Winter 2004

Bringing in the State: Toward a Constitutional Duty to Protect from Mob Violence

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INTRODUCTION

South Central Los Angeles, California

"This is for Rodney King[!]"[1] And thus, at 4:15 p.m. on April 29, 1992,[2] one of the deadliest urban riots in the nation's history began.[3] The riot continued to rage for six days, engulfing South Central Los Angeles in a deluge of violence, looting, and arson.[4] By the time the mayhem subsided, at least forty-two people had perished,[5] more than 700 businesses were burned, and over one billion dollars in property was lost.[6] Caught unprepared, the city was unable to respond to the

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1. This statement was allegedly uttered by a young black man as he and four companions struck David Lee in the head with a bottle of malt liquor and hurled additional bottles at the glass door of the Pay-less Liquor and Deli at Florence and Dalton Avenues. LOU CANNON, OFFICIAL NEGLIGENCE: HOW RODNEY KING AND THE RIOTS CHANGED LOS ANGELES AND THE LAPD 281 (1997). Lee, son of the owner of the store, had blocked the exit when the youths had attempted to leave the store without paying for the alcohol. *Id.*

2. The Webster Commission assigns a time of 4:15 p.m. to the looting of the Lee's liquor store. *See* WILLIAM H. WEBSTER & HUBERT WILLIAMS, THE CITY IN CRISIS: A REPORT BY THE SPECIAL ADVISOR TO THE BOARD OF POLICE COMMISSIONERS ON THE CIVIL DISORDER IN LOS ANGELES 11 (1992) [hereinafter THE WEBSTER REPORT]. Another riot researcher places the event at 4:17 p.m. CANNON, *supra* note 1, at 281. Judge William H. Webster and Chief Hubert Williams served as special advisor and deputy special advisor, respectively, to the Board of Police Commissioners. The Webster Commission was charged with ascertaining "the nature of the L.A. Police Department's response to the recent civil disorders, as well as its level of preparation." THE WEBSTER REPORT, *supra*, at preface.

3. The Webster Report cites this event, occurring at approximately 4:15 p.m. on April 29, 1992, as the first incident of the South Central riot. *See* THE WEBSTER REPORT, *supra* note 2, at 11. Indeed, it is the first confrontation that resulted in damage and injury. CANNON, *supra* note 1, at 281. The first recorded emergency call, however, came at 3:43 p.m., when a young man unsuccessfully targeted a passing pickup truck with a brick. *Id.*

4. THE WEBSTER REPORT, *supra* note 2, at 23. The 1992 Los Angeles riot is widely considered to be the most serious occurrence of race-related crowd violence in twentieth century American urban history. Kathleen J. Tierney, *Property Damage and Violence: A Collective Behavior Analysis*, *in* THE LOS ANGELES RIOTS: LESSONS FOR THE URBAN FUTURE 149 (Mark Baldassare ed., 1994).

5. THE WEBSTER REPORT, *supra* note 2, at 23. Of the forty-two known deaths, at least thirty-six were "disorder-related." *Id.* at 27. Other studies place the body count at over fifty. *E.g.*, PAUL ONG & SUZANNE HEE, LOSSES IN THE LOS ANGELES CIVIL UNREST APRIL 29-MAY 1, 1992: LIST OF THE DAMAGED PROPERTIES AND THE L.A. RIOT/REBELLION AND KOREAN MERCHANTS 7 (1993).

6. THE WEBSTER REPORT, *supra* note 2, at 23. Korean merchants suffered over half of the damages from the civil unrest—losses well out of proportion to their numbers in the general population. ONG & HEE, *supra* note 5, at 7, 9. Ong and Hee base their findings on records compiled by the California State Insurance Commissioner's office, which list the businesses damaged or destroyed by type and by ethnicity of the owner. *See id.* at 9. Korean merchants accounted for approximately three-quarters of the listings. *Id.* The records, however, do not include the uninsured businesses that were damaged or destroyed and thus understate the actual amount of riot damage. *Id.* In addition, Koreans comprised about three-quarters of those who applied for Disaster Unemployment Assistance, which provides support to persons who lose their livelihoods in a disaster but do not qualify for regular unemployment benefits. *Id.* at 10. Small Business Administration and Federal Emergency Management Agency data also indicate that approximately sixty percent of riot-related applicants were Asian, with Koreans comprising the largest subgroup. *Id.* Nevertheless, no

lawlessness.[7] As stated by a prominent member of the Los Angeles City Council, "It was the Pearl Harbor of the LAPD."[8]

Crown Heights, New York

"Death to Jews!" and "Heil Hitler!" shouted hundreds of African American youths running through the streets of Crown Heights and smashing windows from August 19-22, 1991.[9] A group of youths surrounded Yankel Rosenbaum, a twenty-nine-year-old scholar from Australia, and stabbed him in the chest.[10] Terror governed for a period of four days, as roving bands of rioters moved through the Crown Heights Hasidic Jewish community robbing, assaulting, and terrorizing civilians and police officers; vandalizing and burning property; looting businesses; and generally wreaking havoc.[11] At least thirty-eight civilians and an estimated 152 police officers were injured, twenty-seven police vehicles were damaged or destroyed, and at least six businesses suffered significant losses from burglary and

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complete list of all the stores in Los Angeles County suffering riot losses exists; likewise, no comprehensive source lists by ethnicity all businesses in the riot-affected areas. *Id.*

7. THE WEBSTER REPORT, *supra* note 2, at 11. The riot broke out shortly after the verdicts were announced in the Rodney King case. On March 3, 1991, Rodney King, a black man, was savagely beaten by three white police officers, while a sergeant and other law enforcement officers watched. The beating was captured on videotape by a bystander and broadcast worldwide by the media. INDEP. COMM'N ON THE L.A. POLICE DEP'T, REP. OF THE INDEP. COMM'N ON THE L.A. POLICE DEP'T 5-7 (1991). No one had expected that a jury, after viewing the videotape, would find the officers innocent of using excessive force against King. This lack of anticipation by city officials left the city vulnerable to the violence that ensued. THE WEBSTER REPORT, *supra* note 2, at 11; *see also infra* Part IV.

8. Lou Cannon, *When Thin Blue Line Retreated, L.A. Riot Went Out of Control*, WASH. POST, May 10, 1992, at A1 (quoting Zev Yaroslavsky).

9. 1 RICHARD H. GIRGENTI, A REPORT TO THE GOVERNOR ON THE DISTURBANCES IN CROWN HEIGHTS: AN ASSESSMENT OF THE CITY'S PREPAREDNESS AND RESPONSE TO CIVIL DISORDER 129 (1993) [hereinafter GIRGENTI REPORT]. Crown Heights is a community in central Brooklyn. *Id.* at 40. For an in-depth discussion of the impact of the Crown Heights riot in the context of the history of Hasidim in the United States, see JEROME R. MINTZ, HASIDIC PEOPLE: A PLACE IN THE NEW WORLD 328-47 (1992).

10. Estate of Rosenbaum v. City of New York, 975 F. Supp. 206, 210 (E.D.N.Y. 1997). He died shortly afterwards. *Id.* Lemrick Nelson, a sixteen-year-old during the riots, was charged with his murder. In 1992, Nelson was acquitted of second-degree murder charges in the Rosenbaum case. Melissa Radler, *Attacker Cleared in Crown Heights 1991 Killing*, JERUSALEM POST, May 16, 2003, at 6A. This past spring, on May 14, 2003, Nelson was found guilty of violating Rosenbaum's civil rights during the riots. *Id.* At this civil trial, Nelson admitted, for the first time, that he had stabbed Rosenbaum. *Id.*

11. GIRGENTI REPORT, *supra* note 9, at 135-36. The roving gangs identified Jewish homes by the mezuzahs tacked on the right doorposts. MINTZ, *supra* note 9, at 334. The Lubavitcher Hasidim are ultra-orthodox Jews belonging to the Hasidic community known as *Chabad Lubavitch*. *Id.* at 44. Hasidim share a common history, customs, and language. *Id.* at 1. The men traditionally wear full beards and peyes (earlocks), black coats, and hats, *id.* at 24; ties are rarely worn, *id.* at 24, 31. Women cover their heads with kerchiefs, wigs, or turbans and wear clothing with long sleeves and high necks and opaque, heavy-gauged stockings. *See id.* at 30. Although many Lubavitcher Hasidim follow more contemporary styles of dress than do other Hasidim, they are still easily recognizable. *Id.* at 45. Moreover, most of the whites living in Crown Heights are Lubavitchers. GIRGENTI REPORT, *supra* note 9, at 41.

arson.[12] Several businesses incurred losses in the hundreds of thousands of dollars.[13] Although limited to a geographical area covering roughly one square mile, the 1991 disturbances in Crown Heights exhibited an intensity and violence rarely seen even in New York City.[14]

The devastating losses from these riots illustrate the tragic consequences of mob violence.[15] Even more appalling is that inadequate police preparation and planning were responsible for these tremendous costs. For example, with respect to the Rodney King riots, despite warnings from law enforcement officers and community leaders, Los Angeles government officials failed to implement any planning efforts or coordination to address the building racial tensions or to prepare county, state, and federal law enforcement authorities for the impending riots.[16] Regarding the 1991 riot in Crown Heights, even though a city riot plan existed prior to the disorder, official indecision in countering the unrest and lack of compliance with the riot plan led to several days of violence and destruction.[17]

Since these outbreaks, United States cities have fallen victim to additional, large-scale riot violence. For instance, disturbances surrounding the 1999 World Trade Organization conference in Seattle, Washington injured numerous demonstrators, bystanders, and police and resulted in an estimated three million dollars in property damage, seventeen million dollars in business loss, and civil rights lawsuits.[18] Similarly, in April 2001, Cincinnati's predominantly African American, Over-the-Rhine neighborhood exploded into three days of violence in response to the shooting of a black teenager by a white police officer.[19]

Terrifying eruptions on a smaller scale have also occurred. Examples include an attack in Atlanta, Georgia by demonstrators protesting the verdicts in the Rodney King case on four Korean American business owners with stones, bricks, and bottles[20] and assaults that followed the 2000 New York City Puerto Rican Day

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12. GIRGENTI REPORT, *supra* note 9, at 130.

13. *Id.* at 131.

14. In particular, the aggression exhibited in the 1991 disorder was directed by one segment of the community (the African Americans) at another segment of the community (the Hasidic Jews). *Id.* at 135-36.

15. Last spring, the United States marked the ten-year anniversary of the Rodney King Riots in South Central Los Angeles. This summer, a dozen years separate New Yorkers from the civil unrest that took over Crown Heights.

16. *See infra* Part IV.C.

17. *See infra* notes 274-85 and accompanying text; Part IV.D.

18. THE SEATTLE POLICE DEP'T, WTO AFTER ACTION REP. 47-49 (2000).

19. *Mayor Scales Back Curfew After Calm Night in Cincinnati*, N.Y. TIMES, Apr. 16, 2001, at A17. Calm was restored when the mayor instituted a dusk-to-dawn curfew. *Id.*

20. Brief for Plaintiffs-Appellants, Sang S. Park et al. at 8, Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997) (No. 96-8512). "Kill the Koreans!" and "Koreans get out!" the crowd chanted, along with other racial epithets, as they attacked Hi Soon Park, Sang S. Park, Kwang Jun No, and Jin Soon No. Park v. City of Atlanta, 120 F.3d 1157, 1162 (11th Cir. 1997); Brief for Plaintiffs-Appellants, Sang S. Park et al. at 8, 12, Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997) (No. 96-8512). This confrontation occurred on May 1, 1992, two days after the verdict of acquittal was delivered against police officers involved in the Rodney King beating. *Park*, 120 F.3d at 1159. The victims were the owners of two businesses located in a predominately African American community and in the immediate vicinity of Clark Atlanta University, Spelman College, Morehouse College, and Morris Brown College, four historically African American universities and colleges. Brief for Defendants-Appellees, Sang S. Park et al. at 3, Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997) (No. 96-8512). This area is commonly known as the Atlanta University Center.

Parade, during which roving mobs of men attacked and sexually assaulted at least fifty-seven women while police officers refused to intervene.[21]

At both the local and national level the fragile social fabric of our nation's inner cities continues to fray, providing an environment conducive to social explosions akin to that which occurred in Los Angeles on April 29, 1992. Behind every economic crisis lies the promise of another uprising in another American city that barely holds itself together despite often extreme divisions based on race, class, and educational opportunity. To protect our inner city residents from the devastation of mob violence, we must recognize the State as "an independent entity that can affect the broad course of social change."[22] By acknowledging the State's role in the creation and development of riots, we can instigate positive change. In short, we must seek to bring in the State.

Part I of this Article discusses the common law underpinnings of the governmental duty to protect citizens from mob violence. Under the English common law, local governments were responsible for providing riot protection for their denizens. In keeping with the English tradition, early state laws in the United States also provided for communal riot responsibility, and when the states ratified the Fourteenth Amendment, state obligations in the riot context were well established. These statutes, however, were not inducted into the American common

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Id. Many of the demonstrators and riot participants were students. *Id.* at 4-19. On the day prior to the violence, student marchers protesting the verdicts in the Rodney King case attacked the stores, breaking the plate glass windows of both businesses. The vandalism escalated into a riot, causing substantial property damage and a number of injuries. *Id.* at 3; Brief for Plaintiffs-Appellants, Sang S. Park et al. at 4, Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997) (No. 96-8512). The following day, the demonstrators reassembled and violence flared. *Id.* The rioters gained access to the Parks' and Nos' stores and proceeded to attack and loot the businesses. Brief for Plaintiffs-Appellants, Sang S. Park et al. at 7, Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997) (No. 96-8512); Brief for Defendants-Appellees, Sang S. Park et al. at 10, Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997) (No. 96-8512). All the while, the Parks and Nos were cloistered above the businesses in a small apartment, watching the destruction of their livelihoods unfold on live television and frantically calling 911 for help. Brief for Plaintiffs-Appellants, Sang S. Park et al. at 5, 7, Park v. City of Atlanta, 120 F.3d 1157 (11th Cir. 1997) (No. 96-8512). When the mob discovered the apartment, the owners fled onto the roof, bracing the steel trapdoor to the rooftop with a two-by-four wood beam and their bodies. *Id.* at 7. From below, the mob pelted the victims with stones, rocks, bricks, and bottles, until they were eventually rescued by a S.W.A.T. team. *Park*, 120 F.3d at 1159.

21. *New York Press Comment on the Police's Failure to Stop Attacks on Women in Central Park After the Puerto Rican Day Parade*, THE INDEPENDENT (London), June 15, 2000, at F2 (excerpting articles from the *New York Times*, the *New York Daily News*, the *New York Post*, and *Newsday* citing overwhelming evidence that dozens of city cops did nothing as male marauders sexually assaulted women in Central Park); *Rivera Live: Attacks Against 10 Women in New York's Central Park and the Lack of Police Response*, CNBC NEWS TRANSCRIPTS, June 14, 2000 (reporting on victim's allegations that she sought help three times from nearby police officers who failed to respond). *See* David Barstow & C.J. Chivers, *A Volatile Mixture Exploded Into Rampage in Central Park*, N.Y. TIMES, June 17, 2000, at A1 (describing events surrounding the attacks). Lawlessness reigned in Central Park as female victims were "soaked with water, dragged to the ground, stripped, groped and manhandled, as they desperately tried to resist by biting, scratching and screaming." *Rivera Live: Attacks Against 10 Women in New York's Central Park and the Lack of Police Response*, *supra*.

22. Bert Useem, *State and Collective Disorders: The Los Angeles Riot/Protest of April, 1992*, 76 SOCIAL FORCES 357, 358 (1997).

law.[23] Today, few states have retained their riot responsibility statutes, leaving most victims of mob violence without relief or recompense.

Part II discusses the current law defining the scope of governmental liability in the riot context when individuals or their property are injured by mob violence. When victims of private violence seek to litigate injury claims in federal court, they generally allege a violation of their Fourteenth Amendment right to due process. For this reason, this Part begins with a brief history of the Civil Rights Act of 1871, which Congress crafted to rectify state violations of the Fourteenth Amendment. Section 1 of the Act, now codified as 42 U.S.C. § 1983,[24] holds accountable local governments and state and local officials who deprive individuals of their federal rights. The United States Supreme Court, however, has severely limited the use of § 1983 in indirect harm cases[25]—cases in which individuals are harmed by private actors—by narrowing the scope of the Due Process Clause of the Fourteenth Amendment. Specifically, the Court, in *DeShaney v. Winnebago County Department of Social Services*,[26] held that government generally has no duty under the Fourteenth Amendment to protect individuals from privately inflicted harms.[27]

The Supreme Court's opinion in *DeShaney* incited a slew of scholarly criticism.[28] This commentary is highly impassioned and provides a barrage of legal,

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23. Accordingly, riot responsibility statutes remain the prerogative of state legislatures and exist only by virtue of legislative munificence.

24. Civil Rights Act of 1871, Pub. L. No. 96-170, 93 Stat. 1284 (codified at 42 U.S.C. § 1983 (2000)).

25. Professor Julie Shapiro identifies these cases as "indirect harm" cases in *Snake Pits and Unseen Actors: Constitutional Liability for Indirect Harm*, 62 U. CIN. L. REV. 883-84 (1994).

26. 489 U.S. 189 (1989).

27. The Court determined that the constitutional drafters phrased the Due Process Clause as a negative limitation on the State's power to act, not as a guarantee of minimal levels of protection. *Id.* at 195.

28. *See, e.g.*, Akhil R. Amar, *Remember the Thirteenth*, 10 CONST. COMMENT. 403 (1993); Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Jack M. Beermann, *Administrative Failure and Local Democracy: The Politics of* DeShaney, 1990 DUKE L.J. 1078; Theodore Y. Blumoff, *Some Moral Implications of Finding No State Action*, 70 NOTRE DAME L. REV. 95 (1994); Christine M. Dine, *Protecting Those Who Cannot Protect Themselves: State Liability for Violation of Foster Children's Right to Safety*, 38 CAL. W. L. REV. 507 (2002); Thomas A. Eaton & Michael Wells, *Governmental Inaction as a Constitutional Tort:* DeShaney *and Its Aftermath*, 66 WASH. L. REV. 107 (1991); Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House*: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990); Steven J. Heyman, *The First Duty of Government: Protection, Liberty and the Fourteenth Amendment*, 41 DUKE L.J. 507 (1991); Mary K. Kearney, DeShaney*'s Legacy in Foster Care and Public School Settings*, 41 WASHBURN L.J. 275 (2002); Mark Levine, *The Need for the "Special Relationship" Doctrine in the Child Protection Context*, 56 BROOK. L. REV. 329 (1990); Alan R. Madry, *State Action and the Obligation of the States to Prevent Private Harms: The Rehnquist Transformation and the Betrayal of Fundamental Commitments*, 65 S. CAL. L. REV. 781 (1992); Martha Minow, *Words and the Door to the Land of Change: Law, Language, and Family Violence*, 43 VAND. L. REV. 1665 (1990); Laura Oren, DeShaney*'s Unfinished Business: The Foster Child's Due Process Right to Safety*, 69 N.C. L. REV. 113 (1990); Laura Oren, *The State's Failure to Protect Children and Substantive Due Process:* DeShaney *in Context*, 68 N.C. L. REV. 659 (1990); Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379 (1993); Amy Sinden, *In Search of Affirmative Duties Towards Children Under a Post-*DeShaney *Constitution*, 139 U. PA. L. REV. 227 (1990); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of*

political, historical, and moral attacks on the Court's restrictive reading of the Constitution. Despite the obviously troubling aspects of the majority opinion in *DeShaney*, the purpose of this Article is not to add to existing academic invective. Instead, this Article seeks to work within the constraints of the currently prevailing law to establish state responsibility to prevent riot violence.

Notwithstanding the Court's limited reading of state due process obligations, the State has a duty to protect individuals from private danger when the State created the danger that caused the individuals' injuries.[29] Specifically, constitutional tort liability lies when the State renders an individual more vulnerable to private danger or places the individual in a worse position than she would have been had the State not acted at all. In these situations, the State, although not the immediate cause of the harm, has arguably created or increased the potential for harm by its actions.

Part III builds upon the theory of state-created danger to suggest that state actions that create or increase riot danger could lead to governmental liability pursuant to this doctrine of recovery. This Part takes an interdisciplinary approach to analyzing the problem of mob violence and merges sociological studies with the existing legal framework of the state-created danger doctrine. Principles developed from sociological studies affirm that state action directly impacts not only the gravity of mob violence, but also the opportunities for mobs to form. The conclusions from these studies can provide pertinent information for the trier of fact for the purpose of determining the extent of the State's role in creating or increasing dangers to citizens from mob violence in a particular riot.[30] To illustrate this point, this Part focuses on the 1992 riot in South Central Los Angeles, California and the 1991 disturbances in Crown Heights, New York and applies sociological principles in an analysis of these riots to show that social controls initiated by local officials contributed to the ferocity and scale of both riots.

Part III also articulates some limits to the application of the state-created danger theory in the riot context. In particular, this Part suggests that state liability be confined to redressing deficiencies in official planning and preparation to confront and combat civil unrest. As such, the asserted constitutional claim concentrates on state action taken after resources have been allocated and before officials are confronted with a raging riot. Sociological evidence once again bolsters this argument by establishing that official actions taken during a riot often reflect poor planning and preparation, which, in turn, directly impact the size and direction of the mayhem.

Finally, this Article revisits the earlier Parts and concludes that the State bears a governmental duty to protect individuals from riot violence pursuant to the Due Process Clause of the Fourteenth Amendment. This Part underscores the urgent need for official riot planning and preparation for urban upheavals. The social, political, and economic conditions affecting the 1992 riot in Los Angeles and the

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DeShaney, 57 GEO. WASH. L. REV. 1513 (1989); David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53; Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

29. *See infra* notes 244-45, 253-55 and accompanying text; Parts I.C. and D.

30. Experts commonly testify to this so-called "social framework" evidence in both federal and state litigation. *See generally* JOHN MONAHAN & LAURENS WALKER, SOCIAL SCIENCE IN LAW: CASES AND MATERIALS (4th ed. 1998).

1991 disturbance in Crown Heights are present in other large U.S. cities and will almost certainly lead to repeat episodes of urban mob violence in the future.[31]

I. OBLIGATIONS TO MEET THE MOB[32]: THE ORIGINS AND EVOLUTION OF THE DUTY TO PROTECT FROM MOB VIOLENCE

A. Communal Liability Under English Common Law

The duty to provide riot protection is not without historical precedent. American riot statutes are based on a policy that is coeval with the laws of England, and one that has been constantly endorsed and acted on in that country. In England, the traditional rule provided for governmental financial liability for property losses resulting from mob violence.[33] The archetypical statute, the English Riot Act of 1714, provided a scheme of compensation from public funds for certain injuries resulting from riot violence.[34] The measure imposed liability on local government and provided for compensation for property damage caused by riots.[35]

1. Hue and Cry Communal Responsibility

The Riot Act finds its roots in the Anglo-American legal tradition as far back as the tenth century. Prior to the Norman Conquest, the Saxons conserved the peace by means of "a well-understood principle of social obligation, or collective security."[36] By the tenth century, this system had become a compulsory one—

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31. Tierney, *supra* note 4, at 169-70.

32. Throughout this article, the word "mob" is not used as a strictly legal term. Rather, it is intended to describe "a riotous assemblage disturbing the public peace and order" or "a determined and lawless group bent on taking the law into its own hands in disregard of the orderly processes of administering justice." Maus v. City of Salina, 114 P.2d 808, 809 (Kan. 1941). *See also infra* note 311.

33. *See generally* A.H. BODKIN & L.W. KERSHAW, WISE ON RIOTS AND UNLAWFUL ASSEMBLIES (4th ed. 1907).

34. English Riot Act, 1714, 1 Geo., c. 5 (Eng.). Serious concerns for the breakdown of social order led to the imposition of communal liability. *See infra* Part I.A.3. Despite numerous amendments, the principal provisions of this statute are still in force. *See infra* notes 69-75 and accompanying text.

35. English Riot Act, 1714, 1 Geo., c. 5 (Eng.). The act created a right of action against any two or more inhabitants of a hundred (or city or town) for riot damages to property. A successful plaintiff could collect judgment by requiring a justice of the peace to levy a tax against all inhabitants of the hundred. *Id.* § 6. In 1827, Parliament adopted a more comprehensive riot statute. An Act for Consolidating and Amending the Laws in England Relative to Remedies Against the Hundreds, 1827, 7 & 8 Geo. 4, c. 31 (Eng.). The 1827, statute retained the principle of communal liability but provided that an action for riot damages should be brought against the constable. *Id.* §§ 2, 4, 12. Any judgment was to be paid by the county treasurer and reimbursed to the treasury via a precise tax on the hundred. *Id.* §§ 6-7. The Riot (Damages) Act of 1886 completed the shift to taxation as the sole means of making payment for riot damages. Riot (Damages) Act, 1886, 49 & 50 Vict., c. 38, §§ 2, 5 (Eng.). The primary provisions of the 1886 act remain in force today. *See infra* notes 69-75 and accompanying text.

36. T.A. CRITCHLEY, A HISTORY OF POLICE IN ENGLAND AND WALES 2 (2d ed. 1972). The earliest conception of communal responsibility is evident in sections 23 and 24 of the Code of Hammurabi:

> If the brigand be not captured, the man who has been robbed, shall, in the presence of the god, make an itemized statement of his loss, and the

requiring every adult male to enroll in a "tything" (or "tithing"), or group of families.[37] Groups of tythings were organized into "hundreds."[38] The hundreds were rural units, subdivisions of counties or shires.[39] A tything was headed by a tythingman; a hundred was headed by a hundred man or royal reeve.[40] Each tything was responsible for maintaining order among its members.[41] If a member of a tything committed a crime, "the others had to produce him for trial; if they failed to do so they could be fined or called upon to make compensation."[42]

Both Canute[43] and the Normans retained this system of collective security. In particular, Canute issued an ordinance requiring all persons to raise a "hue and cry" upon discovering a thief:

> [I]f anyone comes upon a thief and of his own accord lets him escape without raising the hue and cry, he shall make compensation . . . or clear himself . . . [by stating] that he did not know him to be guilty of any crime. And if anyone hears the hue and cry and neglects it, he shall pay the fine for insubordination to the king . . . .[44]

> city and the governor, in whose province and jurisdiction the robbery was committed, shall compensate him for whatever was lost.

Hammurabi, *available at* http://www.humanistictexts.org/hammurabi.htm (adapted from THE CODE OF HAMMURABI: KING OF BABYLON, (Robert F. Harper trans., Univ. of Chicago Press 1904)). *See also* 1 G.R. DRIVER & JOHN C. MILES, THE BABYLONIAN LAWS 110 (1952) (interpreting Code of Hammurabi's communal responsibility provision); MARTHA T. ROTH, LAW COLLECTIONS FROM MESOPOTAMIA AND ASIA MINOR 85 (1995) (translating Laws of Hammurabi ¶¶ 21-24).

37. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 7-8 (3d ed. 1990); CRITCHLEY, *supra* note 36, at 3.

38. CRITCHLEY, *supra* note 36, at 2. A tything was originally comprised of about ten men. *Id.* The hundred, comprised of ten groups of ten families, was a subdivision of a county or shire, governed by a high constable. BLACK'S LAW DICTIONARY 741 (6th ed. 1990).

39. *See* BAKER, *supra* note 37, at 8-9. In towns, hundreds were known as boroughs; in London, they were wards. *Id.*

40. CRITCHLEY, *supra* note 36, at 2.

41. 1 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 14 (7th ed. 1966).

42. CRITCHLEY, *supra* note 36, at 2.

43. Canute became King of England in 1016. He ascended the throne in Denmark in 1018 and in Norway in 1028. Some experts cite the laws of Canute as the first evidence of communal liability in England. 1 FREDERICK POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW: BEFORE THE TIME OF EDWARD I 46 (Cambridge Univ. Press 1952) (2d ed. 1898). Other scholars argue that Canute's laws were derived from earlier rulers. *E.g.*, Dorothy Whitelock, *Wulfstan and the Laws of Cnut*, *in* HISTORY, LAW AND LITERATURE IN 10TH-11TH CENTURY ENGLAND 432-52 (Dorothy Whitelock ed. 1981); JOHN R. GREEN, THE CONQUEST OF ENGLAND 406-07 (1883) (arguing that Danish law did not significantly change the legal system that existed prior to the Danish Conquest). *See also supra* notes 36-42 and accompanying text.

