement in the emergency search but not in the other cases; and (2) area searches and roadblocks invade the privacy of uninvolved persons in the absence of probable cause, thereby justifying the greater protection hopefully provided by judicial intervention.
fruitful. The magistrate’s determination that there is presently an emergency caused by a civil disorder, that the objects sought to be seized are capable of being used to exacerbate the disturbance, and that there is probable cause for believing that these objects are in a limited and described geographical area, is a far cry from suspicions by a policeman that weapons may be found in the area. Nevertheless, there is a need to restrict the area to be searched to reasonable limits. Presumably, most people would agree that a search of 300 houses might be patently unreasonable, while a search of each of two adjoining row houses would be much less offensive. It is difficult in advance to specify whether limits of one or two blocks would be reasonable or unreasonable without knowledge of the particular facts involved. The appropriate limits should be determined on a case by case basis by a magistrate applying a standard of reasonableness. Additional protection could be provided by limiting the number of judicial officials who would be authorized to issue the warrant. In short, it is our opinion that area searches during civil disorders, authorized by statute and subject to the limitations we have suggested, would be constitutional.

We reject the argument that warrantless area searches should be permitted. An area search is by its nature likely to invade the privacy of persons who are completely innocent of any wrongdoing and who planned no such activity. It is not asking too much to require submission of the proposed search to a judicial officer before such a step is undertaken. Emergency searches of particular dwellings may sometimes be justified without a warrant, but area searches should always require one.

3. **Roadblocks and Vehicle Searches.** Police frequently stop vehicles to inspect car registrations or operators’ permits, sometimes justifying the stop on the basis of statutes imposing a duty on the motorist to display a permit upon request, sometimes upon the more general theory that the operation of a motor vehicle on public highways is a “privilege” rather than a “right,” and sometimes under express statutory authorization. Trucks are stopped for weighing and cars are routinely stopped

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142. Jurisdiction to issue such a warrant might, for example, be granted to judges of the court of general jurisdiction and denied to lower-ranking judicial officials who are normally authorized to issue warrants.

143. The Plainfield, New Jersey, search discussed in note 139 supra is the kind of abuse that could probably be avoided by insistence upon a warrant. See Limits on Riot Control 98.

144. See, e.g., State v. Fish, 280 Minn. 163, 167, 159 N.W.2d 786, 789-90 (1968); State v. Allen, 282 N.C. 503, 194 S.E.2d 9 (1973). For authorities to establish roadblocks to check licenses, see Lipton v. United States, 348 F.2d 591 (9th Cir. 1965); City of Miami v. Aronovitz, 114 So. 2d 784 (Fla. 1959); Commonwealth v. Mitchell,
for safety checks. Presumably, no right to a general search of the vehicle would ordinarily accompany the authority to stop under these statutes, absent the presence of other factors such as an arrest and a valid search pursuant to it, the observation of seizable objects in plain view, or probable cause to believe that the vehicle contains objects subject to seizure.

In addition, some jurisdictions have routinely used the roadblock to cordon off roads in an attempt to apprehend a criminal who is believed to be in a particular area. There is law upholding the use of cordons, at least where a crime is known to have been committed and there is a

355 S.W.2d 686 (Ky. 1962). The doctrine that the police have an absolute power to check licenses and registrations which may be used to serve general crime detection objectives has recently come under severe criticism. Note, Automobile License Checks and the Fourth Amendment, 60 VA. L. REV. 666 (1974). The courts of Pennsylvania and New York have ruled that the validity of any license check practice that gives the police discretion to select cars on the basis of observation should be measured by the standards of Terry v. Ohio, 392 U.S. 1 (1968), and that only systematic stopping practices such as roadblocks are permissible in the absence of reasonable suspicion of criminal activity. People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975); Commonwealth v. Swanger, 453 PA. 107, 307 A.2d 875 (1973), noted in 47 TEMPLE L.Q. 640 (1974). Compare CAL. VEHICLE CODE § 2814 (West 1971), with CAL. VEHICLE CODE § 2804, 2806 (West 1971). A middle course has been taken by the District of Columbia in permitting stops if the purpose is to insure possession of a valid license and registration, but requiring compliance with the Terry standards if the purpose is to investigate unrelated criminal activity. Palmore v. United States, 290 A.2d 573, 582-83 (D.C. Ct. App.), aff'd, 411 U.S. 389 (1973); State v. Severance, 108 N.H. 404, 237 A.2d 683 (1968) (to the same effect). One commentator would require probable cause to justify a stop. Note, Nonarrest Automobile Stops, Unconstitutional Seizures of the Person, 25 STAN. L. REV. 865 (1973). See also Note, Automobile Spot Checks and the Fourth Amendment, 6 RUTGERS-CAMDEN L.J. 85 (1974).

146. See Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 365 (1964); cf. ALI CODE OF PRE-ARRAIGNMENT PROCEDURE, § SS 230.4:

Search of Vehicles

(1) Permissible Circumstances. If, at the time of the arrest, the arrested individual is in or in the immediate vicinity of a vehicle of which he is in apparent control, and if the circumstances of the arrest justify a reasonable belief on the part of the arresting officer that the vehicle contains things which are

(a) subject to seizure . . . , and

(b) connected with the offence for which the arrest is made, the arresting officer may search the vehicle for such things and seize any things subject to seizure . . . discovered in the course of the search.

The Code requires that the search be contemporaneous with the arrest or as soon thereafter as is reasonably practicable. Id. § SS 230.4(2). The limitations are less significant in view of the broad authority for "inventory searches" apparently permitted under Cady v. Dombrowski, 413 U.S. 433 (1973). But see State v. Navarro, 312 So. 2d 848 (La. 1975) (striking down a vehicle search incident to a traffic arrest).

reasonable belief that the criminal is nearby, but roadblocks to "curb juvenile problems," to check for "anything suspicious," or to police a certain area with a high crime rate have been struck down. In a famous dictum, Justice Jackson opined that the propriety of a roadblock and a search pursuant to it depends in large part upon the gravity of the offense. Commentators have suggested that Justice Jackson's standard balanced the seriousness of the offense, the certitude that some offense has been committed by someone, and the necessity of such action not only to apprehend the violator but to protect others. It is conceded, however, that the sole criterion of seriousness is used most frequently by law enforcement agencies in determining whether to stop all vehicles or use patrol cars to seal off an area for discriminate stops.


151. But if we are to make judicial exceptions to the Fourth Amendment for these reasons, it seems to me they should depend somewhat upon the gravity of the offense. If we assume, for example, that a child is kidnapped and the officers throw a roadblock about the neighborhood and search every outgoing car, it would be a drastic and undiscriminating use of the search. The officers might be unable to show probable cause for searching any particular car. However, I should candidly strive hard to sustain such an action executed fairly and in good faith, because it might be reasonable to subject travelers to that indignity if it was the only way to save a threatened life and detect a vicious crime. But I should not strain to sustain such a roadblock and universal search to salvage a few bottles of bourbon and catch a bootlegger. Brinegar v. United States, 338 U.S. 160, 183 (1949) (Jackson, J., dissenting).

152. See, e.g., L. TIFFANY, D. McINTYRE & D. ROTENBERG, DETECTION OF CRIME 36-37 (1967). An essentially similar approach has been taken in a recent proposal of the American Law Institute that police be given express authority to stop vehicles at a roadblock when such action is reasonably necessary to apprehend a suspected felon or free a victim of a felony. ALI PRE-ARRAIGNMENT CODE § 110.2:

(2) Stopping of Vehicles at Roadblock: A law enforcement officer may, if
(a) he has reasonable cause to believe that a felony has been committed; and
(b) stopping all or most automobiles, trucks, buses or other such motor vehicles moving in a particular direction or directions is reasonably necessary to permit a search for the perpetrator or victim of such felony in view of the seriousness and special circumstances of such felony,
In a serious civil disorder, there may be a compelling need for the use of roadblocks or patrol cars to seal off an area. These would include, for example, the need (1) to prevent weapons or incendiary materials from being brought into the area; (2) to prevent the disorder from spreading to yet unaffected areas of the city; and (3) to prevent reinforcement of rioters by sympathizers from outside the immediate area. Unlike the use of the roadblock in other situations, law enforcement during a civil disorder should not be primarily concerned with the apprehension of any particular suspect, the protection of any particular victim, or the seriousness of any particular offense. Rather the disorder creates the emergency; the primary objective is the restoration of order. It is the need to isolate the area in which the disorder is taking place, in order to permit the effective use of other techniques to reduce the intensity of the disturbance, which dictates the need for a roadblock.

Law enforcement authorities should have authority to stop vehicles within, entering, or leaving the immediate area of a riot, to search them to determine the presence of weapons or other objects capable of being used to cause bodily harm or injury to property, and to seize such objects if found. Such authority should exist without the necessity of establishing probable cause for believing that the vehicle contained objects subject to seizure, as would normally be required for vehicle searches.\(^1\)\(^2\) The operation of a vehicle within, or an attempt to enter or leave a riot area should be an adequate predicate to justify the search.

It seems desirable that a warrant should be required for such authority. A magistrate should be required to find that there is a serious civil disorder justifying the use of a roadblock for a limited period, perhaps twenty-four hours, with the obligation placed upon the police to return to the magistrate to seek an extension of their authority if the conditions justifying the roadblocks have not abated.\(^1\)\(^3\) In the unusual situations where immediate action is required before a magistrate can be reached, authority might be granted to establish the roadblock subject to subsequent judicial approval.\(^1\)\(^4\)

We do not think our proposals are necessarily inconsistent with the

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\(^1\) Cf. URCP 211(a); ABA Standards Relating to Pretrial Release, § 2.2; NAC STANDARDS, CORRECTIONS, § 4.3; NAC STANDARDS, COURTS, § 4.2.


\(^4\) Cf. id. § 2518(7).
holding in United States v. Williams, where, as already noted, FBI agents had established a roadblock across a road leading to a village during the Wounded Knee disturbance in 1973. The defendant's car was stopped and a search revealed marijuana, which the trial court suppressed on the ground that the fourth amendment had been violated by the search. It concluded that a "frisk" of the kind permitted in Terry v. Ohio would have been proper, but not the broad search that was actually conducted. A broader search would have been authorized if any of the usual exceptions justifying a warrantless search had been present; as perhaps would have been the case if the defendant had been coming from within the government's perimeter, or if the vehicle had approached the roadblock from outside the perimeter and then attempted to avoid it.

One may wonder whether the result in Williams would have been the same if the search had revealed grenades, automatic weapons, or ammunition instead of marijuana. In any event, the officers acted without legislative authority or judicial approval, and the scope of the search was far more intensive than that required to determine whether the vehicle was carrying weapons to the insurgents. We do not think that Williams is authority for the proposition that a search of a vehicle at a roadblock pursuant to a warrant authorized by statute during a civil disorder of the kind that took place at Wounded Knee would be unconstitutional.

Although the roadblock authority that we suggest would probably exceed the constitutional powers of law enforcement officials under normal circumstances, the emergency caused by the serious civil disorder is an appropriate basis for the "reasonableness" of the search. A recent statute has authorized roadblocks in serious emergencies.

