CALIFORNIA'S URGING TO RIOT LAW

On July 7, 1966, the California Legislature added to the Penal Code section 404.6[1] proscribing urging to riot. Ostensibly, the new section is intended to create a first line of defense against riots. It is meant to be an aggressive measure, designed to prevent the eruption of physical force or violence. It should be contrasted to the more restricted method of control, which goes into effect only after physical force or violence has erupted, or after a threat of such force or violence, accompanied by immediate power of execution. Section 404[2] of the Penal Code, which defines riot, embodies this more restricted method of control.

Section 404.6 permits the arrest and prosecution of every person who, by his acts or conduct, intends to cause a riot under circumstances where the probabilities that he will succeed are imminent. By allowing the police to arrest such a person or persons, the section intends to nip the riot-rose in the bud and thereby preserve the public peace.

The purpose of this note is threefold. First, the factors which led to the enactment of section 404.6 will be discussed to provide a background for the new section, and to illustrate to the reader that section 404.6 was intended to be used in situations where passions are aroused and where tension is so great that the circumstances are considered explosive in nature. Examples of such situations are the public disorders in the Watts district of Los Angeles during mid-August, 1965, and in the Hunters Point-Bayview and Fillmore districts of San Francisco during late September, 1966. Second, section 404.6 will be viewed in the light of laws relating to the preservation of the public peace which existed prior to the enactment of section 404.6. Two preexisting sections of the Penal Code will be examined

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[1] CAL. PEN. CODE § 404.6 provides:

> Every person who with the intent to cause a riot does an act or engages in conduct which urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property, and at a time and place and under circumstances which produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of a misdemeanor.
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> This section shall not apply to, nor in any way affect, restrain, or interfere with, otherwise lawful activity engaged in by or on behalf of a labor organization or organizations by its members, agents or employees.

(Cal. Stat. 1966, 1st Ex. Sess. ch. 166, § 1, at —, urgency, eff. July 20, 1966.)

[2] CAL. PEN. CODE § 404, "Riot," defined in text *infra*, at II. The Law Relating to the Preservation of the Public Peace Prior to the Enactment of Section 404.6, A. Section 404—Riot.

in detail to point out their adequacies or inadequacies as compared with the provisions of section 404.6. Two additional Penal Code sections will be cited to represent the law in the general area relating to the preservation of the public peace. Third, section 404.6 will be broken down into its elements, each of which will be analyzed in order to determine why that element was inserted, and what effect it will have on the section as a whole.

I. Factors Leading to Enactment of the Urging to Riot Statute

A. *The Riots in the Watts District of Los Angeles*

The most important factor or event was the eruption of violence and destruction, which lasted for 144 hours, in the predominantly Negro Watts district of Los Angeles on August 11, 1965. The incident which ignited the rioting was the arrest of a drunken Negro youth whose dangerous driving prompted another Negro to complain to a Caucasian motorcycle officer who made the arrest. During the course of the rioting 34 persons were killed,[3] 1,032 were hurt or injured,[4] and property damage approximated $40,000,000.[5] Subsequently, 3,952 persons were arrested.[6] The riots shattered the general belief in Los Angeles that the problems which had caused rioting in other cities throughout the United States were not acute in Los Angeles.

> A "statistical portrait" drawn in 1964 by the Urban League which rated American cities in terms of ten basic aspects of Negro life—such as housing, employment, income—ranked Los Angeles first among the sixty-eight cities that were examined. ("There is no question about it, this is the best city in the world," a young Negro leader told us with respect to housing for Negroes.)[7]

The question "Then why Los Angeles?" demanded an answer.

B. *The Governor's Commission on the Los Angeles Riots*

Within a week after the Watts riots had subsided, Governor Edmund G. Brown appointed a commission "to make an objective

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[3] *Violence in the City—An End or a Beginning?* Report of the Governor's Commission on the Los Angeles Riots, p. 1 (December 2, 1965) (commonly known as "The McCone Commission Report" and hereinafter cited as McCone).

[4] *Ibid.*

[5] *Ibid.*

[6] *Ibid.*

[7] *Id.* at 3.

and dispassionate study of the Los Angeles riots . . . ,"[8] charging it with the responsibility of making constructive recommendations.

> First, I believe that the Commission should prepare an accurate chronology and description of the riots and attempt to draw any lessons which may be learned from a retrospective study of these events. The purpose of this would not be to fix blame or find scapegoats, but rather to develop a comprehensive and detailed chronology and description of the disorders . . . . Second, I believe that the Commission should probe deeply the immediate and underlying causes of the riots. . . . Third, the Commission should develop recommendations for action designed to prevent a recurrence of these tragic disorders. The Commission should consider what additional can be done at any level of government or by any agency of the government to prevent a recurrence. Of equal importance, the Commission should consider whether there are steps which private citizens may take, individually or jointly, to prevent a repetition of the bloodshed.[9]

Three months later the Commission submitted its report to Governor Brown. Sixty-four meetings had been held during which time the Commission had received testimony and statements from administrators, law enforcement officers, government employees at the city, county, and state levels, residents of the riot-torn areas, leaders of minority groups, representatives from business and labor, and reports prepared by government agencies, universities, and private institutions.