44. 2 Canute, c. 29 (1027), *reprinted in* A. J. ROBERTSON, THE LAWS OF THE KINGS OF ENGLAND FROM EDMUND TO HENRY I 175-219 (A. J. Robertson ed., A. J. Robertson trans., 1925). A subsequent provision of the same ordinance required the hundreds to bring to justice any person who killed an agent of the king. 1 JOHN REEVES, HISTORY OF THE ENGLISH LAW 17 (E. Brooke ed., 1787). "This irregular provision it was thought would engage every one in the prevention and prosecution of such secret offenses." *Id.* Edward III later abolished the law. Nonetheless, the hundred remained responsible for bringing murderers to trial. 1 HOLDSWORTH, *supra* note 41, at 11 n.12. For a more thorough discussion of the reign of Canute, *see* GREEN, *supra* note 43, at 402-59.

The Normans maintained the principle of communal responsibility and introduced the "frankpledge" system, pursuant to which each adult male member of a tything was responsible for the good conduct of the others.[45] Accordingly, responsibility for individual transgressions belonged to the community:

> Every man who wishes to be accounted as free shall be in a pledge, so that the pledge hold him and produce him before the court if he offend. And if anyone of such people escape, let the pledges see that they pay the sum claimed by the plaintiff, and prove that they were privy to no fraud committed by him that has escaped.[46]

The frankpledge system established "compulsory, collective bail, fixed for individuals, not after their arrest for crime but as a safeguard in anticipation of it."[47]

2. The Statute of Winchester[48]

In 1285, hue and cry communal responsibility emerged on the law books in the form of the Second Statute of Winchester. Steeped in tradition, the statute imposed civil liability on local governments for damages from criminal disorders.[49] Under the statute, the inhabitants of "the hundred" in which a robbery or other felony was committed had the duty to raise a "hue and cry" to pursue the felons.[50] If the inhabitants failed to apprehend the offenders, the individual residents of the hundred were liable for damages resulting from the commission of the crime:

> And if the Country will not answer [for the Bodies of such manner of Offenders,] the Pain shall be such, that every Country, that is to wit, the People dwelling in the Country, shall be answerable for the Robberies done, and also the Damages; so that the whole Hundred where the Robbery shall be done, with the Franchises being within the Precinct of the same Hundred, shall be answerable for the Robberies done.[51]

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45. The Normans also introduced the position of the "constable," which eventually evolved into what has been described as "the direct lineal descendant of the ancient tythingman." CRITCHLEY, *supra* note 36, at 1-2. The constable was known as "a local man with a touch of regal authority about him." *Id.* at 2.

46. 1 HOLDSWORTH, *supra* note 41, at 14 (quoting Will. 1, c. 84, § 8 (Eng.)).

47. WILLIAM ALFRED MORRIS, THE FRANKPLEDGE SYSTEM 2 (1910). William I developed the frankpledge system for the purpose of protecting his followers. Murder victims were presumed to be Norman. 1 HOLDSWORTH, *supra* note 41, at 15.

48. Statute of Winchester, 1285, 13 Edw., c. 2 (Eng.).

49. *Id.* c. 1, 2. *See* 25 HALSBURY'S LAWS OF ENGLAND 359 (2d ed. 1937). This statute was later re-enacted as 28 Edw. 3, c. 11 (1354) (Eng.).

50. Statute of Winchester, 1285, 13 Edw., c. 1, 4 (Eng.) ("Cries shall be solemnly made in all Counties, Hundreds, Markets, Fairs, and all other Places where great Resort of People is, so that none shall excuse himself by Ignorance . . . ."). For this purpose, every man between fifteen and sixty years of age was required to keep specified armaments on hand, to be determined by each person's relative wealth. *Id.* c. 6. *See generally* 4 WILLIAM S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 521 (1924). *See generally* Darlington v. Mayor of New York, 31 N.Y. 164, 173-74, 187-88 (1865) (discussing the liability of "the hundred"); 3 JOHN REEVES, HISTORY OF THE ENGLISH LAW 712-17 (W.F. Finlason ed., 1869).

51. Statute of Winchester, 1285, 13 Edw., c. 2 (Eng.). Under the statute, the hundred had forty days to seize the perpetrators. *Id.* Although the statute made all inhabitants equally responsible for compensating crime victims for damages, the practice was "to levy the

The rationale for compensation was that the people of the locale had failed to protect the public.[52] As one court explained:

> It is plain that the intent of the Legislature in this Act, and others of the like nature, was to make the inhabitants of hundreds vigilant for their own sakes, by making it their interest to prevent the commission of offences, and where that could not be done, to exert themselves to bring the offenders to justice.[53]

The failure of the inhabitants to maintain or restore order to their community resulted in strict vicarious liability for any and all individuals.[54] The law made no exceptions for those unable, due to their ignorance of the ongoing offense or their inability to prevent its occurrence or apprehend the perpetrator, to fulfill its

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damages from the most solvent inhabitants of the hundred, who had no means of recouping themselves from their fellow-inhabitants." 4 HOLDSWORTH, *supra* note 50, at 521. In 1585, Parliament redressed this imbalance by creating a right of contribution for those from whom the victim had exacted payment. 27 Eliz., c. 13, § 1 (1585) (Eng.). Later, in 1735, victim suits were statutorily required to be brought against the high constable. If the plaintiff obtained judgment against the hundred, a tax was assessed on all inhabitants to pay the judgment. 8 Geo. 2, c. 16, § 4 (1735) (Eng.). The 1735 statute also provided for taxation measures to pay for the constable's costs of defending against victim suits and for any reward offered for the capture of a felon. *Id.* §§ 7, 9.

The reasons for allowing this right of contribution and for spreading the loss are multifold. In particular, victims, presuming to recover their losses from another, were "many tymes negligent and careles" in aiding attempts to apprehend and convict their assailants, 27 Eliz., c. 13, § 1 (1585) (Eng.), and the inequities inherent to the system of compensation provided "great incoragement and [embolding]" to offenders, who very often escaped with impunity, along with their ill-gotten gains. *Id.* (alteration in original). The new method for assessing damages taxed all inhabitants, including any victims and offenders, with losses. *Id.* § 3. In addition, changes to the law placed a greater onus on the victim to raise the hue and cry, to bring suits for loss within a year of the offense, and to endeavor to identify his or her attacker. *Id.* §§ 7, 9. Moreover, not only did the financial responsibility for injury unfairly burden a single or few inhabitants, but Parliament discerned that the residents of nearby hundreds, to which felons often fled, were less diligent in their response to the hue and cry because they were "not chargeable for any portion of the Goodes robbed." *Id.* § 1. To remedy this, Parliament amended the law and allowed inhabitants of adjacent hundreds to be liable for half the damages if their hundred was negligent in lending assistance. *Id.* § 5.

52. The preamble to the statute makes clear the Crown's concern that local people be responsible for local acts and for maintaining order:

> Foreasmuch as from Day to Day, Robberies, Mur[d]ers, Burnings, and Theft, be more often used than they have been heretofore, and Felons cannot be attained by the Oath of Jurors, which had rather suffer Strangers to be robbed, and so pass without pain, than to indite the Offenders, of whom great part be People of the same Country, or at the least, if the Offenders be of another Country, the Receivers be of places near . . . .

Statute of Winchester, 1285, 13 Edw., c. 2 (Eng.).

53. Clark v. Inhabitants of the Hundred of Blything, 107 Eng. Rep. 378-79 (K.B. 1823). In *Clark*, the plaintiff was allowed "to recover from the hundred satisfaction and amends for certain stacks of hay and corn which had been wil[l]fully burnt, in the hundred of B., by some person unknown." *Id.* at 378. What is even more interesting is that the loss was insured. *See id.* Thus, the right to recovery was not solely for the purpose of compensating the victim, but also for the purpose of punishing the hundred.

54. *See supra* notes 36-47 and accompanying text.

directive.[55] Professor R.F.V. Heuston provides a concise summary of the foundations for communal liability: "The principle . . . is a very ancient one, going back at least to the days of the tithing. It is one of the means whereby the common law secures the fulfil[l]ment of the duty to preserve the peace which is laid upon every citizen."[56] Thus, the purpose of the statute was to hold individuals accountable for acts that threatened the safety of others by requiring them to provide redress to victims of injurious acts.[57]

In 1722, Parliament extended communal responsibility under the act, obliging hundreds to prosecute bands who had "entered into confederacies . . . in great numbers, armed with swords, fire-arms, and other offensive weapons several of them with their faces blacked, or in disguise[]" and who had attacked those who had "endeavored to bring them to justice, to the great terror of his majesty's peaceable subjects."[58] The amended statute bore a strong resemblance to the Riot Act of 1714.[59] Although these bands were formed for the primary purpose of poaching game from the king's forests,[60] they presented a threat to sovereign rule. The modified act called for locals to put down those who defied royal authority and held liable communities who failed to bring violators to justice.

Referral to these long-tried English laws shows at a glance how this subject has been viewed by the English Parliament and on what principles and precedents the laws were framed and enacted. Although the hue and cry statutes were repealed in 1827,[61] they demonstrate that the responsibility to provide police protection was a communal one.

3. The English Riot Act of 1714[62]

The Second Statute of Winchester thus reaffirmed the existing system of communal law enforcement and responsibility and served as a springboard for the

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55. *See generally* 13 Edw., c. 1, § 1 (1285).

56. John Marston, *Riot in the Riot (Damages) Act 1886*, 84 LAW SOCIETY'S GUARDIAN GAZETTE, June 17, 1987, at 1797 (quoting Professor Heuston).

57. Indeed, the court in *Pellew v. Inhabitants of the Hundred of Wonford*, laid emphasis on the remedial function of the act. 109 Eng. Rep. 50 (K.B. 1829). In allowing a holder of a future interest in property to recover for its destruction from arson, the court urged that the statute should be read to conform with "the object with which it was made, viz. to give a remedy to a party injured." *Id.* at 54. So much was the emphasis on providing a remedy to the victim that the court allowed recovery despite the fact that the plaintiff had not identified the person he suspected of having set the fires. *Id.* at 53-54. The *Pellew* court's focus on compensation was in sync with the House of Lords' interpretation of the purpose of the act. In *Merrick v. Hundred of Osselstone*, Chief Justice Lee stated that the statute was not a penal statute, but a remedial one. 95 Eng. Rep. 323, 325 (K.B. 1737). This wholesale classification of the statute, however, met some resistance on the court, which held the case over for consideration before accepting the position of the Chief Justice on the last day of the term. *Id.* Considering that communal liability was a consequence of the monarchy's desire to protect its servants and agents, the statutes likely possessed both penal and remedial attributes. *See also infra* note 63.

58. 9 Geo., c. 22, § 1 (1722). The Act underwent a series of changes following its initial enactment. *See, e.g., supra* note 51.

59. *See* 1 Geo., c. 5 (1714).

60. 9 Geo., c. 22, § 1 (1722).

61. 7 & 8 Geo. 4, c. 27 (1827).

62. 1 Geo., c. 5 (1714).

Riot Act of 1714. Challenges in opposition to sovereign rule raised royal alarms and resulted in augmentation of existing communal responsibility and liability:

> [O]f late many rebellious riots and tumults have been in divers parts of this kingdom, to the disturbance of the publick peace, and the endangering of his Majesty's person and government, and the same are yet continued and fomented by persons disaffected to his Majesty, presuming so to do, for that the punishments provided by the laws now in being are not adequate to such heinous offenses; and by such rioters his Majesty and his administration have been most maliciously and falsely traduced, with an intent to raise divisions, and to alienate the affections of the people from his Majesty . . . .[63]

The act gave standing to individuals who suffered property damage at the hands of a mob to bring suit against the hundred in which the riot occurred.[64]

Unlike the hue and cry statutes that provided the genesis for the Riot Act, however, the Riot Act departed from its source codes by assessing absolute communal liability. Under the Riot Act, the hundred was responsible for property damages caused by rioters regardless of whether the offending miscreants were apprehended.[65] Thus, whereas the duties of yesteryear left off when criminals were brought to justice, the Riot Act taxed localities for allowing the disorder to occur. The new act made hundreds responsible for thwarting the formation of riots and for preventing their spread.

The justification for this strict communal liability requiring the prevention of disorder may lie in the special nature of riots and civil unrest. Such disturbances endanger social stability and, thus, present a distinct threat to sovereign power. This reasoning is evident in Lord Mansfield's opinion in *Ratcliffe v. Eden*:[66]

> [T]hese riots are not only injurious to individuals, but dangerous to the state . . . . To encourage people to resist persons thus riotously assembled . . . by way of inducement to the inhabitants to be active in suppressing such riots, which it is their duty to do; and which being thus made their interest too, they are more likely to execute. This is the great principle of the law, that the inhabitants shall be in the nature of sureties for one another. It is a very ancient principle . . . whereby the whole neighbourhood or tithing of freemen were mutually pledges for each other's good behaviour.[67]

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63. *Id.* § 1. The Act was generally a penal statute, making it a felony to engage in riots and other civil disobedience. Under the Act, twelve or more individuals riotously assembled were deemed felons and subject to the death penalty. *Id.* Faced with an impending riot, officials would first read aloud a proclamation calling for the crowd to disperse. If the mob failed to disband within an hour, officials could use lethal force in their attempts to arrest members of the crowd. *Id.* § 3. Hence, the likely origin of the oft-heard phrase, "to read the Riot Act." *See* The Riot (Damages) Act, 1886, 49 & 50 Vict., c. 38 (Eng.).

64. 1 Geo., c. 5 § 6 (1714). Compensation for losses was borne by the community. *See supra* note 51.

65. *See* 1 Geo., c. 5 (1714).

66. 98 Eng. Rep. 1200 (K.B. 1776) (charging the hundred with responsibility for the destruction of the furniture and house of a slave trader who attempted to suppress a mob of sailors and who subsequently fell victim to their discontent).

67. *Id.* at 1202.

Moreover, communal liability in the event of civil disorder bears a certain logic: a mob represents shared disapproval or rejection of authority. As such, the community "cannot be considered as free from blame."[68]

4. The English Riot Act of 1886[69]

After a course of nearly three hundred years, the object of the original Riot Act not only remains unimpaired, but in 1886, Parliament enhanced both its remedy and efficacy.[70] The present English statute is the Riot (Damages) Act of 1886.[71] Section 2(1) of the 1886 Act provides:

> Where a house, shop, or building in any police district has been injured or destroyed, or the property therein has been injured, stolen, or destroyed, by any persons riotously and tumultuously assembled together, . . . compensation . . . shall be paid out of the police rate of such district to any person who has sustained loss by such injury, stealing, or destruction . . . .[72]

As set forth above, the statute provides for compensation to be made from the local police fund for damage to real or personal property sustained in a riot.[73] Like its sixteenth century forerunner, the act affixes liability even when police authorities have acted in good faith to quell disorder.[74] The act also allows for

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68. Maison v. Sainsbury, 99 Eng. Rep. 538, 540 (K.B. 1782) (allowing suit for recovery for riot damages despite fact that plaintiff had insured the damaged property).

69. 49 & 50 Vict., c. 38 (1886). The 1886 Act replaced earlier laws codifying the common law liability of the hundred. *See generally* A.H. BODKIN ET AL., THE LAW RELATING TO RIOTS AND UNLAWFUL ASSEMBLIES TOGETHER WITH A VIEW OF THE DUTIES, POWERS AND LIABILITIES OF MAGISTRATES, CONSTABLES, THE MILITARY, AND PRIVATE CITIZENS IN THE SUPPRESSION THEREOF (3d ed. 1907).

70. *See* 49 & 50 Vict., c. 38, §§ 3-5 (delineating processes for awarding and paying of compensation and rights of claimants).

71. 49 & 50 Vict., c. 38 (1886).

72. *Id.* § 2(1). The Act does not compensate for personal injuries. *See id.* The Association of Police Authorities is currently lobbying for the repeal of the Act. Their position is that the Act is archaic, given the growth in private insurance, and that holding authorities liable for damages regardless of negligence or default is inappropriate. Media Release, APA Welcomes Home Affairs Committee Endorsement of Local Policing (May 7, 2002), *at* http://www.apa.police.uk/news_views_papers/2002/003-2002.html (last visited June 11, 2003). Parliament has also recently discussed the possibility of amending the 1886 Act to exclude coverage for riot damages to removal and accommodation centers. 637 PARL. DEB., H.L. (5th Cir.) (2002) (166, cols. 661-65), *available at* http://www.parliament.the-stationery-office.co.uk/pa/ld199900/ldhansrd/pdvn/lds02/text/207 09-24.htm (last visited June 11, 2003) (discussing amendment proposed by Baroness Anelay of St. Johns) (on file with author) [hereinafter *U.K. Parliament* website].

73. Police authorities are required to create and keep a police fund, from which expenditures are paid and into which receipts are made. Police Act 1996, c. 16, § 14 (Eng.). Grants from the Commissioners of Her Majesty's Treasury toward expenses incurred are also paid into the police fund. Civil Defence Act 1948, 12 & 13 Geo. 6, c. 5, § 3 (Eng.); Interpretation Act 1978, c. 30, sched. 1 (Eng.).

74. *U.K. Parliament* website, *supra* note 72, at col. 664.

certain insurance claims to be refunded to insurance companies at the expense of the local police unit.[75]

B. Communal Liability for Riot Damages in State Laws

Derived from its English predecessors, the American riot statutes shed insight on nineteenth century legal thought and make clear that governmental duties included the responsibility to prevent and punish mob violence.[76] Many states provided a legal remedy for the blameless victims of police failure to prevent or suppress riots and riot destruction.[77]

Communal riot responsibility found its way into state statutes as early as 1835.[78] Although not introduced into the American common law,[79] these laws

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75. 49 & 50 Vict., c. 38, § 2(2) (1886); *U.K. Parliament* website, *supra* note 72, at col. 663. *See also* 25 HALSBURY'S LAWS OF ENGLAND 291-92, 335 (4th ed. 1994). The improved act also encompasses other cases that lie within the general principles undergirding the 1714 Act. *See, e.g.*, 49 & 50 Vict., c. 38, § 6 (extending Act to damage or destruction of farming or mining equipment); *id.* § 7 (extending Act to damage or destruction of churches and public institutions).

76. *See infra* notes 99-128 and accompanying text.

77. *See infra* notes 82-83 and accompanying text.

78. *See* 1835 Md. Laws 1372 (originally enacted in 1835). The legislative history of the Act includes a "revealing statement" as to the reasons underlying the Act by the chairman of the Joint Committee of the Senate and House of Delegates:

> [I]n the judgment of your committee, it is expedient at once to set an example by, and carry out in perspective (sic) legislation, provisions that will connect the interest of any tax-payer at least with the support of the laws, and demonstrate to the disorderly and malicious, that those whom they would make victims of lawless wrath, are under the broad shield of indemnity, from which their blows may glance with injury to themselves, or their friends.

City of Baltimore v. Blibaum, 374 A.2d 1152, 1154 (Md. 1977) (quoting William D. Merrick's statements in the Report of and Testimony Taken Before the Joint Committee of the Senate and House of Delegates, at 6 (1836)). The statute owes its inception to the Baltimore "Bank Riots" of August 1835, occasioned by the Bank of Maryland going into receivership. A national economic disaster troubled this era of United States history, precipitated by President Jackson's opposition to renewing the charter of the Federal Bank of the United States. City of Baltimore v. Silver, 283 A.2d 788, 791 n.4 (Md. 1971). For a detailed account of the mob action that lead to the passage of Article 82, see James H. Fitzgerald Brewer, *The Democratization of Maryland, 1800-1837*, *in* THE OLD LINE STATE 62 (Morris L. Radoff ed., 1971).

79. *See, e.g.*, Roy v. Hampton, 226 A.2d 870, 871 (N.H. 1967) (noting that, at common law, there is no municipal liability for damage to personal property caused by mobs absent statute abrogating governmental immunity); Hathaway v. City of Everett, 91 N.E. 296, 296 (Mass. 1910) (denying recovery because of plaintiff's failure to plead statute); Long v. City of Neenah, 107 N.W. 10, 11 (Wis. 1906) ("It is well settled that at common law a municipal corporation is not liable for damage done by mobs within its limits either to persons or property."); City of Chicago v. Chicago League Ball Club, 63 N.E. 695, 697 (Ill. 1902) (holding defendant city was not liable to the ball club for compensation for use of or damage to its property by state militia called in to suppress riot because no statute created indebtedness or liability); Wallace v. Town of Norman, 60 P. 108, 111 (Okla. 1900) ("Public or municipal corporations are under no common-law liability to pay for the property of individuals destroyed by mobs or riotous assemblages, but in such case the legislature may constitutionally give a remedy, and regulate the mode of assessing the damages."); Prather v. City of Lexington, 52 Ky. (13 B. Mon.) 559, 561-62 (1852) (stating that public or municipal

imposed liability on cities and counties for property damages,[80] and sometimes for personal injuries,[81] occasioned by mob violence. By 1890, at least seventeen states had statutes that spread the loss from destructive mob violence throughout the locality in which the riot took place.[82] By 1936, at least twenty-four states had enacted mob violence statutes.[83]

Most of these statutes were fashioned after the 1836 Pennsylvania Riot Act.[84] Pennsylvania's law empowered individuals to bring suit against the county in which the riot took place to recover damages for riot destruction.[85] To recover, plaintiffs had to have given notice to a conservator of the peace or police officer, if sufficient time had been available to do so.[86] An officer with notice of the property destruction was required "to take all legal means to protect the property so attacked."[87] Any officer failing to fulfill this duty became civilly liable to the owner for the property damage.[88] While the owner could recover his or her losses from the

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corporations are under no common-law liability to pay for property or individuals destroyed by mobs or riotous assemblages and denying liability for mob violence in absence of statute creating liability).

80. 1867 Ca. Stat. 418; 1891-92 Ky. Acts 1383-86; 1855 La. Acts 206; 1871 Me. Laws 207. *See* Legislation, *Communal Liability for Mob Violence*, 49 HARV. L. REV. 1362, 1362 n.5 (1936).

81. Some statutes included personal injury within their recovery ambits. *See, e.g.*, CONN. GEN. STAT. ANN. § 7-108 (1958); ILL. REV. STAT. ch. 38, § 25-3 (1965); KAN. STAT. ANN. ch. 80, §§ 1-2 (1967); WIS. STAT. § 66.09(1) (1961).

82. *See* 1835 Md. Laws 137; 1839 Mass. Acts 54; 1841 Pa. Laws 415; 1854 N.H. Laws 1519; 1855 La. Acts 206; 1855 N.Y. Laws 428; 1856 Ky. Acts 594; 1858 Mo. Laws 25; 1862 Kan. Sess. Laws 77; 1863 Wis. Laws 211; 1864 N.J. Laws 237; 1867 Cal. Stat. 418; 1871 Ala. Acts 74; 1871 Me. Laws 207; 1871 S.C. Acts 561; 1875 Ark. Acts 12; 1887 Ill. Laws 573.

83. CAL. POL. CODE §§ 4452-56 (Deering 1931); CONN. GEN. STAT. § 514 (1930); ILL. REV. STAT. 38, §§ 512-14 (Smith-Hurd 1935); KAN. REV. STAT. §§ 201-02 (1923); KY. STAT. § 8 (Carroll 1930); LA. GEN. STAT. § 5369 (Dart 1932); ME. REV. STAT. 130, § 20 (1930); MD. CODE ANN. Art. 82, §§ 1-3 (1924); MASS. GEN. LAWS ch. 269, § 8 (1932); MINN. STAT. §§ 10036-38 (1927); MO. REV. STAT. § 8672 (1919); MONT. REV. CODE § 5086 (1935); NEB. COMP. STAT. §§ 602-06 (1929); N.H. PUB. LAWS 42, §§ 41-42 (1926); N.J. REV. STAT. 979, §§ 5-9 (1877); N.Y. GEN. MUN. LAWS 685, § 21 (1892); N.C. GEN. STAT. § 3945 (1939); OHIO REV. CODE ANN. §§ 6280-88 (Baldwin 1934); PA. STAT. ANN. tit. 16, §§ 3921-25, tit. 18, §§ 339-40 (Purdon 1936); R.I. GEN. LAWS § 6055 (1923); S.C. CODE §§ 1384-89, 3041 (1932); UTAH REV. STAT. ANN. 104, § 2(26) (1933); W. VA. CODE ANN. § 6038 (Michie 1932); WIS. STAT. § 66.07 (1931). By 1977 only fifteen states fixed liability for riot losses on local governments. City of Baltimore v. Blibaum, 374 A.2d 1152, 1154 (Md. 1977).

84. The 1836 statute was repealed in 1839, but the section relating to compensation for destruction of buildings by a mob was restored by the act of April 7, 1840. *In re* Pennsylvania Hall, 5 Pa. 204, 210 (1847). Maryland, however, was the first state to adopt a riot act. The Maryland statute differed from the English Riot Act because it required negligence on the part of local authorities before liability attached. *See infra* note 98. In contrast, most of the American riot acts provided for absolute liability on the part of local officers. *See id.*

85. 1841 PA. LAWS 418 (based on 1836 statute).

86. *Id.*

87. *Id.* § 8.

88. *Id.*

county, the county, in turn, could seek redress from the rioters or against any officer who failed in his duty to suppress the riot.[89]

On the whole, state legislatures enacted American riot statutes in response to "such activities as lynchings, labor confrontations, civil disturbances, and demonstrations involving religious feelings."[90] Correspondingly, the increase in the number of communal liability statutes to address riot damages accompanied the expansion of industry in the United States.[91] Indeed, industrialists not infrequently enjoyed the benefits of the mob violence statutes.[92] Furthermore, at least one court places the rise of communal liability for riots and the rise of capitalism in lockstep:

> Happily for the past welfare of our people, it is only of recent date that such laws have seemed to the legislature to be necessary . . . . As the State has increased in population, however, and become more densely inhabited, the competition for wealth on the one hand and the struggle for existence upon the other have been sharpened and intensified, sometimes bringing capital and labor into serious conflict, while strikes of great magnitude have, in the past few years, been not only frequent, but such as to seriously threaten the peace and good order of society. On several occasions these strikes have resulted in mobs and riots, and the destruction of much valuable property.[93]

Related to the growth of industry and, accordingly, the revival of communal liability, was the development of densely populated urban centers.[94] Increases in area population often led to an increase "in the materials and elements out of which spring riots and disorders."[95]

Like the English Riot Act and other English predecessors, American riot statutes required local governments not only to punish rioters, but to prevent riots from arising. Accordingly, most of these American statutes held local governments, and thus local residents via taxation,[96] strictly liable for riot damages.[97] No

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89. *Id.* §§ 7-11.

90. Abraham v. City of Woburn, 408 N.E.2d 664, 668 (Mass. App. Ct. 1980) (citing Koska v. Kansas City, 255 P. 57, 58-59 (Kan. 1927)); *see* Legislation, *supra* note 80 at 1364; Annotation, *Municipal Liability for Property Damage Under Mob Violence Statutes*, 26 A.L.R.3d 1198, 1206 n.4 (1969). In *A. & B. Auto Stores of Jones St., Inc. v. City of Newark*, the New Jersey Supreme Court observed that the state legislature was prompted to enact New Jersey's riot statute by circumstances surrounding "the draft riots of New York in 1863, when an entire army corps was withdrawn from the front, where it was sorely needed, to hold in check the rebellious elements of that city." 279 A.2d 693, 696 (N.J. 1971) (internal quotations omitted).

91. *See* Russell Glazer, Comment, *The Sherman Amendment: Congressional Rejection of Communal Liability for Civil Rights Violations*, 39 UCLA L. REV. 1371, 1387 (1992).

92. *See* Legislation, *supra* note 80, at 1368 (questioning the use of mob violence statutes by large corporations in light of the superior ability of large corporations to absorb riot losses when compared to that of individual citizens).