157. See notes 66-73 supra and accompanying text.
158. See notes 60-65 supra and accompanying text.
160. See notes 144-50 supra and accompanying text.
161. We recognize that there is a superficial similarity between a roadblock during a civil disorder and the so-called "airport search," which has uniformly been upheld by the courts. See note 89 supra. The airport search cases may be an indication of the approach that courts might take in analyzing the use of a roadblock during a civil disorder, imposing a requirement of reasonable suspicion before a limited search is permitted. See United States v. Williams, 372 F. Supp. 65, 67-68 (D.S.D. 1974). See notes 66-73 supra and accompanying text.
162. The North Carolina provision, N.C. GEN. STAT. § 14-288.11 (1969), would permit a roadblock to be authorized by warrant for "all vehicles entering or approaching a municipality in which a state of emergency exists," as well as for "vehicles which might
4. Dispensation with the Requirement of Probable Cause. A final question involves whether probable cause should be dispensed with altogether in the civil disorder situation. As indicated earlier, the martial law cases support the general proposition that a search in good faith which directly relates to the restoration of order would be permissible without the presence of probable cause.\(^{163}\) The only Supreme Court case dealing specifically with searches in the absence of a warrant stressed that "reasonable grounds" existed for making the disputed search.\(^{164}\) It may be doubted whether there is any real difference between the existence of "reasonable grounds" and "probable cause," though each can be distinguished from "reasonable suspicion."\(^ {165}\)

In any event, there seems to be no compelling justification for abandoning the standard of probable cause if the police have enlarged authority to stop and frisk; the right to search incident to an arrest for curfew violations; authority to obtain warrants for area searches; broadened authority for vehicle searches and roadblocks pursuant to a warrant; and authority to search premises and vehicles without a warrant upon probable cause to believe that deadly weapons, or any other similar devices, are present and are likely to be used or removed unless promptly seized. The few cases where a search of a premise, person, or vehicle will be prohibited because of the absence of probable cause—although there is a good faith suspicion—may involve a certain degree of danger to the community, but the nature of the danger does not justify the abandonment of the probable cause requirement which would in substance remove any meaningful restraint upon police action.

F. Documentation of Arrests

The documentation that may be necessary when persons are taken into custody during a civil disorder presents additional problems for

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\(^{163}\) See Part I 636-55. See notes 241-260 infra and accompanying text.

\(^{164}\) Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (discussed at note 130 supra).

\(^{165}\) The ALI Pre-Arraignment Code defines "reasonable cause to believe" as a "basis for belief in the existence of facts which, in view of the circumstances under and purpose for which the standard is applied, is substantial, objective, and sufficient to satisfy applicable constitutional requirements." ALI Pre-Arraignment Code § 210.1(7)(a). "Reasonable belief" is defined as a "belief based on reasonable cause to believe." Id. § 210.7(b). The ALI standard would not embody the requirement of a "more probable than not" standard. Cf. LaFave, supra note 42, at 73-75 (arguing that in the context of arrests, it must be more probable than not that the person to be arrested has committed a crime).
The basis for many of these concerns is the assumption that there must be a bona fide intention to prosecute every person who is arrested. Thus, it is argued that the police must perform the paper work required for subsequent identification of each arrestee, because without such paper work successful prosecution might not be possible. If this is not done, an arrest is said to be improper.

Attempted compliance with the mandate required by this approach may, however, drown a police force in Polaroid pictures and forms, even when specially tailored short forms are utilized. But efforts to escape the dilemma by abandoning the use of forms when the burden becomes so great that the police cannot both prepare the forms for those already arrested and deal effectively with those still on the street have produced widespread criticism that fundamental rights are being violated.

Notwithstanding such criticism, we believe that there is no constitutional requirement that arrest during a civil disorder must in all cases be fully documented. The Constitution does not assure each offender the right to be arrested, nor does it guarantee his successful prosecution if he is arrested. It does require that a citizen be arrested only when there is probable cause to believe that he has committed an offense. But if probable cause exists, and a person is taken into custody, he has no legitimate complaint that the police did not assemble evidence that would be sufficient for a subsequent conviction.

In taking this position, we are not unmindful of Sullivan v. Murphy, in which the United States Court of Appeals for the District of Columbia Circuit held presumptively invalid any arrest in the Washington May Day demonstration of 1971 that was not accompanied by a contemporaneous Polaroid photograph and field arrest form executed by the arresting officer. The case involved the extraordinary procedure of attacking mass arrests by a class action. It was not disputed that wide-scale arrests had taken place without probable cause, nor was there any question that persons other than arresting officers had been per-

166. The requirements for documentation of arrest is a subject that has also produced considerable uncertainty in “normal” circumstances. See W. LaFave, supra note 31, at 495-97.
167. See CIVIL DISORDERS REPORT 184.
168. This seems to be the thrust of 1973 D.C. REPORT 12-16.
171. 478 F.2d at 967.
mitted to execute arrest forms; some arresting officers wore neither name tags nor badges; and the offenses for which arrests were made did not involve the seizure of evidence, thereby making the exclusionary rule irrelevant as a deterrent to unlawful arrests.\textsuperscript{172}

In such unique circumstances we do not quarrel with the court's conclusion that the arrests were presumptively invalid subject to an affirmative showing that any particular arrest was based upon probable cause, as a "legal principle corollary to the Fourth Amendment's protection."\textsuperscript{177} The dictum of the Sullivan v. Murphy court, which suggests that the purpose of arrest forms is the accountability of the arresting officer to the person arrested, is much less defensible.\textsuperscript{174} The recommendation by the 1973 District of Columbia Judicial Conference Committee that, as a matter of policy, field arrest forms should be suspended only as a last resort "in those extreme circumstances where, but for the suspension, loss of life or serious bodily harm would result,"\textsuperscript{175} which was cited by the court, seems particularly unwise to us. This qualification is a standard that is more commonly used as justification for the use of deadly force,\textsuperscript{176} and it seems extraordinary that it should also be employed as the test for dispensation of the documentation of arrest. The justification relied upon by the Committee for its

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\textsuperscript{172} Id. Sullivan v. Murphy can be read more narrowly to mean that the evil with which the court was concerned was not so much arrest without documentation, as it was arrest without documentation followed by attempted prosecution. The court stated:

The action of the police in this case went beyond precautionary measures to ensure public safety by detention, as in Korematsu; officials did not merely stop and detain persons who had been on the streets during the May Day demonstrations, they preferred criminal charges against those who had been held in police custody. Even assuming for the sake of discussion that in May Day emergency conditions police officials had the authority to suspend normal constitutional rights against unlawful arrest and detention—a suspension defendants claim not to have effected here—no legitimate overriding interest of public safety can be served by later booking or prosecuting on criminal charges those who were stopped and detained.

In electing to apply the sanctions of the criminal law to those arrested, the public authorities not only subjected those whom they accused to the processes of the criminal justice system, but they also bound themselves to follow rules that govern the conduct of criminal prosecutions. \textit{Id.} at 959-60.

Although the language is not free from ambiguity, it is not necessary to embrace the court's assumption that constitutional rights could have been suspended during the May Day disorders to surmise that a different case might have been presented if prosecution had not been undertaken.

\textsuperscript{173} \textit{Id.} at 967. When the circumstances of arrest are questioned, the officer must be able to demonstrate probable cause in order for the arrest to be upheld. \textit{See}, e.g., Beck v. Ohio, 379 U.S. 89, 95-97 (1964); Carroll v. United States, 267 U.S. 132, 159-62 (1925).

\textsuperscript{174} 478 F.2d at 967.

\textsuperscript{175} 1973 D.C. REPORT 135. The court did, however, cite the \textit{Report} with apparent approval. 478 F.2d at 967 n.57.

\textsuperscript{176} \textit{See} ALI PRE-ARRAIGNMENT CODE § 120.7; ALI MODEL PENAL CODE § 3.07 (1962). \textit{See also} ALI PRE-ARRAIGNMENT CODE § 260.5 (emergency searches).
\end{quote}
recommendation was that suspension of the evidence-recording requirement in mass arrests is qualitatively different from lesser responses, and may preclude "the resolution of the disorder and the cases it produces within the framework of the judicial process." The result, according to the Committee, would be substituting arrest and detention for conviction and punishment.\footnote{177} But this is certainly not the necessary result. It is quite possible, for example, that arrests can take place without the usual paperwork but still with scrupulous regard for the necessity of probable cause. Even if this does not occur, the courts can fashion remedies to provide suitable redress, as was done in Sullivan v. Murphy, by creating a rebuttable presumption of illegality when normal procedures are not followed.\footnote{178}

We certainly do not suggest that arrest documentation should be eliminated without good cause. In normal conditions, routine forms should be used; in most serious disorders, recourse should be had to special procedures such as a field arrest form executed by the arresting officer, accompanied by a Polaroid photograph wherever possible.\footnote{179} Cases may occur, however, where the price of using the emergency procedure will be an inability to cope with a disorder of an intensity that may not threaten life or serious bodily harm but which does threaten substantial damage to property and the functioning of government itself. In such circumstances, it seems unwise to insist that priority be given to documentation of lawful arrests of persons, most of whom will never be tried for the offenses they have committed, rather than using available

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\footnote{177} 1973 D.C. REPORT 134. See also id. at 12-18.

\footnote{178} 478 F.2d at 967. In subsequent proceedings upon remand no showing of probable cause could be made. Sullivan v. Murphy, 380 F. Supp. 867 (D.D.C. 1974). If arrests are made without documentation and the arrestees are not prosecuted for the offenses for which they were arrested, but subsequently bring civil suits for damages alleged to have been suffered as a result of the arrest, then the issue of probable cause would again be raised. If probable cause were demonstrated, then relief would presumably be denied; if it were not, then liability might result if the defendants were unable to claim protection by the immunities that are often available to those involved in the quelling of a civil disorder. See Part I 651 n.209. In any event, a suit for expungement of an arrest record should be successful if no probable cause can be produced. See note 308 infra.

\footnote{179} See Metropolitan Police Department, District of Columbia, General Order No. 6, Series 1968, Procedures for Handling Prisoners and Property During Civil Disturbances 2-3 (Aug. 16, 1968). See also Long, Hot Summers 972-73. Depending upon local law, other changes in normal documentation requirements may be appropriate. See Dodds & Dempsey, supra note 2, at 378-79 (discussing two provisions adopted in New York in 1968, which would have permitted an arresting officer to be absent from arraignment of a defendant during an emergency upon affirming the relevant facts and charges for the arrest in an affidavit, N.Y. Laws of 1968, ch. 1077 (June 22, 1968), and authorized a court during an emergency to arraign and admit a defendant to bail without the fingerprint search normally required at that time, N.Y. Laws of 1968, ch. 1078 (June 22, 1968); neither provision survived recodification).
manpower to restore order. The police should appreciate that the failure to document fully may result in (1) a decision that there is no basis to detain the arrestee; (2) that no prosecution is justified; or (3) that the record of the arrestee should be expunged in the absence of proof establishing probable cause for the arrest. If the emergency is sufficiently grave, the police may be justified in accepting these potential consequences of a failure to document, providing that they continue to observe the requirement that no one should be arrested except under circumstances permitted by law.

