Riot Insurance

The Molotov cocktails, looting and sniping which wracked nearly eighty American cities this past summer have taken a heavy toll in lives and property damage.\(^1\) The totals may rise in future years, as long as the frustrations and despair of the urban ghetto resident make themselves felt in civil disturbances and riotous destruction. During the past four years, the insured damage attributable to urban riots has tripled, from an estimated cost of between $6.5 and $8.5 million in 1964,\(^2\) to approximately $40 million in the Los Angeles riots in 1965,\(^3\) to an estimated $125-200 million in 1967.\(^4\) Absent any sign of a lessening in ghetto tensions, the forecast can only be for more and more destruction.

As a result of this increasing risk of insuring property in ghetto neighborhoods, insurance companies have indicated that they will not continue to insure against riot damage in riot-threatened areas,\(^5\) at least not without large rate increases. Insurance rates in the Watts area of Los Angeles trebled after the riot,\(^6\) and rate increases have been substantial in other riot-affected cities as well.\(^7\) Property owners in ghetto neighborhoods have been forced to bear a large portion—estimates range from 25 per cent to 50 per cent—of the riot damage this summer. The trend towards withdrawal of insurance protection from the slums will throw an even greater share of future riot loss upon ghetto property owners, especially upon ghetto merchants whose small neighborhood stores bear the brunt of the riot-inflicted damage.

Economic exploitation of the poor by merchants in slum areas, such as charging higher prices for goods because slum residents do not have the means of shopping selectively outside the slum area,\(^8\) has been sug-

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1. From April 1, 1967, to September 4, 1967, 83 persons were killed, 3,210 were injured, and an estimated $524.8 million worth of property was destroyed as a result of riots. Library of Congress, Survey of Racial Violence 3 (Sept. 14, 1967).
4. Press Release by Governor Hughes, Chairman of President's Advisory Panel on Insurance in Riot-Affected Areas, Sept. 15, 1967, at 2. This includes $85 million in insured losses from the Detroit riots and $15 million from the Newark disturbances. All damage figures are approximations since uninsured loss can only be estimated and no official tabulations are kept even on insured losses.
8. Hughes, supra note 4.
9. According to residents of Watts, the cost of traveling to distant supermarkets has limited many residents to one or two trips per month and forces the rest to trade with the little corner stores whose prices are higher than the supermarkets'. Jones, The View from Watts Today, Los Angeles Times, July 18, 1967 (unpaged reprint). Part of the
gested as a reason for the outbreak of violence in the ghetto. But the profit margins of these merchants are not high enough to enable them to bear the costs of riot damage. As a result, merchants have been driven out of the ghetto whenever insurance protection or other forms of riot compensation are unavailable. The demands of insurers for higher rates and the anticipated cancellation of insurance coverage in the ghetto, such as that which followed the Watts rioting, can only accelerate the departure of commercial business from the slums. Such departures produce not only a loss of services to the ghetto, but also a loss of jobs for its residents and an intensification of the feelings of Negro slum-dwellers that society has left them behind in its mad dash for material affluence.

Therefore, even on the assumption that the "exploiting" merchant is somehow "responsible" for the riot damage, placing the damage burden on slum property owners would not be a satisfactory solution. Since the appropriate goal of any such policy must be to achieve a proper balance between spreading and deterrence, placing the burden of future riots on ghetto merchants would not produce satisfactory results. Costs would not be spread. They would be borne by the merchants themselves and by the ghetto residents who could be forced to pay higher prices for poorer service. Nor would deterrence be achieved, since (1) merchants are more likely to respond to the increase in their costs by withdrawing their services from the ghetto or by raising their prices than by reducing their prices in order to deter future riots, and (2) residents are at least as additional cost of trading with the smaller ghetto stores is, of course, due to the small volume in such a small-scale business, but some of the increased price may be due to marketplace considerations such as inability of residents to trade elsewhere. See note infra.

10. See testimony mentioned in Governor's Comm'n on the Los Angeles Riots, Violence in the City—An End or a Beginning 62 (1965).

11. Many of the stores struck by the 1965 Watts riots did not reopen following the violence due to prohibitively high insurance rates or the reluctance of insurers to write policies in the burned-out areas of Watts. In addition, only one grocery store and two small clothing stores represent new business in Watts since the riots. Jones, supra note 9.


13. See authorities cited note 5 supra. The problem of cancellation has been temporarily abated by moratoriums on "mass cancellations" imposed by state insurance commissions. Hughes, supra note 4, at 3.

14. As an alternative to pulling out, the merchant could pass on riot costs to the consumer in the form of higher prices. The hardship imposed on the slum-dweller is the same whether the merchant leaves the neighborhood or tries to pass on his riot costs to the consumer, i.e., the resident is forced to travel to distant stores to purchase goods and services at prices he can afford.