93. Spring Valley Coal Co. v. City of Spring Valley, 65 Ill. App. 571, 577-78 (Ill. App. Ct. 1895).

94. In 1820, a mere four percent of Americans lived in cities. By 1860, over sixteen percent lived in urban areas. AVERY O. CRAVEN, RECONSTRUCTION: THE ENDING OF THE CIVIL WAR 5 (1969).

95. County of Allegheny v. Gibson's Son & Co., 90 Pa. 397, 411 (1879).

96. English common law developed at a time when community liability was ascribed to the hundred. As the hundreds were not corporations, suits under the riot act were typically brought against the high constable. If the plaintiff was successful, the sheriff would draw his

allowances were made for inability or lack of neglect on the part of the city or county.[98]

In passing these statutes, legislatures reaffirmed the principles underlying the English tradition of communal liability for riot violence: deterrence of residents from participation in riots;[99] incentive to residents and local law enforcement

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warrant on the county treasurer for the amount of recovery. The monies were ultimately collected via local taxation in the hundred found to be liable. *See supra* note 35.

When mob violence statutes rose to prominence in the United States, local government units—municipalities or counties—were often distinct from the general populace, with separate treasuries and often extensive police powers. Glazer, *supra* note 91, at 1390. Nonetheless, although governmental bodies rather than individual residents were charged with responsibility to suppress mobs, the loss was passed to the community through taxation. *See, e.g.*, Goldman v. Forcier, 27 A.2d 340, 342 (R.I. 1942) ("[The statute's] primary object is to make the citizens of the municipalities law-conscious through apprehension of the penalty that they collectively would have to pay by way of compensation, through the municipality, to an individual whose property was destroyed or injured during a riot."); Blakeman v. City of Wichita, 144 P. 816, 817-18 (Kan. 1914) ("One of the purposes of the statute was to quicken the public conscience and stimulate a sentiment in favor of law and order by making each citizen and taxpayer responsible for a proportionate share of the loss resulting from mob violence and thus making each a champion of peace and good order."); *County of Allegheny*, 90 Pa. at 418 ("The principle upon which this legislation rested was that every political subdivision of the state should be responsible for the public peace and the preservation of private property; and that this end could be best subserved by making each individual member of the community surety for the good behavior of his neighbor and for that of each stranger temporarily sojourning among them."); Darlington v. Mayor of New York, 31 N.Y. 164, 186 (1865) (noting that legislature has general authority to require "an expenditure for general or local purposes . . . in any contingency").

97. Many states, however, made available various defenses to the local government. For example, some statutes prohibited recovery if the plaintiff was contributorially negligent. Note, *Municipal Liability for Riot Damage*, 81 HARV. L. REV. 653, 653 (1968) (listing Kentucky, Maine, Massachusetts, New Hampshire, New Jersey, Pennsylvania, Rhode Island, South Carolina, and Wisconsin as states requiring plaintiffs to be free from fault).

98. *See, e.g.*, Palmer v. Concord, 48 N.H. 211, 218 (1868) ("The liability imposed by the statute is irrespective of any inability or neglect on the part of the city."); Slaton v. City of Chicago, 130 N.E.2d 205, 210 (Ill. App. Ct. 1955) ("finding that the negligence or inefficiency of local authorities is not the sole basis of the municipality's liability under the statute") (citing Kennedy v. City of Chicago, 91 N.E.2d 138, 142 (Ill. App. Ct. 1950)). *But see, e.g.*, City of Baltimore v. Blibaum, 374 A.2d 1152, 1158 & n.4 (Md. 1977) (disallowing indemnity when civil authorities and citizens have "used all reasonable diligence" to prevent or suppress riotous assemblages) (emphasis omitted) (citing Note, *Riot Insurance*, 77 YALE L.J. 541, 553 (1968)).

99. *See, e.g.*, Slaton v. City of Chicago, 130 N.E.2d 205, 210 (Ill. App. Ct. 1955) ("One of the objects of the statute is to impose sanctions against the citizens of the community when they participate in or allow the condition to arise that we find in the instant case."); Spring Valley Coal Co. v. City of Spring Valley, 65 Ill. App. 571, 579 (Ill. App. Ct. 1895) (noting the "frequent apathy displayed by ordinarily good citizens at the destructive work of riotous mobs" as a consideration inducing the legislature to enact a mob violence statute); Fauvia v. City of New Orleans, 20 La. Ann. 410, 411 (La. 1868) (praising the wisdom of the mob violence statute, which "concerns the whole community to prevent the wanton destruction of private property by mobs"); *see also* Ratcliffe v. Eden, 98 Eng. Rep. 1200 (K.B. 1776) (Mansfield, J.); *see also supra* notes 66-67 and accompanying text; Legislation, *Liability of the Municipality for Mob Violence*, 6 FORDHAM L. REV. 270, 273 (1937) (noting that mob violence statutes "may compel the innocent to pay for the acts of the guilty").

officials to prevent or suppress unrest;[100] and belief in collective financial responsibility as an evenhanded measure for spreading costs throughout a locality instead of burdening chance victims of mob violence.[101] As in the English tradition, mobs and riots represented risks to society of the highest order[102] because they "seriously threaten[ed] the peace and good order of society."[103] Moreover, large urban riots could be "of a character so serious as to shake the social fabric to its foundations."[104] As such, statutes imposing communal liability on counties and cities for destruction caused by mobs were "essential to the order and good government of the cities affected by [them]."[105]

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100. *See, e.g.*, Roy v. Hampton, 226 A.2d 870, 872 (N.H. 1967) (holding that notice was not a prerequisite to recovery under the riot responsibility statute); Febock v. Jefferson County, 262 N.W. 588, 591 (Wis. 1935) ("The cause of action against the county . . . is predicated on its failure to provide proper police protection."); Underhill v. Manchester, 45 N.H. 214, 221 (1864) ("The object of the statute . . . is, to prevent and suppress riots. The course taken is, first and chiefly, punitive, in making the loss of property destroyed by mobs, a charge upon the town treasuries, thereby joining the personal interest of tax payers with the official duty of the local authorities, and arraying both against rioters, with a new motive to discover, discourage, overawe, and overpower all riotous proceedings and tendencies; secondly, remunerative, in encouraging every one to oppose mobs by giving indemnity for property destroyed in consequence of efforts to preserve order."); *see also* Legislation, *supra* note 80. Pursuant to some statutes, officials could be personally liable for neglect of their duties to quell a riot. *See, e.g.*, MONT. REV. CODE § 94-5314 (1947); N.Y. GEN. MUN. LAW §71 (McKinney 1965); WIS. STAT. § 66.091(4) (1961).

101. *See, e.g.*, A. & B. Auto Stores of Jones Street, Inc. v. City of Newark, 279 A.2d 693, 698 (N.J. 1971) (noting the justness of spreading riot losses among the citizens of a municipality or county); Slaton v. City of Chicago, 130 N.E.2d 205, 211 (Ill. 1955) ("We are of the opinion that it was the legislative intent in enacting the law to impose a penalty upon the community in the form of additional taxes when its members participate in or allow [a mob] to arise."); Yalenezian v. City of Boston, 131 N.E. 220, 221 (Mass. 1921) (stating the communal liability reflects "the principle of making all members of a territorial or municipal division sureties for each other in criminal matters"); *Darlington*, 31 N.Y. at 187 ("The policy on which the act is framed, may be supposed to be, to make good, at the public expense, the losses of those who may be so unfortunate, as without their own fault to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent; and further, and principally we may suppose, to make it the interest of every person liable to contribute to the public expenses to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order."). The particularly pernicious character of riots likely also explains legislative refusal to extend governmental liability to include all damages naturally flowing from other crimes and torts. *See, e.g.*, A. & B. Auto Stores of Jones St., Inc. v. City of Newark, 248 A.2d 258, 269 (N.J. Super. Ct. Law Div. 1968) (noting that American statutes never sought to encompass the broad reach of the original Statute of Winchester).

102. *E.g.*, Hailey v. City of Newark, 36 A.2d 210, 212 (N.J. Ct. Com. Pl. 1944) ("[T]he statutory intent is, to impose such responsibility on a municipality, in cases where its law enforcement has become so inefficient, that the populace, or a portion of them, have felt, rightly or wrongly, that they were compelled to take the law into their own hands, for the purpose of maintaining law and order.").

103. *Spring Valley Coal Co.*, 65 Ill. App. at 578 (referring to "strikes of great magnitude" that had occurred between capital and labor in the years preceding the instant case).

104. County of Allegheny v. Gibson's Son & Co., 90 Pa. 397, 413 (1879) (discussing riots that had occurred and that would occur in large cities).

105. *Id.* at 410; *see also* Butte Miners' Union v. City of Butte, 194 P. 149, 150 (Mont. 1920) ("The purpose of our statute, and those of similar import, is to create municipal

Furthermore, because they were aimed at stimulating the exertions of the indifferent and law-abiding alike, they "directly operate[ed] on and affect[ed] public opinion," which "tend[ed] strongly to the upholding of the empire of the law."[106]

C. Riot Protection and the Fourteenth Amendment

By 1868, when the states ratified the Fourteenth Amendment to the United States Constitution,[107] state obligation to take reasonable measures for the prevention of riot violence was evident and well-established. At this point in history, at least twelve states had enacted riot laws similar to the English riot act.[108] As illustrated by these statutes, the duty to provide riot protection included not only punishment of mob violence, but prevention of mob violence.[109]

1. Judicial Endorsement of State Riot Statutes

Courts, in particular, recognized that prevention of riots and the preservation of social stability are basic governmental functions owed as due process of law. In 1847 in *In re Pennsylvania Hall*, the Pennsylvania Supreme Court set forth one of the earliest judicial acknowledgments of this governmental duty.[110] In this case,

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liability and tend to instill in the mind of every person liable to contribute to the public expense a will to discourage violence and to stimulate effort to preserve public safety.").

106. City of Chicago v. Sturges, 222 U.S. 313, 324 (1911) (upholding the Illinois riot liability statute against constitutional challenge). *Cf.* Note, *Municipal Liability for Riot Damage*, 81 HARV. L. REV. 653, 654 (1968) (arguing that riot statutes do not have a significant impact on individual behavior, but might discourage any tendency of local governments to contain riots within poor areas without serious efforts to give aid to those in riot zone).

107. A certificate of the Secretary of State dated July 28, 1868 declares the Fourteenth Amendment to have been ratified by the legislatures of 28 of the 37 States. The states adopting the amendment at this time, in the order of ratification, were Connecticut, New Hampshire, Tennessee, New Jersey, Oregon, Vermont, Ohio, New York, Kansas, Illinois, West Virginia, Michigan, Minnesota, Maine, Nevada, Indiana, Missouri, Rhode Island, Wisconsin, Pennsylvania, Massachusetts, Nebraska, Iowa, Arkansas, Florida, North Carolina, Louisiana, and South Carolina. Ratification was completed on July 9, 1868. The amendment was subsequently ratified by Alabama, Georgia, Virginia, Mississippi, Texas, Delaware, Maryland, California, and Kentucky. Emory School of Law Website, *Amendments to the Constitution*, *at* http://www.law.emory.edu/FEDERAL/usconst/amend.html (last visited Sept. 6, 2003) [hereinafter *Amendments to the Constitution*].

108. *See* 1862 Kan. Sess. Laws 77; 1856 Ky. Acts 594; 1867 Cal. Stat. 418; 1855 Mo. Laws 25; 1864 N.J. Laws 237; 1863 Wis. Laws 211; 1855 La. Acts 206; 1855 N.Y. Laws 428; 1854 N.H. Laws 1519; 1841 Pa. Laws 415; 1839 Mass. Acts 54; 1835 Md. Laws 137.

109. *See supra* notes 99-106 and accompanying text. With the advent of modern police forces during the nineteenth century, states became better positioned to afford greater protections to residents by preventing crimes, including mob violence. *See* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1205-11 (1999) (discussing early American policing in the mid-1800s). This dual role, as protector and punisher, has always belonged to the states. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2, 251 (St. George Tucker ed., 1803 & photo. reprint 1969) (asserting that "preventive justice is . . . preferable in all respects to punishing justice") (emphasis omitted) (citing CESARE BECCARIA, CRIMES AND PUNISHMENTS ch. 41 (Albany, W.C. Little 1872) (1764)). *See also generally* Heyman, *supra* note 28.

110. 5 Pa. 204 (1847).

members of the board and trustees of the Pennsylvania Hall Association sought compensation under Pennsylvania's riot statute for damages sustained by the Pennsylvania Hall building.[111] A mob had assailed the hall, first breaking windows and then burning the structure.[112] Addressing the validity of the act,[113] the court explained that the riot statute recognized that "tax-payers have a right to be indemnified for losses occasioned by lawless outrage, whenever the public are unable or unwilling to protect property."[114] Although acknowledging that those innocent of wrongdoing might be saddled with the debts of the lawless, the court reasoned that this effect "necessarily results from the structure of society, and the nature of all institutions."[115] Moreover, the court reckoned: "That the legislature had the right to pass such an act, cannot be denied, and it is equally clear that they were bound to do so on every principle of equity and justice."[116]

A year prior to congressional approval of the Fourteenth Amendment,[117] the Court of Appeals of New York conveyed a similar message in upholding New York's riot law.[118] In the case at issue, the defendants, the mayor and other officials of the City of New York, protested the legality of the Riot Compensation Act.[119] Finding the statute constitutional, the court observed:

> The policy on which the act is framed, may be supposed to be, to make good, at the public expense, the losses of those who may be so unfortunate, as without their own fault to be injured in their property by acts of lawless violence of a particular kind which it is the general duty of the government to prevent; and further, and principally we may suppose, to make it the interest of every person liable to contribute to the public expenses to discourage lawlessness and violence, and maintain the empire of the laws established to preserve public quiet and social order. These ends are plainly within the purposes of civil government, and, indeed, it is to attain them that governments are instituted . . . .[120]

Two decades subsequent, the United States Supreme Court confirmed the due process duty of states to combat riot violence.[121] *City of Chicago v. Sturges*

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111. *Id.* The hall was used for abolitionist meetings. *Id.* at 205 (noting that the building "was dedicated and occupied for free discussion of liberty, slavery, &c"). Plaintiffs alleged that, despite notice given to the mayor and sheriff, officials made no attempt at resisting the mob. *Id.*

112. *Id.*

113. The exception made to the act went to the substitution of an inquest of six men to make factual determinations out of court, as opposed to a jury of twelve to decide the matter in court. *Id.* at 206.

114. *Id.* at 209.

115. *Id.*

116. *Id.* at 210.

117. The Fourteenth Amendment was proposed to the state legislatures by the Thirty-ninth Congress, on June 13, 1866. *Amendments to the Constitution*, *supra* note 107.

118. Darlington v. Mayor of New York, 31 N.Y. 164 (1865).

119. Defendants argued, inter alia, that the act deprived them of their property without due process of law. *Id.* at 164-65.

120. *Id.* at 187. Other New York courts also have found that the riot act was based on the duty of protection belonging to government. *See* Ely v. Supervisors of Niagara County, 36 N.Y. 297, 300 (1867); Luke v. City of Brooklyn, 43 Barb. 54, 56-58 (N.Y. App. Div. 1864).

121. City of Chicago v. Sturges, 222 U.S. 313, 323 (1911).

provided the Court with the opportunity to review the Illinois riot statute in the context of a constitutional challenge by the city.[122] The Court remarked that the first duty of government was to maintain social order by protecting the life, liberty, and property of its citizens.[123] This duty lies at the foundation of the social compact,[124] pursuant to which individuals relinquish their natural law rights of self-preservation and establish government "for the mutual Preservation of their Lives, Liberties, and Estates."[125] Turning to the riot law, the Court deemed it to be a "valid exercise of the police power"[126] of the state and proclaimed:

> [The Illinois Riot Act] rests upon the duty of the state to protect its citizens in the enjoyment and possession of their acquisitions, and is but a recognition of the obligation of the state to preserve social order and the property of the citizen against the violence of a riot or a mob.[127]

Following the *Sturges* decision, other courts upheld as constitutional their own state riot acts, recognizing the due process right of the citizenry to the prevention of and protection from mob violence.[128]

2. Congressional Acknowledgement of the Duty to Protect From Riots

While considering the proposal to adopt the Fourteenth Amendment, the United States Congress, too, was cognizant of the right to protection from mob violence, as evidenced by its response to the Memphis riot of 1866.[129] News of the riot reached Washington on the eve of House approval of the Fourteenth Amendment.[130] During the final debate on the amendment, Representative Thaddeus Stevens, the Republican leader, proclaimed the disturbance an

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122. The city argued that the act denied it due process of law because it imposed liability regardless of the city's capability to prevent the violence or due diligence in use of its power. *Id.* at 321.

123. *Id.* at 322.

124. *Id.*

125. JOHN LOCKE, TWO TREATISES OF GOVERNMENT bk. 2, § 123 (Peter Laslett ed., Cambridge Univ. Press 2d ed., 1988) (1698) (emphasis omitted).

126. *Sturges*, 222 U.S. at 322.

127. *Id.* In its examination of the Illinois statute, the Court recited the history of the development of the policy of communal liability, acknowledging its roots in the Anglo-Saxon police system and following its progress from the 1714 riot act to the shores of the United States. *Id.* at 323.

128. *E.g.*, Hailey v. City of Newark, 36 A.2d 210, 211 (N.J. Ct. Com. Pl. 1944) (noting that *Sturges* held statutes such as this constitutional and recognized them as due process of law from earliest Anglo-Saxon times); Abraham v. City of Woburn, 408 N.E.2d 664, 668 (Mass. App. Ct. 1980) (finding that the purpose of riot statutes was "to make good, at the public expense" not the consequence of all crimes but losses from "acts of lawless violence of a particular kind which it is the general duty of the government to prevent") (quoting Yalenezian v. City of Boston, 131 N.E. 220, 221 (Mass. 1921), *rev'd on other grounds*, 421 N.E.2d 1206 (Mass. 1981)).

129. In addition, by 1865, reports of widespread violence in the South against blacks, Unionists, and Northerners were common. *See, e.g.*, S. EXEC. DOC. NO. 39-2, at 3 (1865) (containing accounts of these atrocities by Carl Schurz, who traveled throughout the South at the behest of President Johnson to report on the effects of the Civil War on the Southern people).

130. *See* CONG. GLOBE, 39th Cong., 1st Sess. 2544 (1866) (remarks of Rep. Stevens).

"atrocity"[131] and appealed to the House for an investigation of the riot.[132] A fact-finding committee was soon afterwards sent to Memphis.[133]

Overwhelmed by all that it had discovered, the House committee described the riot as a "massacre"[134] and quickly discredited false reports of the event as being a "simple row" between discharged soldiers and police.[135] The immediate cause of the Memphis riot was a clash between white police officers and discharged black soldiers on May 1, 1866.[136] By evening of that day, mayhem was rampant. Bands of armed whites sought out the conflict, shooting blacks wherever they were found.[137] Innocent and helpless men, women, and children were shot down, "in several instances from eight to ten bullets hitting them."[138] After three days of rioting and destruction, at least forty-six blacks and two whites were killed,[139] five black women were raped,[140] and over two hundred homes, schools, and churches were damaged, ransacked, or destroyed by arson.[141]

The committee also expressed dissatisfaction with the actions of local law enforcement officials and private citizens during the riot. It noted that, although the sheriff and chief of police attempted to protect riot victims and to control the mob, their efforts were ineffective in suppressing the riot.[142] Additionally, many citizens "reprobated" the riot, but fear for their own safeties as well as the tremendous

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131. *Id.*

132. *Id.* at 2572.

133. *Id.*

134. E.B. WASHBURNE, MEMPHIS RIOTS AND MASSACRES, H.R. REP. NO. 101, 39th Cong., 1st Sess. 5 (1866), *available at* http://memory.loc.gov/ammem/amhome.html (last visited Sept. 6, 2003) ("The proportions of what is called the 'riot,' but in reality the massacre, proved to be far more extended, and the circumstances surrounding it of much greater significance, than the committee had any conception of before they entered upon their investigation.").

135. *Id.*

136. *The Memphis Riots*, HARPER'S WEEKLY, May 26 1866, at 1, *available at* http://blackhistory.harpweek.com/7Illustrations/Reconstruction/ScenesInMemphisBI.htm (last visited Jan. 27, 2004). Although the altercation sparked the riot, many historians and observers of the day described the fight as a pretext for violence. *See, e.g.*, *id.*; WASHBURNE, *supra* note 134, at 5. Racial tensions in the city were high, particularly between the Irish population in Memphis, who "embrace[d] nearly all the members of the city government," and the black population. *Id.* at 6, 23. During the Civil War, a regiment of black troops had been stationed at Fort Pickering for a lengthy period, and the families of the soldiers had settled and built homes nearby. *Id.* at 6. In addition, large numbers of blacks had moved to the city once Union authorities occupied it. *Id.* The result was that, over a short period of time, the black population in Memphis had quadrupled. *The Memphis Riots*, *supra*. Considering the amount of racial animosity extant in the city, the fight between the soldiers and police served as a mere catalyst for the violence that ensued. *See* WASHBURNE, *supra* note 134, at 5-8.

137. *The Memphis Riots*, *supra* note 136.

138. *Id.*

139. WASHBURNE, *supra* note 134, at 35.

140. *Id.* at 36; *The Memphis Riots*, *supra* note 136.

141. *See* WASHBURNE, *supra* note 134, at 36; ERIC FONER, RECONSTRUCTION: AMERICA'S UNFINISHED REVOLUTION, 1863-1877, at 261-62 (1988).

142. WASHBURNE, *supra* note 134, at 23-25. According to witnesses, the mayor, although not a riot participant, appeared to be walking the streets "three-quarters drunk" while the mob raged around him. *Id.* at 23.

opposite sentiment rendered their resistance unsuccessful.[143] Worse still, the committee determined from witness testimony that the "ringleader" of the "murder, incendiarism, and butchery" was the judge of the recorder's court[144] and that many police officers had also assisted in leading the mob.[145]

In its report, the committee criticized city officials for failing to quell the disorder and expressed extreme discontent with the lack of measures taken to bring the perpetrators to justice.[146] Furthermore, the report made implicit reference not only to the duty of civil authorities to refrain from partaking in mob violence, but also to their duty to prevent it as "the chosen guardians of the public peace, the sworn executors of the law for the protection of the lives, liberty, and property of the people, and the reliance of the weak and defenseless in time of danger."[147] The committee concluded that, due to the prevailing attitudes in Memphis, the city officials would neither punish rioters nor accept responsibility for the property damage and destruction.[148] Consequently, the committee stoutly averred its belief that the federal government bore the duty "to arrest, try, and punish the offenders" and "levy a tax upon the citizens of Memphis sufficient to cover the losses for all property destroyed."[149]

House approval of the report "was virtually contemporaneous with Congress's approval of the Fourteenth Amendment"[150] and bears out the Framers' understanding that the obligations of government include the duty to prevent and protect against mob violence.[151] The committee submitted its *Report on Memphis Riots and Massacres* to the United States House of Representatives on July 18, 1866, just six weeks after congressional endorsement of the Fourteenth Amendment,[152] and the House endorsed the report.[153]

3. Congressional Rejection of a Federal Riot Statute

Considering the judicial and legislative pronouncements outlined above, the principle of communal responsibility for prevention of mobs and riots would appear armed cap-à-pie against criticism; nonetheless, federal efforts to adopt strict communal liability for mob violence fizzled. The reasons for the abortive attempts,

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143. *Id.* at 26. Afterwards, some citizens expressed their desire to hunt out the rioters and recompense for the burnings. *Id.*

144. *Id.* at 23-24.

145. *Id.* at 25-26.

146. *See id.* at 23-25, 27. In particular, the report reads, "That no effort should have been made by the civil authorities to bring to justice the perpetrators of these stupendous and multiplied outrages is a burning and lasting disgrace to the officers of the law, and a blot on the American name." *Id.* at 27.

147. *Id.* at 34.

148. *Id.*

149. *Id.* The committee also ascertained that to safeguard blacks and white Unionists in Memphis, federal troops would be needed "to uphold the authority of the government, and protect the lives, liberty, and property of citizens of the United States." *Id.* at 27.

150. Heyman, *supra* note 28, at 570. Professor Heyman persuasively argues that the duty to prevent and protect extends to all private violence, whether perpetrated singly or by mobs. *See generally id.*

151. Prior to approval of the Fourteenth Amendment, the Joint Committee on Reconstruction criticized the failure of civil authorities to "prevent or punish" offenses against blacks. *See* H.R. REP. NO. 39-30, at XVII (1866).

152. CONG. GLOBE, 39th Cong., 1st Sess. 3905 (1866).

153. *Id.* at 4159. The vote on the motion was 85-23. *Id.*

which arose from congressional concern for state sovereignty, came to light during the legislative debates surrounding the proposed Sherman Amendment to the Civil Rights Act of 1871.[154]

Congress enacted the Civil Rights Act of 1871 to enforce the provisions of the Fourteenth Amendment.[155] When Congress was debating the bill that ultimately became the 1871 Act, Senator John Sherman of Ohio introduced a proposal to add a section that would have allowed a right of recovery to individuals injured in person or property "by private persons 'riotously and tumultuously assembled.'"[156] This recovery right ran against the private property of any inhabitant of the municipality in which the damage occurred[157] and regardless of good faith efforts made by local officials or the citizenry to combat the riot.[158] The intended effect of the proposal was virtually identical to that of the English Riot Act of 1714 and the Statute of Winchester of 1285.[159]

The Senate passed the amendment,[160] but the House rejected it,[161] as well as a second proposal that shifted liability for riot damage to the local government.[162]

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154. *See generally* Glazer, *supra* note 91 (arguing that the Sherman Amendment failed because Congress was unwilling to accept communal liability for civil rights violations).

155. *See infra* notes 191-99 and accompanying text. In particular, federal legislators enacted the law in response to "the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." Wilson v. Garcia, 471 U.S. 261, 276 (1985).

156. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 664 (1978) (emphasis omitted) (quoting CONG. GLOBE, 42d Cong., 1st Sess., 749 (1871)). The amendment created a cause of action "if any house, tenement, cabin, shop, building, barn, or granary shall be unlawfully or feloniously demolished, pulled down, burned, or destroyed, wholly or in part, by any persons riotously and tumultuously assembled together" or "if any person shall unlawfully and with force and violence be whipped, scourged, wounded, or killed by any persons riotously and tumultuously assembled together" with an intent to deprive citizens of their constitutional rights. CONG. GLOBE, 42d Cong., 1st Sess., 663 (1871).

157. CONG. GLOBE, 42d Cong., 1st Sess. 663 (1871). The bill provided that action could be brought against the county, city, or parish in which the riot had occurred. *Id.*

158. *Id.* Senator Sherman believed that strict communal liability on the local electorate was appropriate because "where the wrong is done by a tumultuous assemblage . . . so as to attract the attention of the whole community and spread fear and terror . . . every man round about knows what is going on." *Id.* at 761 (statement of Sen. Sherman). In opposition to the imposition of strict liability upon local governments, Senator Thurman queried: "Why make the county, or town, or parish liable when it had no reason whatsoever to anticipate that any such crime was about to be committed, and when it had no knowledge of the commission of the crime until after it was committed? What justice is there in that?" *Id.* at 771 (statement of Sen. Thurman).

159. *Id.* at 705 (stating that the proposal was "copied from the law of England that has been in force six hundred years") (statement of Sen. Sherman). For an overview of these English laws, see *supra* Part I.A.2-3. The Riot Act allowed individual recovery from the local government, whereas the Hue and Cry Statute allowed individual recovery from any inhabitant of the hundred. *Id.* The Riot Act, however, did not permit claims for personal injury. *See supra* notes 64, 72 and accompanying text.

160. CONG. GLOBE, 42d Cong., 1st Sess. 707 (1871).

161. *Id.* at 725.