A strong argument can be made for the proposition that a defendant should not be held in custody for any substantial period of time to answer for a crime if there is no evidence to warrant conviction. Even in this situation, it is doubtful if any constitutional rights have been violated if there is enough evidence to justify a finding of probable cause that the arrestee has committed the offense. But even if the Constitution is not offended, sound policy dictates that anyone held to answer to criminal charges should normally be released when it becomes clear that no case against him can be proved. A temporary detention may be justified to provide the prosecutor an opportunity to locate alternative sources of proof, but after a reasonable interval, an accused should be released if there are no witnesses or documents sufficient to establish guilt.

IV. JUDICIAL RELEASE AND PREVENTIVE DETENTION

A. Prior Experience

The prompt release of a defendant held in custody in a noncapital case on personal recognizance or bail, which is not excessive measured by the likelihood of his presence at trial, is fundamental to the proper functioning of our system for the administration of justice under normal conditions. It reflects the basic notions of presumption of innocence, opposition to punishment without trial, recognition of the importance of pretrial freedom for effective case preparation, and concern over the impact of pretrial incarceration on adjudication and sentencing at trial. Recent efforts to substitute nonmonetary conditions for a surety bond accept these postulates, as well as the policy against invidious discrimination between the rich and the poor.

182. See notes 36-39 supra and accompanying text.
183. Stack v. Boyle, 342 U.S. 1 (1951); ABA Standards Relating to Pretrial Release § 5.3.
The Riot Commission, consistent with its approach that the basic purposes of the criminal process remain unchanged during a riot, asserted that the “purposes of bail in our system of law have always been to prevent confinement before conviction and to insure appearance of the accused in court” and not “to deter future crime.” It recognized, however, that “some have difficulty adhering to that doctrine when it results in releasing a dangerous offender back into a riot area,” and refrained from an outright condemnation of preventive detention in mass disturbances, characterizing the issue as a “problem of great perplexity.”

B. Preventive Detention

The courts both before and after the Commission’s Report have practiced preventive detention although rarely admitting it. They have done so by either denying bail or setting it at an unattainably high amount. In the 1965 Watts riots, for example, bond was routinely set at $3,000. In the 1967 Newark riots, bond was initially set at $2,500 for those charged with breaking and entering, $500 for curfew violators, and $250 for those charged with loitering, but lower bonds were subsequently set as the jails filled and the riots subsided. In the 1967 Detroit riots, about three quarters of the bonds were higher than $5,000. The same general results followed the Report. In the April, 1968, Baltimore riots after the death of Dr. Martin Luther King, Jr., bail was routinely set at $500 for curfew violators, and $1,000 for those charged with more serious offenses. In Chicago, normal bail rules were suspended and bond was set in almost every case in amounts


185. CIVIL DISORDERS REPORT 192.
186. Id.
ranging from $1,000 for disorderly conduct to $5,000 for looting, and up to $100,000 in other cases. In the District of Columbia, most of the judges uniformly set money bond at $1,000 for looting and $500 for misdemeanors, unless a reliable third party would undertake to ensure that the defendant would not again involve himself in the riot.

It is apparent that the courts generally engaged in preventive detention in these disorders, and that the decision not to release on conditions which the defendant could meet was in general not individualized. The courts seemed to have based their actions primarily upon two grounds: (1) the numbers involved precluded individualized disposition; and (2) it is justifiable to detain someone who is likely to commit a serious offense or rejoin the riot if released. The first argument...
seems questionable for several reasons.\textsuperscript{196} If our recommendations are followed, the volume of cases presented to the courts should be substantially reduced. Second, the available evidence indicates that a large number of persons arrested during a riot are curfew violators or looters who do not have previous criminal records and are unlikely to become involved again in the riot, or with other crimes, but who will not be able to post high monetary bail.\textsuperscript{197} The presumption should favor release of these people. Denial of release without trial in such cases certainly cannot be justified on the basis of punishment or general deterrence.\textsuperscript{198}

Thirdly, judicial resources during a civil disorder should be concentrated on determining who should be retained in custody and not upon trials. Finally, the personnel who are potentially available to pursue this screening function have not been totally mobilized anywhere. In some jurisdictions, trial judges of courts of general jurisdiction and appellate judges do not participate, leaving the entire workload for the already overworked magistrates and misdemeanor trial judges.\textsuperscript{199} The use of these judges and others from neighboring jurisdictions would greatly relieve the pressure.\textsuperscript{200} In addition, the concept of reserve magistrates, appointed from the practicing bar and assigned to precincts where decentralized decisions concerning custody can be made, has not been adequately explored.

The second ground of defense for the judicial use of mass preventive detention poses more difficult problems. In substance, it asserts that a citizen may be held in custody because there is a reasonable likelihood that he will commit a new offense if released, although there is no reasonable danger that he will flee the jurisdiction before trial.

The Riot Commission recommended a number of alternatives to preventive detention or outright release on condition of third-party custody. These included forbidding access to certain areas or access to

\textsuperscript{196} See Dobrovir 62.
\textsuperscript{197} Thus, in Bail and Civil Disorder, it is suggested that there appear to be a great number of arrested persons who pose little risk of entry (or perhaps reentry) in the riot. Doubtless many of those arrested during riots are completely innocent of crime. Many of those who in fact are guilty of some of the crimes prevalent in riots, such as looting, are ordinarily responsible citizens—the mere contact with authority or arrest would likely suffice to shake them back into the reality of the danger of future criminal conduct. \textit{Id.} at 824. See also Dobrovir 52-53.

\textsuperscript{198} See Criminal Justice in Extremis 588.
\textsuperscript{199} Thus, in the District of Columbia in 1967, 1968, and 1971, the judges of the District of Columbia Superior Court apparently received no assistance from the judges of the United States District Court, the District of Columbia Court of Appeals, or the United States Court of Appeals.

\textsuperscript{200} Civil Disorders Report 189.
these areas at certain times, part-time release with a requirement to spend nights in jail, use of surety or peace bonds on a selective basis, prompt trial, and expedition of bail review by higher courts.\textsuperscript{201} It may be argued that the imposition of some of these conditions upon a defendant who can post a surety bond in the amount found to be adequate reasonably to assure his presence at trial poses the same eighth amendment questions as does preventive detention.\textsuperscript{202} Furthermore, while some of these alternatives would be practicable in many situations, they would be impracticable in many more.\textsuperscript{203} It is clear that there will be cases where a court will determine that the defendant would rejoin the riot or commit additional crimes if released, regardless of conditions imposed upon him, that there is no danger of flight, and that prompt trial is impossible.

Assume, for example, that a rooftop sniper is captured when he runs out of ammunition. He is charged with assault with intent to kill and brought before a magistrate. The evidence establishes that (1) he is a leader of the riot forces; (2) all of his ties are with the community; (3) it is extremely unlikely that he will leave the city; and (4) if released, he plans to return to the riot area, arm himself, and continue to shoot at police and firemen.

In this situation, there are some who would apparently believe that setting bail at a figure clearly in excess of the amount required to assure his presence at trial, or detaining him until the disorder subsides, would be unconstitutional or at least unwise.\textsuperscript{204} In their opinion the arrestee should be released upon his own recognizance subject to conditions

\textsuperscript{201} Id. at 192. The 1973 D.C. Report urged that courts should not set any pretrial conditions that would bar a defendant generally from "participating in an activity which may fall within the protections of the First Amendment." 1973 D.C. REPORT 43.


\textsuperscript{203} Thus, it has been observed that the Kerner recommendations with respect to conditional release of dangerous offenders (i.e. part-time release with requirements to spend nights in jail, forbidding access to certain areas, peace bonds and release to third persons) seem to the authors to be unrealistic except for some possible use of the recommendation that arrestees be released to custodians outside the riot area. For example, rearrest for failure to return to jail at night would probably not be feasible due to the record keeping and follow up required of an otherwise well occupied police force. Also rearrest would be impossible in situations such as the Detroit riot where police for a time abandoned control of whole sections of the city. Daytime release from detention facilities perhaps 100 miles from the city required by inadequate local jail facilities would be impracticable. Bail and Civil Disorder 827.

\textsuperscript{204} See Dobrovir, supra note 188; CIVIL DISORDERS REPORT 192.
which are probably unenforceable as long as his community contacts suggest no likelihood of flight. It is respectfully submitted that any sane society might grant such a defendant pretrial release if he promised to flee, but would deny it to him if he is likely to remain in the riot area.

Obviously, no case is likely to arise in which the facts are so clear, and concededly the reliability of criteria for assessing future dangerousness is dubious at best. Judges also have no special qualifications for making such decisions. These are cogent reasons for denying authority to detain in normal circumstances, but a legal system can only operate through human beings with the best techniques available at any given time. Judges lack special qualifications for making many of the decisions that society entrusts to them. To admit that they must realize both the difficulties involved in their tasks and their limitations does not mean that judges should refrain from acting to protect the community when they believe they are able to reach a rational decision that a defendant is likely to rejoin a riot or commit a serious offense if released. Laymen are expected to be able to agree unanimously as a jury on whether conduct was done with knowledge or a certain intent and whether a defendant is suffering from a mental disease, although experts may have expressed an honest difference of opinion. Similarly, judges regularly predict future conduct in making probation decisions, and it is doubtful that they are less qualified to make decisions concerning whether a person is likely to rejoin a riot or commit a crime during a disorder.


206. In recommending that a limited preventive detention power be available during emergency situations, we do not overlook the principle that exists in almost all jurisdictions today that, under normal circumstances, a person arrested for a non-capital case is entitled to pretrial release regardless of whether he may present a danger to the community. See 18 U.S.C. § 3146 (1970); United States v. Bronson, 433 F.2d 537 (D.C. Cir. 1970); United States v. Leathers, 412 F.2d 169 (D.C. Cir. 1969); In re Underwood, 9 Cal. 3d 345, 508 P.2d 721, 107 Cal. Rptr. 401 (1973), noted in 5 U.W.L.A.L. Rev. 68 (1973). This does not, however, mean that “dangerousness” must always be ignored in determining whether detention of a citizen is permissible. Thus, dangerousness has frequently been used as a basis for a preventive detention type power in, for example, capital cases, civil commitment proceedings, and release pending appeal from a conviction. See Carbo v. United States, 82 S. Ct. 662 (Douglas, Circuit Justice, 1962); Banks v. United States, 414 F.2d 1150 (D.C. Cir. 1969); Note, Preventive Detention Before Trial, 79 Harv. L. Rev. 1489, 1504 (1966). See also 18 U.S.C. § 3148 (1970); D.C. Code § 23-1322 (1970). Although the constitutionality of any preventive detention provision
We believe that preventive detention is a procedure that should be available to law enforcement personnel during a serious civil disorder, but only within the bounds of narrowly drawn legislative authorization.\textsuperscript{207} In considering this limited power, it is important to make several preliminary observations.

Preventive detention is a subject that has spawned much rhetoric and scholarly comment in recent years.\textsuperscript{208} We think it possible to acknowledge the serious concerns that are expressed about preventive detention when used as a law enforcement procedure in ordinary circumstances, and still conclude that it may be justified when used in the narrowly defined circumstances of a civil emergency. The answer to such concerns is not to bar the use of a procedure that may in many cases be necessary during an emergency, but to limit its use and the concerns that it generates to the greatest extent possible.

Preventive detention, as with all other procedures that are to be utilized under emergency conditions, must be considered in light of the objectives and purposes of the system. In our view, these include restoration of order and protection of the persons and property of the citizenry.\textsuperscript{209} Given these paramount objectives and the extraordinary danger posed by a serious civil disorder, we think the permissibility of a limited preventive detention power should not be viewed on the same basis as it has been when proposed for use in non-emergency situations.