15. Such spreading of losses will also result in a smaller "real" burden of riot damage, because secondary losses such as business failure in the riot area are more likely to be eliminated. See Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 Yale L.J. 499, 517 (1961).

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likely to respond to the threat or actuality of such withdrawals or price increases by rioting as by abstaining from such activity. For similar reasons, placing the burden of loss directly on the rioters themselves is not a satisfactory—much less a practicable—solution. Thus it appears that the cost of future riots must be spread among a larger segment of the population.

I. Private Methods of Allocating the Riot Damage Burden

A. The Present System of Insurance

The standard fire insurance policy covers all fire losses, including fire loss resulting from riots or other civil disturbances. Protection against non-fire losses is provided by “extended coverage” clauses at an additional cost. Such clauses normally cover non-fire losses, including theft and vandalism, arising from riots, civil commotions and strikes, but exclude coverage of losses resulting from war, insurrection, revolution or civil war. Under fire and extended coverage policies in force during the past summer, insurance companies have paid, or are expected to pay, some $110 million in claims arising from 1967’s urban riots.

Yet insurance company officials have made it clear that they will not continue to absorb losses of this magnitude. By cancelling policies or raising rates—which would require the acquiescence of state insurance commissions—insurance companies will avoid future losses from riot damage. Even where policies on ghetto property are kept in force by

17. Legally, the individual rioters are liable in ordinary tort for the damages their actions have produced. But this remedy can be useful only when the particular rioter can be identified, served with process and collected against. Also, any participant in the riot can be held liable for the full amount of the riot damage, whether or not he individually caused the damage complained of, if a conspiracy can be proved. See De Vries v. Brumbaugh, 53 Cal. 2d 643, 349 P.2d 532, 2 Cal. Rptr. 764 (1960) and cases cited therein. See also Note, Mass Demonstrations and Criminal Conspiracies, 16 Hastings L.J. 405 (1965). But cf. Peterson v. City of Greenville, 375 U.S. 244 (1963).

18. Comment, Insurance Protection Against Civil Demonstration, supra note 18, at 706 n.10.
20. See statement of James L. Bentley, President of the National Association of Insurance Commissioners, id.
21. See statement of James L. Bentley, President of the National Association of Insurance Commissioners, id.
state insurance commission "moratoriums" on cancellations,21 the insurer may seek to escape liability by claiming that the riots constitute an "insurrection" and thus that liability is excluded in the extended coverage agreement.22

In the only case construing the "insurrection" clause in a fire insurance policy, the First Circuit held that an intent to overthrow the government must be present in order for violence to constitute an "insurrection."23 Home Ins. Co. v. Davila24 involved an insurer's attempt to invoke the "insurrection" clause to avoid liability for damage caused by an armed band of Puerto Rican nationalists who took control of the town of Jayuya, Puerto Rico, for one day before being driven out by units of the National Guard.25 The court interpreted the word "insurrection" as a movement accompanied by action intended to overthrow the government. This is, perhaps, a reasonable interpretation in light of the fact that the categories of excepted perils, including an "insurrection," are laid down by statute26 and the legislature probably intended that the ordinary meaning be employed.

However, future judicial decisions on the meaning of the "insurrection" clause may reach different results,27 or the insurance companies

24. See note 13 supra.
25. "There is no question but that the troubles border on insurrection," stated Robert Braddock, president of the General Reinsurance Company of New York City, referring to the Newark riots, THE WEEKLY BOND BUYER, Aug. 21, 1967, at 10. Speculation that insurers might attempt to avoid liability was enhanced by New Jersey Governor Richard Hughes' characterization of the Newark riots as an "insurrection" in statements to newsmen, and by rumors that Michigan's Governor Romney had refused to declare the Detroit riots an "insurrection" out of fear that insurance coverage would be nullified, Washington Star, July 26, 1967. However, insurers, publicly at least, have thus far refused to invoke the "insurrection" escape clause. Id. This may be the result more of a desire to retain a healthy "public image" than of a fear of a court test on the "insurrection" issue.
26. Sometimes the word "insurrection" is used to characterize an outbreak or disturbance more limited in its objective than the forcible overthrow of the government . . . . But we are dealing here with the meaning of "insurrection" in an insurance policy which expressly covers fires set in consequence of a "riot"; and which contains no exclusion of fires caused by a "civil commotion" . . . . Therefore, we think the district judge correctly told the jury that, to constitute an insurrection or rebellion within the meaning of these policies, there must have been a movement accompanied by action specifically intended to overthrow the constituted government.
27. Home Ins. Co. v. Davila, 212 F.2d 731, 736 (lst Cir. 1954). Cases which define the word "insurrection" as something less than "forcible overthrow" for the purposes of a criminal statute making "insurrection" an offense, e.g., In re Charge to Grand Jury, 62 F. 828 (C.C.N.D. Ill. 1894), are not applicable to the meaning of "insurrection" in fire insurance policies, according to the Davila court.
28. 212 F.2d 731 (lst Cir. 1954).
29. Id. at 732-34. The court reversed a verdict for the insured on the grounds that the trial judge had instructed the jury on the evidence presented as to the Nationalists' motive and purpose in a manner too favorable to the insured. Id. at 733. However, the court approved the definition of "insurrection" employed by the trial judge, note 26 supra.
30. See, e.g., statutes cited note 18 supra; Extended Coverage Endorsement No. 4, Uniform Standard New England Form No. 758 (1962).
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may attempt to include riot damage within the list of specifically excepted perils. These possibilities, coupled with the reluctance of insurers to continue policies covering slum property and their insistence on rate increases, illustrate the inability of the present insurance system to compensate riot victims adequately.