162. *Id.* at 800-01 (rejecting second proposal); *id.* at 749 ("[I]n every such case the county, city, or parish in which any of the said offenses shall be committed shall be liable to pay full compensation to the person or persons damnified by such offense, if living, or to his

The prevailing view as to why the House rejected these proposals is found in the statements of Representative Austin Blair of Michigan.[163] Blair argued that the English government could oblige hundreds to act under the English Riot Act because English hundreds were subdivisions of the national government.[164] In contrast, municipalities in the United States were "the creation of the States alone."[165] Accordingly, any attempt of the federal government to control an area "subject to the control of another and distinct government" endangered state sovereignty.[166]

In the end, the advocates of federally-mandated strict communal liability for riot violence were defeated,[167] leaving state riot statutes to serve as the primary vehicles for riot protection and recovery. Although Congress eventually passed a second substitute to the Sherman Amendment, the alternate bill restricted liability to individuals who had knowledge of the impending crime and the ability to prevent it, and who had neglected or refused to aid or intervene.[168]

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widow or legal representative if dead."). The Senate passed the second proposal as well. *Id.* at 779.

163. Monell v. Dep't of Soc. Servs. of City of New York, 436 U.S. 658, 673 (1978) (citing Rep. Blair's statements as the most "complete statement" of the position against Sherman's amendment). Representative Blair stated: "The proposition known as the Sherman amendment . . . is entirely new. It is altogether without a precedent in this country. . . . That amendment claims the power in the General Government to go into the States of this Union and lay such obligations as it may please upon the municipalities, which are the creations of the States alone . . . . " *Id.* (quoting Rep. Blair).

164. *Id.* at 675 (quoting CONG. GLOBE, 42d Cong., 1st Sess., 795 (1871)).

165. *Id.* at 674 (quoting CONG. GLOBE, 42d Cong., 1st Sess., 795 (1871)).

166. *Id.* at 676 (quoting Collector v. Day, 78 U.S. 113, 127 (1871)).

167. Senator Sherman was dissatisfied with the final version of his amendment and refused to sign on to the conference report that provided the altered proposal. CONG. GLOBE, 42d Cong., 1st Sess., 804, 822 (1871) ("[I]n my judgment this section, although intended to supply a remedy, will give these parties no remedy whatever. It is delusive; it is idle. It would be far better to leave it out.").

168. CONG. GLOBE, 42d Cong., 1st Sess., 831 (1871) (Senate); CONG. GLOBE, 42d Cong., 1st Sess., 808 (1871) (House). This amendment is codified today at 42 U.S.C. § 1986 (1994):

> Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

D. Riot Protection Today

Once commonplace, strict communal riot liability is a relic of the past. [169] At present, only nine states appear to retain some type of riot liability statute that allows riot victims to recover for property damage or physical injuries.[170] Moreover, even in states that allow recovery for riot damage, "the circumstances that give rise to this liability are very limited,"[171] and several states cap liability at set amounts.[172] Alternatively, many plaintiffs have sought support in state tort law to combat inadequate policing during riots.[173] A survey of case law, however,

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169. Indeed, in *Susman v. City of Los Angeles*, 240 Cal. Rptr. 240 (Cal. Ct. App. 1969), the California statute was instrumental in the dismissal of the plaintiff's claims against state and local authorities for damage caused by the Watts riot. The complaint alleged that government officials triggered the riot by negligently arresting a person for drunk driving and that the city was negligent in its failure to control the mob.

Some commentators argue that federal or state compensation for riot injuries and damages is preferable to municipal liability because the larger national or state tax base would reduce the possibility that other important programs would be cut to fund riot costs. Federal–or state–based compensation might also stem the migration of people and business to the suburbs. *See generally* AMOS H. HAWLEY, THE CHANGING SHAPE OF METROPOLITAN AMERICA (1956) (discussing the relocation of people and business from urban to suburban areas); *see also* RAYMOND VERNON, THE CHANGING ECONOMIC FUNCTION OF THE CENTRAL CITY 41-62 (1959) (same).

170. CONN. GEN. STAT. § 7-108 (1999); KY. REV. STAT. ANN. § 411.100 (Banks-Baldwin 2003); MASS. GEN. LAWS ANN. ch. 269, § 8 (2000); N.J. STAT. ANN. § 2A:48-1 (West 2000); OHIO REV. CODE ANN. § 3761.03 (West 2003); R.I. GEN. LAWS § 45-15-13 (2002); S.C. CODE ANN. § 16-5-70 (Law Co-op 2002); W. VA. CODE ANN. § 61-6-12 (Michie 2003); WIS. STAT. ANN. § 893.81 (2003). Although Montana lists a time period for the commencement of an action against a municipal corporation for damages or injuries to property caused by a mob or riot, *see* MONT. CODE ANN. § 27-2-209 (2002), it does not appear to have retained its mob violence statute that allowed for the action itself.

171. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 131 (5th ed. 1984); *see, e.g.*, CONN. GEN. STAT. § 7-108 (1999) (allowing liability only when local government fails to exercise reasonable care or diligence in the prevention or suppression of riot).

172. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 269, § 8 (2000) (allowing recovery for property damage only and limiting recovery to three-fourths of value of property or amount of injury to property); N.J. STAT. ANN. § 2A:48-1 (West 2000) (allowing recovery for property damage only and capping recovery for aggregated damages at $10,000); OHIO REV. CODE ANN. § 3761.03 (West 2003) (allowing recovery for physical injury only and capping recovery for permanent disability at $5000, for serious injury not amounting to permanent disability at $1000, and for minor injury at $500); R.I. GEN. LAWS § 45-15-13 (2002) (allowing recovery for property damage only and capping recovery at three-fourths of value of property or three-fourths of amount of injury to property); W. VA. CODE ANN. § 61-6-12 (Michie 2003) (capping recovery at $5000).

173. *See, e.g.*, FLA. STAT. ANN. § 768.28 (2003) (allowing suit against state for negligent or wrongful act of employee acting within scope of office or employment); IOWA CODE ANN. § 670.2 (1998) (subjecting municipalities to liability for their torts and those of their officers and employees acting within scope of employment or duties); MISS. CODE ANN. § 11-46-9(1)(c) (1999) (exempting governmental entities and employees from liability from claim arising out of act or omission in the performance or execution of duties or activities relating to police protection unless employee acted in reckless disregard of the safety and well-being of any person not engaged in criminal activity at the time of injury); VT. STAT. ANN. tit. 12, § 5601 (2002) (allowing suit against state for negligent or wrongful act of employee acting within scope of office or employment).

reveals a nearly wholesale rejection of governmental tort liability based on a general "failure to provide police protection."[174]

The general repeal of the strict communal liability riot statutes most deeply impacts the urban poor living in riot-wreaked areas.[175] In addition to deterring rioters and providing incentives to the police to prevent and suppress mob violence, riot acts,[176] both English and American, provide redress for injuries when no other manner of compensation may be available.[177] Compared to other sources of loss, which typically occur more equally across socio-economic lines, riot loss has a disproportionate impact on the poor. This loss is "exacerbated by the general inability of potential riot victims to protect themselves against the risk of such loss."[178] As riots have become more common and the damages resulting from them have become more extensive, insurance companies have taken measures to exclude from coverage damages caused by riot and civil commotion, especially in inner-city areas.[179]

How, then, to fill the void left by the disappearing state riot acts—laws that states are "bound" to pass "on every principle of equity and justice"?[180] Although federal legislators declined to adopt a law in the form of the English Riot Act,[181] the Civil Rights Act of 1871 may yet provide a solution. Specifically, § 1 of the

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174. KEETON ET AL., *supra* note 171, § 131. *See also* Barbara E. Armacost, *Affirmative Duties, Systemic Harms, and the Due Process Clause*, 94 MICH. L. REV. 982, 1000-01 (1996). While some courts ground rejection of liability in governmental immunity, *see* KEETON ET AL., *supra* note 171, § 131; 2 STUART M. SPEISER ET AL., THE AMERICAN LAW OF TORTS § 6.11 (1990); Armacost, *supra*, at 997 n.78, other courts refuse to find any governmental duty to provide police protection. For example, California's Torts Claims Act provides: "Neither a public entity nor a public employee is liable for failure to establish a police department or . . . for failure to provide sufficient police protection service." CAL. GOV'T CODE § 845 (West 1997). Thus far, this provision has been an insurmountable hurdle to those seeking a remedy for inadequate police protection. *See, e.g.*, Peterson v. San Francisco Cmty. Coll. Dist., 685 P.2d 1193, 1202 (Cal. 1984); Gates v. Superior Court, 38 Cal. Rptr. 2d 489, 503-04 (Cal. Ct. App. 1995). Courts that acknowledge a duty to protect describe the duty as one owed only to the public at large, leaving individual plaintiffs without legal basis for complaint. *See, e.g.*, KEETON ET AL., *supra* note 171, § 131; 2 STUART M. SPEISER ET AL., *supra*, § 6.11; Armacost, *supra*, at 997 n.78. In addition, although most state constitutions contain equal protection and due process clauses, courts generally interpret these provisions in accord with federal constitutional doctrine. *See Developments in the Law, The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1368 (1982). As a result, state guarantees of equal protection and due process warrant no greater police protection than federal assurances. *See also infra* Part II.

175. For discussions of the changing demographics in and economic difficulties faced by U.S. cities, see Tierney, *supra* note 4, at 149-70, and David O. Sears, *Urban Rioting in Los Angeles: A Comparison of 1965 with 1992*, *in* THE LOS ANGELES RIOTS: LESSONS FOR THE URBAN FUTURE 237-54 (Mark Baldassare ed., 1994).

176. *See supra* notes 99-106 and accompanying text.

177. Abraham v. City of Woburn, 408 N.E.2d 664, 668-69 (Mass. App. Ct. 1980), *rev'd by* 421 N.E.2d 1206 (Mass. 1981); Marston, *supra* note 56, at 1797.

178. Note, *Municipal Liability for Riot Damages*, 81 HARV. L. REV. 653, 654-55 (1968); *see* U.K. PARLIAMENT website, *supra* note 72, at cols. 661-65 (remarks of Lord Bassam of Brighton) (discussing proposed amendment to limit reach of Riot Act and the need to "weigh the position of those who have insurance and those who do not").

179. *Abraham*, 408 N.E.2d at 668-69; Note, *supra* note 178, at 655; Note, *Riot Insurance*, 77 YALE L.J. 541 (1968).

180. *In re* Pennsylvania Hall, 5 Pa. 204 (Pa. 1847).

181. *See supra* Part I.C.3.

Act, which is currently codified at 42 U.S.C. § 1983, enables individuals to obtain damages and equitable relief from state and local officials who violate the Constitution.[182] No version of the Sherman Amendment sought to alter § 1 of the civil rights bill.[183] In addition, opponents of the amendment distinguished between a federally-imposed obligation on states to keep the peace and a federal imposition of civil liability for violations of the Fourteenth Amendment—rejecting the former and approving the latter.[184] Consequently, § 1983 presents an alternate means for enforcing the due process duty of states to protect citizens from riot violence and can bridge the gap left by the near-blanket retraction of state riot statutes by state legislatures.

II. SEEDS OF THE JOSHUA TREE:[185] THE DUTY TO PROTECT AND THE STATE-CREATED DANGER DOCTRINE

A. The Fourteenth Amendment and § 1983

The Due Process Clause of the Fourteenth Amendment of the United States Constitution prohibits states from depriving "any person of life, liberty, or property, without due process of law."[186] The clause was intended to safeguard individuals from an abuse of power by government officials.[187] By requiring the State to adhere to appropriate procedures when depriving persons of life, liberty, or property, the framers of the Due Process Clause sought to promote evenhanded

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182. *See infra* Part II.A.

183. Debate over § 1983 was limited and the section was passed without amendment. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 665 (1978).

184. *Id.* at 679-80. Liability under the Fourteenth Amendment included responsibility for failures to keep the peace under state laws. *Id.*; CONG. GLOBE, 42d Cong., 1st Sess., 794 (1871) ("I presume . . . that where a State had imposed a duty [to keep the peace] upon [a] municipality . . . an action would be allowed to be maintained against them in the courts of the United States . . . . ") (statement of Rep. Poland).

185. The "Joshua" referred to here is Joshua DeShaney, the child-plaintiff in *DeShaney v. Winnebago County Dep't of Soc. Servs.*, 489 U.S. 189 (1989), discussed *infra* notes 235-47 and accompanying text, in which the Supreme Court placed a major limit on due process claims for indirect harm.

186. U.S. CONST. amend. XIV, § 1. Section 1 of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id. The drafters of this clause intended that it encompass the same assurances as that of the Due Process Clause of the Fifth Amendment. *See* CONG. GLOBE, 39th Cong., 1st Sess. 1292 (1866) (referring to the Due Process Clause of the Fifth Amendment, which was to be incorporated into the Fourteenth Amendment). It was to ensure "the protection of the laws," *id.*, and guarantee the right "of all persons to be protected in life, liberty, and property." *Id.* at 1089.

187. Daniels v. Williams, 474 U.S. 327, 331 (1986) (stating that the Due Process Clause was "intended to secure the individual from the arbitrary exercise of the powers of government") (quoting Hurtado v. California, 110 U.S. 516, 527 (1884)). The Magna Carta was the precursor to the Due Process Clause. *Id.* (citing Edwin S. Corwin, *The Doctrine of Due Process of Law Before the Civil War*, 24 HARV. L. REV. 366, 368 (1911)).

decisionmaking.[188] Furthermore, by forbidding certain official actions, notwithstanding fair methods of application or implementation,[189] the Due Process Clause prevents official authority from being "used for purposes of oppression."[190]

Following the ratification of the Fourteenth Amendment, Congress enacted the Civil Rights Act of 1871[191] to provide a constitutional tort remedy for violations of the Fourteenth Amendment.[192] The Reconstruction period following the Civil War was rife with hate crimes perpetrated against African Americans.[193] In particular, southern whites waged a campaign of violence and terror against the newly-freed slaves. These acts were often wrought not only by private actors, but also with the

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188. *Id.* This guarantee of fair procedure is often referred to as "procedural due process." *See, e.g., id.* at 337 (Stevens, J., concurring).

189. *Id.* at 331 (citing Rochin v. California, 342 U.S. 165 (1952)).

190. *Id.* at 331-32 (quoting Murray's Lessee v. Hoboken Land & Improvement Co., 59 U.S. (18 How.) 272, 277 (1856)). In *Murray's Lessee*, the Court discussed the assurances of the Due Process Clause of the Fifth Amendment. The due process clauses of both the Fifth and Fourteenth Amendments were intended to secure similar guarantees. *See supra* note 186. In his concurring opinion in *Daniels*, Justice Stevens articulated three types of constitutional protection afforded by the Due Process Clause of the Fourteenth Amendment. He acknowledged the guarantees of substantive and procedural due process. In addition, he stated that the clause "incorporates specific protections defined in the Bill of Rights." *Daniels*, 474 U.S. at 337.

191. The Civil Rights Act of 1871, ch. 22, 17 Stat. 13 (1871) (codified as amended at 42 U.S.C. § 1983 (2000)). Just three years after the states ratified the Fourteenth Amendment, President Grant exhorted Congress to pass the Civil Rights Act in a letter dated March 23, 1871:

> A condition of affairs now exists in some States of the Union rendering life and property insecure and the carrying of the mails and the collection of the revenue dangerous. The proof that such a condition of affairs exists in some localities is now before the Senate. That the power to correct these evils is beyond the control of State authorities I do not doubt; that the power of the Executive of the United States, acting within the limits of existing laws, is sufficient for present emergencies is not clear. Therefore, I urgently recommend such legislation as in the judgment of Congress shall effectually secure life, liberty, and property, and the enforcement of law in all parts of the United States.

CONG. GLOBE, 42d Cong., 1st Sess., 244 (1871). During and just after Reconstruction, Congress also enacted civil rights legislation now codified at 42 U.S.C. §§ 1981-82, 1984-85 and at 18 U.S.C. §§ 241-42. Nonetheless, as the Supreme Court has remarked, "[o]nly § 1 of the Act of April 20, 1871, 17 Stat. 13, presently codified as 42 U.S.C. § 1983, achieved measurable success in later years." Zwickler v. Koota, 389 U.S. 241, 247 n.9 (1967).

192. As stated by Senator Edmunds, Chairman of the Senate Committee on the Judiciary:

> The first section is one that I believe nobody objects to, as defining the rights secured by the Constitution of the United States when they are assailed by any State law or under color of any State law, and it is merely carrying out the principles of the civil rights bill, which has since become a part of the Constitution.

CONG. GLOBE, 42d Cong., 1st Sess., 568 (1871). Congress enacted 42 U.S.C. § 1983 pursuant to § 5 of the Fourteenth Amendment, *see* CONG. GLOBE, 42d Cong., 1st Sess., app. 68, 80, 83-85, which reads: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this [amendment]." U.S. CONST. amend. XIV, § 5.

193. *See* NEIL R. MCMILLAN, DARK JOURNEY: BLACK MISSISSIPPIANS IN THE AGE OF JIM CROW 252 (1989). Groups such as the Ku Klux Klan terrorized African Americans in the South. *Id.*

support or assent of local officials.[194] The 1871 civil rights legislation was enacted to combat white lawlessness and to protect the basic civil rights of freed slaves.[195]

Although appalled by the violence,[196] Congress was particularly concerned about the apparent inability or indisposition of government officers to combat the injustices. For example, Representative David P. Lowe of Kansas stated:

> While murder is stalking abroad in disguise, while whippings and lynchings and banishment have been visited upon unoffending American citizens, the local administrations have been found inadequate or unwilling to apply the proper corrective. Combinations, darker than the night that hides them, conspiracies, wicked as the worst of felons could devise, have gone unwhipped of justice. Immunity is given to crime, and the records of public tribunals are searched in vain for any evidence of effective redress.[197]

Senator Thomas Ward Osborn of Florida framed the problem as thus:

> That the State courts in the several States have been unable to enforce the criminal laws of their respective States or to suppress the disorders existing, and in fact that the preservation of life and property in many sections of the country is beyond the power of the State government, is a sufficient reason why Congress should, so far as they have authority under the Constitution, enact the laws necessary for the protection of citizens of the United States. The question of the constitutional authority for the requisite legislation has been sufficiently discussed.[198]

Accordingly, the federal government passed the 1871 Act to provide a remedy against state officials who were unable or unwilling to enforce the law.[199]

Section 1 of the 1871 Act, now embodied in § 1983,[200] creates a cause of action for anyone whose federal rights have been abridged by a person acting under color of state law.[201] By extending the statutory remedy to all people, the 1871

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194. CONG. GLOBE, 42d Cong., 1st Sess. 236, 244 (1871) (noting that local officials offered no protection from the Klan).

195. The 1871 Act was a direct result of "the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." Wilson v. Garcia, 471 U.S. 261, 276 (1985).

196. The legislative debate on the 1871 Act is full of references to a 600-page Senate committee report, S. REP. NO. 42-1 (1871), containing details of Klan attacks on innocent citizens and the helplessness of state governments to address the injustice. *See, e.g.*, CONG. GLOBE, 42d Cong., 1st Sess., app. 166-67 (1871).

197. CONG. GLOBE, 42d Cong., 1st Sess. 374 (1871).

198. *Id.* at 653.

199. Monroe v. Pape, 365 U.S. 167, 175-76 (1961). The legislation had three main purposes: to "override certain kinds of state laws"; to provide "a remedy where state law was inadequate"; and "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice." *Id.* at 173-74. *See* Michael T. Burke & Patricia A. Burton, *Defining the Contours of Municipal Liability Under 42 U.S.C. § 1983:* Monell *Through* City of Canton v. Harris, 18 STETSON L. REV. 511, 513 (1989).

200. The statute was part of a larger statute that was popularly known as the Ku Klux Klan Act. *See generally, e.g.*, *Monroe*, 365 U.S. at 167.

201. Section 1983 remedies were relatively undeveloped until revived by the Supreme Court in *Monroe v. Pape*, 365 U.S. 167 (1961). *See* Eugene Gressman, *The Unhappy History of Civil Rights Legislation*, 50 MICH. L. REV. 1323 (1952) (discussing the unwillingness of

Congress "went beyond the mischief" that the civil rights enactment was intended to immediately redress.[202] Congress intended for the statute to provide "a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[203] Today, the statute reads in pertinent part as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.[204]

Section 1983 is the basis for most suits against local governments and state and local government officers for violations of U.S. law.[205] An individual bringing a § 1983 claim must show that the defendant, while acting under color of state law, committed the protested conduct and that the conduct deprived the individual of federally-protected rights.[206] A § 1983 "person" includes not only state officials and employees,[207] but also "bodies politic and corporate,"[208] which include

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both federal and state judges in the South to stop racism and discrimination). Prior to the Court's holding in *Monroe*, the statute had been construed solely to redress violations authorized by state law. *Monroe* read the statute to address conduct by individuals clothed in state authority, regardless of actual state approval. *Monroe*, 365 U.S. at 183-85, *overruled on other grounds by* Monell v. Dep't of Soc. Servs., 436 U.S. 658 (1978).

202. *Monell*, 436 U.S. at 683 (1978).

203. *Monroe*, 365 U.S. at 180. *See also* Mitchum v. Foster, 407 U.S. 225, 242 (1972) (stating that the law interposes the federal courts between the States and the people, to serve as guardians of federal rights and to protect the people from unconstitutional action under color of state law). The federal courts, however, do not have exclusive jurisdiction over § 1983 claims. *See* Maine v. Thiboutot, 448 U.S. 1, 10-11 (1980).

204. Civil Rights Act, 42 U.S.C. § 1983 (2000).

205. ERWIN CHEMERINSKY, FEDERAL JURISDICTION 464 (4th ed. 2003).

206. Parratt v. Taylor, 451 U.S. 527, 535 (1981), *overruled on other grounds by* Daniels v. Williams, 474 U.S. 327 (1986). The Supreme Court has added other elements, including defenses and immunities, as well as limitations to claims brought pursuant to § 1983. *See, e.g.*, Zinermon v. Burch, 494 U.S. 113 (1990) (stating that random, unauthorized deprivation of liberty does not violate due process when adequate post-deprivation remedy is available under state law); DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (holding that government generally has no duty to protect individuals from private harms); *Daniels*, 474 U.S. at 327 (1986) (holding that negligent conduct cannot constitute a deprivation of due process); Davidson v. Cannon, 474 U.S. 344 (1986) (same); Parratt v. Taylor, 451 U.S. 527 (1981) (holding that random, unauthorized deprivation of property does not violate due process when adequate post-deprivation remedy is available under state law); *Monell*, 436 U.S. at 691-95 (rejecting respondeat superior liability and creating "policy or custom" requirement as way of limiting municipal liability); Stump v. Sparkman, 435 U.S. 349 (1978) (holding judge's immunity absolute for official acts when sued under § 1983); Schuer v. Rhodes, 416 U.S. 232 (1974) (recognizing qualified or good-faith immunity for governor and aides when sued under § 1983).

207. Private actors who conspire with state officials may be considered state actors. *See, e.g.*, Dennis v. Sparks, 449 U.S. 24, 27 (1980) (holding that private individual acts

municipalities,[209] counties,[210] and state agencies.[211] The term, however, does not include the State itself.[212]

B. The Devolution of the Duty to Protect from Private Danger

Although § 1983 liability clearly extends to governmental officials who directly deprive individuals of their constitutional rights,[213] a more difficult issue arises as to the scope of § 1983 with respect to harms caused by private actors or by factors unrelated to the State. The Supreme Court first recognized a governmental constitutional duty to protect individuals from private danger in the 1976 case of *Estelle v. Gamble*.[214] In *Estelle*, the Court held that § 1983 reaches prison officials who display "deliberate indifference to a prisoner's serious illness or injury."[215]

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under color of state law if he or she is a "willful participant in joint action with the State"); Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) (concluding that restaurant conspiring with police to prevent blacks from being served could be liable under § 1983). Even federal officials who act in concert with state officials are within reach of § 1983. *See, e.g.*, Cabrera v. Martin, 973 F.2d 735 (9th Cir. 1992) (allowing suit against federal officers engaged in conspiracy with state officials to abridge federal rights); Hampton v. Hanrahan, 600 F.2d 600, 623 (7th Cir. 1979), *rev'd in part by* 446 U.S. 754 (1980) (same).

208. Act of Feb. 25, 1871, ch. 71, § 2, 16 Stat. 431 (currently codified at 1 U.S.C. § 1 (2000)). This act was known as the Dictionary Act and was passed by Congress just months before the passage of the Civil Rights Act of 1871. Pursuant to the Dictionary Act, "the word 'person' may extend and be applied to bodies politic and corporate." *Id.*

209. *Monell*, 436 U.S. at 658 (citing the Dictionary Act and overruling the *Monroe* Court's unanimous conclusion that municipalities were not "persons" within the meaning of § 1983). A municipality is liable under § 1983, however, only if the plaintiff shows that the government officer acted pursuant to an official policy or custom. *Id.* at 690.

210. *See, e.g.*, Huffman v. County of Los Angeles, 147 F.3d 1054 (9th Cir. 1998) (allowing suit against county); Carlton v. Cleburne County, 93 F.3d 505 (8th Cir. 1996) (allowing suit against county); Ross v. United States, 910 F.2d 1422, 1429 (7th Cir. 1990) (allowing suit against county for actions of deputy).

211. *See, e.g.*, Armijo v. Wagon Mound Pub. Sch., 159 F.3d 1253 (10th Cir. 1998) (allowing suit against school); Morse v. Lower Merion Sch. Dist., 132 F.3d 902, 906-07 (3d Cir. 1997) (addressing liability of school district in § 1983 suit); D.R. v. Middle Bucks Area Vocational Technical Sch., 972 F.2d 1364 (3d Cir. 1992) (allowing suit against school).

212. Will v. Mich. Dep't of State Police, 491 U.S. 58, 64-66 (1989) (construing § 1983 to exclude suits against states).

213. *See, e.g.*, Graham v. Connor, 490 U.S. 386 (1989) (excessive force used by police officers); Cooper v. Casey, 97 F.3d 914 (7th Cir. 1996) (beating of prisoner by prison official); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), *cert. denied sub nom.* Employee-Officer John, # 1765 Badge Number v. Johnson, 414 U.S. 1033 (1973) (excessive force used by prison guard). *But see supra* note 206 (providing examples of limitations on § 1983 suits). For a thorough and interesting discussion of the concept of constitutional torts, see Christina B. Whitman, *Constitutional Torts*, 79 MICH. L. REV. 5 (1980) and Christina B. Whitman, *Government Responsibility for Constitutional Torts*, 85 MICH. L. REV. 225 (1986).

214. 429 U.S. 97 (1976).

215. *Id.* at 105. For a critical discussion of the "deliberate indifference" standard, see Gerald E. Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715, 771-72 (1978) (arguing that the standard provides no incentive for improving prison medical facilities) and Eric Neisser, *Is There a Doctor in the Joint? The Search for Constitutional Standards for Prison Health Care*, 63 VA. L. REV. 921, 922 (1977) (analyzing the standard within the framework of Eighth Amendment jurisprudence and policies underlying constitutional tort law). For a history of prison reform litigation, see MALCOLM M. FEELEY & EDWARD L.

Under the Eighth Amendment,[216] the State has an affirmative duty to tend to the medical needs of prisoners; the failure to provide medical care can lead to unnecessary pain and suffering; unnecessary pain and suffering is equivalent to cruel and unusual punishment.[217] Thus, the custodial relationship between the individual and the State in the prison setting[218] obliges the latter to provide some protection against injuries stemming from untreated illness or disease.[219]

A custodial relationship in other settings may also lead to the imposition of affirmative duties on states to protect individuals from private harm. In *Youngberg v. Romeo*,[220] the Supreme Court recognized a right to protection under the Due Process Clause of the Fourteenth Amendment for a profoundly retarded adult who had been involuntarily committed to a state hospital.[221] The plaintiff, Nicholas Romeo, had been injured, by himself and by other residents, numerous times while institutionalized.[222] The Court held that the State had a duty to protect Romeo from danger: "If it is cruel and unusual punishment to hold convicted criminals in unsafe conditions, it must be unconstitutional to confine the involuntarily committed—who may not be punished at all—in unsafe conditions."[223]

Four years subsequent to *Estelle*, however, the Court rejected a § 1983 claim brought under the Due Process Clause of the Fourteenth Amendment for injuries wrought by a private actor in a non-custodial setting. In *Martinez v. California*,[224] the Court assumed that state officials recklessly released a parolee who, five months following his release, murdered Mary Ellen Martinez, a fifteen-year-old girl.[225] The girl's family sued the officials who had paroled the killer, asserting that the release of the parolee ultimately caused the harm that deprived the victim of her

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RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (1998).