C. *The Unresolved Problems and Fear of Future Violence*

The Commission found that the riots could be attributed to no single cause or circumstance, but that three fundamental issues[10] in the urban problems of disadvantaged minorities existed: employment, education, and police-community relations. After making several constructive recommendations,[11] the Commission concluded by emphasizing the need for leadership.

> Yet to do all these things [*i.e.*, implement the Commission's recom-

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[8] *Id.* at i.

[9] *Id.* at i-iii.

[10] *Id.* at 86.

[11] Some of the Commission's recommendations were: (1) improve police-community relations; (2) develop job training and placement centers; (3) reduce class size in elementary and junior high schools and employ special personnel; (4) improve transportation throughout the Los Angeles metropolitan area; (5) construct new hospital and improve medical programs; (6) liberalize credit and area requirements for FHA-insured loans; (7) exercise of constructive leadership by government, business and labor, news media, and Negroes themselves. *Id.* at 37, 47-48, 60-61, 67-68, 74, 80-86.

> mendations] and spend the sums involved will all be for naught unless the conscience of the community, the white and the Negro community together, directs a new and, we believe, revolutionary attitude towards the problem of our city. . . . The time for bitter recrimination is past. It must be replaced by thoughtful efforts on the part of all to solve the deepening problems that threaten the foundations of our society.[12]

Although Governor Brown had specifically charged the Commission to "develop recommendations for action designed to prevent a recurrence of these tragic disorders,"[13] it did not recommend any penal legislation creating new crimes against the public peace. However, the Commission was aware that the existing breach between the "advantaged" and "disadvantaged" segments of the community was so serious and potentially explosive that "unless it is checked, the August riots may seem by comparison to be only a curtain-raiser for what could blow up one day in the future."[14]

Apprised of the Commission's warning, and realizing that the myriad problems responsible for igniting the Watts riots had not been eradicated, the California Legislature enacted several Penal Code sections that made unlawful certain conduct inimical to the public peace. For example, section 241, as amended, makes it a felony to assault a peace officer or fireman who is in the performance of his duties; section 452 prohibits the unauthorized possession, manufacture, and disposition of a fire bomb. Finally, section 404.6, the subject of this note, makes "urging to riot" a misdemeanor. The legislature labeled this section an urgency measure, to take effect immediately.[15]

The Watts riots, the unresolved problems, and the fear that riots might again erupt were the factors leading to the enactment of section 404.6. Through the testimony gathered by the Governor's Com-

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[12] *Id.* at 82-83.

[13] *Id.* at iii. See part of Governor's third charge note 9 *supra.*

[14] *Id.* at 7-8.

[15] This act is an urgency measure necessary for the immediate preservation of the public peace, health or safety within the meaning of Article IV of the Constitution and shall go into immediate effect. The facts constituting such necessity are:

History and statistics indicate that the incidence of conduct proscribed by this act tends to increase during the months of the summer. The current extraordinary session of the Legislature has been protracted, to the extent that its adjournment is likely to occur during these months, and the ordinary effective date of this act is thereby deferred beyond the summer. In order that this act will be available to local law enforcement authorities at the appropriate time of year, it is necessary that this act go into effect immediately.

(Cal. Stat. 1966, 1st Ex. Sess., ch. 166, § 2, at —, urgency, eff. July 20, 1966.)

mission the causes of the riots were explored and articulated. Unresolved problems, and fear of future riots focused attention not only on the means by which the causes could be eradicated, but also on the police powers of the state which could be invoked to assure the preservation of the public peace.

II. The Law Relating to the Preservation of the Public Peace Prior to the Enactment of Section 404.6

The high number of arrests[16] made during the Watts riots is some evidence of the applicability of several preexisting Penal Code sections. The scope of this note does not permit an examination of each of these sections,[17] but four sections, three of which were invoked against the Watts rioters,[18] are worthy of consideration, for they provide a convenient vehicle for comparative analysis. While sections 404 and 406 will be compared with section 404.6, a discussion of sections 407 and 409 will elucidate the general boundaries of the law in this area prior to the enactment of section 404.6. An analysis of the preexisting Penal Code sections gives rise to the question of whether those sections were adequate to preserve the public peace, or whether they were so inadequate as to necessitate the adoption of section 404.6.