B. Urban Area Plans

The President's Advisory Panel on Insurance in Riot-Affected Areas, headed by Governor Richard Hughes of New Jersey, has recommended the adoption of "Urban Area Plans" as a means of making private insurance available to ghetto property owners. Under this plan, insurers, who join the plan voluntarily, guarantee to insure all property in a given urban area which meets physical standards of insurability set by the insurer. Insurance brokers would be allowed to make on-the-spot investigations of slum properties and could add surcharges to cover both the cost of inspection and any physical deficiencies found. Under present state law, insurers must set uniform rates within areas delineated by the relevant state authority. The Urban Area Plans in effect allow the insurer to vary insurance rates according to the physical condition of the property in return for a guarantee that insurance will be available in slum areas despite the potential for riots. The plans, now being developed or in effect in Boston, the Watts area of Los Angeles, New York, San Francisco and Oakland, have the additional advantage of encouraging slum property owners to improve the condition of their property in order to qualify for lower insurance rates.

However, these Urban Area Plans will be of little use if insurers find it unprofitable to insure slum property, even with the permissible discrimination in rates based on physical condition, because of the high risk of riot damage liability. Insurance companies may decide, as they seem to be deciding at present, that it is better not to insure at all in a given urban area than to accept, without compensating rate increases, the uncertain risks of riot damage.

of the insurer may be found in Comment, Insurance Protection Against Civil Demonstration, supra note 18, at 712.

31. Hughes, supra note 4, at 2.

32. "[The voluntary factor . . . would be a little defect in the plan." Id. at 6. However, there is no constitutional obstacle to a state's making participation in such plans compulsory for all insurers doing business in the state. California Auto. Ass'n v. Maloney, 341 U.S. 105, 110-11 (1951).


34. See, e.g., statutes cited note 23 supra.


36. Since riot damages cannot be actuarialized, it is impossible for insurance companies
C. Assigned Risk Fire and Extended Coverage Insurance

State insurance commissions have the power to force reluctant insurers to write policies for fire and extended coverage insurance, including coverage of major riot damage, under an “assigned risk” plan. Most states have such “assigned risk” statutes for automobile liability insurance. The Supreme Court has upheld the power of the state to require insurers to accept assigned risks as a condition of doing business in the state. In California Auto. Ass’n v. Maloney, the insurer argued that the “assigned risk” plan would “force on insurers contracts that have abnormal risks and from which financial loss may be expected . . .” and thus was an unconstitutional taking under the fourteenth amendment’s due process clause. The Court, however, replied: “Appellant’s business may of course be less prosperous as a result of the regulation. That diminution in value, however, has never mounted to the dignity of a taking in the constitutional sense.”

Yet assigned risk automobile insurance policies allow the insurer to limit the amount of coverage and charge higher premiums for these risks. Thus, while the rationale of the Maloney decision can be extended to cover assigned risk fire and casualty insurance, the amount of riot protection provided by such policies may be too little, and the cost of the premiums too great, to keep merchants in the ghetto neighborhoods or attract new business to the slums.

A state could force insurers to accept assigned risk fire and casualty contracts without allowing an increase in premium rates on such contracts. As the Court said in Maloney, “[In insurance], as in the banking field, the power of the state is broad enough to take over the whole business, leaving no part for private enterprise.” Exercising its rate-making power, a state could decide that the burden of riot loss is a burden “which modern conditions have made incident to the business [of insurance].” This would ultimately place the burden of loss on all policyholders of the company, as the insurer would be forced to

to establish rates which reflect the risks they will be undertaking. The extent of the liability which they incur in a major riot such as the violence in Detroit and Newark mitigates against their trading some rate flexibility for a guarantee of coverage in riot-prone areas.