Finally, it must be noted that legal authority in the area of preventive detention is notably sparse.\textsuperscript{210} However, existing constitutional doctrine has not been interpreted to preclude the limited power that we must await authoritative determination, we believe that the limited provision that we envision would survive challenge if sufficient procedural safeguards were built into it. See ABA Standards Relating to Pretrial Release 67. See notes 212, 245-50 infra and accompanying text.

\textsuperscript{207} See notes 245-60 infra and accompanying text.


\textsuperscript{209} See Part I 636-55.

envision. Constitutional principles have, on the contrary, been interpreted to provide considerable flexibility during serious disorders. In addition, there is respectable authority that has upheld the use of preventive detention, in a much broader manner than we envision, when military force has been called in to aid the civil power in restoring order.

Assuming that detention for a limited period of time for certain persons arrested during a serious disorder may be both desirable and constitutional, serious questions remain to be answered: (1) who may be detained; (2) the duration of detention that will be permitted; and (3) the procedures that should be followed to prevent abuse. The answers to these questions should again be dictated by the purposes of the criminal process during a serious civil disorder, and the necessity of ensuring that extraordinary powers are limited to the emergency that provides justification for their use.

The example of the rooftop sniper who plans to return to the riot area with the intent of committing a serious crime in furtherance of the objective of the disorder provides a paradigm of the need for detention. It may also be justified in other cases involving a situation less dramatic than a serious riot-related offense by an offender who clearly plans to repeat his conduct if released. We shall consider two classes of

211. See Part I 636-55. See notes 241-60 infra and accompanying text.

Under a long series of cases decided by the Supreme Court of the United States, lower federal courts, and state courts, police and troops in emergencies have the authority to detain individuals during the period of an emergency without being required to bring them before a committing magistrate and filing charges of criminal conduct against them. Situations where this rule applies have been traditionally limited to those where violence or the threat of violence prevents the enforcement of the law through normal judicial process, and the doctrine which there obtains is customarily referred to as "qualified" martial law. In that situation, the authority of the nation, state, or city, as the case may be, to protect itself and its citizens against actual violence or a real threat of violence is held to outweigh the normal right of any individual detained by governmental authority to insist on specific charges of criminal conduct being promptly made against him, with the concomitant right to bail or release pending judicial determination of those charges. Address by Assistant Attorney General William Rehnquist, Spring Lecture Series, Appalachian State University, May 5, 1971.


213. In their thoughtful article, Bail and Civil Disorder, Professors Colista and Dononkos would limit preventive detention of a defendant to situations where there was substantial evidence that he participated in inciting a riot or rebellion; that he has a criminal record that evidences violent or destructive antisocial behavior; or that he
offenders arrested during serious civil disorders that pose difficult questions: (1) persons arrested for a serious offense against persons or property unrelated to the disorder itself; and (2) persons arrested for less serious offenses where there is probable cause to believe that they will resume unlawful participation in the disorder if released.

Serious crimes such as burglary and robbery do not stop when a civil disorder starts. The populace may have less protection than usual against street crime as police are required to reduce force levels in relatively quiet sections of the city in order to concentrate their efforts committed or attempted to commit a serious crime against the life or physical safety of others, including arson or illegal destruction of buildings or property by explosives or other violent means. Bail and Civil Disorders 828-29. See also Criminal Justice in Extremis 586-87; National Security Interest and Civil Liberties 1318-21. Others would limit preventive detention to defendants charged with a crime of an aggravated nature—for example, capital crimes, arson, sniping, aggravated assault, possession of a deadly weapon, or inciting to riot—following a finding after a hearing that the defendant represents a substantial danger to others or the community. Bail and Preventive Detention 431-32.

It has also been argued that the present law of bail is sufficiently flexible to justify preventive detention in riots if statutes were amended to provide greater authority for courts to relate probability of guilt and necessity for detention. Limits on Riot Control 104. Our proposal differs from this approach, as do the proposals of Professors Colista and Domonkos and of Bail and Preventive Detention, in that the judiciary would be empowered to act only after an executive or legislative proclamation of an emergency and only during the duration thereof. Obviously, the danger of extending the concept of preventive detention to non-riot situations exists whenever detention is permitted on the basis of future criminal conduct, but the danger of eroding traditional bail practices in such situations is less when the judicial power is limited by the necessity of a political act of high visibility and broad collateral consequences. Some judges have asserted that the courts should not deny reasonable bail in civil disorders, but should rely upon the executive to declare martial law if the situation demands preventive detention. See Greene, A Judge's View of the Riots, 35 D.C.BJ. 24, 30 (Aug.-Oct. 1968). This may well be the appropriate response in the absence of legislation permitting the courts to deal with the emergency within the law. It is suggested, however, that it is far better to have a limited form of preventive detention administered by the regular civilian judiciary after the executive has proclaimed an emergency than to entrust judicial decisions to the military with much broader powers.

The checker at a convenience store, the proprietor of a small liquor store, and the gas station attendant may continue to work at a substantially increased risk as police capability for protection is reduced. In such circumstances, it does not seem unreasonable to us that a person arrested for a serious offense against property or persons should be detained for a longer period than would normally be permitted. We think that detention of a person validly arrested for a serious crime during a civil disorder for a relatively brief period of time is not too high a price to exact from a defendant in exchange for the greater protection provided to the public.

In practice, we doubt if many persons arrested for serious offenses will gain pretrial release during an emergency, regardless of the dictates of law. We think it far wiser that the law reflect what the public expects, and what judges will do, than to pay lip service to maintaining constitutional safeguards at least in theory, when it is known in advance that the system will break down. The language of the Constitution does not require a result that offends experience and reason.216 Attempts to apply the "normal" procedures will, in our judgment, result in decisions articulated in the language of "danger of flight" which will have the inevitable effect of limiting the opportunities of pretrial release in "normal" conditions.

In some civil disturbances, the courts will also be faced with defendants who will probably resume participation in the disorder as soon as they are released from custody, but who are unlikely to commit any serious offenses. Nevertheless, their release will place a burden upon police and make restoration of order more difficult with the consequent inconvenience to law abiding citizens, turn the judicial process into a revolving door, and possibly threaten the ability of the government to function, as was the case with the Washington May Day of 1971.

The legal system must be able to respond effectively to this type of situation. No government should be powerless to deal with concerted illegal conduct aimed at forcing it to behave in a manner contrary to what the elected representatives of the people think is right. One possible alternative would be legislative authorization for the court to require that a defendant enter into a recognizance agreement by which he promises to refrain from participating in the disturbance, entering cer-

215. CIVIL DISORDERS REPORT 173-74. Compare the statement of the District Attorney of Los Angeles County after Watts: "I take the position that any crime occurring during the riots became more serious because of that fact alone. I believe that those who committed crimes during those terrible days of the riot are in a special class."

216. See Criminal Justice in Extremis 581.
tain areas, or doing certain acts, with a penalty sufficiently high to deter all but the most zealous lawbreaker. The obvious difficulty posed by this proposal, however, is whether and how the conditions could be enforced during the period of the emergency. Rather than suggesting approaches that cannot be made to work under the conditions of an emergency, in most cases we think it wiser to provide that the court may refuse release in those cases where it believes that the recognizance will be dishonored.

The power of the courts to suspend the usual bail rules, even for these limited categories of offenders, should be subject to specific durational limitations. In our opinion, it should not extend beyond the period of the emergency, the existence and continuation of which should be subject to review. Additional safeguards might be provided by ensuring access to bail within a period of seventy-two or ninety-six hours regardless of whether the state of emergency has been formally terminated. By that time, or earlier if the appropriate legislative, executive, or judicial authority determines that an emergency no longer exists, all those who have been detained should either be released with charges dropped, or receive immediate hearings with eligibility for pretrial release according to the usual non-emergency practice of the jurisdiction. In addition, persons detained during the emergency for serious crimes should be entitled to a preliminary hearing to assure that there is probable cause to believe that they have committed the crimes with which they are charged. A hearing during the emergency should also be provided to those whose detention is continued on the ground that they are likely to rejoin the disorder.

It is argued that detention even in these limited circumstances authorizes punishment without trial and thus offends the Constitution. The presumption of innocence is said to be violated if a person arrested for a serious offense is detained because of fear that he may commit another serious offense, or if a minor lawbreaker is detained because he intends to resume his participation in the disorder.

There is obviously considerable merit to both sides of the preven-

217. See note 203 supra.
218. See notes 297-98 infra and accompanying text. See also Bail and Civil Disorder 829.
219. See Civil Disorders Report 359-407; Miller, supra note 214, at 24, 40. Only a few serious disorders, such as Newark and Detroit in 1967, have lasted longer than three days.
220. See generally ABA Standards Relating to Pretrial Release 84-88; Limits on Riot Control 104.
CIVIL DISORDERS

tive detention debate. If the presumption of innocence means something more than the obligation of the state to prove guilt beyond a reasonable doubt at trial, it may in theory be infringed by a limited detention. In a similar sense, it is infringed under existing federal law when a suspect is held for six hours before presentation to a magistrate, or for ten days as a result of inability to post bond following a continued preliminary hearing.

A person arrested for disorderly conduct would in fact be punished, in the sense of being deprived of his liberty, as a result of a detention without trial if he is denied release pending trial. His punishment might be considerably less than he would receive if tried in the midst of the emergency, particularly if our suggestion concerning the desirability of dismissing most charges were followed. Nevertheless, the symmetry of traditional legal theory is impaired unless the procedure is examined in terms of its relationship to the purposes of the criminal process during a serious disorder. Neither the serious offender nor the minor offender is being detained because he is presumed to be guilty. Each is presumed innocent, although in a lawful arrest there has been probable cause to believe each is guilty; and each will be given an opportunity to have a trial in which guilt will be determined as soon as it is reasonably possible to do so—at the end of the emergency. At their trials, each will be presumed innocent. The punishment, although real, is incidental and not the objective of the detention. The objective is to facilitate the restoration of order and protect the life and property of the citizenry. The justification for accomplishing this objective, at the expense of the deprivation of liberty without trial which may result from the detention, is the necessity occasioned by the emergency. The defendant is detained because of the likelihood that if released he will endanger persons or property or contribute to the disorder. His detention is justified only because there is no other reasonable alternative which will


223. 18 U.S.C. § 3501 (1970). See also URCP 311; Fed. R. Crim. P. 5; ALI PREARRAIGNMENT CODE § 310.1 (presentation within 24 hours of arrest); ABA STANDARDS RELATING TO PRETRIAL RELEASE § 4.1; NAC STANDARDS, COURTS § 4.5; NAC STANDARDS, CORRECTIONS § 4.5(1).


225. See CIVIL DISORDERS REPORT 193 (“sentencing is often best deferred until the heat of the riot has subsided, unless it involves only a routine fine which the defendant can afford”).

226. See notes 232-40 infra and accompanying text.
accomplish these objectives adequately, and his special status ends with the emergency.

Legislative endorsement of these principles would end some of the hypocrisy which inevitably results when statutes designed with a totally different circumstance in mind require releases during a disorder which both the judge and public deem contrary to the community interest. It would also discourage the available alternative of military detention, and avoid judicial decisions in riot contexts which may water down the right to bail in non-emergency situations.