216. U.S. CONST. amend. VIII.

217. *Estelle*, 429 U.S. at 103-05. This protection is not afforded to pretrial detainees. Bell v. Wolfish, 441 U.S. 520, 535 n.16 (1979) (holding that Eighth Amendment protections are triggered only after criminal prosecution and conviction). Nonetheless, courts have construed the Fourteenth Amendment to provide similar guarantees to pretrial detainees. *See, e.g.*, Cooper v. Dyke, 814 F.2d 941, 949 n.6 (4th Cir. 1987) ("[T]he 'deliberate indifference' standard is applicable to pretrial detainees under the fourteenth amendment.") (quoting Whisenant v. Yuam, 739 F.2d 160, 163 n.4 (4th Cir. 1984)); Garcia v. Salt Lake County, 768 F.2d 303, 307 (10th Cir. 1985) (assuming that the Fourteenth Amendment provides the same guarantees to pretrial detainees that the Eighth Amendment does to prisoners).

218. Eighth Amendment guarantees do not extend to schoolchildren subjected to corporal punishment. Ingraham v. Wright, 430 U.S. 651 (1977) (distinguishing the circumstances surrounding schoolchildren and prisoners).

219. *Id. Estelle* generated a number of holdings allowing prisoners to bring suit for official deliberate indifference to threats to their safety. *See, e.g.*, Elliot v. Cheshire County, 940 F.2d 7 (1st Cir. 1991) (recognizing duty to protect detainee from his own suicidal tendencies of which jail personnel were aware or should have been aware); Davis v. Zahradnick, 600 F.2d 458 (4th Cir. 1979) (recognizing duty of guard to protect from assault).

220. 457 U.S. 307 (1982).

221. *Id. See also* City of Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983) (finding city responsible for providing medical care to suspect injured by police in apprehending him).

222. *Youngberg*, 457 U.S. at 310.

223. *Id.* at 315-16.

224. 444 U.S. 277 (1980).

225. *Id.* at 279-80.

life.[226] The Court held that the state officer's actions did not amount to a violation of due process "within the meaning of the Fourteenth Amendment."[227] In reaching this conclusion, the Court reasoned that the victim's death was "too remote a consequence of the parole officers' action to hold them responsible under the federal civil rights law."[228] Nevertheless, the Court did not entirely spurn the idea of § 1983 liability for private dangers. Specifically, it determined: "We need not and do not decide that a parole officer could never be deemed to 'deprive' someone of life by action taken in connection with the release of a prisoner on parole."[229]

After *Martinez*, the lower courts continued to develop the idea of § 1983 liability in non-custodial situations for harms created by the State but directly caused by parties other than the State or its agents. A few courts expanded state-created danger liability, moving in the direction of a general duty to protect,[230] but most courts recognized liability only if State agents took an active role in creating or increasing the danger.[231] In particular, the Seventh Circuit stated: "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit."[232] Although the court declined to assign to the State a general affirmative duty to protect,[233] it acknowledged that when the government creates or increases danger that ultimately causes injury, then the government bears responsibility in protecting against that injury.[234]

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226. *Id.* at 283-84.

227. *Id.* at 284-85.

228. *Id.* at 285. The Court identified factors in its decision including: that five months had elapsed after the parolee's release and before the victim's murder, that the parole board was not aware of any danger specific to the victim, and that the parolee was not an agent of the board. *Id.*

229. *Id.*

230. *See, e.g.*, Estate of Bailey by Oare v. County of York, 768 F.2d 503 (3d Cir. 1985) (finding a general duty to protect when officials knew child was at risk of being abused). For an intriguing discussion of "actionable inaction," see Lisa E. Heinzerling, *Actionable Inaction: Section 1983 Liability for Failure to Act*, 53 U. CHI. L. REV. 1048 (1986), in which the author analogizes the right to protection to an entitlement to property. Heinzerling argues that a right to protection arises once a service or benefit has been provided to the community on a general basis. *Id.* at 1063. Any decision to withhold an existing service or benefit should be governed by the Due Process Clause. *Id.* at 1063-72.

231. *See, e.g.*, Archie v. City of Racine, 847 F.2d 1211 (7th Cir. 1988) (finding no active role when dispatcher provided poor advice during an emergency that led to death of victim); Escamilla v. City of Santa Ana, 796 F.2d 266 (9th Cir. 1986) (finding no active role when officers did not create or contribute to risk of harm in barroom shooting that killed victim); White v. Rochford, 592 F.2d 381 (7th Cir. 1979) (allowing § 1983 claim when officers' actions in leaving children without adult protection in abandoned car after arresting driver led to physical and emotional injuries). An analogous duty in tort is assigned to private individuals whose conduct creates "an unreasonable risk of causing physical harm to another." RESTATEMENT (SECOND) OF TORTS § 321 (1965). Similarly, § 322 of the Restatement requires a person to aid another when that person acts to cause "such bodily harm to another as to make him helpless and in danger of further harm." *Id.* at § 322.

232. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (finding no due process violation when state failed to protect citizen from criminals or madmen absent any discrimination in providing protection against crime of violence).

233. The court distinguished between action and inaction, stressing that the former is necessary to trigger liability. *Id.*

234. *Id.* The failure to fulfill this obligation is actionable under § 1983. *Id.*

In *DeShaney v. Winnebago County Department of Social Services*,[235] the Supreme Court instituted a major limit on due process claims by refusing to recognize a general duty to protect from private danger. As stated by the Court, "the facts of this case are undeniably tragic."[236] Joshua DeShaney, the child plaintiff, had been repeatedly beaten by his father with whom he lived.[237] When Joshua entered the hospital with multiple bruises and abrasions, a doctor called the Winnebago County Department of Social Services to make them aware of the abuse, and Social Services placed Joshua in the temporary custody of the hospital, only to return him to his father after three days.[238] Thereafter, over the course of fifteen months, the Department of Social Services continued to record the abuse, but did not seek to intervene.[239] In the end, the father beat the four-year-old so severely that he inflicted permanent brain damage.[240] Joshua and his mother brought a § 1983 suit against the Department and county officials, alleging that the defendants' failure to intervene to protect Joshua deprived him of his liberty without due process of law.[241] In addressing the plaintiffs' claim, the Court declared that "[a]s a general matter . . . a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."[242] Instead, the majority described the Due Process Clause as a limit on governmental action and not as an affirmative duty to protect citizens from private harm.[243]

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235. 489 U.S. 189 (1989).

236. *Id.* at 191.

237. *Id.* at 191-93.

238. *Id.* at 192. Winnebago County authorities were alerted to the possibility of this abuse a year prior to the hospital visit, by Joshua's stepmother. *Id.*

239. *Id.* at 192-93.

240. *Id.* at 193. Due to the brain injuries, Joshua will likely spend the rest of his life confined to an institution for the profoundly retarded. *Id.*

241. *Id.* at 191. The plaintiffs also argued that the relationship between Joshua and the State was analogous to that which exists between prisoners or mental health patients and the State. *Id.* at 197. This "special relationship," the plaintiffs contended, imposed an affirmative obligation on the State to provide Joshua with adequate protective services. The Court, however, rejected this argument and limited the State's duty to protect to individuals in state custody against their will. *Id.* at 199-200. Referring to cases such as *Estelle* and *Romeo*, *see supra* notes 214-23 and accompanying text, the Court concluded:

> [T]hese cases afford petitioners no help. Taken together, they stand only for the proposition that when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being. The rationale for this principle is simple enough: when the State by the affirmative exercise of its power so restrains an individual's liberty that it renders him unable to care for himself, and at the same time fails to provide for his basic human needs—*e.g.*, food, clothing, shelter, medical care, and reasonable safety—it transgresses the substantive limits on state action set by the Eighth Amendment and the Due Process Clause. The affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf.

Id. at 199-200 (citations omitted).

242. *Id.* at 197.

243. *Id.* at 195. The Court reasoned:

Notwithstanding this limit on the Due Process Clause, the Court tacitly acknowledged the state-created danger doctrine for redressing privately-inflicted injuries. In particular, in ruling against the plaintiffs, the Court determined that "[w]hile the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."[244] Because the State had taken no action that created or increased the danger to Joshua, the defendants' knowledge of the father's violence imposed no obligation on the State to intervene on Joshua's behalf.[245] It follows, then, that if state action had created or increased the danger to Joshua, then governmental obligation would result.

Academic response to *DeShaney* was decidedly critical and targeted the Court's attempt to draw a distinction between state action and inaction, restricting liability to cases involving the former.[246] The purpose of this Article, however, is not to "pile on" or otherwise supplement these compelling strikes against "negative liberties," but rather to work within the framework of *DeShaney* to establish a governmental duty to prevent riot violence. To accomplish this, this Article posits an interdisciplinary approach to analyzing state action by using sociological studies to establish the State's role in riot formation and riot violence.

The *DeShaney* opinion left open at least two broad conceptual avenues for establishing state substantive due process obligations to protect individuals from

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> The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without "due process of law," but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means . . . . Its purpose was to protect the people from the State, not to ensure that the State protected them from each other.

Id. at 195-96. This reasoning sparked two passionate dissents. Justice Brennan criticized what he described as the majority's "fixation" on the principle of negative limitation, *id.* at 205, and concluded:

> My disagreement with the Court arises from its failure to see that inaction can be every bit as abusive of power as action, that oppression can result when a State undertakes a vital duty and then ignores it. Today's opinion construes the Due Process Clause to permit a State to displace private sources of protection and then, at the critical moment, to shrug its shoulders and turn away . . . . Because I cannot believe that our Constitution is indifferent to such indifference, I respectfully dissent.

Id. at 212 (Brennan, J., dissenting). Justice Blackmum disparaged the majority's "formalistic reasoning" and argued that the Court's "attempts to draw a sharp and rigid line between action and inaction" have "no place in the interpretation of the broad and stirring Clauses of the Fourteenth Amendment." *Id.* (Blackmun, J., dissenting).

244. *Id.* at 201.

245. *Id.* at 194-97.

246. *See supra* note 28. An exception to the negative responses is Professor Armacost's argument that *DeShaney* is "not an outlier in the judicial landscape" involving failure-to-protect claims. Armacost, *supra* note 174, at 985. Despite acknowledging the Court's action/inaction distinction as "normatively unappealing," Professor Armacost observes that, "[i]n the tort context . . . the overwhelming presumption against liability for failure to protect has held fast." *Id.*

known private dangers: (1) state custody and "special relationships";[247] and (2) state-created danger.[248] Although the Supreme Court appears to limit the first theory of recovery to situations in which the State has assumed custody of an individual against his or her will,[249] the lower courts have expanded the concept of state custody to include a variety of custodial and quasi-custodial circumstances, including children in foster care,[250] voluntarily committed mental health patients,[251]

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247. The majority in *DeShaney* implicitly affirmed this avenue of liability. *See supra* notes 244-45 and accompanying text. An exception to the requirement of custody or special relationship is the affirmative duty placed on police officers to protect an individual whose constitutional rights are being violated by other police officers. *See, e.g.*, Hale v. Towney, 45 F.3d 914, 919 (5th Cir. 1995) ("[A]n officer who is present at the scene and does not take reasonable measures to protect a suspect from another officer's use of excessive force may be liable under section 1983."); Anderson v. Branen, 17 F.3d 552, 557 (2d Cir. 1994) ("It is widely recognized that all law enforcement officials have an affirmative duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence."); McHenry v. Chadwick, 896 F.2d 184, 188 (6th Cir. 1990) (finding § 1983 right to protection from officers when fellow officers physically assaulted inmate); O'Neill v. Krzeminski, 839 F.2d 9, 11-12 (2d Cir. 1988) (finding § 1983 right to protection from abuse by an officer after fellow officers witnessed initial blows); Byrd v. Clark, 783 F.2d 1002, 1007 (11th Cir. 1986) ("If a police officer . . . fails or refuses to intervene when a constitutional violation . . . takes place in his presence, the officer is directly liable under Section 1983."); Webb v. Hiykel, 713 F.2d 405, 408 (8th Cir. 1983) (finding § 1983 right to protection from an officer even when officer's superior officers were source of force causing harm); Byrd v. Brishke, 466 F.2d 6, 11 (7th Cir. 1972) ("[O]ne who is given the badge of authority of a police officer may not ignore the duty imposed by his office and fail to stop other officers who punish a third person in his presence."); Masel v. Barrett, 707 F. Supp. 4, 7 (D.D.C. 1989) (noting that all circuits recognize a special relationship between a police officer and victim so as to afford a duty to protect the victim's rights from constitutional violation by fellow officers); *Cf.* Cunningham v. Gates, 229 F.3d 1271, 1290 (9th Cir. 2000) (finding no liability when police officers had no realistic opportunity to intercede and prevent harm).

248. *See supra* notes 244-45 and accompanying text.

249. *See DeShaney*, 489 U.S. at 200-01.

250. Abused, neglected, and dependent children in state custody are entitled to a minimal level of due process protection in foster homes. *See, e.g.*, Niccini v. Morra, 212 F.3d 798, 808 (3d Cir. 2000) (en banc) (finding that the State has an affirmative duty to protect children it places in state-regulated foster care); Norfleet v. Ark. Dep't of Human Servs., 989 F.2d 289, 292-93 (8th Cir. 1993); Yvonne L. v. N.M. Dep't of Human Servs., 959 F.2d 883, 891-93 (10th Cir. 1992); K.H. through Murphy v. Morgan, 914 F.2d 846, 848-49 (7th Cir. 1990); Meador v. Cabinet for Human Res., 902 F.2d 474, 475-76 (6th Cir. 1990); LaShawn A. v. Dixon, 762 F. Supp. 959, 991-92 (D.D.C. 1991), *aff'd*, 990 F.2d 1319 (D.D.C. 1993). In 1995, the Seventh Circuit extended these protections beyond the foster home to the child's living environment. Camp v. Gregory, 67 F.3d 1286, 1294 (7th Cir. 1995) (extending duty to protect to known or suspected dangerous elements in environment outside of foster home); *see also* Taahira W. v. Travis, 908 F. Supp. 533, 539-40 (N.D. Ill. 1995) (requiring State to protect child when foster parent is unable to protect child from other foster children); *Cf.* White v. Chambliss, 112 F.3d 731, 737 (4th Cir. 1997) (stating that the State is liable for placement of child in foster care only if it was deliberately indifferent to the child's placement); Milburn v. Anne Arundel County Dep't of Soc. Servs., 871 F.2d 474, 476 (4th Cir. 1989) (finding that the State has no duty to a child who was voluntarily placed in foster care by his natural parents). For a thorough discussion of recent cases on this topic, see Charles P. Golbert, *The State's Substantive Due Process Obligations Under the Fourteenth Amendment to Protect Its Citizens from Known Private Dangers After* DeShaney v. Winnebago County*: Another Look at the "Cracks"*, 6 POLICE MISCONDUCT

and individuals in "constructive custody."[252] Most significant to this Article is the second method of attaching liability under § 1983—the state-created danger theory. Pursuant to this theory, state actors are liable when the state plays a role in creating or increasing danger that eventually harms an individual.[253]

When analyzing a case under this doctrine, courts focus on state action and its relationship to the victim and the ultimate harm, relying on the Supreme Court's observations in *DeShaney* that the State played no part in the creation of the dangers to Joshua, nor did it render him more vulnerable to these dangers,[254] and that the State's actions "placed [Joshua] in no worse position than that in which he would have been had it not acted at all."[255]

C. The State-Created Danger Doctrine in the Lower Courts

Following *DeShaney*, courts continued to develop the state-created danger

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AND CIVIL RIGHTS LAW REPORT pt. 1, at 13 (Mar.-Apr. 1999) and Charles P. Golbert & Marit A. Rasmussen, *The State's Constitutional Duty to Protect Its Citizens from Known Peril: Post-*DeShaney *Developments Under the Substantive Due Process Guarantees of the Fourteenth Amendment*, 4 POLICE MISCONDUCT AND CIVIL RIGHTS LAW REPORT 157 (Mar.-Apr. 1995).

251. Courts allowing recovery in these situations find sufficient state action in the process of voluntary commitment. *See, e.g.*, Clark v. Donahue, 885 F. Supp. 1159, 1162 (S.D. Ind. 1995); Estate of Cassara v. Illinois, 853 F. Supp. 273, 279 (N.D. Ill. 1994); United States v. Pennsylvania, 832 F. Supp. 122, 124 (E.D. Pa. 1993); United States v. Tennessee, 798 F. Supp. 483, 487 (W.D. Tenn. 1992). Other courts, however, find no such state action when mental health patients have voluntarily committed themselves. *See, e.g.*, Brooks v. Giuliani, 84 F.3d 1454, 1466 (2d Cir. 1996); Monahan v. Dorchester Counseling Ctr., Inc., 961 F.2d 987, 994 (1st Cir. 1992); Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459, 465 (3d Cir. 1991). For a thorough discussion of recent cases on this topic, see Golbert, *supra* note 250, pt. 1, at 20; Golbert & Rasmussen, *supra* note 250, at 160.

252. *See, e.g.*, Horton v. Flenory, 889 F.2d 454, 458 (3d Cir. 1989) (finding sufficient state action in constructive custody of victim left by the police with a retired police officer who beat him to death); Pagano v. Massapequa Pub. Sch., 714 F. Supp. 641, 643 (E.D.N.Y. 1989) (finding sufficient state action when student was harmed by other students at a public school). *But see, e.g.*, Shrum v. Kluck, 249 F.3d 773, 781 (8th Cir. 2001) (holding that public schools do not have a duty to protect schoolchildren from private violence); Doe v. Hillsboro Indep. Sch. Dist., 113 F.3d 1412, 1416 (5th Cir. 1997) (en banc) (declining to find the school liable when the school custodian raped a student on school grounds); J.O. v. Alton Cmty. Unit Sch. Dist. 11, 909 F.2d 267, 272-73 (7th Cir. 1990) (refusing to find custodial relationship between public school officials and students); Burrow v. Postville Cmty. Sch. Dist., 929 F. Supp. 1193, 1209 (N.D. Iowa 1996) (criticizing *Pagano*); B.M.H. v. Sch. Bd., 833 F. Supp. 560, 570 (E.D. Va. 1993) (same). For a thorough discussion of recent cases on this topic, see Golbert, *supra* note 250, pt. 1, at 21; Golbert, *supra* note 250, pt. 2, at 25.

253. For example, in *Currier v. Doran*, 242 F.3d 905 (10th Cir. 2001), the court found a social worker liable under the state-created danger theory when the social worker transferred custody of the child from mother to father and the father subsequently killed the child. *Id.* at 909-10. Finding that the state actor had enhanced the victim's risk of injury, the court held that the child would not have been exposed to the danger "but for the affirmative acts of the state." *Id.* at 918. *But see* Terry B. v. Gilkey, 229 F.3d 680 (8th Cir. 2000) (finding no due process duty to protect children transferred from psychiatric hospital by Department of Human Services to aunt and uncle who abused them).

254. *DeShaney*, 489 U.S. at 201.

255. *Id.*

doctrine.[256] Courts recognizing this theory of recovery have imposed substantive due process obligations on the State to protect certain individuals when the State "affirmatively places a particular individual in a position of danger the individual would not otherwise have faced."[257]

A common fact pattern that arises under the state-created danger doctrine involves police interaction with motorists or their passengers when that interaction creates or increases the dangers to the motorists or passengers.[258] For example, in *Wood v. Ostrander*,[259] the Ninth Circuit was faced with a case in which a police officer arrested an intoxicated driver, impounded the car, and refused to provide transportation for the female passenger.[260] Left behind in a high-crime area at two-thirty a.m. and approximately five miles from her home, the woman accepted a ride from a stranger, who drove her to a remote area and raped her.[261] In allowing the plaintiff to proceed with her § 1983 claim against the police officer, the court found that there existed "a triable issue of fact as to whether [the officer's] conduct 'affirmatively placed the plaintiff in a position of danger,'"[262] and noted that *DeShaney* excluded recovery only in situations in which the State "played no part" in creating the dangers faced by the individual.[263] Another example is *Reed v. Gardner*,[264] in which a family suffered a tragic accident when a drunk driver crossed the centerline and smashed head-on into their car.[265] Earlier, police officers had arrested the original driver of the car, leaving behind a drunk passenger who caused the crash.[266] In reviewing the case, the Seventh Circuit remarked that police

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256. For a thorough discussion of recent lower court decisions on this subject, see Golbert, *supra* note 250, pts 1-2, at 21 and Golbert & Rasmussen, *supra* note 250, at 162.

257. Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc). Thus far, the Second, Third, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and District of Columbia circuits have adopted the state-created danger theory. The First, Fourth, and Fifth circuits have not recognized the theory. For a discussion of this circuit split, see David Pruessner, *The Forgotten Foundation of State-Created Danger Claims*, 20 REV. LITIG. 357 (2001). The D.C. Circuit recently adopted the state-created danger theory in *Butera v. District of Columbia*, 235 F.3d 637, 651 (D.C. Cir. 2001). It bears noting, however, that the circuits recognizing the theory require "different levels of culpability and action by the municipality or state actor with varying requirements placed on the plaintiff." Jeremy Daniel Kernodle, Note, *Policing the Police: Clarifying the Test for Holding the Government Liable Under 42 U.S.C. § 1983 and the State-Created Danger Theory*, 54 VAND. L. REV. 165, 169 (2001).

258. A minority of courts have declined to find due process violations in these situations. *See, e.g.*, Foy v. City of Berea, 58 F.3d 227, 232 (6th Cir. 1995) (refusing to find liability when police officers instructed an obviously intoxicated driver to "get in your car and get out of here" with result that the passenger was killed in an automobile accident); *Gregory*, 974 F.2d 1006, 1009 (8th Cir. 1992) (finding no liability when a police officer arrested a sober driver, leaving obviously intoxicated passengers with the car who subsequently were involved in fatal car accident); Hilliard v. City & County of Denver, 930 F.2d 1516, 1520 (10th Cir. 1991) (declining to find liability when a police officer left the victim stranded in a high crime area where she was robbed and sexually assaulted after the police arrested her boyfriend for being an intoxicated driver and impounded his car).

259. 879 F.2d 583 (9th Cir. 1989).

260. *Id.* at 586.

261. *Id.*

262. *Id.* at 589-90.

263. *Id.* at 590 (citing *DeShaney*).

264. 986 F.2d 1122 (7th Cir. 1993).

265. *Id.* at 1123.

266. *Id.*

officers who remove sober drivers and leave behind drunk passengers with keys may be said to create a danger to others on the road so as to trigger liability under the state-created danger doctrine.[267] Other fact patterns that fall within the state-created danger theory include cases in which the State restrains employees or agents from protecting an individual[268] or cuts off potential private sources of rescue.[269]

D. The State-Created Danger Doctrine in the Riot Context

The state-created danger theory has appeared in the riot context when the State has conspired with private actors who harm others and when the State has condoned the violence that causes the harm. For example, in *Dwares v. City of New York*,[270] a protestor demonstrating in support of the rights of others to engage in flag burning was beaten by skinheads.[271] He sued police and city officials, alleging that the police at the event violated his due process rights by failing to intervene and protect him.[272] Reversing the district court's dismissal of the suit, the Second Circuit found that Dwares's allegations that the officers conspired with the skinheads by agreeing not to interfere unless the attacks got "completely out of control" stated a civil rights claim against the officers for violating his due process rights.[273] In particular, the court noted that, if the allegations were true, then police were willing to allow attackers to beat up flag burners with relative impunity and

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267. *Id.* at 1124-25. *See also* Munger v. Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir. 2000) (finding that the police could be liable for preventing an intoxicated bar patron who was ejected from bar from reentering bar or leaving in his truck with result that the individual died from hypothermia); Davis v. Brady, 143 F.3d 1021, 1026 (6th Cir. 1998) (finding state-created danger exception applicable when police officers arrested plaintiff for drunk and disorderly conduct, drove him outside city limits, and released him along busy, dark highway with result that plaintiff was hit by car and sustained serious permanent injuries); Kneipp v. Tedder, 95 F.3d 1199, 1209 (3d Cir. 1996) (permitting suit when police officers left obviously intoxicated person alone to walk home); White v. Rochford, 592 F.2d 381, 388 (7th Cir. 1979) (holding that the plaintiffs' allegations that police left children without adult protection in abandoned car after arresting the adult driver with result that children were physically and emotionally injured established federal civil rights claim); Mason v. Barker, 977 F. Supp. 941, 945 (E.D. Ark. 1997) (permitting suit when the police officers directed an obviously inebriated person to drive); Hilliard v. Walker's Party Store, Inc., 903 F. Supp. 1162, 1174 (E.D. Mich. 1995) (same); Russell v. Steck, 851 F. Supp. 859, 867 (N.D. Ohio 1994) (same).

268. *See, e.g.*, Freeman v. Ferguson, 911 F.2d 52, 55 (8th Cir. 1990) (suggesting that allegations that police chief's directions to subordinates to withhold assistance based on friendship with assailant would set forth due process claim).

269. *See, e.g.*, Ross v. United States, 910 F.2d 1422, 1431 (7th Cir. 1990) (finding that the county's alleged policy to prevent private citizens from attempting to rescue a person in danger of drowning violated drowning victim's due process right to life and that deputy was liable under § 1983 by ordering private citizens to cease their rescue efforts so that an official rescue team could perform the rescue); Estate of Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343, 1349 (E.D. Wis. 1992) (denying the defendants' motion to dismiss complaint that alleged that officers actively prevented private citizens from helping victim and refused requests to investigate further).

270. 985 F.2d 94 (2d Cir. 1993).

271. *Id.* at 96.

272. *Id.* at 96-97.

273. *Id.* at 97, 99.

thus their actions "increased the likelihood that the 'skinheads' would assault demonstrators . . . [and] made the demonstrators more vulnerable to assaults."[274]

Riot victims charged the State with condoning riot violence in another New York case, *Estate of Rosenbaum v. City of New York*.[275] In this lawsuit, the court addressed allegations, stemming from the 1991 Crown Heights riots, that police and city officials had, by failing to arrest individuals for unlawful assembly and by ignoring requests for assistance, emboldened rioters and increased the danger to the Crown Heights Hasidic Jewish community.[276] The event setting off the riots was a car accident that occurred in August 1991 when a station wagon escorting the late Lubavicher Rebbe Menachem Schneerson[277] collided with another vehicle, veered out of control, and accidentally struck two African American children, a seven-year-old and a nine-year-old, killing one and seriously injuring the other.[278] The accident "sparked an immediate and violent reaction among certain members of the African-American community, which quickly spread to the streets of Crown Heights."[279] The passionate response appears to have been generated by a general perception that the city bestowed preferential treatment on the Hasidic community and by a false report that an ambulance owned by a private Jewish organization that had arrived at the accident before the city ambulance had failed to aid the grievously injured young victims, favoring the Hasidic driver and passengers who were less in need of medical help.[280] Scant hours after the accident, Yankel Rosenbaum, a rabbinical student, was attacked by a group of young African American men and stabbed to death.[281] The following three days saw violent unrest throughout the Crown Heights neighborhood. Both police and citizens endured physical injuries from fists, gunshot fire, and thrown rocks, bottles, and bricks. In addition to physical attacks, rioters destroyed property and looted businesses.[282] During these three days, officials adopted a "policy of restraint," forgoing mass arrests and aggressive crowd control tactics. Police officers were discouraged from making arrests for "minor" crimes, such as unlawful assembly.[283] Officers allegedly stood by, taking no action to stop the physical assaults and ignoring pleas for help by individuals and the community-at-large.[284]

The estate of Yankel Rosenbaum and numerous other victims of the rioting and violence sued police and city officials, asserting a substantive due process claim for relief under § 1983 based on the state-created danger theory.[285] Finding that the plaintiffs had properly alleged a due process violation, the court stated:

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274. *Id.* at 99.