39. Id. at 108.
40. Id. at 111.
41. This permission to charge higher rates for assigned risks was a factor in the Maloney court’s decision that the plan was not “conspiratory” in violation of the Due Process Clause. Id. at 108.
42. Id. at 110.
43. See generally German Alliance Ins. Co. v. Lewis, 233 U.S. 389 (1914).
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raise rates across-the-board in order to maintain the same level of profit. Or, if an overall rate increase were not feasible or not permitted by state insurance commissions, the burden would fall on stockholders of insurance companies. In either case, losses would be spread arbitrarily and inadequately. Moreover, no “general deterrence pressure” (deterrence through the imposition of costs) would be brought to bear through rate increases or decreased stockholder dividends, since neither stockholders nor policyholders are in a position to prevent future riots. If, on the other hand, the insurer were allowed to raise his rates in the ghetto areas alone, marginal businesses might withdraw from the areas in question.

In short, private methods of compensating riot victims are inadequate in that they provide insufficient compensation (limited-coverage assigned risk plans), generate considerable external social costs (driving the merchants out of the ghetto through higher rates or inability to secure coverage), secure little or no deterrence of future riots (placing the burden on stockholders or spreading it to non-ghetto policyholders), and spread the loss arbitrarily and inadequately. Therefore, governmental or public solutions must be sought.

II. Public Methods of Allocating Riot Damage Burdens

A. Judicial Solutions

Allocating the burden of riot loss to state and local governments would be a method of spreading the loss which could incorporate deterrence of future riots, since these agencies arguably are in a position to provide the police protection and other services whose present inadequacy is a factor in the transformation of ghetto grievances into violence. However, the common law doctrine of sovereign immunity, unless abrogated by statute or judicial decision, shields state and municipal governments from liability in court for failure to protect life or property.

Without their consent, state governments are not liable for any negligence on the part of their officers, whether arising from their

45. In the case of “participating insurers,” passing on profits to policyholders in the form of dividends, rather than paying dividends on stock certificates, the policyholders again bear the burden in decreased dividends.
46. The term belongs to Professor Calabresi. Calabresi, supra note 16, at 733.
47. Chicago v. Sturges, 222 U.S. 313 (1911); Gianfortone v. New Orleans, 61 F. 64, 66 (C.C.E.D. La. 1894); see Borchard, Governmental Liability in Tort, 34 Yale L.J. 1 (1924); James, Tort Liability of Governmental Units and Their Officers, 22 U. Chi. L. Rev. 610 (1955); Vanlandingham, Local Governmental Immunity Re-examined, 61 Nw. L. Rev. 297 (1966).
“governmental” or their “proprietary” functions, under the general rule “the king can do no wrong.” Municipal corporations, on the other hand, are not “sovereign” and thus cannot take advantage of the ancient theory of monarchical immunity employed by the states. But municipal corporations have been considered immune from the consequences of their negligence with respect to their “governmental” as distinguished from their “proprietary” functions. While there is disagreement over the rationale behind this distinction, it has been suggested that municipal immunity in the performance of the municipality’s “governmental” functions is an extension of the immunity of the sovereign state, while in the performance of “proprietary” functions the municipality is not carrying out “sovereign” functions but is acting in the same capacity as a private corporation. Whatever the explanation, the courts have been woefully unable to develop a satisfactory test for distinguishing between these two classes of functions, although it is generally established that police activity falls within the “governmental” sphere and hence that local governments are immune from liability for failure to protect property.

Two states, New York and Washington, have waived by statute the state’s immunity from negligence suits, and the courts of both states have extended that waiver to abolish the immunity of local bodies. Other states have admitted some degree of liability in special

48. James, supra note 47, at 615-21.
49. Why the states were ever given the monarchical privilege of immunity is unclear. It is one of those “established doctrines” that were imported into the American common law without reasons being given or sought for. See United States v. Lee, 106 U.S. 196, 207 (1882); Borchard, supra note 47, at 2; 3 K. Davis, ADMINISTRATIVE LAW 438 (1958).
50. James, supra note 47, at 622. The history of this governmental-proprietary distinction is disputed—see Vanlandingham, supra note 47, at 247, 247—but the general view of American courts is that it descended from the 1788 English case of Russell v. Men of Devon, 2 T.R. 667, 100 Eng. Rep. 359 (1788). The doctrine of municipal immunity was imported into American jurisprudence in 1812, Mower v. The Inhabitants of Lefecster, 9 Mass. 247 (1812), and the governmental-proprietary distinction was firmly established by 1842, Bailey v. Mayor of New York, 3 Hill 531 (N.Y. Sup. Ct. 1842).
51. James, supra note 47, at 623.
52. Vanlandingham, supra note 47, at 247 & n.56, and cases cited therein.
53. “The only safe guides are precedent and the underlying attitude toward contraction or expansion of municipal liability with which the problem is approached.” James, supra note 47, at 625. James’ article contains a detailed analysis of the case law construing the distinction. An up-to-date account of the Ohio Supreme Court’s wrestling with the distinction may be found in Hack v. Salem, 174 Ohio St. 383, 189 N.E.2d 857 (1963).
55. N.Y. CONST. art. 6, § 23; N.Y. JUDICIARY LAW, COURT OF CLAIMS ACT § 8 (McKinney 1963).
situations, but none have, by statute, strayed very far from the haven of sovereign immunity. State courts, however, after decades of struggling with the governmental-proprietary distinction, have attempted to undo the injustices embedded in tort law by the judicially created doctrine of municipal immunity.