Two additional matters deserve discussion in the context of detention during emergencies. The first involves forfeiture of collateral. In non-emergency situations, citizens are frequently allowed to post and then forfeit collateral following arrests for minor offenses, thereby avoiding the necessity of a court appearance or the posting of bond or of otherwise qualifying for pretrial release. If the amount of collateral required to be posted is increased, the penalty imposed as a price for avoiding court appearance is obviously greater. If the practice of permitting the forfeiture of collateral is suspended, more arrested persons are subjected to court appearance, detention until hearing, and the possibility of a more severe punishment if found guilty.

Officials may be faced with a situation similar to that which occurred during the District of Columbia May Day demonstrations in 1971, where the normal collateral required for minor offenses was sufficiently low that some disruptors were apparently prepared to post the collateral, forfeit it, and rejoin the disorder. The closing of this revolving door was possible only if collateral schedules were altered, but the effect of prohibiting forfeitures or raising the amount was to subject police detention facilities and the courts to a deluge of defendants whom they were ill equipped to process effectively. Additional confusion resulted from a series of conflicting decisions by the police and courts. Subsequently, the Judicial Conference Committee concluded that collateral schedules should not be revised on the basis of findings concerning the imminence or existence of a particular emergency.

We disagree. The reason for permitting collateral to be posted and forfeited in lieu of court appearance, trial, and punishment is the assumption that the purposes of the criminal justice system can be achieved without resort to the more formal procedures usually involved.

227. See Part I 636-55.
228. 1973 D.C. REPORT 45, 221.
The forfeiture procedures provide both the practical equivalent of an admission of guilt and a punishment normally appropriate for the transgression and sufficient to deter intentional repetition of the offense. If, however, forfeiture of collateral is being used to thwart the purposes of the system—to facilitate the continuation of the disorder—there seems to be no reason why the criminal process should not be altered to prevent the abuse. Likewise, the situation may justify permitting the forfeiture of collateral in cases not normally within the purview of the schedule, as for curfew violations. Whether more harm will result from clogging the courts than from returning offenders to the streets is a decision that should be made by the courts on the scene and should be based upon the criterion of whether the system will operate more efficiently with or without permission to forfeit. We think the existence of an emergency is an appropriate reason for reassessing the wisdom of permitting the forfeiture of collateral.

Finally, it should be remembered that we envision a process where relatively few people are detained at all. Those who are detained will be held solely on the grounds that they constitute an unacceptable risk of danger to the community or are likely to contribute to the disorder. The vast majority of persons arrested in serious disorders do not fall into either category. They are the curfew violators, many of the looters, traffic offenders, trespassers, and people charged with disorderly conduct. It is the mass of these offenders who clog the courts. Enlarged discretion not to arrest, increased use of citations, and authority to release those validly arrested should greatly reduce the number of persons returned to the courts. Those presented to the courts who are not charged with serious offenses should be promptly released on recognizance in the absence of probable cause that they will rejoin the disorder. Available judicial manpower should be used primarily to screen cases brought before the courts to determine whether detention or release is appropriate. The result, we think, will be the release of many who would in the past have been detained and the detention of a few, most of whom would have been detained in the past but under circumstances where there was little justification in law for the detention.

231. See notes 38-39 supra and accompanying text.
V. PROSECUTORIAL DISCRETION

Prosecutorial discretion is tested dramatically in civil disorders at two stages: (1) during the disorder when the arrested person is first presented to the prosecutor, and (2) after the disorder when a decision must be made concerning whether to proceed with or dismiss charges. We think that the basic problem faced by the prosecutor is quite different at each stage.

During the disorder, the prosecutor will be faced with a choice when he first deals with an arrested defendant. The crucial question at this stage of the proceedings, in most cases, should be neither the charges to be asserted against the defendant ultimately, nor his guilt of those charges. Rather, the question should be whether he may be released without serious danger that he will resume the disorder or commit serious crime. If the arresting officer's report indicates probable cause that the arrestee has committed a serious crime, the prosecutor should normally "paper" the case as a serious crime and indicate his intention to seek detention. If the report indicates the commission of a minor offense, he should seek to ascertain whether it is probable that the defendant will join or rejoin the disorder if released. If he concludes that the danger of future contribution to the disorder is minimal, or cannot be proven, he should paper the case as a minor charge, issue a citation for a hearing at a future date, and order the defendant released. Only if the prosecutor can demonstrate probable cause to believe that the defendant will participate in the continuing disorder should he seek continued detention.

The prosecutor will necessarily be concerned tangentially with the issue of guilt and of the appropriate charge, but these should not be the focal points of his inquiry at this point. Naturally, he should not charge anyone where there is inadequate evidence of guilt,²³² but his review of the arrest information should normally be aimed at determining the propriety of immediate release, reserving the issue of the adequacy of evidence to justify prosecution for a later time. Under such a procedure, many who are clearly guilty will be released as will most of those who are not guilty, although the formal dismissal of charges may be delayed. A few persons who are not guilty may also be sent to court with a recommendation for detention. We think that this risk is inevitable, and frankly doubt the capacity of any system to conduct an effective review of arrest information during a serious disorder with the object of deter-

²³² ABA Project on Standards for Criminal Justice, Standards Relating to the Prosecution Function § 3.9(a) (1971).
mining the adequacy of evidence of guilt within three hours of an arrestee's arrival at a detention facility. It is far better that the focus of the inquiry at this stage, assuming once again that there is probable cause to believe that the defendant is guilty, be limited to detention, not guilt. In addition, no attempt should be made to try cases during a disorder. Judicial and prosecutorial manpower should be utilized to determine the propriety of detention and the issuance of warrants.

Prosecutors should again examine the issue of the desirability of detention when a case is first presented to the court to determine whether detention is appropriate. The issue might be litigated then in a number of ways: (1) upon preliminary examination of a defendant charged with a serious offense to determine whether there is probable cause to believe that he has committed the offense; (2) upon a hearing to determine whether there is probable cause to believe that a defendant charged with a minor offense will participate in the disorder if released; and (3) upon habeas corpus to determine whether the emergency justifying the use of extraordinary powers exists.

The determination of what charges will be brought against whom should normally be delayed until the disorder is over. Whether prosecutors should use their "normal standards" in determining whether to prosecute depends upon what is meant by the concept of "normal" standards. Usually, under normal conditions, a defendant whose guilt is clear should be prosecuted for the offense he has committed, or at least some lesser included offense. Concededly, prosecutors sometimes drop charges against such defendants, but a decision to do so is generally regarded as a deviation from the norm and requires special justification.

233. This was the recommendation of 1973 D.C. REPORT 31-33.
234. See notes 294-95 infra and accompanying text.
235. Id. at 36.
236. See STANDARDS RELATING TO THE PROSECUTION FUNCTION, supra note 232, § 3.9(b):

The prosecutor is not obliged to present all charges which the evidence might support. The prosecutor may in some circumstances and for good cause consistent with the public interest decline to prosecute, notwithstanding that evidence exists which would support a conviction. Illustrative of the factors which the prosecutor may properly consider in exercising his discretion are:

(i) the prosecutor's reasonable doubt that the accused is in fact guilty;
(ii) the extent of the harm caused by the offense;
(iii) the disproportion of the authorized punishment in relation to the particular offense or the offender;
(iv) possible improper motives of a complainant;
(v) reluctance of the victim to testify;
(vi) cooperation of the accused in the apprehension or conviction of others;
(vii) availability and likelihood of prosecution by another jurisdiction.
In a disorder there will be hundreds of cases where no useful purpose of the criminal law will be served by prosecution. Prosecution will neither deter, rehabilitate, educate, nor accomplish any other purpose except jamming the court docket and providing a criminal record to a person who is unlikely to commit an offense in the future, but who may experience substantial and undesirable collateral effects as a result of conviction. Many curfew violators, trespassers, persons convicted of disorderly conduct or failure to disperse, and some looters fall into this category. In fact, many if not most of these cases are not prosecuted unless the prosecution occurs during the height of the disorder. The decision not to prosecute in such cases should not be regarded as a breakdown of the system or the consequence of a "speedy trial" rule, but as a justifiable decision of public authority that no attempt should be made to impose criminal sanctions in the absence of a belief that some useful public purpose will be served by so doing. Time and resources now spent in trying individual or "test cases" can be more profitably spent in careful preparation of cases against those charged with more serious offenses, including riot-related offenses.

VI. CONSTITUTIONAL JUSTIFICATION FOR EXTRAORDINARY POWERS

We think that our proposals concerning arrest, search, and seizure are consistent with existing fourth amendment law. In particular, the

The problems that will be posed to a defendant who raises a selective prosecution question are suggested by United States v. Crow Dog, 399 F. Supp. 228 (N.D. Iowa 1975).


239. We think it far wiser to exercise prosecutorial discretion not to proceed in such cases than to attempt a "formal, conceptual separation of the law as it relates to order maintenance," and decriminalizing "situations of incipient violence." See Force, Decriminalization of the Breach of the Peace Statutes: A Nonpenal Approach to Order Maintenance, 46 Tulane L. Rev. 367 (1972).

A sound prosecutorial approach was illustrated by the situation that followed the national political conventions in Miami in 1972. During the Republican convention, some 1,100 youthful offenders were arrested. Of these only a very few were for serious felonies, the remainder being for misdemeanors such as "blocking traffic and failing to disperse." Within a six month period of arrest, the felony cases were tried in the normal manner, but all of the misdemeanor cases were dismissed. This action was apparently justified on the following basis:

Practically all of the law enforcement officers have felt that the main purpose of the arrests was to prevent serious problems and to insure the democratic process. Once that was achieved there was little desire to obtain massive convictions. N.Y. Times, Nov. 24, 1972, at 21, col. 1.

240. Cf. 1973 D.C. REPORT 49-50. The Committee recommended that "the test case be encouraged as a method of resolving cases based on similar facts." Id. at 50. See also ABA COMMISSION ON STANDARDS OF JUDICIAL ADMINISTRATION, STANDARDS RELATING TO TRIAL COURTS 76 (1973).
willingness of the Supreme Court to apply a broad standard of "reasonableness" as the test for searches without a warrant provides clear justification for our proposals concerning emergency searches, roadblocks, searches incident to curfew arrests, and broadened stop and frisk authority. The Court will apparently no longer adopt a "per se unreasonableness" approach to warrantless searches not fitting within "a few specifically established and well-delineated exceptions." In searches incident to an arrest, it has already indicated that it will not require litigation in each case of the "issue of whether or not there was present one of the reasons supporting the authority for search of person." Instead, any lawful arrest will subject the arrestee to a full search of his person. Searches of his property without a warrant, of a kind not falling within the traditional exceptions, may be permitted if "the search is reasonable," without regard to whether it may have been reasonable to procure a search warrant.

Our proposals for preventive detention stand on a less firm footing. We are aware of the strong arguments that have been advanced to the effect that the eighth amendment prohibits only excessive bail and does not preclude a legislative decision to deny bail altogether in designated types of cases, and that, at least for certain serious offenses, bail can be denied a dangerous offender because historically such serious offenses were not bailable as a matter of right at common law. Either of these theories would support our recommendation that release be denied defendants arrested for serious offenses during a disorder, and the former would presumably justify the denial of bail to the perpetrator of a less serious offense who is likely to contribute to the disorder upon release. The difficulty is that both would also justify a much broader concept of preventive detention during non-emergency conditions, a doctrine that is quite unnecessary in order to uphold the more limited detention power that we envision in the extraordinary conditions that frequently accompany a serious civil disorder.