A. *Section 404—Riot*

Section 404 provides that, "Any use of force or violence, disturbing the public peace, or any threat to use such force or violence, if accompanied by immediate power of execution, by two or more persons acting together, and without authority of law is a riot." This section makes unlawful not only the *use* of force or violence, but also any *threat* to use such force or violence. In *People v. Dunn*, the Fourth Appellate District Court affirmed a conviction of riot upon the find-

16 McCone, *supra* note 3, at 1.

17 A riot of the Watts magnitude, for example, would include offenses too numerous to be discussed here. A few of the Penal Code sections invoked against Watts rioters were: § 69 (Resisting officers); § 404 (Riot); § 407 (Unlawful assembly); § 409 (Riot, rout, or unlawful assembly; remaining present after warning to disperse); § 415 (Disturbing the peace); § 417 (Drawing or exhibiting firearm); §§ 447, 447(a), 448(a) (Arson); § 459 (Burglary); §§ 484-485 (Theft); § 594 (Malicious mischief). Cal. Mil. & Vet. Code § 1600 (Curfew) was invoked many times. See generally, Klein, Ogren & Thomas, *Watts 1965: Arrests & Trials: Analysis & Statistics*, 3 Law in Trans. Q. 177, 182-183, 187.

18 Klein, Ogren & Thomas, *supra* note 17, at 179, 188. Cal. Pen. Code §§ 404, 407, and 409 accounted for 53 convictions in the Municipal Courts of Los Angeles and were among 828 cases completed as of January 20, 1966.

ing that although there was no evidence of the use of force or violence, "there was a disturbance of the public peace, and conduct on [defendants'] part, which indicated threats to use force or violence."[19] In *People v. Bundte*, the court appeared to go even further by holding that the mere inciting of a riot would be punishable under section 404, though, apparently, an actual riot must have in fact resulted.

> Regarding the guilt of all who participate in, or who promote or encourage, a riot, it is said in 8 Ruling Case Law, page 331, section 361, supported by authorities, that: ". . . All who encourage, incite, promote or take part in a riot are guilty of riot as principals; and a person, to be guilty as a rioter, need not be actively engaged, but if present giving support, countenance, etc., it is sufficient; but mere presence alone is not sufficient to constitute one a rioter."[20]

The court in *Bundte* also found that, "It was not necessary that a previous agreement between the aggressors should have been alleged, or have existed, to bring such offenses within the inhibitions of section 404."[21]

Thus, section 404, as construed in *Dunn*, would make punishable a threat to use force or violence even though the force or violence was never perpetrated, and under *Bundte*, section 404 would punish anyone who incited or promoted a riot, even though he did not actively take part in the actual force or violence, and regardless of whether a conspiracy between two or more aggressors had taken place. The essential difference between section 404 and section 404.6 is that culpability for inciting to riot, under section 404, would appear to arise only if a riot actually followed. Section 404.6, on the other hand, would proscribe the mere act of urging a riot, and the fact that a riot did or did not occur would be irrelevant. Moreover, it must be noted that section 404 is restricted in application to two or more persons acting together, whereas section 404.6 would allow the prosecution of one person who singlehandedly urges a riot.

B. *Section 406—Rout*

Section 406 provides that, "Whenever two or more persons, assembled and acting together, make any attempt or advance toward the commission of an act which would be a riot if actually committed,

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19 1 Cal. App. 2d 556, 559, 36 P.2d 1096, 1097 (1934).

20 87 Cal. App. 2d 735, 740, 197 P.2d 823, 830-31 (1948), *cert. denied*, 337 U.S. 915 (1949).

21 *Id.* at 743, 197 P.2d at 829.

such assembly is a rout." A rout, which is essentially an attempt to commit a riot, requires the presence of a specific intent to riot and a situation which ultimately falls short of actual riot. Thus, if two or more persons, having the intent to riot, commit an act which threatens further acts of force or violence, they could be guilty of rout.[22]

In contrast, section 404.6 provides that if *one* person, with the intent to cause a riot, does an act which *urges* a riot, under circumstances which produce a clear and present and immediate danger of acts of force or violence, he would be guilty of a misdemeanor. Section 406 is restricted in that it requires "two to threaten"; however, section 404.6, while requiring only "one to urge," is somewhat limited in that it also requires circumstances which produce a clear and present and immediate danger. Thus, it might be argued that the only real advantage which section 404.6 enjoys over section 406 lies in the fact that it precludes the necessity for finding more than one party to the crime.

Although the following two Penal Code sections cannot be analytically compared with section 404.6, the provisions therein do reflect the extent to which the legislature has attempted to insure the public peace.