The first of what proved to be many of these attempts was the 1957 decision of the Florida Supreme Court holding a municipality liable for the wrongful death of a jail inmate who suffocated from smoke inhalation due to the negligence of the city jailor, even though the function was admittedly "governmental." The court in Hargrove v. Town of Cocoa Beach examined the precedents and questions of policy and concluded:

The modern city is in substantial measure a large business institution. While it enjoys many of the basic powers of government, it nonetheless is an incorporated organization which exercises those powers primarily for the benefit of the people within the municipal limits who enjoy the services rendered pursuant to the powers. To continue to endow this type of organization with sovereign divinity appears to us to predicate the law of the Twentieth Century upon an Eighteenth Century anachronism. Judicial consistency loses its virtue when it is degraded by the vice of injustice.

Since the Florida decision, the courts of nine other states have abolished municipal immunity. In some of these cases, the sovereign acting in [their] governmental or proprietary capacity," but the Washington Supreme Court has resurrected the common law distinction by narrowly construing the statute to maintain immunity for "discretionary acts" of public officials. Evangelical United Breth. Church v. State, 67 Wash. 2d 246, 407 P.2d 440 (1965).


59. Hargrove v. Town of Cocoa Beach, 96 So. 2d 130 (Fla. 1957).

60. Id. at 133. The sweeping abrogation of municipal immunity in Hargrove must be qualified, however, as remnants of the governmental-proprietary distinction remain. Under present Florida law, municipalities are not liable for negligence involved in "matters of judgment" by city officials, or in "legislative" or "judicial" acts. See, e.g., Modlin v. Washington Ave. Food Center, 178 So. 2d 506, 603 (Fla. App. 1965) (failure to inspect a building); Steinhardt v. North Bay Village, 132 So. 2d 764 (Fla. App. 1961) (employing untrained and incompetent fireman); Raven v. Costs, 125 So. 2d 777 (Fla. App. 1961) (providing police for a particularly dangerous intersection).

immunity of the state was abolished as well, but most state courts contented themselves with abrogating only municipal immunity. The road to municipal liability has not been an easy one, however; state legislatures in almost every state where immunity has been judicially abolished have quickly re-established at least partial immunity. For example, the legislatures of Illinois, Minnesota, Michigan, and California have reacted by restoring full or partial immunity to counties, school districts and municipal corporations. In other state supreme courts, the doctrine of municipal immunity has been examined and approved in recent decisions, usually over strong dissents. The view

63. In some cases, the courts were precluded from abolishing the immunity of the state by state constitutions conditioning the right to sue upon legislative authorization; see Muskopf v. Corning Hosp. Dist., 55 Cal. 2d 211, 216, 359 P.2d 457, 460, 11 Cal. Rptr. 89, 92 (1961); Holsz v. City of Milwaukee, 17 Wis. 2d 26, 41, 115 N.W.2d 618, 625 (1962).
expressed in these decisions is that municipal liability is a matter more appropriate for the state legislature to establish or reject, since the issue presents questions of the solvency of municipal corporations, the quasi-legislative or quasi-judicial powers exercised by such agencies of state and local government, and the ability of such entities to secure adequate liability insurance. The prompt legislative reaction in states where the courts have abrogated the traditional doctrine, evidencing disapproval of sweeping judicial abolition of municipal immunity, has also been a factor which has discouraged courts in other jurisdictions from scuttling the established precedents. Thus the trend towards judicial abrogation of immunity for cities and other local governmental units seems to have been halted in recent years by a wary "Let's let the legislature do it" attitude on the part of state judicial organs.

Moreover, riot damages would not necessarily be recovered in property owners' actions against the state or municipality even if state and local immunity were legislatively or judicially abrogated. The claimant must first prove that negligence was involved, and this requirement poses serious problems for the aggrieved property owner: how many policemen should the state have called in? how should the authorities have known about the impending violence before it erupted? how did the actions of the police spur the rioters to greater violence? Some or all of these questions must be answered before a negligence suit will be successful. Also, these issues involve areas of legislative discretion, such as the number of police to be employed in a particular neighborhood, which should not be invaded by judicial hindsight. Recognizing their inability to second-guess the wisdom of these essentially legislative decisions, courts have generally refused to allow actions which seek to hold a municipality liable for the consequences of its "discretionary acts."

Therefore, the abrogation of a state's or municipality's tort immu-

69. See Boyer v. Iowa High School Athl. Ass'n, 250 Iowa 337, 342-46, 127 N.W.2d 605, 609-11 (1964), and cases cited note 68 supra.