243. Id.


Some justification for preventive detention may be found in the short duration of the detention which we would permit. The right to bail has never been interpreted to require instantaneous presentation before a magistrate and release on bail following arrest. In rural areas, and in some cities, the delay between arrest and a bail decision may now often exceed the seventy-two hours that we think reasonable.\textsuperscript{247} There is, of course, a difference between not being presented before a magistrate for a pretrial release decision and a denial of release after presentation. We question whether the difference reaches constitutional dimensions, at least where the detention is as limited as we suggest. Certainly, the realistic effect of a seventy-two hour delay—followed by release governed by ordinary criteria for a few offenders, and release upon recognizance or citation for most—would seem less violative of the constitutional principles than requiring a minimal bond of $300 to $500 for all offenders with full knowledge that most will be unable to post the premium or find a bondsman who will undertake to serve as surety.\textsuperscript{248}

As was indicated earlier, case precedent in the preventive detention area is notably lacking, especially in view of the rhetoric that it has spawned.\textsuperscript{249} Notwithstanding this general lack of precedent, our proposals are supported by the martial law cases.\textsuperscript{250} Military authorities in serious civil disorders have been permitted to exercise powers of detention that are far greater than those we think desirable, and it should be possible under the Constitution to authorize civilian officials of the state to exercise the powers which military officials may constitutionally exercise over civilians.\textsuperscript{251}

\textsuperscript{247} D. Freed & P. Wald, \textit{supra} note 184, at 202.
\textsuperscript{248} Such a procedure apparently meets the requirements of the Constitution. Cf. Foote, \textit{supra} note 184, at 1126-36.
\textsuperscript{249} Blunt v. United States, 102 Wash. L. Rep. 1585 (D.C. Ct. App. 1974). Nothing in Stack v. Boyle, 342 U.S. 1 (1951), even remotely suggests that its holding was intended to deal with mass civil disturbances.
\textsuperscript{250} See note 212 \textit{supra}.
\textsuperscript{251} See Part I 636-55. We appreciate that there is rhetoric suggesting that the existence of emergencies has no effect upon the power of government. See, e.g., Coolidge v. New Hampshire, 403 U.S. 443 (1971):

In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law [of the fourth amendment] and the values that it represents may appear unrealistic or extravagant to some. But the values are those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyone's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. \textit{Id.} at 455 (footnotes omitted).

We do not think the lofty sentiment is justified by the decisions of the Court. We recognize that our argument is on a firmer foundation when applied to mass violence
There is authority for the proposition that, while the military may exercise broad powers in such an emergency, similar powers cannot be asserted by civil authorities. In the absence of legislation, we have no quarrel with the result, although it produces at least two strange and undesirable consequences. The rights of the citizen may depend upon whether he is arrested, searched, and detained by a soldier or by a policeman, and such a doctrine creates an incentive to use troops when sound policy should, in our opinion, dictate that troops not be used if civilian authorities with broader powers can cope with the situation. A sounder approach would be a recognition that the emergency that justifies the use of troops and their extraordinary empowerment also justifies extraordinary powers in civil authorities.

Support for this proposition may be found in the decision of the Court of Appeals for the Fourth Circuit in United States v. Chalk. Pursuant to a state statute and city ordinance, the mayor of Asheville, North Carolina, proclaimed a state of emergency following a battle between blacks and police at a local high school. He also imposed a nighttime curfew and prohibited the off-premises possession of firearms, in addition to other restrictions upon activities which would normally have been beyond his authority. At about 11:00 p.m., a car was stopped by a police officer who placed Chalk, the driver, and a passenger under arrest for violation of the curfew order. The officer noticed what appeared to be the butt end of a shotgun protruding from underneath a newspaper on the floor of the car. He pulled it out and observed the stock and trigger mechanism of a twelve-gauge shotgun. Further search revealed the barrel of the gun, shotgun shells, and dynamite fuses. The car was again searched at the police station where additional incendiary materials were discovered. These materials constituted the basis for federal prosecution for possession of unregistered firearms.

such as characterized the urban riots of 1967 and 1968 than mass non-violent civil disobedience such as exemplified in the Washington May Day disturbance of 1971. The precedents clearly involve cases of violence. We think they should also apply to massive civil disobedience if of a nature sufficient to threaten the orderly functioning of government.

253. See Valdez v. Black, 446 F.2d 1071 (10th Cir. 1971), cert. denied, 405 U.S. 963 (1972). For a discussion of Valdez see Part I 607 n.203. The petition for a writ of certiorari in Valdez raised the question, inter alia, of whether National Guardsmen are subject to the fourth amendment in the absence of insurrection or a declaration of martial law. 40 U.S.L.W. 3290 (U.S. 1971).
255. See 26 U.S.C. §§ 5841, 5861(d) (1970). The firearms in this case were materials from which an incendiary bomb could be assembled.
Chalk asserted that the searches which produced the incendiary materials violated his constitutional rights, in part because they were triggered by unlawful restrictions, particularly the curfew, imposed by the mayor. Specifically, he argued that the statutory scheme authorizing a mayor's declaration of a state of emergency was vague and "overbroad," and that there was an insufficient threat to public safety to allow the mayor to impose the restrictions. The court, in an opinion by Judge J. Braxton Craven, analogized the exercise of discretion by the mayor to the permissible use of military force in a domestic disorder. Relying on the martial law cases, it observed that an executive decision that civil control has broken down to the point that emergency measures are necessary is not conclusive nor is it free from judicial review, but that the scope of the review must be limited. The application of the martial law approach required that judicial scrutiny be limited to determining whether the action was taken in good faith and whether there was some factual basis for the decision that the restrictions imposed were necessary to maintain order. If such a factual basis existed, Judge Craven noted, it would be highly inappropriate for a court to substitute its judgment of the degree of necessity for the judgment of the official who was required to take immediate action. Although Chalk was written in terms of the limited scope of judicial review, it not only reaffirms the basic theory of the martial law cases, but also uses them as a rationale for sustaining executive action by local officials where military forces were not involved.

VII. LIMITATIONS UPON POWERS OF MILITARY FORCES

We have suggested earlier that in serious civil disorders military forces should be authorized by statute to utilize the same emergency powers as civilian police. In some states this may increase the existing powers of the military; in most it will probably limit the powers which

257. Id. at 1280-81. Predictably, the court relied upon Luther, Moyer, Sterling, Milligan, and other cases noted at earlier parts of this Article.
258. Id. at 1281.
259. The court stated that "whether the measures employed . . . were absolutely necessary in order to prevent a serious civil disorder is clearly an important question for political debate, but not, we think, a question for judicial resolution in this case." Id. at 1282.
261. See Part I 636-55.
262. See id. at 648 n.205.
are now dependent upon the more flexible concepts of necessity;\textsuperscript{263} and in others it will clarify law that is now ambiguous.\textsuperscript{264}

Eminent authority has opposed the codification of permissible military powers upon the ground that a code is "not very helpful in dealing with situations incapable of precise delimitation in advance" and that "[n]o legislation could envision every situation which might arise or help in the solution of the really difficult cases."\textsuperscript{265} In our judgment, these observations would also apply to any attempt to fashion legislation to deal with emergencies. It is no more or less difficult to determine what powers civilian law enforcement authorities should be permitted to exercise during a civil disorder. In substance, the issue is whether crucial decisions involving public safety and individual rights will be made in periods of comparative calm by popularly elected legislatures or in the tumult of a disorder by civilian or military executives. We think it far better that crucial decisions concerning the breadth of extraordinary powers be made by the elected representatives of the people than by military commanders.\textsuperscript{266}

Assuming that some form of legislative authorization and restriction upon the powers of the military is appropriate, the issue then becomes one of what extraordinary powers should be conferred. The concept of codifying the permissible powers of troops is not new. Unfortunately, past proposals have proceeded upon the assumption that troops should be permitted to utilize the powers of civilian authorities in non-emergency conditions,\textsuperscript{267} or be given special powers not entrusted to civil authorities without discussion of why such powers should be entrusted only to the military.\textsuperscript{268} We see no reason why military forces should be granted greater powers than the civilian police. To do so would inevitably provide an even greater incentive for their use, when, in our opinion, resort to military force should occur only if civilian authorities, using their emergency powers, are unable to deal with a disorder effectively.

\textsuperscript{263} Id. at 648 n.206.
\textsuperscript{264} Id.
\textsuperscript{265} WIENER 164.
\textsuperscript{266} This is, indeed, the common procedure in much of the free world. See note 26 supra.
\textsuperscript{267} See University of Colorado Law Revision Center, \textit{A Comprehensive Study of the Use of Military Troops in Civil Disorder with Proposals for Legislative Reform}, 43 U. ColO. L. Rev. 399 (1972). The proposed statutory scheme reflects many of the views of Professor Engdahl, at that time director of the Center. See Part I 655-90.
\textsuperscript{268} Ballantine, \textit{Qualified Martial Law, A Legislative Proposal} (pts. 1-2), 14 Mich. L. Rev. 102, 197 (1915).
We also see no convincing reason why military forces should have less authority than civilian police.\(^{269}\) As a matter of prudent judgment, it may be appropriate that troops be used to replace police in normal protective functions and as guards for vital facilities such as bridges, power plants, and communications centers, rather than deploying them in a disorder area. But occasions may arise where it will be necessary to use troops to arrest, search, or man roadblocks. They should be authorized to perform these functions without the necessity of a platoon’s being accompanied by a police officer who in theory makes the arrests,\(^{270}\) or of deputizing a regiment of National Guardsmen under the theory that they will in fact be acting as special police officers under the command of a police chief.\(^{271}\)

We recognize that there may be a catastrophe of such gigantic proportions that the executive may be required to govern temporarily through the use of troops who exercise powers greatly in excess of those which we would permit in the more "routine" emergencies resulting from serious civil disorders such as race or campus riots, massive labor violence, or localized insurrection. Such a situation could, for example, occur as an aftermath of a nuclear attack.\(^{272}\) In such circumstances, resort to the more flexible concept of necessity might be appropriate despite the legislative authority and restrictions which we think should be imposed upon police and the military. Such situations are unlikely to occur, and should not justify a failure to delineate by legislation the appropriate powers of the military in the disorders much more likely to be the basis for military intervention. Neither should recognition of the need for greater powers in the most extreme situation be used to justify their use in less serious disorders which are nevertheless beyond the effective control capacity of civilian authorities.

At one end of a spectrum will be disorders which civilian authorities can deal with under normal procedures, and at the other will be disruptions which threaten the survival of the political community and in which extraordinary measures will probably be taken by an executive and tolerated by the courts regardless of the absence of articulated legal justification. Between these poles will be circumstances where civilian authorities can adequately deal with serious disorders through temporar-

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\(^{269}\) But see 1973 D.C. Report 19-23 (opposing a grant of arrest authority to regular military personnel).

\(^{270}\) Civil Disorders Report 291.