275. 975 F. Supp. 206 (E.D.N.Y. 1997).

276. *Id.* at 216.

277. The late Rebbe Schneerson was the religious leader of the Lubavitcher Hasidic community. *Id.* at 210. In 1993, approximately 10,000 to 16,000 Lubavitchers resided in Crown Heights, making up about ten percent of the Brooklyn community's population. GIRGENTI REPORT, *supra* note 9, at 41.

278. *Estate of Rosenbaum*, 975 F. Supp. at 209.

279. *Id.*

280. *Id.* at 209-20.

281. *Id.* at 209, 210. Rosenbaum was a visiting scholar from Australia. *Id.* at 209.

282. *Id.* at 208-11.

283. *Id.* at 210, 216.

284. *Id.* at 210-12.

285. *Id.* at 214. In addition to the § 1983 claim, the complaint contained claims under 42 U.S.C. §§ 1985 and 1986 as well as eight supplemental causes of action under state law. *Id.* at 214.

> If plaintiffs contended simply that the City had failed to respond to requests from the Hasidic community for additional police protection during the Crown Heights disturbances, such a claim would arguably be barred by *DeShaney*, decided two years before the disturbances took place. However, the thrust of plaintiffs' argument is quite different: plaintiffs allege that defendants, by the inappropriate implementation of a policy of restraint, actually exacerbated the danger to the Hasidic community and rendered the community more vulnerable to violence by private actors.[286]

The proliferation of state-created danger cases in the lower courts since *DeShaney* demonstrates that this theory of recovery survived the Court's abolition of a general governmental duty to protect individuals from private harms. Clearly, "the *DeShaney* doctrine is not without some small cracks in its surface; hairline, perhaps, but cracks nonetheless."[287] In Part IV below, this Article hopes to widen some of these cracks by using social science studies to develop a theory of State response to hostile outbursts that identifies the State's role in the formation and escalation of riots and puts forward a framework for considering social science studies in constitutional tort litigation against local governments and state and local officers for failure to prevent and protect against mob violence.

III. BRINGING IN THE STATE: THE DUTY TO PROTECT FROM MOB VIOLENCE

A. The Legal Use of Social Science Studies in the Riot Context

Social science research made its debut in the American courtroom nearly a century ago.[288] Today, social science data is used in the law as a fact-finding tool and as a tool for developing legal rules.[289] As a fact-finding tool, research results can be presented as factual evidence or "social facts" in a particular case.[290] The study results are specific to the case and do not generalize beyond the facts of the

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286. *Id.* at 217. In reaching this conclusion, the court relied heavily on the reasoning and holding in *Dwares*. *See id.* Despite this determination, however, the court granted the defendants' motion for summary judgment on qualified immunity grounds, finding that the right at issue was not clearly established at the time of the police and official actions, *id.* at 218-21, and if clearly established, that defendants' law enforcement strategy was objectively reasonable, *id.* at 221-23.

287. Estate of Sinthasomphone v. City of Milwaukee, 785 F. Supp. 1343, 1348 (E.D. Wis. 1992).

288. This first outing was in *Muller v. Oregon*, 208 U.S. 412 (1908).

289. *See, e.g.*, Laurens Walker & John Monahan, *Social Facts: Scientific Methodology as Legal Precedent*, 76 CAL. L. REV. 877, 881 (1988). *See generally* MONAHAN & WALKER, *supra* note 30. Professor Kenneth Culp Davis was the first to remark on the dual uses of social science in the law. *See* Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 423-25 (1942). He identified as "adjudicative" facts "concerning the immediate parties—what the parties did, what the circumstances were, and what the background conditions were." *Id.* at 402. In contrast, he coined the term "legislative facts" to describe social science research data used to create or modify a rule of law. *Id.* Professors Walker and Monahan substitute the terms "social facts" and "social authority" for Davis's adjudicative and legislative facts. *See* Walker & Monahan, *Social Facts*, *supra*, at 881.

290. Walker & Monahan, *supra* note 289, at 881.

dispute.[291] For example, in *Processed Plastic v. Warner Communications*,[292] the court allowed into evidence social science data demonstrating that the Processed Plastic Company had violated the Lanham Trademark Act[293] by creating consumer confusion.[294] The study was a social science survey of children in which eighty-two percent of the participants confused the two products in question.[295] This study was conducted to help determine the particular issues in dispute and directly involved the parties and facts.

When used to create or modify rules of law, social science is presented much like legal precedent.[296] Like case law precedent or legislative policy, this information or "social authority" is not specific to the facts in dispute, but is "intended to describe or prescribe general principles that pertain to whole classes of human behavior."[297] For example, in *United States v. Leon*,[298] the Court considered social science research studying the effects of the Fourth Amendment exclusionary rule on the disposition of felony arrests. The Court used the data in its analysis of whether to modify the rule so as to admit evidence seized by officers acting in good faith reliance on a search warrant later found invalid.[299] The studies did not directly

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291. *Id.* As with findings of fact, case-specific research data should be presented by the parties. Most social facts are presented through expert testimony. John Monahan & Laurens Walker, *Judicial Use of Social Science Research*, 15 LAW. & HUM. BEHAV. 571, 579 (1991). The methodology of the research, however, would be subject to review as a legal question. Michael J. Saks, *Judicial Attention to the Way the World Works*, 75 IOWA L. REV. 1011, 1025-26, 1029 (1990).

292. 675 F.2d 852 (7th Cir. 1982). Professors Walker and Monahan provide this and other examples in Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559 (1987).

293. 15 U.S.C. § 1125(a) (1999).

294. *Processed Plastic*, 675 F.2d at 857. Warner Communications held a registered copyright in the "Dukes of Hazzard" television series and had granted several toy manufacturers licenses to manufacture and sell replicas of the "General Lee," a bright orange-colored 1969 Dodge Charger that the show's producers considered to be one of the "stars" of the series. *Id.* at 854. The Processed Plastic Company, which was not licensed by Warner Communication, began producing a large plastic toy car that was modeled after the "General Lee." *Id.* Warner Communication sought to enjoin the Processed Plastic Company from manufacturing or distributing these toy cars and introduced the social science survey to support its motion. *Id.* at 854-55.

295. *Id.* at 854-55. The survey results also showed that fifty-six percent of the children believed that the Processed Plastic Company's car was sponsored by the "Dukes of Hazzard" program. *Id.*

296. John Monahan & Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 U. PA. L. REV. 477, 490-91 (1986). Like legal precedent, social authority should be submitted to the courts as written briefs or obtained via independent judicial investigation. *Id.* at 495-98. *See also* Saks, *supra* note 291, at 1022-23 (discussing how judges may acquire social science knowledge using Monahan and Walker's functional theory).

297. Richard L. Wiener, *Social Analytic Jurisprudence and Tort Law: Social Cognition Goes to Court*, 37 ST. LOUIS U. L.J. 503, 549-50 (1993) (describing Monahan and Walker's work).

298. 468 U.S. 897 (1984).

299. *Id.* at 907 n.6. Professors Monahan and Walker provide this and other examples in Walker & Monahan, *supra* note 292. The most notable use of social authority was in *Brown v. Board of Education*, 347 U.S. 483 (1954), in which the Supreme Court referred to social science studies that supported the district court's findings that segregated public education had a detrimental effect upon African American children. *Id.* at 494 n.11.

involve the parties or facts of the *Leon* case. Instead, the Court used the data to determine whether to create an exception to an existing rule of law.[300]

A third use of social science is in "the creation of *social frameworks*" in which "general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case."[301] Social framework research is similar to social authority in that the research is of a general nature and was not conducted based on the facts of the immediate case.[302] It resembles social fact in that it is used to help resolve factual issues contested by the parties in the case at hand.[303] In their seminal article on social framework research, Professors Walker and Monahan identify several examples of the use of social framework in cases pertaining to eyewitness identification, evaluations of dangerousness, preemptive strikes by battered women, and sexually abused children.[304] For example, in trying to decide how much weight should be given to particular eyewitness testimony, a court may allow admission of testimony describing research on the reliability of eyewitnesses in general.[305] In assessing the dangerousness of a particular defendant convicted of murder, a court may allow expert testimony demonstrating that murderers have the lowest rate of recidivism of all offenders.[306] With respect to assertions of 'the battered woman syndrome' raised in a self-defense claim, a court may admit social science reports on the state of mind "of other women who ha[ve] been in similarly abusive relationships" to help a jury understand that the defendant honestly believed that her life was in danger.[307] To aid in determining whether a defendant has sexually abused a specific child, the prosecution may be allowed to present expert testimony on emotional and psychological characteristics typically observed in sexually abused children for the purpose of providing insight on the conduct and demeanor of the child

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300. *Leon*, 468 U.S. at 907 n.6. In *Leon*, the Court cited six social science studies in its finding that one "objectionable collateral consequence" of the exclusionary rule was "that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains." *Id.* at 907.

301. Walker & Monahan, *supra* note 292, at 559 (emphasis in original).

302. *Id.* at 569.

303. *Id.* at 570. Recognizing the similarities between social framework research and social fact research, many courts accept social science used as a social framework via expert testimony before a jury or other fact finder. *Id.* at 583. Monahan and Walker, however, stress that frameworks resemble social authority as much as they resemble social fact and suggest that courts obtain empirical framework data in written briefs or through the court's own research. *Id.* at 588-91. Pursuant to their theory, empirical context research should be used by the parties "to propose and justify a set of jury instructions incorporating a social framework," and by the court to properly instruct a jury. *Id.* at 588-89.

304. *Id.* at 564-67.

305. State v. Chapple, 660 P.2d 1208, 1224 (Ariz. 1983) (en banc). Citing *Chapple*, other courts have approved the use of social framework research concerning the reliability of eyewitness identification. *See, e.g.*, United States v. Downing, 753 F.2d 1224 (3d Cir. 1985); People v. McDonald, 690 P.2d 709 (Cal. 1984). *But see* State v. Poland, 698 P.2d 183, 194 (Ariz. 1985) (en banc) (upholding exclusion of expert testimony on eyewitness identification).

306. State v. Davis, 477 A.2d 308, 311 (N.J. 1984) (per curiam).

307. State v. Kelly, 478 A.2d 364, 375-81 (N.J. 1984). *Kelly* is part of a trend towards admitting expert testimony on 'battered woman syndrome.' *See, e.g.*, Smith v. State, 277 S.E.2d 678 (Ga. 1981); State v. Anaya, 438 A.2d 892 (Me. 1981); State v. Baker, 424 A.2d 171 (N.H. 1980); State v. Allery, 682 P.2d 312 (Wash. 1984) (en banc).

complainant.[308] The reason for introducing research in these kinds of situations is to assist the jury or other fact finder in deciding the specific factual issues being litigated.[309]

Most relevant to this Article is this third use of social science research as framework evidence. A major task for trial lawyers representing riot victims in indirect harm cases is to persuade judges and juries, under the constraints imposed by *DeShaney*, that the State bears legal responsibility for injuries caused by mob violence.[310] Social science studies concerning the connection between state action and riot development can be employed as a framework for deciding case-specific facts in a § 1983 indirect harm suit. These studies are not used to make or modify the state-created danger doctrine, nor do they prove what happened to the parties in court. Rather, social framework evidence can help fact finders understand and evaluate factual claims pertaining to the State's role in creating or increasing dangers to private citizens in the context of a particular riot.

B. The State's Role in Riot Formation and Trajectory

Numerous scholars of collective disorder[311] have noted the relevance of law enforcement activities to understanding the development of protests, riots, and mobs.[312] Without question, the State plays a definitive role in not only suppressing,

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308. State v. Myers, 359 N.W.2d 604, 608-11 (Minn. 1984). Other courts have also allowed expert testimony on the characteristics of child sex offense victims. *See, e.g.*, State v. Kim, 645 P.2d 1330 (Haw. 1982); State v. Middleton, 657 P.2d 1215 (Or. 1983); State v. Petrich, 683 P.2d 173 (Wash. 1984) (en banc).

309. Walker & Monahan, *supra* note 292, at 568.

310. *See* 489 U.S. 189 (1989).

311. Throughout this Article, terms such as "riot," "mob," "disorder," "mayhem," "disturbance," and "hostile outburst" are employed interchangeably to denote aggressive and violent group behavior. Scientific studies, however, employ more formal terms. For example, Professor Roger Brown classifies mobs as a type of crowd that can be subdivided into aggressive (lynching, rioting, terrorizing) mobs, escape (panic) mobs, acquisitive (looting) mobs, and expressive mobs. Roger W. Brown, *Mass Phenomena*, *in* 2 HANDBOOK OF SOCIAL PSYCHOLOGY 840-65 (Gardner Lindzey ed., 1954). Pursuant to these classifications, this Article focuses on the aggressive mob. Although the relevant mob activity has included looting, the looting occurred as a consequence of the initial aggression and is not the primary focus of this Article. The most general term for these types of group behaviors is "collective behavior." Other terms used by social scientists include "mass phenomena," "mass behavior," "collective dynamics," "collective outbursts," and "collective movements." These terms embrace a wide variety of mass actions, including civil disobedience. NEIL J. SMELSER, THEORY OF COLLECTIVE BEHAVIOR 2-3 (1962).

312. *See, e.g.*, Gary T. Marx, *External Efforts to Damage or Facilitate Movements: Some Patterns, Explanations, Outcomes, and Complications*, *in* DYNAMICS OF SOCIAL MOVEMENTS (Mayer N. Zald & John D. McCarthy eds., 1979); John D. McCarthy & Clark McPhail, *The Institutionalization of Protest*, *in* A MOVEMENT SOCIETY? CONTENTIOUS POLITICS FOR A NEW CENTURY (David Meyer & Sidney Tarrow eds., 1997); Clark McPhail et al., *The Policing of Protest in the United States, 1960-1995*, *in* POLICING PROTEST: THE CONTROL OF MASS DEMONSTRATIONS IN WESTERN DEMOCRACIES (Donatella Della Porta & Herbert Reiter eds., 1998); BARBARA SALERT & JOHN SPRAGUE, THE DYNAMICS OF RIOTS (1980); Albert Bergesen, *Race Riots of 1967: An Analysis of Police Violence in Detroit and Newark*, 12 J. BLACK STUDIES 261-74 (1982); Ruud Koopmans, *The Dynamics of Protest Waves: West Germany, 1965 to 1989*, 58 AM. SOCIOLOGICAL REV. 637-58 (1993); Karen Rasler, *Concessions, Repression, and Political Protest in the Iranian Revolution*, 61 AM. SOCIOLOGICAL REV. 132-52 (1996); Marco Giugni & Dominique Wisler, *Political*

but also constraining mob activity.[313] Accordingly, it naturally follows that policing activities directly impact the initiation and direction of riots.[314] In particular, a riot's severity "depend[s] at least as much on the tactics of police and troops as it [does] on the number of people in the streets or the amount of property seized and destroyed."[315]

An important determinant of a riotous outbreak is the operation of social control.[316] Social control includes official actions that "prevent, interrupt, deflect, or inhibit" an episode of collective disorder.[317] Two broad types of social controls are (1) controls that minimize societal conditions, such as economic deprivations and inter-ethnic conflicts that can predispose an area toward riot activity; and (2) controls that are activated to address a particular outbreak of hostilities. The first types of controls help prevent the occurrence of riots because they are directed at social and economic conditions that can create a riot-prone environment.[318] These controls address social tensions and conditions such as conflicts of interest, value and cultural clashes, severe economic deprivation, and overcrowding due to inadequate housing, all of which can lead to mob activity.[319] Accordingly, social controls that address and ease these problems can weaken any potential for riotous activity to form. For example, social controls that institutionalize respect for the

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Coalitions, Face-to-Face Interactions, and the Public Sphere: An Examination of the Determinants of Repression with Protest Event Data, CBSM WORKING PAPER SERIES 1(4) (1998), *available at* http://www.nd.edu/~dmyers/cbsm/vol1/berlin98a.pdf (last visited Jan. 27, 2004).

313. Useem, *supra* note 22, at 357. *See also supra* note 9.

314. Useem, *supra* note 22, at 357-58.

315. CHARLES TILLY, BIG STRUCTURES, LARGE PROCESSES, HUGE COMPARISONS 57 (1984). Professor Tilly argues that no satisfactory explanations for the urban riots of the 1960s emerged because observers focused solely on the actions and characteristics of the rioters, forgoing further study of policing activity. *Id.* He states that "the events in question typically began with contested actions of police," and that "the conflict consisted mainly of interactions between armed authorities and civilians." *Id.* This mono-vision, he argues, hindered systematic analysis. *Id.* at 59.

316. SMELSER, *supra* note 311, at 15-17. Professor Smelser identifies six determinants of collective behavior: (1) structural conduciveness; (2) structural strain; (3) growth and spread of a generalized belief; (4) precipitating factors; (5) mobilization of participants for action; and (6) the operation of social control. *Id.* With respect to the sixth determinant, he writes, "In certain respects this final determinant arches over all the others." *Id.* at 17.

317. *Id.* at 17.

318. *Id.*

319. For instance, Professor L.L. Bernard writes:

> Mobs develop with special ease under social conditions in which conflicting interests, ideals and controls are prevalent. The presence in close proximity of two or more races with fairly distinct customs, traditions and standards; of distinct social classes, such as capitalist and labor, rich and poor; of radically distinct religious alignments, each sect or religion holding firmly to its own tenets; of two rival gangs, each intent upon dominating the situation; or of two or more political parties, each with its patronage and graft to protect and candidates to elect, is especially conducive to the appearance of the mob spirit and mob action. Such conditions easily evoke race, class, religious or partisan animosities and hatreds, which become chronic prejudices.

L.L. Bernard, *Mob*, *in* 10 ENCYCLOPAEDIA OF THE SOCIAL SCIENCES 553.

law and establish orderly means of expressing grievances may assist in alleviating conditions that generate discontent.[320]

The second type of social controls used in response to actual riotous activity "determine how fast, how far, and in what directions the [riot] will develop."[321] For instance, indecisiveness on the part of police authorities with respect to whether to use force tends to encourage hostilities and may lead to the spread of disorder.[322] Conversely, quick and decisive application of sanctions against mobs may reduce hostilities.[323] Departments that achieve success in dampening civil unrest have "almost always responded quickly with sufficient manpower and deployed rapidly into troubled areas."[324] "Delay in the use of force, and hesitation to accept responsibility for its employment when the situation clearly demands it, will always be interpreted as weakness, encourage further disorder and eventually necessitate measures more severe than those which would suffice in the first instance."[325] For example, in the Chicago Riot of 1919, official hesitation in calling for additional help from the state militia when local police were clearly overwhelmed contributed to a five-day period of lawlessness.[326] In the wake of the riot, thirty-eight people lay dead, hundreds were injured, and over a thousand left homeless.[327] Similarly, during the Detroit Riot of 1943, local authorities vacillated before calling in federal troops to aid police in quelling the disorder that claimed thirty-four lives, injured nearly seven hundred individuals, and cost two million dollars in property damage.[328] Over twenty-four hours passed after the initial outbreak of hostilities before Detroit officials finally took steps to attain sorely-needed help.[329]

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320. SMELSER, *supra* note 311, at 261.

321. *Id.* at 17.

322. *Id.* at 262 (affirming that vacillation tends to foster the spread of overt hostility). Controlling a mob does not always require the use of force. For example, redirecting the attention of a crowd by throwing people into a state of panic, getting individuals interested in other objects, or engaging them in discussion or argumentation may break up a crowd. Herbert Blumer, *Collective Behavior, in* NEW OUTLINE OF THE PRINCIPLES OF SOCIOLOGY 181-82 (Alfred McClung Lee ed., 1951).

323. SMELSER, *supra* note 311, at 262.

324. GIRGENTI REPORT, *supra* note 9, at 205 (quoting JULIUS JERICO ET AL., PREVENTION AND CONTROL OF CIVIL DISTURBANCE: TIME FOR REVIEW (U.S. Dep't of Justice ed., 1992).

325. SIR CHARLES W. GWYNN, IMPERIAL POLICING 15 (1934). Major-General Sir Charles W. Gwynn goes on to write:

> Subversive movements, or disorders of any nature, do not break out fully organized [sic]. Leaders in the early stages are apt to be more distinguished by their oratorical powers, and perhaps by capacity of political organization [sic], than for military qualities. Given time, leaders who are men of action will assert themselves, and a knowledge of the best means of countering Government measures will be acquired.

Id.

326. SMELSER, *supra* note 311, at 264; Chicago Public Library, *Death, Disturbances, Disasters and Disorders in Chicago: 1919 Race Riots, at* http://www.chipublib.org/004chicago/disasters/riots_race.html (last modified May 2001) [hereinafter *1919 Race Riots*].

327. *1919 Race Riots*, *supra* note 326. Racial tensions in Chicago were exacerbated by the influx of African Americans between 1910 and 1920. During this period, the black population increased from 44,000 to more than 109,000. *Chicago Race Riot of 1919, at* http://search.eb.com/blackhistory/micro/121/87.html (last visited Oct 5, 2003).

328. SMELSER, *supra* note 311, at 264; PBS website, *Detroit Race Riots 1943, at* http://www.pbs.org/wgbh/amex/eleanor /peopleevents/pande10.html (last visited June 11, 2003) (on file with author). Prior to the 1943 riot, racial and social tensions in Detroit were at an all-time high. Recruiters had lured poor southern blacks and whites to the city to work

Another type-two control that is intertwined with the general principle requiring the State to adopt an unequivocal position toward riot violence is the need to implement an unambiguous arrest policy and strategy.[330] To make clear their intent and ability to respond to violations of the law, police must affirmatively act when crimes are committed. To refrain from acting effectively excuses lawbreakers and encourages further criminal activity.[331] At a symposium on riot control, commanders of twenty large law enforcement departments agreed that "[t]here should be little tolerance for those who perpetrate riotous activity . . . . [A]nything less will reap increased property loss and injury to citizens and police alike."[332]

Delay in moving law enforcement officers to the riot site may also heavily impact the direction and dimensions of a hostile outburst. An example of a riot in which police delay was a large factor in its development occurred in 1949 in Quito, Ecuador, when H.G. Wells' "War of the Worlds" was performed by a local radio station. Terrified by the realistic depiction of Martians landing and taking over the city, thousands of people fled their homes, many in their nightclothes.[333] Police were sent to a community nearby Quito where the space ship had presumably landed and were absent when the angry mob discovered that the alien takeover was purely fictional and wreaked its vengeance by burning the radio station, killing fifteen people.[334]

Likewise, actual or apparent bias in dispensing justice can further enflame a riot.[335] In specific, when authorities cease to make decisions in an impartial manner, they "enter the conflict itself," and give confidence to the mob.[336] An example of this occurred in the Cicero, Illinois Riot of 1951, when a black man attempted to move into the city of Cicero and the local police arrived to stop him.[337] A white crowd quickly gathered and, fueled by the implicit official

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in the new war factories, and the numbers that arrived quickly strained housing, transportation, education, and recreational facilities. Vivian M. Baulch & Patricia Zacharias, *The 1943 Detroit Race Riots*, THE DETROIT NEWS, *available at* http://www.detnews.com/history/riot/riot.htm (last visited June 11, 2003) (on file with author).

329. Baulch & Zacharias, *supra* note 328.

330. GIRGENTI REPORT, *supra* note 9, at 222-23.

331. *Id.*

332. GIRGENTI REPORT, *supra* note 9, at 223 (quoting JERICO ET AL., *supra* note 324, at 21).

333. Don Moore, *The Day the Martians Landed*, *available* http://members.tripod.com/donmoore/south/ecuador/martians.html (last visited Jan. 27, 2004). Eleven years earlier, Orson Wells presented a dramatization of *War of the Worlds* on the CBS network, representing that Martians had landed near Princeton, New Jersey. The program sent millions of Americans across the country into a panic. *Id.*

334. *'Mars Raiders' Cause Quito Panic; Mob Burns Radio Plant, Kills 15*, N.Y. TIMES, Feb. 14, 1949, at 1, 7, *reprinted in* SELECTED READINGS IN SOCIAL PSYCHOLOGY 304-07 (Stewart Henderson Britt ed., 1950).

335. SMELSER, *supra* note 311, at 264-65.

336. *Id.* at 264.

337. William Gremley, *Social Control in Cicero*, 3 BRITISH J. OF SOCIOLOGY 322 (1952). Professor Gremley points out that the actions of the Cicero police reveal

> a basic conflict of roles . . . . While on the one hand these officials have a sworn responsibility to uphold legal rights, on the other, we can assume that the Chief of Police believed he was expressing, in his actions, the sentiments of the community and acting as a mediator or even "protector" of community mores, thus crystallizing the state into an instrument to enforce mores contrary to the law of the state. The

acquiescence in the volatility of the situation, soon erupted into a riot.[338] Similarly, police officers encouraged hostilities during the East St. Louis, Illinois Riots of 1917 by "fle[eing] into the safety of cowardly seclusion or listlessly watch[ing] the depredations of the mob, passively and in many instances actively sharing in the work."[339] When the state militia arrived to support the local law enforcement, they also contributed to the riot by "fraterniz[ing] with the mob, jok[ing] with them and ma[king] no serious effort to restrain them."[340] What is more, in the months preceding the culmination of the rioting, city authorities fostered an atmosphere of racism and violence, allowing attacks on African Americans to go unrestrained.[341] Adding further to the anti-African American sentiment, the mayor promised his white constituency to do all he could in his power to drive African Americans from East St. Louis and to prevent them from moving to the city.[342] The riot, which lasted nearly a week, resulted in the deaths of hundreds of black citizens and forced over six thousand African Americans to flee the city.[343]

The general conclusions of these kinds of social science studies can be employed as social framework information by parties and by courts to aid in determining factual issues in a state-created danger case.[344] Principles emerging from these studies clearly illustrate how the State can create dangers that threaten riot victims as well as render them more vulnerable to harm. Official uncertainty, delay,[345] and bias can all place riot victims in worse positions than that in which they would have been had the State not acted at all. Official errors like these in implementing social controls constitute state action that may satisfy the state-created danger theory because they directly impact the incidence and magnitude of mob activity. The next section further develops this interdisciplinary approach to mob violence and governmental liability by examining the response by the Los Angeles Police Department ("LAPD") to the April 1992 riot and observing the impact of the social controls taken by the LAPD on the riot's formation and development.

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reluctance of the Cicero police to act vigorously to prevent the violence that followed also reflects this conflict of roles.

Id. at 328.

338. *Id.* at 323.

339. CHICAGO COMM'N ON RACE RELATIONS, THE NEGRO IN CHICAGO 77 (1922).

340. *Id.*

341. Marcus Garvey, Speech regarding the East St. Louis Riots (July 18, 1917), *in* PBS website, *Primary Sources: The Conspiracy of The East St. Louis Riots*, *at* http://www.pbs.org/wgbh/amex/garvey/filmmore/ps_riots.html (last visited Sept. 6, 2003).

342. *Id.* True to his promise, the mayor sent a dispatch to the governor of Louisiana, advising all African Americans living in Louisiana to "remain away" from East St. Louis. *Id.*

343. PBS website, *People & Events: The East St. Louis Riot*, *at* http://www.pbs.org/wgbh/amex/garvey/peopleevents/e_estlouis.html (last visited June 11, 2003). According to historian Winston James, African Americans were "being murdered in the most wanton and barbaric manner . . . ; children [were] being thrown back into flaming houses, people [were] being boarded up in their houses before [they were] torched so that they couldn't escape." *Id.*

344. *See* Walker & Manahan, *supra* note 292, at 570.

345. On its own, however, delay that leads to a complete absence of law enforcement presence might not be actionable under the state-created danger theory because there is no affirmative constitutional right to receive basic protective services. In other words, state inaction falls within the limits of *DeShaney*. *See* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989).