70. Of the nine jurisdictions which have expressly considered the question since 1964, only one has abolished immunity by judicial decision. See notes 61 & 68 supra.


nity would provide only limited help to riot victims, especially since the provision of adequate police protection is a "discretionary act." As a scheme for the compensation of riot victims, both the variegated state of the law of sovereign immunity and the limitations on recovery arising from the "discretionary acts" doctrine make state and local tort liability impracticable. In addition, such a system would be extremely costly, for it would require each property owner to pay the legal costs of maintaining the suit; this economic factor might deter many ghetto property owners from attempting to secure compensation.

B. Legislative Solutions at the Local Level

Since control of police and administrative actions involved in suppressing or deterring riots is particularly the province of the state and municipal legislative bodies, it may be appropriate to turn to these agencies for a solution. Fifteen state legislatures have enacted special liability statutes imposing liability on the municipality or county for damages caused by "riotous or tumultuous assemblages." These statutes, some of which have been in force for over a century, are descen-

73. Raven v. Coats, 125 So. 2d 770 (Fla. App. 1961) (failure to provide policeman at allegedly dangerous intersection).

74. When the damaged property is insured, the insurer would be subrogated to the victim's claim against the state or city. In this instance, there would be no deterrence to maintaining the suit.


However, three states have repealed their statutes. Louisiana's law was repealed in 1966, No. 51, [1855] La. Acts (repealed 1966).


Illinois has also repealed its statute. Wall Street Journal, Aug. 31, 1967, at 1, col. 6; the Illinois statute, § 1-4-8, [1961] Ill. Laws 576, was amended in 1965 in the aftermath of the Molitor imbroglio, discussed note 64 infra.


76. E.g., Massachusetts' statute was passed in 1839, Pennsylvania's in 1841, and New Jersey's in 1864.
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dents of the English Statute of Winchester of 1285\textsuperscript{77} and the English Riot Act of 1714.\textsuperscript{78}

However, the existing state statutes impose only a limited liability on local governments. Only Connecticut, Kansas and Wisconsin allow recovery for personal injury as well as property damage. Massachusetts, Rhode Island and Maine permit recovery of only three-fourths of the value of the property destroyed or damaged,\textsuperscript{79} and impose a $50 minimum for claims against the municipality. Connecticut, Kentucky and Maryland disallow recovery when city or police authorities could not have prevented the riot through the exercise of reasonable diligence.\textsuperscript{80}

Almost all of the statutes provide that there can be no recovery if the "claimant's negligence contributed to the destruction,"\textsuperscript{81} or if the claimant failed to exercise due diligence in protecting his property or in notifying public authorities of an impending riot,\textsuperscript{82} or if the claimant's conduct was "illegal or improper."\textsuperscript{83} The statutes have varying definitions of what constitutes a mob or riotous assembly: Kansas and Massachusetts require five or more persons, Rhode Island requires six or more, the Illinois statute before its recent repeal\textsuperscript{84} required 20 or more, and Maine requires 12 or more with clubs or weapons or 30 or more unarmed or armed. The rest are content with vague definitions like "mob, riotous assembly or assembly of persons engaged in disturbing the public peace."\textsuperscript{85} In addition, almost all of the statutes allow the local government which is forced to pay a riot damage claim to recover against the participants in the violence, in subrogation of the riot victims' claims.\textsuperscript{86}

The burden on the potential plaintiff under these statutes, except in

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\textsuperscript{77} 13 Edw. 1, c. 2, 3 (1285).
\textsuperscript{78} 1 Geo. 1, c. 5 (1714), now embodied in the Riot Damages Act of 1885, 49 & 50 Vict., c. 38 (1889); the English statutes impose absolute liability on the "police district" for riot damages. See Note, Municipal Liability for Riot Damage, 16 Harv. L.J. 459, 469-61 (1963).
\textsuperscript{80} In Maryland, the police authorities must have had the actual ability to prevent the injury complained of. Md. Ann. Code art. 82, § 2. Most states having such statutes do not require such a showing. See, e.g., Pa. Stat. Ann. tit. 16, § 11822 (1956); Allegheny County v. Gibson, 90 Pa. 397 (1879); Iola v. Birnbaum, 71 Kan. 600, 81 P. 57 (1903); Chadburne v. Newcastle, 48 N.H. 198 (1888).
\textsuperscript{83} Note 75 infra.
Connecticut, Kentucky and Maryland, is less than that required to prove negligence on the part of police authorities in a general tort action against the municipality, because the statutes provide for absolute liability for riot damage on the part of the local governmental unit in the absence of some contributory negligence or dereliction of duty on the part of the victim. This may in part be the cause of the rash of claims filed by Newark property-owners under New Jersey's riot-liability law—over 100 claims, usually with a common count alleging negligence in the failure to provide police protection, have been filed. Similar suits are being prosecuted in Boston following the violence in the Roxbury section; 125 claims totaling $1.7 million have been filed in Chicago from the 1966 rioting under the now-repealed Illinois statute; and claims have also been filed in Milwaukee and Philadelphia.