\(^{271}\) This has been the recent practice in the District of Columbia. 1973 D.C. Report 21-22.

ily expanded powers, and other disorders where military forces using these same powers will be adequate to restore order. It is in this concededly vague middle ground that we favor the legislative expansion of civilian authority with the same powers, but no others, being granted to the military.

VIII. PROTECTION AGAINST ABUSE

Procedures to protect against abuse should be incorporated in any process where extraordinary powers are vested in governmental authorities. Expanded powers to deal with serious civil disorders provide a classic example of the desirability of such safeguards, because there is both a tendency to justify excessive use of power on emergency or national security grounds by executives seeking to accomplish ends that would clearly be unlawful in normal circumstances, and a tendency

273. The possibility of abuse on such grounds is well summarized by Friedrich and Sutherland, as follows:

If constitutional executives or legislatures were able, on the pretext of emergency, to exercise unlimited discretion in the assumption of powers normally denied to them, self-interest would often tempt them to discover imaginary crises, or to exaggerate the extent and severity of real ones. This situation, which if carried far enough would make a farce of any system of constitutional restraints, can be avoided only by subjecting the exercise of emergency powers to the judgment of some relatively independent and disinterested authority. Friedrich & Sutherland, supra note 26, at 688.

This type of justification has been regrettably frequent in recent years. Its most familiar invocation in this country has been the attempted defense of several aspects of the so-called Watergate Affair. Thus, the drafting of domestic intelligence-gathering plans, the creation of the so-called "plumbers" unit, the burglary of the office of Daniel Ellsberg's psychiatrist, the wiretapping of suspected "leakers," and the attempted cover-up itself, as well as various other projects, were justified by those responsible for them as being in the interest of national security. See, e.g., Hearings Before the Senate Select Comm. on Presidential Campaign Activities, 93d Cong., 1st Sess., Book 3, at 1319-45 (1973) (the so-called Huston Plan documents, which set forth a broad program of domestic intelligence gathering); Brief on Behalf of the President of the United States, in Hearings Before the House Comm. on the Judiciary, 93d Cong., 2d Sess. 15 (1974); Statement of Information, Hearings Before the House Comm. on the Judiciary, 93d Cong., 2d Sess., Book 1, at 103 (1974); Testimony of Witnesses, Hearings Before the House Comm. on the Judiciary, 93d Cong., 2d Sess., Book 2, at 304 (1974); W. Dobrovir, J. Gebhardt, S. Buffone & A. Oakes, The Offenses of Richard M. Nixon: A Guide for the People of the United States 23-24, 28-33 (1974). It had also been used as a basis for warrantless wiretapping in so-called domestic security cases, see Hearings Before the Senate Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 92d Cong., 2d Sess. 95-99 (1972), a practice that was subsequently invalidated by the Supreme Court notwithstanding the argument. United States v. United States Dist. Court, 407 U.S. 297 (1972) (though, as noted at notes 135-38 supra and accompanying text, the Court did indicate that warrant requirements could be altered if Congress concurred that legitimate interests required such procedures); see Zweibon v. Mitchell, 516 F.2d 594 (D.C. Cir. 1975).

The invocation of emergency conditions or national security requirements has also been a frequent basis for repressive action on a far broader scale in other lands. The
by some officials acting in good faith to overreact to events that may constitute incipient emergencies.\textsuperscript{274} Any process that authorizes extraordinary powers in the event that certain conditions exist is subject to abuse if the officials to whom the decision is entrusted err, with good or bad motive, in determining the existence of the conditions that trigger the expanded authority.\textsuperscript{275} A high degree of procedural protection against the possibility of such error may mean a substantially diminished capacity to respond when conditions justify prompt action. A low degree of procedural protection, on the other hand, is an invitation to abuse. The challenge is to provide a capacity for immediate response to real emergencies while still maintaining effective safeguards to prevent abuses from happening, as well as adequate redress if an abuse does occur. Reasonable people will differ on how the balance should be struck, and the choices should be made by legislatures after full and open debate. The comments that follow reflect our suggestions for a pattern of procedural protection that might be adopted.

Effective procedural protection requires the utilization of different techniques of control of executive discretion and oversight by both

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most recent example was in India in 1975, when all of the fundamental constitutional rights of the people were suspended after a court decision finding that the Prime Minister had engaged in unlawful campaign activities. Thus, the Indian press reported that "a state of emergency [has been declared] this morning on account of [sic] threat to the 'security of the country' due to 'internal disturbances.'" The Times of India, June 27, 1975, at 1, col. 1 (Bombay ed.). The activity in India is by no means unique, since a state of emergency or martial law has been declared in no less than nine other countries in the past four years. These have included the Philippine Islands, N.Y. Times, Sept. 23, 1972, at 1, col. 7; Turkey, id., Apr. 30, 1971, at 2, col. 7; Korea, id., Oct. 18, 1972, at 1, col. 5; South Vietnam, id., July 18, 1972, at 4, col. 5; Argentina, id., May 1, 1973, at 3, col. 1; Chile, id., June 28, 1973, at 18, col. 2; Greece, id., Nov. 18, 1973, at 1, col. 3; Burma, id., Dec. 17, 1974, at 2, col. 4; and Nicaragua, id., Dec. 29, 1974, at 1, col. 4.


\textsuperscript{274} For example, the behavior of National Guardsmen in Newark and Plainfield, New Jersey, and Detroit in 1967 provide excellent examples, \textit{Criminal Disorders Report} 30-38, 41-46, 47-61, as does the behavior of the judiciary in Chicago in 1968 and Detroit in 1967, \textit{Criminal Justice in Extremis}; Comment, 66 MICH. L. REV., supra note 2.

\textsuperscript{275} In Luther v. Borden, 48 U.S. (7 How.) 1 (1849), Chief Justice Taney observed that

\begin{quote}
[It is said that this [intervention] power in the President is dangerous to liberty, and may be abused. All power may be abused if placed in unworthy hands. But it would be difficult, we think, to point out any other hands in which this power would be more safe, and at the same time equally effectual. \textit{Id.} at 44.
\end{quote}

Recent events suggest that abuse of power entrusted to the President may occur in the absence of effective legislative or judicial oversight.
Our basic suggestions for state legislatures involve several quite disparate elements: (1) legislative definition of the circumstances justifying extraordinary powers and delineation of the powers that may be exercised in such circumstances; (2) executive responsibility for the declaration of an emergency when conditions warrant the use of extraordinary powers, appropriate publication of the declaration, and a division of responsibility between local executives and the governor with reference to certain powers; (3) legislative reservation of the power to require approval for the continuation of an emergency after a stated period as well as the power to determine that emergency conditions have terminated; (4) judicial power to review whether an emergency justifying the use of extraordinary powers exists during a declared emergency; (5) brief maximum limits on preventive detention; (6) the development of guidelines authorizing and encouraging release of offenders during an emergency and dismissal of cases after a disorder has subsided when no useful purpose will be served by detention or prosecution; and (7) creation of an effective civil remedy for victims of abuse, including money damages and expungement of arrest records.

At the federal level major problems arise when regular troops are used or state guardsmen are federalized. As has been suggested earlier, there is good reason to clarify existing federal statutes to express more precisely when regular troops may be used, and when state guards may be called into federal service. The President should be denied the authority to act in any other cases without prior congressional authorization.

There is likewise a need to specify the powers of troops when they

276. The elements that we envision in an emergency power scheme were described by Friedrich and Sutherland as “an experiment [that] has [not] yet been made in any federal system, nor indeed in any other form of constitutional state.” Friedrich & Sutherland, supra note 26, at 692. They also identified four requirements that were necessary to ensure that emergency powers will not be used for an improper purpose:

(1) That the assumption of emergency powers be strictly legitimate in character—it must have its origin in and its authority must be derived from the legitimate constitutional source of power.

(2) The assumption of power must be for a relatively short period of time.

(3) Final authority to determine the need for emergency power must never rest with the agency which assumes the power.

(4) There must be an independent agency to determine whether or not acts perpetrated under an assumption of emergency powers were in defense of the constitution. Id. at 693.

While we have not attempted to build our model upon these requirements, they are reflected in the theoretical model suggested in the text.

277. See notes 306-08 infra and accompanying text.

278. See Part I 610-32.

279. Id. at 616-18 n.97.
are used. The President should be required to issue an executive order whenever troops are utilized, stating the reasons for their deployment and the authority for his action. There may also be reasons for authorizing congressional oversight of the President's decision to commit troops, by requiring congressional approval if troops are not removed after a limited period. Additional protection exists in federal court jurisdiction to issue the writ of habeas corpus, as well as federal relief against individuals and the government for unconstitutional action.

The greatest need for procedural protection is at the state and local level. The most prevalent current pattern combines broad powers of governors to use guardsmen, no clear statement of their powers, no legislative oversight, limited judicial capacity or inclination to restrain executive action, broad authority of local officials to proclaim emergencies and institute curfews, and broad immunity statutes without effective alternative remedies against the state. We think that considerable protection to the citizenry can be provided by more carefully drafted statutes defining the circumstances in which certain extraordinary powers may be exercised by civilian executive and judicial officials. Such

280. See notes 262-72 supra and accompanying text. Limitations on the power of federal troops might follow several models: (1) Congressional enactment of laws governing police powers in civil disorders within the District of Columbia with provision that the powers and limitations would apply to federal military forces used anywhere within the United States to maintain order; (2) delegation to the President of power to enact limitations by Executive order not inconsistent with principles reflected in Congressional legislation; (3) adoption of the law of the state in which federal troops are being used; and (4) legislation specifically setting forth powers.

281. See Part I 620 n.103.

this provision should be viewed as a counterpart to the Bivens case and its progeny, in that it waives the defense of sovereign immunity so as to make the Government independently liable in damages for the same type of conduct that is alleged to have occurred in Bivens (and for which that case imposes liability upon the individual Government officials involved). S. REP. No. 93-588, 93d Cong., 1st Sess. 3 (1973).

statutes might incorporate different thresholds as justification for the use of specific powers, with the decision as to the existence of the necessary conditions correspondingly entrusted to officials of different rank. Thus, mayors might be authorized to impose curfews upon a finding of widespread public disorder, while a decision to broaden the powers of arrest, search, or detention might require a finding that the disorders have reached a level that available civilian law enforcement authorities are unable to restore order under normal procedures. The seriousness of such action might justify a requirement that it be made by the governor upon request from the appropriate local official, particularly since the decision as to whether to commit the state guard will presumably continue to be made by the governor. The statute might require a specific finding that conditions necessitate the use of the special powers authorized by the executive action. A demonstration such as the Washington May Day demonstration might, for example, justify broadened powers of arrest and detention, but not necessarily require broadened powers of search. The decision to use troops might also require a finding that even with their enlarged powers civilian law enforcement authorities will be unable to restore order promptly. The statute should set out specifically the special powers entrusted to police and courts, and authorize troops to exercise the same powers as police.