C. State Capacity Problems Impacting Riots

In a meticulous study of social controls undertaken by the police in response to the Los Angeles Riot of 1992, Professor Bert Useem posits that, to effectively respond to collective disorder, the State must solve certain capacity problems relating to strategy, command, and planning and preparation.[346] State capacity describes the ability of public safety agencies to carry out their purposes and goals.[347] Concomitantly, capacity problems can prevent a state agency from effectively providing its services. When responding to collective disorder, law enforcement officials must resolve issues of capacity such as electing a strategy of diplomacy or force and establishing the structure of command.[348] To best make these sorts of determinations, planning and preparation are essential. Professor Useem describes planning as "what to do" and preparation as "the ability to execute."[349] Planning activities include settling issues involving goals, tactics, equipment, structure, and assignments.[350] Mental readiness and active mobilizations, which require the actual involvement of those expected to perform, comprise preparation.[351]

During the 1992 Los Angeles Riot, the LAPD's inability to effectively resolve the capacity problems of strategy, command, and planning and preparation resulted in civil disorder that raged for six days, ripping the city asunder.[352] These serious problems afflicted the LAPD before the riot expanded and engulfed large areas of the city.[353] The protest began on April 29, 1992, almost immediately after the verdicts of acquittal were read in the trial of the four police officers accused of beating Rodney King.[354] Groups of angry people congregated in South Central Los Angeles to protest the verdicts. At the intersection of Florence and Normandie

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346. Useem, *supra* note 22, at 360. Although many scholars recognize the role of the State in suppressing and constraining civil disorder, few studies explore that role, tending to focus, instead, on the characteristics and circumstances of the rioters. *See, e.g., id.* at 357-58; TILLY, *supra* note 315, at 57.

347. KENNETH FINEGOLD & THEDA SKOCPOL, STATE AND PARTY IN AMERICA'S NEW DEAL 52-53 (1995).

348. Useem, *supra* note 22, at 360. Although Professor Useem does not argue that one strategy is superior to the other, he does point out that force is likely to antagonize potential rioters and thus undermine diplomatic efforts. If diplomacy fails, then time is necessary to reconfigure strategy and activate force mode. Any delay in deploying police could prove costly in stifling the riot. *Id.*

349. *Id.* at 361.

350. *Id.*

351. *Id.* at 361-62.

352. *Id.* at 360-61. "It was the LAPD's Vietnam." Interview by Jaxon Van Derbeken with Charles Duke, Sergeant, LAPD, (Aug. 22, 1994), *quoted in* CANNON, *supra* note 1, at 263.

353. Useem, *supra* note 22, at 365-69.

354. THE WEBSTER REPORT, *supra* note 2, at 11. On March 3, 1991, an individual shot a home video of four white LAPD officers viciously beating a black man, Rodney King. *E.g.*, DENNIS E. GALE, UNDERSTANDING URBAN UNREST: FROM REVEREND KING TO RODNEY KING 4 (1996). The segment showed a non-resistant King lying on the side of the road, enduring a seemingly endless barrage of baton-beatings and kicks delivered by the officers. *Id.* When the jury in the beating case rendered acquittals for three of the officers and a mistrial set the fourth officer free, many Americans were stunned with disbelief. *Id.* at 5.

avenues, dubbed the flashpoint of the riots by numerous commentators,[355] anger swelled into violence and destruction. Demonstrators torched buildings, looted stores, and attacked passing motorists with crowbars, bottles, and rocks.[356] The collective anger over the King decision quickly spilled over into other parts of the city, and lawlessness gained the upper hand for the following six days and five nights.[357] After-riot assessment of the tragedy confirmed that the 1992 Los Angeles Riot was the worst urban riot in United States history, exceeding all others in death and destruction.[358]

In his study of the 1992 riot, Professor Useem deftly depicts the State's failure to resolve these capacity problems.[359] Regarding the first capacity issue, following the acquittals in the King beating case, the LAPD adopted a strategy of diplomacy, placing officers from its Metropolitan Division ("Metro") on "soft patrol."[360] Although Metro trains its officers for special assignments, including riot control, hostage situations, and high-risk arrests,[361] after the verdicts were announced, its officers were garbed in regular patrol uniforms, instead of riot gear, and drove around the city waving and conversing with residents.[362] Authorities did not shift toward a strategy of force until several hours after the riot commenced.[363] By this time, the riot's own momentum, coupled with police delay in switching from soft patrol to a riot-ready configuration, had propelled mob activity beyond the immediate reach and control of local law enforcement efforts.[364] What is more, despite orders that a tactical alert be issued when the verdicts were read, which

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355. *See* GALE, *supra* note 354, at 5-6; CANNON, *supra* note 1, at 282; THE WEBSTER REPORT, *supra* note 2, at 19.

356. GALE, *supra* note 354, at 5-6; THE WEBSTER REPORT, *supra* note 2, at 12. Four hours after the verdicts were announced, Reginald Denny attempted to traverse the intersection and was dragged from his truck and beaten, kicked, stomped, and nearly killed by rioters. David Freed & Ted Rohrlich, *Crisis Shows LAPD is Ill-Prepared for Riots*, L.A. TIMES, May 1, 1992, at B1 (beating begins at 6:30 P.M.). Laurie Becklund & Stephanie Chavez, *Beaten Driver a Searing Image of Mob Cruelty*, L.A. TIMES, May 1, 1992, at B1 (verdicts announced at 3:15 P.M.)

357. *E.g.*, GALE, *supra* note 354, at 5-7. For a blow-by-blow description of the riots, see CANNON, *supra* note 1, at 263-346. *See generally* JAMES D. DELK, FIRES AND FURIES: THE LOS ANGELES RIOTS OF 1992 (1995) (giving a detailed report of the riots in Los Angeles).

358. GALE, *supra* note 354, at 7.

359. It should be noted that Professor Useem concludes that "[p]lanning was not at fault at Florence and Normandie" because there was a plan for such occurrence. Useem, *supra* note 22, at 373. This article, however, argues that planning was a factor in the formation and growth of the 1992 Los Angeles riot based on the findings in the Webster Report.

360. CANNON, *supra* note 1, at 272-73. This deployment of Metro was later described as a "giant-assed mistake." *Id.* at 273.

361. *See* CANNON, *supra* note 1, at 268-69, 272.

362. *See* CANNON, *supra* note 1, at 273; Useem, *supra* note 22, at 365-66.

363. This change in strategy was further impeded by the failure to call a tactical alert until nearly four hours after the verdicts were read. THE WEBSTER REPORT, *supra* note 2, at 24.

364. In a study of twenty-four disorders, the Kerner Commission observed that "in one-half of the cases police withdrew from the initial encounter for fear that they might not be able to maintain control. In these cases the violence spread rapidly." THE WEBSTER REPORT, *supra* note 2, at 123 (citing REPORT OF THE NAT'L ADVISORY COMM'N ON CIVIL DISORDERS 20 (1968)). Accordingly, the Webster Commission cites a pivotal error made by law enforcement in failing to return to the Florence and Normandie vicinity after retreating from a confrontation with an angry crowd. Although officers were outnumbered during the initial incident, the failure to return in force was a significant tactical blunder. *Id.* at 121.

would have allowed commanders to keep officers beyond their shifts, no such alert was broadcast until nearly four hours after the verdicts were read and six hours after the jurors notified the judge that they would be returning a verdict.[365] The delays in recalling officers unquestionably impacted the department's capacity to respond to the riots.[366]

In the initial stages of the riot, LAPD response appeared hesitant and uncertain.[367] This official indecisiveness during the first six hours of the disorder spurred riotous activity and "led to situations that spread, intensified, and careened out of control."[368] Contrary to traditional riot response protocol as well as sociological findings regarding optimal methods for combating riots, the actions of the LAPD were anything but "quick and decisive."[369]

Although hindsight offers an unfair vantage point when reviewing strategy decisions, it bears pointing out that police response during the early hours of the rioting was at odds with the weight of authority. Law enforcement officials agree that "police must act quickly with strength in response to a potential disorder at the onset."[370] A "'wait and see' stance is not wise."[371] The LAPD's tactical manual shares the same philosophy:

> The *primary responsibility* of the . . . Field Commander during the initial stages of an unlawful assembly or riot is the *rapid assembly of sufficient forces to immediately confront the participants.* In the case of an unlawful assembly, a dispersal order is ignored, or in the case of riot, law violators must be *quickly overwhelmed and arrested.*[372]

Command variables also played a part in the escalation of the riot. Particularly, the official decision to locate the field command post at Florence and Normandie was severely lacking in many respects: telephone lines were too few and quickly overloaded; emergency equipment clogged the site; communication within the command post was inefficient; and needed office equipment, such as faxes, computers, and copiers, was unavailable.[373] The congestion of information, equipment, and personnel impeded the processing of incoming information as well as the dispatch of law enforcement units.[374]

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365. *Id.* at 119-21.

366. As then Chief of Police Daryl Gates acknowledged after the riots, "a citywide tactical alert, put into effect as the verdicts were read, could have speeded our response somewhat." CANNON, *supra* note 1, at 279.

367. THE WEBSTER REPORT, *supra* note 2, at 104-14.

368. *Id.* at 24.

369. *See supra* notes 321-24 and accompanying text.

370. THE WEBSTER REPORT, *supra* note 2, at 121.

371. *Id.* (quoting the Int'l Assoc. of Chiefs of Police Report, *Areas of Concern in Addressing Contemporary Civil Disorders* 10 (July 1992).

372. *Id.* (quoting the LAPD tactical manual).

373. Useem, *supra* note 22, at 367; CANNON, *supra* note 1, at 311-12.

374. Useem, *supra* note 22, at 367; *see also* CANNON, *supra* note 1, at 312. Compounding problems, the lieutenant who initially set up the field command post had all 911 emergency calls rerouted to the post. "Without a computer terminal and with virtually no telephones, this decision reduced management of the response to a primitive paper and pencil exercise." THE WEBSTER REPORT, *supra* note 2, at 121, *quoted in* CANNON, *supra* note 1, at 312.

Consequently, swarms of police personnel clogged the command post, waiting for assignments and watching the havoc unfold on the evening news.[375] Dispatch delays lasted anywhere between forty-five minutes and three hours.[376] "As a result, during the critical first six hours of the disturbance, the [area around Florence and Normandie] was stripped bare of police service."[377]

In addition, a higher level of command was needed to dispel problems that arose under unity of command.[378] Two command structures were present at the field command post—that of the lieutenant who set up the command post and that of the captain of Metro. Absent a higher authority to coordinate their activities, the dual commands compounded the bedlam of the command post.[379]

Command factors at a higher level further impaired the LAPD's ability to function effectively in the face of large-scale urban disorder. In particular, the city's Emergency Operations Center ("Center"), which serves as the LAPD headquarters during a local emergency, "was overwhelmed by the events that took place in the riots and by its inability to gather and process information."[380] The immense volume of information resulting from the riots quickly overcame the Center's communications and information network.[381] Moreover, delays in summoning staff as well as insufficient training provided to Center personnel rendered ineffective the Center's operational ability during the early, critical stages of the riot.[382]

Inadequate riot preparation and planning created hurdles for law enforcement as well and likely deeply impacted other capacity variables, such as command and strategy. According to the Webster Commission, which was impaneled by the city board of police commissioners to report on the LAPD's preparation and response to the riot, civil disorder plans were virtually nonexistent at all the levels of local government.[383] The city's emergency plans were wanting in both broad strategies, and actual tactics and assignments to be implemented in the event of a hostile outburst. At the city hall level, no specific planning was done for the possibility of

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375. *See* Useem, *supra* note 22, at 368; CANNON, *supra* note 1, at 326-27. The Webster Commission described the command post as "a sort of 'black hole' into which police officers from all over the City were poured, but out of which few were deployed on the first night." THE WEBSTER REPORT, *supra* note 2, at 109. According to a sergeant, "Officers were just standing there, doing nothing." CANNON, *supra* note 1, at 327.

376. Useem, *supra* note 22, at 36. Officers became frustrated and morale levels dipped. The department "damn near had a mutiny . . . . [O]fficers were ready to go back to their cars and just go out." Stephen Braun & Leslie Berger, *Chaos and Frustration at Florence and Normandie*, L.A. TIMES, May 15, 1992, at A1, *quoted in* Useem, *supra* note 22, at 368.

377. THE WEBSTER REPORT, *supra* note 2, at 122.

378. *Cf.* Useem, *supra* note 22, at 367 (arguing that a higher level of command may have been able to effectively organize the command post); THE WEBSTER REPORT, *supra* note 2, at 109-10 (same). Many high-ranking officers were present at the command post, but none seemed solely in command. Three hours after the post was established, a deputy chief finally arrived, assumed command, and organized the post. *Id.* at 109.

379. *See* Useem, *supra* note 22, at 368; CANNON, *supra* note 1, at 317.

380. THE WEBSTER REPORT, *supra* note 2, at 106-07

381. *Id.* at 112.

382. *Id.* at 106. Adding to the obstacles faced by Center personnel, the LAPD stationed its top commanders and their staff in the Center during the disorder. Space problems notwithstanding, these senior officers often diverted the Center's commanding officer from his duties and also used LAPD personnel assigned to the Center for non-Center projects. *Id.* at 107.

383. *Id.* at 79-81.

civil unrest after the verdicts in the King case.[384] At the law enforcement level, the LAPD's tactical manual and riot plans "were fundamentally deficient because they failed to provide for the essential elements of planning—identification and *prioritization* of *objectives*, identification of *resources*, a statement of *tasks* and *assignments* to complete the tasks."[385] Training, too, was inadequate.[386] General civil disorder training throughout the ranks was largely theoretical and inconsistent.[387] Despite predictions by several LAPD leaders of civil disorder following the King beating trials, specific training for the King case was also "sporadic and of varying quality."[388] For example, whereas Metro officers received a week-long and intensive training in riot control procedures and tactics,[389] training and preparation for officers assigned to the geographic bureaus and areas of the city was often incomplete and erratic.[390] Moreover, leadership was absent during the emergent stages of the riot. When the King beating case went to the jury, two-thirds of the police captains were out of town attending a three-day seminar,[391] and, after the trial, the police chief left town to attend a political event.[392]

The LAPD's "tentative response" to initial hostilities and incidents that swelled into the devastating riot "enabled the violence, looting and destruction to take hold and grow."[393] State failure to resolve capacity problems affected the

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384. *Id.* at 80. For example, the section of the plan related to civil disorder merely provides: "Control of a civil disturbance lies primarily with the Police Division. Plans for civil disturbance control are included in Police Division operational plans. Other [Emergency Operations Organization] divisions may be called upon to assist the Police Division with logistical support as well as initial situation estimates." *Id.* at 79.

385. *Id.* at 80 (emphasis in THE WEBSTER REPORT). *But see* Useem, *supra* note 22, at 373 (stating that there was a plan for an outburst such as the one at the intersection of Florence and Normandie, but that these plans were not executed due to other capacity problems and political pressures and divisions within the LAPD).

386. THE WEBSTER REPORT, *supra* note 2, at 93-96.

387. *Id.* at 94-95.

388. *Id.* at 95. Many commentators attribute the inconsistent preparation for the possibility of rioting following the release of the verdicts to political rifts within the LAPD. The chief of police's impending retirement combined with the infighting and loss of morale following the King beating and the Christopher Commission report had split the once-united LAPD into uncooperative and non-communicating factions. In addition, various command changes made by the chief of police prior and close-in-time to the riots seriously impacted the department's ability to perform. *See, e.g.*, *id.* at 107-09; Useem, *supra* note 22, at 369-73; CANNON, *supra* note 1, at 275-77.

389. CANNON, *supra* note 1, at 272.

390. *See id.* at 268-78. According to Assistant Chief Robert Vernon, "[t]here is clear evidence that some [command officers] of bureaus and areas had not taken the steps of preparation that had been ordered." ROBERT L. VERNON, L.A. JUSTICE: LESSONS FROM THE FIRESTORM 165 (1993); *see also* THE WEBSTER REPORT, *supra* note 2, at 95-96.

391. CANNON, *supra* note 1, at 304.

392. *Id.* at 302; THE WEBSTER REPORT, *supra* note 2, at 109.

393. THE WEBSTER REPORT, *supra* note 2, at 12. The Webster Report observes that "rapid and forceful responses [to the initial outbreak in hostilities] would significantly have altered the public perceptions of the developing environment in the City" and would have been "an important first step toward controlling the outburst of violence." *Id.* at 123; *see also* Peter A. Morrison & Ira S. Lowry, *A Riot of Color: The Demographic Setting*, *in* THE LOS ANGELES RIOTS: LESSONS FOR THE URBAN FUTURE 43 (Mark Baldassare ed., 1994) ("We think that the Los Angeles riot of April 1992 could have been prevented by competently organized police action between the time of the initial disturbances and the general conflagration."); Tierney, *supra* note 4, at 150 (noting that police "inability to act decisively

occurrence and direction of the 1992 riots in Los Angeles. As stated by one officer in a post-riot interview, "There's no doubt in my mind that we could have saved the city."[394] Better planning and preparation could have alleviated challenges to command and strategy capacity. Better planning and preparation would have aided the State in addressing the riot before the chaos enveloped vast areas of South Central.

Social framework reports and experts like Professor Useem who can describe the body of social science data on state action and its effect on crowd behavior can assist a jury by explicating the consequences of the challenged policing activities on riot formation and growth. In particular, considering that the "behavior of controlling agencies at the scene of the hostile outburst itself" is often crucial to the success of law enforcement in quelling a riot,[395] these studies can show how certain social control factors can influence the level of harm caused by a riot. Submitted as evidence, these studies can help jurors understand the complex dynamic that exists between state action and crowd reaction.

An expert may also review the allegations and other material in the specific case and provide a contextual analysis of the official actions and mob violence at issue. Evidence for such an analysis would include organizational civil disorder policies and procedures, as well as testimony as to how they were actually implemented. In his examination of the 1992 Los Angeles riot, Professor Useem pointed to three problems related to strategy, command, and planning and preparation, which confounded public safety officials and compounded hostilities.[396] Potential obstacles to controlling other riots, however, could also encompass issues pertaining to force structure, sustainability, or equipment.[397] Although not every action taken by officials to address a riot or potential riot should be actionable under the Due Process Clause, an expert can help fact finders decide whether the state action in dispute created or increased the riot danger or at least caused a plaintiff's exposure to the dangerous situation.

Other scholars are beginning to study the extent to which the behavior of law enforcement impacts collective conflict.[398] Research in this area will be relevant, and sometimes crucial, to riot victims raising due process claims under the state-created danger theory because these studies will provide the necessary nexus

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in the early hours was a factor in the growth of the disturbance"); Ernest Van Den Haag, *Causes, Alleged and Actual, of the L.A. Riots*, 66 S. CAL. L. REV. 1657, 1658 (1993) ("Unaccountably unprepared for the ensuing mayhem, the police tried to control it only after it became uncontrollable.").

394. CANNON, *supra* note 1, at 303 (quoting LAPD Officer Greg Baltad in March 10, 1994 interview).

395. SMELSER, *supra* note 311, at 261.

396. Useem, *supra* note 22, at 365-69.

397. *Id.* at 373-74. Force structure lapses affect the number and kinds of units available to confront the violence; sustainability reflects the "ability of an agency to perform over time with sufficient intensity." *Id.*

398. For example, in a comparative analysis of policing and riots in San Francisco and Boston during the riot years from 1967-1969 researchers documented police behaviors before and during riots and identified behaviors that likely caused or escalated riot activity during the target period. Kimberly M. Berg and Anthony D. Perez, Dep't of Sociology, Notre Dame Research Workshop, *The Contribution of Policing to Racial Rioting in the 1960s*, *available at* http://www.nd.edu/~dmyers/team/ktfinal.pdf (last visited June 11, 2003) (on file with author). These researchers also catalogued attitudes toward police in both cities and discovered that public opinion serves as a predictor for rioting. *See id.* at 15.

between state action and mob behavior. Even more important, further studies considering what types of official actions result in a riotous reaction and in what social contexts this sort of reaction is most likely to occur will aid future decision makers in planning and preparing to respond to hostile collective action.

D. Official Recognition of the State's Role in Riot Formation and Trajectory

In *Estate of Rosenbaum v. City of New York*,[399] discussed earlier in Part II.D, the district court acknowledged the legal link between state action and mob action and determined that state action can encourage rioting and increase riot dangers to individuals.[400] In this case, the court found that the *DeShaney* restrictions on the governmental duty to protect individuals from private violence did not extend to the plaintiffs' argument that official action taken during the riots "exacerbated the danger to the Hasidic community and rendered the community more vulnerable to violence by private actors."[401]

The director of criminal justice for the state of New York, in an assessment of the official preparation and response to the disturbances in Crown Heights, also noted the correlation between official action and mob activity. [402] In particular, the report identified many of the same social control problems faced by the LAPD during the 1992 riot. As with the Los Angeles riot, the control problems experienced by Crown Heights law enforcement during the initial three days of the collective disorder embraced a variety of capacity issues, including strategy, command, and planning and preparation. In choosing a strategy to address the rioting, officials opted for a policy of restraint and non-confrontation.[403] This plan, however, lacked tactical strategy, such as containment and dispersal, and thus was unsuccessful in ending the violence.[404] Even so, despite clear evidence that diplomacy was not only ineffective but also feeding further violence, officials adhered to this strategy for three days.[405] Among its extensive findings, the study determined that the police should have realized that the policy of restraint, even if initially justifiable, was not achieving the desired outcome[406] and that the official failure to modify this approach until the fourth day of the rioting "allowed the disorder to continue unabated."[407]

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399. 975 F. Supp. 206 (E.D.N.Y. 1997).

400. *See Id.* at 216-18. For more details about this case, see *supra* notes 275-86 and accompanying text.

401. *Id.* at 217.

402. GIRGENTI REPORT, *supra* note 9, 342-63. In the report, the director, along with his staff and a slate of reviewers and investigators, examines the city's response to the riot and makes recommendations for future preparations for responding to civil unrest. Volume II of the study reviews the circumstances surrounding the criminal investigation and prosecution of the Rosenbaum killing. *See* 2 RICHARD H. GIRGENTI, A REPORT TO THE GOVERNOR ON THE DISTURBANCES IN CROWN HEIGHTS: A REVIEW OF THE CIRCUMSTANCES SURROUNDING THE DEATH OF YANKEL ROSENBAUM AND THE RESULTING PROSECUTION (1993).

403. GIRGENTI REPORT, *supra* note 9, at 206.

404. *Id.* at 207; *see also id.* at 235 (noting that "while police officers were ordered to exercise restraint, there was no plan stating what to do if restraint failed").

405. *See supra* notes 283-84 and accompanying text.

406. GIRGENTI REPORT, *supra* note 9, at 235, 264.

407. *Id.* at 235. The report to the governor on the Crown Heights riots nicely summarizes this point:

> A police department must employ a well-thought-out plan and must implement it if it is to respond to civil unrest effectively. The chaotic

Law enforcement efforts were also hampered by flaws in the command structure and top-down control as well as a general failure to follow the city's disorder plan, which delayed the implementation of appropriate tactics to control the riot and resulted in a diffuse command structure, ineffective management, and confusion in the ranks.[408] The command troubles included a collective failure by top-ranking police officials to provide oversight of field operations and to intervene when strategic and tactical changes were necessary[409] and poor placement and equipage of the command post, which was the "nerve center" of police response.[410] Oversight and intervention were also missing at the city hall level. In particular, the city's chief executive, the mayor, did not act quickly or decisively in requiring the police to restore peace and order to Crown Heights.[411]

In addition, notwithstanding the need for "rapid deployment of sufficient personnel" to keep unstable conditions from escalating into violence,[412] mobilization and deployment of police during the first night of the rioting was slow.[413] The resulting shortage of officers impeded efforts to contain the spread of the disorder.[414] Moreover, the conspicuous absence of law enforcement gave confidence to rioters and exposed the inadequacy of the police response.[415] Specifically, after the catalytic car accident, when roving bands had formed and were moving through the areas surrounding the crash site, destroying property and assaulting individuals,[416] the officers present were not sufficient in number to deal with these groups.[417] Further exacerbating mob conditions, police in the affected areas were primarily assigned to fixed posts and were unable to pursue the roaming clusters of youths.[418] Instead, widespread use of mobile patrols was necessary to combat the groups roaming through the neighborhoods causing mayhem.[419]

Analysis also reveals that, despite the obvious mayhem occurring on the streets, police officers were anything but aggressive in making arrests throughout the initial days of the disorder.[420] Only forty-eight arrests were made during the

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> conditions created by a disturbance, compounded by the complexity and uniqueness of the tasks that must be performed, preclude the development of a plan after a disturbance begins. And without such a plan, even the most extensive and well-received community interventions will fall short of their potential to promote calm . . . . In implementing its plan, the police must be prepared for all foreseeable contingences. Moreover, they must be sensitive to changes in circumstances and flexible enough to react accordingly. While an initial policy of restraint might be appropriate, the police must be prepared to change their strategy if restraint proves ineffective. That does not appear to have been the case in Crown Heights.

Id. at 236.

408. *Id.* at 241-65, 349-55.
409. *Id.* at 350-52.
410. *Id.* at 355.
411. *Id.* at 361-63.
412. *Id.* at 205.
413. *Id.* at 205-06.
414. *Id.* at 345.
415. *Id.* at 222.
416. *Id.* at 205.
417. *Id.* at 205, 216.
418. *Id.* at 216-17, 347-48.
419. *Id.* at 347-48.
420. *Id.* at 224.

first three days of the disturbance—thirty of these arrests were made on Day Three of the riot.[421] Underlying the low arrest numbers were operational and tactical problems related to the lack of a clear mission and strategy.[422] Not until the fourth day of the disorder did authorities take on a coherent plan to address and contain the rioting, adding mobility and revised tactics to confront the mob and arresting people for unlawful assembly, which likely prevented additional crimes from occurring.[423] The change in strategy extinguished the riot.[424]

The city, itself, accepted responsibility for its equivocal position toward the riot violence in a statement made by then-Mayor Rudolph Giuliani regarding the settlement of the Crown Heights lawsuit:

> In the spirit of conciliation, the City of New York accepts responsibility for the mistakes that were made in August 1991, and apologizes to the residents of Crown Heights . . . . The City of New York hereby reaffirms that in the future it will not allow several days of rioting without adequate response. There is no excuse for allowing people to victimize others based on their race, religion, ethnicity or for any other reason without a strong and immediate response from City government.[425]

The most notable snags in addressing the disturbance, however, arose from poor planning and preparation. The city's plans for unusual disorders, though comprehensive, were deficient in setting forth a procedure for activating the use of the plans.[426] Moreover, the police department did not regularly review the plans, and command personnel were unfamiliar with them.[427] Worse still, executive level officers received little practical and tactical training, and training sessions for front-line responders were too short and the information about officer riot responsibilities was insufficient.[428] At the City Hall level, no action plan existed defining the roles of relevant city agencies and setting forth a system for coordinating their responsibilities and efforts.[429]

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421. *Id.*; *see id.* at 225 tbl. 8.3. During the first two nights of violence, at least 35 residences were vandalized, yet only 8 arrests were made for property offenses. *Id.* at 228. Despite over 160 complaints of assault filed by police officers and civilians during the two days following the automobile accident, only 16 arrests for assault were made. *Id.* Numerous looting crimes were witnessed by police and civilian alike, and no official attempts were made to intervene. *Id.* at 228-29.

422. *Id.* at 224. The riot situation itself added to the difficulties faced by officers in making arrests. *Id.* at 225. Individual officers can do relatively little when confronting a mob. Instead, officers must function as a unit. To this end, appropriate riot arrest tactics must be transmitted to those in the field. During the disorder in Crown Heights, this was not done. *Id.*

423. *Id.* at 229-31, 235-36.

424. *Id.* at 222.

425. *Statement by Mayor Rudolph W. Giuliani Regarding the Settlement of the Crown Heights Lawsuit*, Archives of the Mayor's Press Office (April 2, 1998), *available at* http://nycha-spotlight.com/PDF/snitow-nyc.pdf (last visited June 11, 2003) (on file with author). The city settled the claims in the *Rosenbaum* lawsuit for $1.1 million and paid an additional $250,000 to plaintiffs' counsel. Prior to this settlement, the City settled with two of the plaintiffs for a total of $200,000. *Id.*

426. GIRGENTI REPORT, *supra* note 9, at 342.

427. *Id.* at 342-43.