Placing the financial burden of riot loss on municipalities through such special statutes does provide a measure of deterrence of future rioting. Community liability stimulates a community concern for the maintenance of law and order and a community effort to eliminate the serious and long-standing grievances which might lead to violence if neglected too long. Yet municipal governments today do not have the resources to compensate adequately the victims of such extensive rioting as took place in Newark, Detroit and elsewhere. The shift of population and wealth to the suburbs has left the central city with a decreasing tax base at a time when demands for city services are on the rise. The fragmentation of taxing authority between center city and suburban towns and counties makes it difficult, if not impossible, for the relevant municipal government to find the revenue to pay for the sudden and heavy damage produced by major riots. Where metropolitan areas cross state boundaries the fragmentation problem is even more severe.

87. See p. 553 supra.
88. Northern Assur. Co. v. City of Milwaukee, 277 Wis. 124, 277 N.W. 149 (1936), and cases cited note 79 supra. Absolute liability was a means of deterring mob violence by encouraging strong local action in suppression of violence. Clark Thread Co. v. Freeholders of County of Hudson, 54 N.J.L. 265, 22 A. 829 (1892). In this regard, the statutes are true children of the Statute of Winchester.
90. Id.
This fragmented structure of local governmental bodies also severely reduces the deterrent effect of placing the riot burden on municipalities. Without close cooperation from adjoining suburban areas, metropolitan police forces and community agencies cannot develop the tools to enforce law and order and extinguish the fires of ghetto grievances. Such cooperation and riot-prevention planning is not well developed at this time. Therefore, local municipal governments cannot do an adequate job of deterring riots or preventing their violence, and local governments cannot pay for them once they occur. This economic reality, however it may conflict with the theoretical possibilities for riot deterrence at the local level, forces us to turn to the states and the federal government.

C. Legislative Impetus at the Federal Level

The federal government possesses the resources to compensate the victims of riot damage adequately. Placing the burden on the federal government also accomplishes the widest possible loss spreading and, therefore, imposes the smallest burden on the individual taxpayer. While state governments can draw on a wider tax base than municipalities, state revenues are often derived mainly from general or special sales, use, or gross receipts taxes which are regressive, falling hardest upon the low income groups. States have not been eager to finance the services required by the modern metropolitan city, and it is unlikely that they could alone bear the burden of extensive riot damage.

In contrast, the federal government has been active in promoting urban development and in providing financial assistance for urban programs. The so-called "war on poverty" has attacked those urban problems which are most clearly connected with the ghetto frustrations which lead to riots. A method of spreading the loss of riot damage, therefore, is an appropriate and logical continuation of any such effort to eliminate the problems of poverty.

There are several alternatives which could be employed in such a

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95. See L. Elison, supra note 94, at 137; Advisory Comm'n on Intergovernmental Relations, Metropolitan Social and Economic Disparities: Implications for Intergovernmental Relations in Central Cities and Suburbs 52-54 (1965).
96. Such intergovernmental planning between county, town and city police forces has been notably hard to obtain and jealously resisted by local communities. See M. Poel, Consolidating Police Functions in Metropolitan Areas 1-3 (1962).
97. See note 15 supra.
98. L. Elison, supra note 94, at 11.
loss-spreading scheme. The most straightforward method would be direct federal insurance of ghetto property. There is no doubt that the federal government has the power to effectuate such a plan, since in the insurance field, "the power of the state is broad enough to take over the whole business" and Congress has the power to supersede all state authority. Direct federal insurance, however, would involve high administrative costs and would sacrifice all "general deterrence pressure" to the goal of compensation.

A more practicable scheme is federal re-insurance of private fire and casualty insurers. This type of program is embodied in the Federal Flood Insurance Act of 1956. Under this act, the Federal Housing and Home Finance Administrator was empowered to provide re-insurance against flood damage, because Congress found that "insurance against certain losses resulting from this peril is not so available . . . [and] that the safeguards of insurance are a necessary adjunct of preventive and protective means and structures." Under this program, the federal government can subsidize up to 40 per cent of the cost of flood insurance premiums.

The similar unavailability of fire and casualty insurance in the ghetto has prompted the introduction of legislation to create a "Federal Re-insurance Corporation" with authority to re-insure "property and casualty" losses "attributable to riots or civil disturbances." Under this legislation, private insurers would issue policies to ghetto property owners at rates reflecting normal risks and would be re-insured by the federal government. The re-insurance premiums would be federally subsidized to the extent that they reflected the added risk of riot damage. This plan maintains an essentially private system of insurance and eliminates the administrative costs which would be incurred if the federal government directly wrote insurance contracts covering slum property, yet it shifts the risk of riot damage to the federal government.