In order to empower police or troops to use extraordinary powers, a governor should be required to declare an emergency and to delineate its geographical area. The declaration should be published widely through the media and by sound truck or other device in the affected areas. The promulgation and publication of the emergency declaration would perform several important functions: (1) provide notice to

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286. The problem of defining the local officials who should be empowered to act can cause difficulty in states with complex patterns of local government. See 35 BROOKLYN L. REV. 524 (1969). See also Part I 648-50 n.206. Thus, consideration must be given to the person who is to be authorized to act in the absence of the mayor or other local official. See, e.g., Riot Control Legislation 158 (noting that in the absence of the mayor of Denver, the deputy mayor would have such power, and the deputy mayor would be the manager of public works). We specifically think it unwise to entrust decisions concerning the existence of an emergency to state police or sheriffs. See Comment, 72 W. VA. L. REV., supra note 10. It has also been argued that it is important to require local officials to act to guard against a local mayor who sympathizes with rioters. Ducharme & Eickholt, State Riot Laws: A Proposal, 45 J. URBAN L. 713, 729-30 (1968). We doubt the efficacy of any attempt to mandate action through the imposition of criminal sanctions for neglect or refusal to act. Such approaches have in the past caused more practical problems than they have solved. See Part I 664-67.

287. See note 251 supra.

288. See notes 48-55 supra and accompanying text (notice requirements for curfew orders).
some potential offenders of the seriousness of the situation and deter some from participating; (2) provide a clear indication to the public of acceptance by the governor of responsibility for conduct limiting civil liberties, thereby discouraging its use in doubtful situations where an executive might be willing to act if his decision had lower visibility; and (3) tend to prevent post hoc justification for actions on the ground that they were justified by an emergency, since deviation from normal practice would not be permitted in the absence of the declaration.

Our proposal would involve prior legislative approval of a governor's power to act if certain conditions exist. In doing so we have obviously opted in favor of executive discretion to determine whether the required conditions exist, rather than reserving to a legislature the power to decide whether an emergency justifies the use of special powers. We do so for several reasons: (1) many state legislatures are not permanently in session; (2) some do not always demonstrate the capacity to take decisive action within short periods when in session; and (3) the intelligence resources of a governor probably render him more capable of assessing the seriousness of conditions and the relative levels of force required to deal with different types of disorders.

It does not follow that the legislature has no role to play. It seems to us quite reasonable to require legislative approval for the continuation of emergency conditions beyond a stated time period, such as a week, as well as to recognize the power of a legislature to terminate the resort to special powers by finding that an emergency no longer exists. Such negative controls may go far in discouraging overreaction by a governor.

291. See Friedman, Contingency Planning for the Administration of Justice During Civil Disorder and Mass Arrest, 18 AM. U.L. REV. 77, 95 (1968).
292. Cf. English Emergency Powers Act of 1920, which provides, in pertinent part, as follows:

1. Issue of proclamation of emergency

(2) Where a proclamation of emergency has been made the occasion thereof shall forthwith be communicated to Parliament, and, if Parliament is then separated by such adjournment or prorogation as will not expire within five days, a proclamation shall be issued for the meeting of Parliament within five days, and Parliament shall accordingly meet and sit upon the day appointed by that proclamation, and shall continue to sit and act in like manner as if it had stood adjourned or prorogued to the same day.

2. Emergency regulations

(2) Any regulations so made shall be laid before Parliament as soon as may be after they are made, and shall not continue in force after the expiration of seven days from the time when they are so laid unless a resolution is passed by both Houses providing for the continuance thereof.
We think it wise that a legislature confer jurisdiction upon its courts to determine if the statutory conditions justifying expanded powers or the use of troops exist, when a challenge to emergency powers is asserted by a detained citizen. We are mindful of the extensive case law in which courts have declined to examine whether emergencies in fact existed in the face of executive action. Such judicial self-restraint, or abdication of function, may sometimes have been justified by the constitutional separation of powers, or by adherence to “political question” or “standing” doctrines, but we are not impressed by the supposed lack of capacity of the courts to determine whether conditions are as the executive claims them to be. If the legislature has manifested its intent that the executive should act only if certain conditions exist, and has authorized the courts to determine if such conditions do in fact exist, there should be no serious question about the power of the courts to act. Such litigation should also not jam the dockets during a disorder. Presumably, a limited number of cases, with expedited appeals if necessary, could serve as the vehicles for determining whether an emergency existed and, if so, when it terminated.

The standard of review to be applied by a court should be whether the conditions justifying extraordinary powers existed and whether limitations placed upon police powers were exceeded. It has been suggested that the courts should play a more dynamic role, reviewing the exercise of emergency powers to determine if the measures taken were necessary to restore order. Such a standard would require that “there

(4) The regulations so made shall have effect as if enacted in this Act, but may be added to, altered, or revoked by resolution of both Houses of Parliament or by regulations made in like manner and subject to the like provisions as the original regulations. Emergency Powers Act of 1920, 10 & 11 Geo. 5, c. 55, §§ 1(2), 2(2), (4).

See 38 Halsbury’s Statutes of England 289-90 (1972). See also National Security Interest and Civil Liberties 1293 (proposal to permit temporary use of measures designed to deal with early stages of a disorder but requiring legislative action for more drastic measures).

293. We doubt if judicial review would provide realistic protection in any but the most extreme cases when an emergency was declared by a governor. It might, however, provide more protection when emergency measures are continued after the events which gave rise to the declaration have ceased to exist.

294. See Part I 635; McGonagle, supra note 26 at 211-12. But see Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 193 (1962) (“If judicial review is to constitute a meaningful restraint upon unwarranted encroachments upon freedom in the name of military necessity, situations in which the judiciary refrains from examining the merit of the claim of necessity must be kept to an absolute minimum”).

295. See Part I 632-34.


not be available to the government alternative means of coping with
the emergency that were as effective as the measures employed but
less restrictive of individual liberties." Under such an approach no
attempt would be made by the legislature to articulate permissible pow-
ers, but executive discretion would be subject to judicial review in a
context where the government would be required to establish the neces-
sity of each exercise of emergency powers.

We think that such a procedure would prove unworkable in prac-
tice. The height of a civil disorder is not an appropriate time, nor is the
court the best vehicle, for determining which measures are absolutely
necessary to accomplish a restoration of order. Each case would inevita-
ibly require separate litigation, since a decision in one would rarely be
binding on a second where conditions were different. The relative costs,
effectiveness, and restrictiveness of alternative measures are better deter-
dined by a legislature before a disorder takes place.

There is, furthermore, no compelling reason why a less restrictive
measure should always be used instead of a constitutionally permissible,
but more restrictive, measure. There is certainly no such requirement in
non-emergency conditions, where, for example, an arrest without a
warrant is permitted although a warrant could have been obtained; an
arrest is lawful although a summons or citation would have sufficed to
bring the defendant before the court; a complete search of the person for
a weapon is permitted upon arrest in the absence of any reason to
believe that the arrested person was armed; and a surety bond may be
required for a defendant to obtain pretrial release although release on
recognizance would have provided adequate assurances of the defend-
ant's presence at trial. We see no compelling justification for a greater
standard during an emergency.

We have previously suggested that it may be appropriate to provide
a time limit on the period that a defendant may be detained without
opportunity to obtain pretrial release through normal procedures, such as seventy-two to ninety-six hours. Such a limit seems justified
for several reasons. Most serious disorders will peak at a relatively
early point. Also, there is an understandable tendency to continue
emergency conditions until authorities are reasonably sure that they are
not experiencing a temporary lull. There may be reason to continue
other powers for longer periods, but detention without opportunity for
pretrial release is a sufficiently serious infringement of individual lib-

298. *Id.* at 1296-97.
299. See notes 247-48 *supra* and accompanying text.
300. See note 219 *supra.*
CIVIL DISORDERS

erty to justify a return to normalcy as soon as it is reasonably possible. Such a time limitation, after which bail hearings would commence, would provide prosecutors with an opportunity to prepare cases where high bonds may be appropriate and to order the release of detained persons who after investigation are found to be unlikely future offenders.

We also see no reason why persons arrested for serious offenses should not be entitled to a prompt preliminary hearing if their detention is to be justified solely on the ground of the emergency. Likewise, a prompt hearing should precede less serious offenses if attempts are made to justify a continued detention on the grounds that the arrestee is likely to rejoin the disorder.

Our proposals contemplate that police and prosecutors should release most persons arrested during a disorder upon the issuance of a citation and dismiss most charges after a disorder has subsided. Decisions by an individual prosecutor to adopt such an approach could well bring charges that he is “soft on crime,” is encouraging future disorders, or is otherwise derelict in the performance of his duties. An official who must soon face re-election in a city experiencing a serious disorder may be loathe to take such action unless explicit support can be found for his decisions. Accordingly, legislative authority to issue citations and a legislative statement of policy with delegation of the responsibility for drafting guidelines to the appropriate prosecutorial officials, would be a helpful step toward governing the exercise of prosecutorial discretion in civil disorders.

Unquestionably, some excesses will occur regardless of good faith efforts to comply with the law. The victims of misguided zeal should have a remedy in the courts of their state. They should not be required to establish an intentional violation of their federal constitutional rights, or be left without redress if official immunity is successfully asserted or if their claim establishes unlawful action not reaching constitutional dimensions. Thus, civil relief in the form of an action for damages against a state official acting unlawfully under circumstances where no immunity exists should be authorized, as should an action 301. See Gerstein v. Pugh, 420 U.S. 103 (1975). An expedited and more informal preliminary hearing of the kind authorized by Gerstein might be appropriate. Such a hearing would provide adequate protection against the possibility of an unlawful arrest. 302. See notes 232-40 supra and accompanying text. 303. See notes 232-40 supra and accompanying text. 304. See 42 U.S.C. § 1983 (1970); Scheuer v. Rhodes, 416 U.S. 232, 235 (1974). 305. See Part I 651-55 n.209. 306. There is, of course, a broad immunity available in most jurisdictions. See id. In
against the state when there has been unlawful action without regard to whether the actor is protected by immunity.\textsuperscript{307} Included in any such remedy should be the power to expunge official records of any unlawful arrest.\textsuperscript{308}

IX. Conclusion

As the length of this two-part essay may suggest, the role of the criminal process during civil disorders presents a wide range of fundamental problems, some of which have been unresolved for several centuries at the very least. We have not attempted to discuss all of these problems. Some of those left unexplored are relatively insignificant, such as the power of the state to close places of business during a civil emergency. Some are among the more important issues facing our society, such as the extent to which the state should be permitted to engage in strategic intelligence-gathering activities.\textsuperscript{309} We have also not undertaken to consider the broader underlying issues—for example, the obligation of our society to remove or alleviate the social, economic, or political causes of civil disorder.

Our object has been to study the decisional, legislative, constitutional, and historical principles which bear upon the role of the criminal process in civil disorders, and to suggest that during serious emergencies the criminal process has different purposes from those in normal circumstances and that special powers are justified to accomplish the different objectives. Legislatures should act during periods of relative tranquility to provide the powers and safeguards that may be needed in later emergencies. Troops may be used constitutionally to deal with

\textsuperscript{307} See, e.g., \textsc{N.Y. Judicary—Court of Claims Act} § 8-a (McKinney Supp. 1974) (torts of militia members).


serious disorders, but when used their powers should be the same as those of civilian police. While extraordinary powers are justified, special safeguards are also required to assure that civil liberties are limited only to the extent justified by the necessity.

Others will strike a different balance between police power and individual liberties from that which we have suggested. Our hope is that in the relative calm of the middle seventies, legislatures will address the problems which were presented by the civil disorders of the late sixties, face the hard choices that must be made, and provide a framework that will provide a basis for both the maintenance of order and the protection of civil liberties in future crises.