428. *Id.* at 343-45.

429. *Id.* at 360-61.

As in the 1992 Los Angeles Riot, the collective failures on the part of city and police officials during the disturbance in Crown Heights not only allowed riot violence to occur, but actually increased the dangers to riot victims. Analyses of these disturbances demonstrate that the size and scope of a riot is inextricably linked to the actions of law enforcement in responding to a mob. Accordingly, in circumstances like these, the state-created danger theory presents a viable avenue for relief under the requirements of due process.

E. The Ramparts of the Duty to Protect from Mob Violence

Having established this connection between state action and mob activity, further discussion is necessary to determine the extent of the legal duty arising from this link. As argued above, on-the-spot social controls taken by the State to address mob activity can have a profound effect on riot formation and trajectory.[430] Broadly applied, this causal relationship between the State and a riot could lead to § 1983 state-created danger liability whenever hostility erupts in a collective fashion.[431] The State would be automatically responsible for any and all riot violence and destruction. States, however, are guardians, not guarantors, of the public peace.[432]

Moreover, courts are unlikely to venture forth into an area of liability so far-ranging and all-encompassing. Proof positive of this point is the court's opinion in *Estate of Rosenbaum v. City of New York*.[433] Although the court readily concluded that the plaintiffs' claims, predicated on the state-created danger doctrine, properly set forth a substantive due process basis for relief,[434] it granted the defendants' motion for summary judgment on qualified public official immunity grounds.[435] The court's holding on this point was twofold: (1) it found that the due process right asserted was not clearly established during the applicable time period;[436] and (2) it determined that, even if the right was clearly established at the time of the 1991 riot in Crown Heights, the defendants' actions in addressing the disturbance

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430. *See supra* notes 321-43 and accompanying text.

431. As Professor David Strauss points out: "[S]tate action is always present in the background . . . [and] contributes to the condition in which all members of society . . . find themselves." David A. Strauss, *Due Process, Government Inaction, and Private Wrongs*, 1989 SUP. CT. REV. 53, 67.

432. *See supra* notes 158, 163; DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) (holding that the Due Process Clause "is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security"). LAPD Chief of Police Daryl Gates aptly phrased the point as thus: "There are going to be situations where people are going to be without assistance. That's just the facts of life." Chief Daryl Gates, Comment at a Brentwood Political Event on the First Night of the Riots, *quoted in* CANNON, *supra* note 1, at 303. Resort to the Equal Protection Clause is also unavailing. The Court has interpreted this clause to prohibit the State's discriminatory denial of "protective services to certain disfavored minorities." *DeShaney*, 489 U.S. at 197 n.3. Application of this clause extends only to governmental decisions made with a "discriminatory purpose," that is, decisions made "'because of,' not merely 'in spite of,' . . . adverse effects upon an identifiable group." Personnel Adm'r v. Feeney, 442 U.S. 256, 279 (1979); *see also* McCleskey v. Kemp, 481 U.S. 279, 298 (1987).

433. 975 F. Supp. 206 (E.D.N.Y. 1997).

434. *See supra* note 286 and accompanying text.

435. *Rosenbaum*, 975 F. Supp. at 222-23.

436. *Id.* at 218-21.

were objectively reasonable.[437] The first ruling was unsurprising, considering how heavily the court relied on the 1993 *Dwares* case in finding the due process violation.[438] Observing that the Second Circuit did not decide *Dwares* until two years after the unrest in Crown Heights, the court concluded that city officials could not have reasonably been aware that their conduct may have implicated the plaintiffs' due process rights at the time that they acted.[439] The second line of reasoning, however, raises concerns that many courts are likely to have with respect to second-guessing strategy decisions made in the field. Despite expert findings that law enforcement authorities should have realized that the policy of restraint was not working and that a change in strategy was needed,[440] the *Rosenbaum* court found that "reasonably competent similarly situated public officials could disagree as to the legality of [the defendants'] actions"[441] and refused to subject the defendants to liability based on an after-the-fact judgment that a different strategy might have attained better results.[442] Writing more generally, the court noted: "Lawsuits alleging that police should have acted one way or another in response to a [crisis] situation 'pose[] a no-win situation for the police and do[] nothing to encourage law enforcement or a respect for constitutional rights.'"[443]

Courts, aware that "[a]n individual who confronts an emergency necessarily acts 'in agitation and with imperfect knowledge,'"[444] are likely to shy away from imposing liability on state and local governmental actors whose critical decisions, made under urgent circumstances, do not have their intended effect or produce unforeseen results.[445] As in *Rosenbaum*, this concern may lead courts to effectively relegate the recognized due process right to the realm of theory, never to be applied in practice. In essence, although the State might be theoretically responsible for its actions in causing or increasing riot danger, no liability would attach in practice because of a court's unwillingness to second-guess decisions made by authorities on the battlefield. Consequently, short of a willful denial of protection or of a deliberate official decision to proceed in a manner so perverse so as to be

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437. *Id.* at 221-23.

438. *See id.* at 217-21 (discussing *Dwares v. City of New York*, 985 F.2d 94 (2d Cir. 1993)). For a more detailed exposition of the Second Circuit's opinion in *Dwares*, see *supra* notes 270-74 and accompanying text.

439. *Id.* at 218-21. Although the court conceded that other circuits had begun to sketch a rough outline of the state-created danger due process right prior to the Second Circuit's opinion in *Dwares*, it concluded that the conduct at issue in *Rosenbaum* was sufficiently unlike that in the pre-*Dwares* cases. *Dwares* and *Rosenbaum* concerned "allegations that a premeditated police decision to withhold protection emboldened violent private actors and made the plaintiff or plaintiffs more vulnerable to injury." *Id.* at 220.

440. *See, e.g.*, GIRGENTI REPORT, *supra* note 9, at 235; *supra* notes 406-07 and accompanying text.

441. *Rosenbaum*, 975 F. Supp. at 221.

442. *Id.* at 222.

443. *Id.* (quoting Salas v. Carpenter, 980 F.2d 299, 311 (5th Cir. 1992)).

444. *Id.* (quoting Justice Cardozo in Wagner v. Int'l Ry. Co., 133 N.E. 437 (N.Y. 1921)).

445. *See, e.g.*, A. & B. Auto Stores of James Street, Inc. v. City of Newark, 279 A.2d 693, 696 (N.J. 1971) (finding no substantive basis for liability "because ultimately plaintiffs challenge administrative or legislative decisions of a discretionary character, and it would be intolerable to burden those decisions with a dollar liability whenever a trier of the facts disagrees with them").

completely at odds with all possible strategic alternatives in the face of riotous activity, liability would never lie.

Accordingly, if these sociological studies are to be useful and effective in the legal sphere, the contours of the due process right to riot protection must be charted.[446] Although this Article does not seek to offer a comprehensive study of this issue, some broad brushstrokes on the subject will be tendered.

Two primary concerns implicated in the riot responsibility context are judicial involvement in legislative resource allocation decisions and executive discretionary decisions. The argument commonly advanced in the first area of concern is that courts are not institutionally equipped to make budgetary determinations about the appropriate level and distribution of law enforcement services.[447] These decisions are considered to be political decisions that are best left to the political branches "where all the affected interests can appear before the decision-making body and the 'multiple centers can engage in exchange and consider the claims of others.'"[448] Moreover, traditional judicial standards provide no guidance in evaluating these "polycentric" decisions.[449] The reasoning underlying the second area of concern can be found in the *Rosenbaum* court's reluctance to second-guess authorities making crucial decisions in crisis situations.[450] The judiciary is disinclined to involve itself in the management of emergency law enforcement operations requiring expertise in crowd control strategies and tactics.[451] It is also unwilling to subject decision-makers to liability for mistakes made in good faith and pursuant to the responsibilities attendant to their official posts, for fear of deterring officials from acting "with the decisiveness and the judgment required by the public good."[452]

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446. With this in mind, Justice White has remarked that "'[n]o problem so perplexes the federal courts today as determining the outer bounds of section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 . . . .'" Jackson v. City of Joliet, 465 U.S. 1049, 1050 (1984) (White, J., dissenting from denial of certiorari) (quoting Jackson v. City of Joliet, 715 F.2d 1200, 1201 (7th Cir. 1983)). In particular, courts continue to grapple with the pesky problem of establishing the boundaries of the Fourteenth Amendment's due process guarantee. *See id.* at 1050-51.

447. *See, e.g.*, Armacost, *supra* note 174, at 1003-09; William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 645-49 (1982); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394 (1978).

448. Armacost, *supra* note 174, at 1005 (quoting CLAYTON P. GILLETTE, LOCAL GOVERNMENT LAW 396 (1994)).

449. Fletcher, *supra* note 447, at 645-49; *see also* Comment, *The Aftermath of the Riot: Balancing the Budget*, 116 U. PA. L. REV. 649, 662 (1968) ("Even were one to assume that the duty to preserve law and order can be transmuted into an individual legal right, the competence of the courts to enunciate the proper standards of liability and to fashion adequate remedies is doubtful.").

450. *See supra* notes 441-43 and accompanying text.

451. *See supra* notes 441-43 and accompanying text; Comment, *supra* note 449, at 676-77.

452. Scheuer v. Rhodes, 416 U.S. 232, 240 (1974); *see* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) ("The[] social costs [of liability] include the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office" as well as "the danger that fear of being sued will dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.") (internal quotation marks omitted).

With respect to these two concerns, state action impacting riots can be divided into three stages: (1) state action taken that preconditions an area to be more riot-prone; (2) state action taken to plan and prepare for riots in general and, when possible, an impending riot in specific; and (3) state action taken in the field, during a riot. Resource allocation concerns clearly attach to state action taken at stage one, when legislatures and municipalities put into operation social controls that shape a locality's propensity toward collective disorder,[453] as well as make various determinations regarding the allocation of resources, including the creation of law enforcement institutions.[454] Although these decisions undoubtedly impact riot development and direction,[455] they are political decisions and are arguably best left to the legislative branches of government.[456] In a similar manner, concerns about discretion may reasonably be confined to stage three, at which point the potential for error is strong and the probability of official negligence is likely to be very high.[457] Decisions made in the field in response to a host of variables perhaps should receive a presumption of protection, rebuttable by a showing of willful denial of protection or evidence of strategy and tactics in clear contravention of established practice and procedures.[458]

These concerns take on a different cast, however, at stage two, at which point resource allocation decisions have already been made and need only to be implemented. Whereas a decision as to whether to establish a police department may be political in character, "[t]he operation of a going public service . . . is not a legislative function."[459] Moreover, all states have formed emergency management

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453. *See supra* notes 318-20 and accompanying text.

454. *See supra* notes 163-66 and accompanying text. The belief that the federal government could not constitutionally require local governments to provide law enforcement services led to the defeat of the Sherman Amendment. Monell v. Dep't of Soc. Servs., 436 U.S. 658, 673 (1978). *Contra* City of Chicago v. Sturges, 222 U.S. 313, 323 (1911) ("The state is the creator of subordinate municipal governments. It vests in them the police powers essential to the preservation of law and order. It imposes upon them the duty of protecting property situated within their limits from the violence of such public breaches of the peace as are mobs and riots.").

455. *See supra* notes 318-20 and accompanying text.

456. *See supra* notes 447-48 and accompanying text.

457. *See supra* notes 450-52 and accompanying text.

458. *See supra* notes 450-52 and accompanying text. Some might argue that, even with such a showing, judicial review should be confined to circumstances in which internal departmental disciplinary procedures are lacking. Otherwise, concerns of dampening official enthusiasm in carrying out official responsibilities outweigh any desire to control the acts of public officers. *See* Comment, *supra* note 449, at 676-77 (discussing suits against fire department officials for failure to provide fire protection).

459. Comment, *supra* note 449, at 670-71. *See* Doyle v. South Pittsburgh Water Co., 199 A.2d 875, 878 (Pa. 1964). In *Doyle*, the court determined that the defendant water company could not avail itself of municipal immunity because the task of maintaining the water system at issue was not discretionary owing to the fact that the company had already exercised its discretion in setting up the water system. *Id.* at 878. According to the court, "Discretion having been exercised and the physical fact of that exercise having become a *fait accompli*, reasonable care in the maintenance and repair of the planted hydrants became imperative." *Id. But see* Bradley v. Bd. of County Comm'rs, 890 P.2d 1228 (Kan. Ct. App. 1995) (finding that state law requirement to have an approved emergency plan on file did not preclude local government from having immunity under the state tort claims act); Litchhult v. Reiss, 183 A.D.2d 1067 (N.Y. App. Div. 1992) (finding that weather notification responsibility under the county's emergency preparedness plan falls within definition of discretionary act). These cases, however, are easily distinguishable from *Doyle* as well as the

agencies to contend with disasters, including civil disorder,[460] and require state or local governments to perform emergency management functions.[461] Accordingly, planning for and preparing to respond to an event of collective disorder are not discretionary undertakings. These tasks largely involve ministerial acts that fall within the purview of the judiciary.[462] For instance, the Webster Report, in describing the city of Los Angeles's civil disorder plans and the individuals responsible for carrying out the planning, recognized official discretion in delegating tasks and duties, but assumed that such tasks and duties pursuant to the plans would be executed—from updating and revising current manuals to building consensus among law enforcement agencies and political leaders.[463] With respect to the disturbance in Crown Heights, several NYPD documents set forth procedures to guide law enforcement authorities in responding to collective hostile outbreaks.[464] While police commanders exercise discretion in deciding how to implement the provisions, compliance with the requirements of these manuals and plans is expected.[465] Nonetheless, a failure to complete even ministerial tasks would not necessarily constitute a breach of the constitutional duty to protect from mob violence, unless that failure created or increased riot dangers that led to injury.[466]

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argument accompanying this footnote. In *Bradley*, the court noted that governmental entities were liable for emergency preparedness activities, but that the definition of such activities did not include the requirement to keep an approved emergency plan on file. 890 P.2d at 1231-32. In *Litchhult*, the official responsibility set forth in the provision of the emergency plan at issue was qualified by the phrase "as conditions warrant." 183 A.D.2d at 1069. From this language, the court determined that this provision described a discretionary act. *Id.*

460. For quick access to information on each state's emergency management organizations, see *State Emergency Management Agencies*, *available at* http://www.tnema.org/Misc/StateEMA.htm (last visited June 11, 2003).

461. *See, e.g.*, ALA. CODE § 31-9-10 (2003); ALASKA STAT. § 26.23.040 (Michie 2002); ARIZ. REV. STAT. § 26-307 (1993); ARK. CODE ANN. § 12-75-110 (Michie 2002); CAL. GOV'T CODE § 8568 (2003); MICH. COMP. LAWS § 70.14 (2003). In addition, all of the states, with the exception of Hawaii, have entered into interstate compacts for emergency management and assistance. *See e.g.*, ALA. CODE § 31-9-40; ALASKA STAT. § 26.23.136; ARIZ. REV. STAT. § 26-309; ARK. CODE ANN. § 12-49-402; CAL. GOV'T CODE § 178.5.

462. Day v. State *ex rel.* Utah Dep't of Pub. Safety, 882 P.2d 1150, 1157 (1994) ("Generally speaking, discretionary functions are those involving policy setting and decision making, while ministerial acts are more operational, involving the carrying out of policies."); *see also* WAYNE R. LAFAVE, ARREST: THE DECISION TO TAKE A SUSPECT INTO CUSTODY 79-82 (1965) (listing cases in which courts have found the police role to be solely ministerial). While "much police work is highly discretionary, the courts over a long period have classified police action as ministerial; that means a policy [sic] officer generally has only qualified immunity, not absolute immunity, even when what he does is clearly discretionary." KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 19.3 (3d ed. 1994).

463. *See* THE WEBSTER REPORT, *supra* note 2, at 77-98.

464. *See* GIRGENTI REPORT, *supra* note 9, at 159-77.

465. *Id.*

466. *Cf.* Bradley v. Bd. of County Comm'rs, 890 P.2d 1228, 1229-32 (Kan. Ct. App. 1995). In *Bradley*, the plaintiff sued the city and county officials for allegedly negligently failing to warn her of an approaching tornado, which damaged her home and injured her. *Id.* at 1230. Her claim arose from the county's failure to have in place an approved emergency plan, as was required by the Kansas Emergency Preparedness Act. *Id.* at 1231. The court, however, determined that the lack of an approved emergency plan did not preclude a claim of immunity by the government agents. Moreover, it also found that the defendants, upon realizing that the tornado warning siren was not functioning, directed police vehicles to drive

Consequently, the precise scope of the duty at this stage would depend on the particular facts at issue in a given case, making social framework evidence, as well as expert analysis, all the more valuable in establishing the elements of a constitutional claim brought pursuant to the state-created danger doctrine.

Additionally, studies reveal that stage-two state action not only directly impacts the development and severity of a riot, but also leaves an indelible imprint on the ability of officials to make optimal decisions at stage three, when riotous events are unfolding very quickly and the potential for official miscalculation is great.[467] For example, the costly strategic errors made in addressing the riots in Crown Heights were inextricably intertwined with earlier failures made by the NYPD and city officials in planning and preparing for civil disorder.[468] Furthermore, even at stage three there lies the argument that, though an initial official decision to adhere to a particular strategy or course of conduct is a discretionary act, negligence in implementing the original tactical and discretionary decision is a ministerial act.[469]

Pursuant to this premise, not every riot situation presents a federal case. Without question, resource allocation is more accurately a legislative or executive concern, as opposed to a judicial one, and reasonable choices made "among conflicting behavioral hypotheses" should shield a state official from any form of legal accounting.[470] These concerns, however, do not erect the same barriers to court review of stage-two state actions;[471] official planning and preparation are vital

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through the city streets sounding their sirens and found that one of the vehicles "passed within a distance of two mobile homes of Bradley's location a total of four times with its siren on." *Id.* at 1232. Therefore, in this case, stage-two failures do not appear to have contributed to the danger faced by Bradley.

467. *See supra* Part III.A-C.

468. *See supra* notes 425-29 and accompanying text.

469. *See, e.g.*, Gibson v. City of Pasadena, 148 Cal. Rptr. 68, 73 (Cal. Ct. App. 1978) (finding merit in plaintiff's contention that "the police officers' initial decision to pursue was the discretionary act while the alleged negligent pursuit was a ministerial act in implementation of the original discretionary act"); Johnson v. State, 447 P.2d 352, 362 (Cal. 1968) ("[A]lthough a basic policy decision (such as standards for parole) may be discretionary and hence warrant governmental immunity, subsequent ministerial actions in the implementation of that basic decision still must face case-by-case adjudication on the question of negligence.").

470. MARSHALL S. SHAPO, THE DUTY TO ACT: TORT LAW, POWER, & PUBLIC POLICY 114 (1936).

471. A duty to individuals in the context of hostile urban outbursts also recognizes governmental obligations stemming from control and dependence. Professor Beermann criticizes the *DeShaney* opinion as being inconsistent with government's extensive involvement responsibility in the modern welfare state, arguing that this involvement "creates dependencies that give rise to further responsibility." Beermann, *supra* note 28, at 1089. Moreover, in furtherance of crime control and order maintenance, the state's goal is to monopolize the coercive use of force. *See, e.g.*, LES JOHNSTON, THE REBIRTH OF PRIVATE POLICING 24 (1992) ("In the twentieth century . . . it has generally been assumed that policing is an inherently public good, whose provision has to reside in the hands of a single, monopoly supplier, the state."). This contrasts sharply with and significantly curtails the inherently private right of self-defense. For arguments supporting the right of self-defense as codified in the Second Amendment, see, for example, Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 MICH. L. REV. 204 (1983); William Van Alstyne, *The Second Amendment and the Personal Right to Arms*, 43 DUKE L.J. 1236 (1994); Eugene Volokh, *The Amazing Vanishing Second Amendment*, 73 N.Y.U. L. REV. 831 (1998). *But see* Carl T. Bogus, *Race, Riots, and Guns*, 66 S. CAL. L.

to controlling or dispersing a mob.[472] Although officials should not be liable for lacking knowledge gained only by virtue of hindsight, lack of foresight should have entirely different consequences.[473]

One of the fundamental substantive purposes of the Due Process Clause is to protect "liberty in a social organization . . . against the evils which menace the health, safety, morals and welfare of the people."[474] As poignantly expressed by the second Justice Harlan:

> [T]he full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This "liberty" is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, . . . and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.[475]

While the Fourteenth Amendment affords no protection against private conduct, the Due Process Clause was unquestionably "intended to secure the individual from the arbitrary exercise of the powers of government."[476]

State involvement in private wrong brings to the forefront Fourteenth Amendment concerns.[477] Courts cannot discount state contributions, unwitting or

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REV. 1365, 1365 (1993) (commenting on the surge in California firearms sales following the 1992 Los Angeles riots and noting that the fear-induced nature of the purchases stemmed from the inability of police to defend people from mob violence); David C. Williams, *The Unitary Second Amendment*, 73 N.Y.U. L. REV. 822 (1998).

472. Furthermore, inadequate planning and preparation for making these decisions arguably breaches the social contract. *See, e.g.*, Manzo v. City of Plainfield, 258 A.2d 149, 152 (N.J. Super. Ct. Law Div. 1969) (describing "the obligation of government to protect life, liberty and property against the conduct of the indifferent, the careless and the evil-minded" as "lying at the very foundation of the social compact"), *aff'd*, 279 A.2d 706 (N.J. 1971). *See also* City of Chicago v. Sturges, 222 U.S. 313, 322 (1911) (upholding strict liability mob violence statute as resting constitutionally "upon the duty of the State to protect its citizens in the enjoyment and possession of their acquisitions," and declaring statute "but a recognition of the obligation of the State to preserve social order and the property of the citizen against the violence of a riot or a mob").

473. The Supreme Court long ago recognized the value of foresight:

> It has in modern times become apparent that the physical health of the community is more efficiently promoted by . . . preventive means, than by the skill which is applied to the cure of the disease after it has become fully developed. So also the law, which is intended to prevent crime . . . by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, . . . is more efficient than punishment of crimes after they have been committed.

In re Neagle, 135 U.S. 1, 59 (1890).

474. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 391 (1937).

475. Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds).

476. Hurtado v. California, 110 U.S. 516, 527 (1884) (quoting Bank of Columbia v. Okley, 17 U.S. (4 Wheat.) 235, 244 (1819)).

not, to destruction meted out by angry mobs.[478] "Courts must still decide when power holders have defaulted on their social obligations in particular circumstances."[479] To this end, failures in fulfilling the dual responsibilities of planning and preparation that directly and negatively impact the development and progression of a riot, and thus the ability of officials to make decisions in the field, are suitable for court review.

Although the State most surely is not in the business of underwriting riot losses endured by its citizens, the State should account for any role held in the equation leading to such losses. Law enforcement, which includes the tasks of peacekeeping, personal security, and property protection, is considered to be a basic and essential public function, both a governmental chore and prerogative.[480] This notion is evident in the words of the United States Supreme Court stating that "the most basic function of any government is to provide for the security of the individual and of his property."[481] By meeting its responsibilities to make provisions in the event of violent civil disorder, the State guards against constitutional claims of abuse or default.

CONCLUSION

"Burn the corner down again! Ain't nothing's changed!"[482]

This Article sounds a clarion call for governmental accountability to its citizens for riot violence pursuant to the Fourteenth Amendment of the United States Constitution. Although state limitation and retraction of riot statutes have curtailed the protective policies that once animated the original state acts, the guarantees of the Federal Due Process Clause present an alternate avenue for achieving the same policy goals of maintaining peace and good order in society by requiring the state to protect its citizens from mob violence when the state, through its local governments or state or local officers, has created or increased the danger

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477. *See* Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) (stating that "private conduct abridging individual rights does no violence to the Equal Protection Clause unless to some significant extent the State in any of its manifestations has been found to have become involved in it").

478. *Cf., e.g.*, DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 200-02 (1989) (tacitly supporting the state-created danger theory of liability); Butera v. District of Columbia, 235 F.3d 637, 650-53 (D.C. Cir. 2001) (embracing the state-created danger theory of liability); Kneipp v. Tedder, 95 F.3d 1199, 1205-11 (3d Cir. 1996) (same); Gregory v. City of Rogers, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc) (same); White v. Rochford, 592 F.2d 381, 383-86 (7th Cir. 1979) (same).

479. SHAPO, *supra* note 470, at 115. Professor Shapo urges that judicial caution in reviewing policy decisions should not "melt into abstention." *Id.*

480. *See, e.g.*, Heyman, *supra* note 28, at 512-30 (tracing the origins of the duty to protect); Clifford D. Shearing, *The Relation Between Public and Private Policing*, *in* MODERN POLICING 399, 403-09 (Michael Tonry & Norval Morris eds., 1992) (describing policing as "a quintessentially public service"). For an insightful discussion of police functions, both past and present, see generally Sklansky, *supra* note 109.

481. United States v. United States Dist. Court, 407 U.S. 297, 312 (1972) (quoting Miranda v. Arizona, 384 U.S. 436, 539 (1966) (White, J., dissenting)); *accord* Illinois v. Gates, 462 U.S. 213, 237 (1983).

482. Sarah Tippit, *Bush Sees Hope After L.A. Riots, Some See No Change*, REUTERS, Apr. 29, 2002 (quoting the shouts of a motorist interrupting the ceremony at Florence and Normandy commemorating the ten-year anniversary of the Rodney King riot).

of that violence. To trigger these constitutional safeguards, studies establishing the sociological link between state action and mob violence can provide guidance to fact-finders in individual cases. Social science studies have long identified the State as playing a leading role in the theater of riot violence: a riot's severity is as dependent on police strategy and tactics as it is on the character and circumstances of the people milling about in the streets.[483] Social science research illustrating the effects of certain policing activities on mob behavior in other riots can help fact-finders understand and appreciate factual claims regarding whether state action contributed to the rise and development of a specific riot. In addition, social science experts can provide contextual analyses of the factual claims in a particular case.

Riots are not natural catastrophes. They are man-made and, accordingly, avoidable or, at the very least, controllable. By setting forth a constitutional claim for riot protection, this Article hopes to encourage state and local governments to develop organizational and tactical strategies to address the ongoing, serious threat of civil disorder. Official malfunction that results in mob violence has a disparate impact on urban blacks and other racial and ethnic minority groups who populate the inner-city neighborhoods where collective action is most likely to occur. Poverty, chronic unemployment, broken families, teen pregnancies, and soaring school dropout rates plague these communities and heighten the potential for violence.[484] Furthermore, the combined effects of foreign immigration and economic restructuring, present in many United States cities, are causing inter-ethnic hostilities.[485] As one commentator has observed:

> Every major city . . . is a racial powder keg, ready to go off. I promise you, in twenty years, I'm telling you, this country is headed toward revolution if we don't do something about the inner city. If the poor people of this country, black and white and brown, ever realize that what unites them is greater than what divides them, we're in terrible trouble.[486]

If our cities are, in truth, primed and ready to ignite, then the State must be prepared to extinguish the flames. Although things may fall apart, the center must hold.[487]

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483. TILLY, *supra* note 315, at 57.

484. Mark Baldassare, *Introduction*, *in* THE LOS ANGELES RIOTS: LESSONS FOR THE URBAN FUTURE 1, 2 (Mark Baldassare ed. 1994). In today's South Central Los Angeles, the average income is about half that of the rest of the city. The number of businesses and jobs in South Central are about forty percent of the city's average. Murders and other violent crimes are at least double the rate of that elsewhere in Los Angeles. Doug Saunders, *L.A. Story, the Sequel*, THE GLOBE & MAIL, Apr. 20, 2002, at F1 (citing a study by economist Paul Ong of the University of California at Los Angeles).

485. Baldassare, *supra* note 484, at 3.

486. Attorney David Berg *quoted in* DAVID K. SHIPLER, A COUNTRY OF STRANGERS: BLACKS AND WHITES IN AMERICA 13 (1997).

487. *But see* William Butler Yeats, *The Second Coming*, *in* THE COLLEGE ANTHOLOGY OF BRITISH AND AMERICAN VERSE 486-87 (A. Kent Hieatt & William Park eds., 1964) ("Things fall apart; the centre cannot hold.").