102. United States v. South-Eastern Underwriters Ass'n, 322 U.S. 533, 553 (1944), the Court holding that the business of writing insurance policies across state lines was within the Commerce Clause and thus under congressional control. Congress, however, chose to leave insurance regulation to the states in the McCarran-Ferguson Act, 15 U.S.C. § 1011 (1963).
103. See note 46 supra.
105. Id. § 2401.
Riot Insurance

Such a plan could be combined with an "Urban Area Plan" or an "assigned risk" plan to require the availability of insurance in the ghetto, while spreading the burden of riot damage nationwide. Here too, however, the deterrence value realizable from imposing riot costs on a specific "category" of persons, i.e., persons or governmental entities who are in a position to prevent riots, is lost.

This deterrence could be realized, and adequate loss spreading accomplished, if the federal government insured state and local governments against riot damage which they agreed to bear. In other words, the state and local governments could admit liability for riot-caused damage through special statutes somewhat like the present state riot-liability statutes discussed above. They could then secure insurance from the federal government "below cost," so that the federal government would still bear the major share of the financial burden of riot loss. The premiums charged to state, local or municipal entities—the choice of which entity would be left to the state legislature—would be based on the ability of the state or local government to pay, the past riot record of the area, and other criteria reflecting the willingness of these entities to prevent riot violence. This flexibility in re-insurance rates would encourage the development of local measures to deter riots and eliminate the causes of riots, and thus help to realize the goal. A federal insurance program of this type, conditioned on the passage of state laws admitting liability, would probably be readily accepted by every state which now faces extensive riot-damage claims or mass cancellation of private insurance policies in its urban slums.

One ticklish problem remains: what is "riot-caused" damage for purposes of state liability and federal insurance? The existing state liability laws are hardly instructive since their definitions of a riot range from violence created by five or more persons to 30 or more.

108. Federal re-insurance could be conditioned on the adoption by state legislatures of "Urban Area" or "assigned risk" plans. Such a technique was employed in the Federal Flood Insurance Act of 1956, under which the Administrator was empowered to write re-insurance contracts only in those states which enacted zoning laws to restrict property development and use in flood-prone areas. 42 U.S.C. § 2411(c) (1954).

109. See Calabresi, supra note 16, at 723-34, where the same point is made regarding automobile accident insurance.

110. Such a statute should create absolute liability in the state and local government—apportioned between them as the state legislature desires—for all riot loss which is not the result of willful or wanton misconduct on the part of the property owner. (The limitation on liability is necessary to insure that property owners take reasonable steps to protect their property, but allows a lower than usual standard of care in consideration of the high risks involved in protecting one's property during a riot.)

111. Such criteria might include the degree of law enforcement agency coordination and consolidation, the proficiency of police training in riot-control techniques, and the quality of state and local anti-riot planning.

112. See p. 553 infra.
and the case law construing these statutes is spotty and inconclusive. This definition has already been accepted by one branch of Congress: "a riot is a public disturbance, involving acts of violence by assemblages of three or more persons, which poses an immediate danger of damage or injury to property or persons." This definition is generally in accord with the purposes behind the riot-liability statute, but it lowers the number of persons required to the point where the liability statute could be misused; for example, a barroom brawl, a band of teenagers "mugging" a pedestrian and a group of armed bank robbers would all qualify as "rioters" under this definition. Since the liability statute attempts to deter major riot damage and not all violent crimes against persons or property involving three or more persons, the minimum number of rioters should be set at a level, admittedly arbitrary, where the "usual" police response will not be sufficient to cope with the danger, such as 15 to 20 persons.

III. Conclusions

Since the result of allocating riot costs to property owners in the urban ghettos will be the withdrawal of business establishments and services from these neighborhoods, such an allocation cannot be made without intensifying the frustrations and economic problems of ghetto residents. Private insurance alone cannot accomplish the necessary tasks of loss spreading and deterrence. Urban area and assigned risk plans will either spread losses arbitrarily and inadequately or drive ghetto merchants from the area in question, or both. Such schemes also fail to provide incentives to the parties who are best able to deter future riots. Establishing the liability of state and municipal governments for riot damage will provide a measure of deterrence to future violence, but these entities are not financially able to bear the costs. Accordingly, a program of state and local liability with federal insurance at subsidized rates would appear to provide the best combination of loss spreading and deterrence available.


114. H.R. 421, 90th Cong., 1st Sess., at 2, lines 11-14 (1967), which passed the House of Representatives on July 19, 1967, and is now pending before the Senate Committee on the Judiciary. This is the so-called "anti-riot" bill which makes it a federal crime to use interstate commerce in the promotion or incitement of a "riot."