C. *Section 407—Unlawful Assembly*

Section 407 provides that, "Whenever two or more persons assemble together to do any unlawful act, and separate without doing or advancing toward it, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly." The apparent requirement—that before there can be an unlawful assembly those who assembled to do an unlawful act must separate without doing or advancing toward it—has not always been afforded a literal interpretation by the California Supreme Court. In *Coverstone v. Davis*,[23] a group of students had gathered together for the purpose of viewing an unlawful "hot-rod" race. The court held that assembling for this illegal purpose rendered the actions of the individuals knowingly participating therein an unlawful assembly within the meaning of section 407. However, lest the words "knowingly participating therein" be interpreted as requiring an intent to assemble

[22] See People v. Judson, 11 Daly 1, 83 (New York City Ct. C.P. 1849). "A rout differs from a riot in that the persons do not actually execute their purpose, but only make some motion towards its execution; . . ." 54 C.J. RIOT § 2 (1931); Commonwealth v. Duitch, 165 Pa. Super. 187, 190, 67 A.2d 821, 822 (1949).

[23] 38 Cal. 2d 315, 239 P.2d 876, *cert. denied*, 344 U.S. 840 (1952).

unlawfully, the general rule appears to be that, "the time when the intent is formed is immaterial. In fact it is not necessary that a specific intent of any sort exist in the minds of the persons assembled in order to constitute the offense."[24]

A holding similar to *Coverstone* was reached in *In re Bacon.* There, the First District Court of Appeal sustained a conviction of unlawful assembly against a group of minors who staged a "sit-in" demonstration at the University of California. The court stated:

> [An] unlawful assembly occurred . . . when the group of protesters knowingly remained in Sproul Hall after it became closed to the public and after having been warned to leave by the custodian of the building. The record is clear that appellants were present at the place of an unlawful assembly.[25]

The construction placed upon section 407 by the courts in *Coverstone* and *Bacon* makes the section more effective in application than its wording would indicate.

D. *Section 409—Riot, Rout or Unlawful Assembly; Remaining Present After Warning To Disperse*

Section 409 provides that, "Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor." Though applicable only after the commission of some other criminal act, this section allows the police to reinstate the public peace and to prevent further breaches of the peace by requiring those present without a valid reason or purpose to disperse from the scene of the public disorder.

In re Bacon also dispelled the idea that prosecutions for violation of section 409 required participation by the accused in the original criminal offense. There, a police officer had ordered the students to disperse after the custodian had asked them to leave, and the court, in finding a violation of section 409, stated, "Accordingly, if they did not disperse after the assembly was lawfully warned to disperse appellants were in violation of section 409 even though they may not have participated in the assembly."[26] Hence, to successfully prosecute violators of section 409, the defendant need not be shown to have par-

[24] 43 CAL. JUR. 2d *Unlawful Assembly* § 10 (1966).
[25] 240 Adv. Cal. App. 34, 50, 49 Cal. Rptr. 322, 331 (1966).
[26] *Id.* at 49-50, 49 Cal. Rptr. at 331.

ticipated in an unlawful assembly so long as he remained at the scene of the public disorder after having been lawfully warned to disperse. The words "lawfully warned to disperse" were interpreted in *People v. Sklar* to provide that, "a violation of § 409 cannot occur until the command mentioned in § 726[27] has been given. . . . The list of officers who are authorized by § 726 to give this command . . . may be held by construction to include the police."[28] Accordingly, it may be noted that section 409 would punish anyone who failed to disperse, and that the section would also protect innocent bystanders from oppressive conduct on the part of police officers. However, after the warning has been given, the police need not declare their intention to make an arrest before they actually do so.[29]

In re Bacon is also noteworthy in that section 409 was subjected to two constitutional attacks by the protesters-appellants. Appellants contended that section 409 violated due process of law as guaranteed by the fourteenth amendment to the United States Constitution because it was stated in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application.[30] In rejecting this contention, the court stated that section 409 "uses language which is clear and unambiguous."[31] The appellants' second contention—that section 409 deprived them of their rights of free speech, assembly, and petition for redress of grievances—was based upon the decision in *Cox v. Louisiana*.[32] The court, however, concluded that the reliance on *Cox* was misplaced, pointing out that the statute under attack, as opposed to the statute in *Cox*, was reason-

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27 CAL. PEN. CODE § 726 provides:

> Where any number of persons . . . are unlawfully or riotously assembled, the sheriff of the county and his deputies, the officials governing the town or city, or the judges of the justice courts and constables thereof, or any of them, must go among the persons assembled, or as near to them as possible, and command them, in the name of the State, immediately to disperse.

28 111 Cal. App. 776, 778, 292 Pac. 1068 (1930).

29 People v. Anderson, 117 Cal. App. 763, 772, 1 P.2d 64, 68 (1931). Where a speaker committed a misdemeanor in the presence of officers by refusing to move on, the officers could arrest the speaker without a warrant or a previous declaration of their intention to do so, although the speaker's listeners and not the speaker were blocking traffic.

30 See Winters v. New York, 333 U.S. 507, 509-10 (1948); Lanzetta v. New Jersey, 306 U.S. 451, 453 (1939); Connally v. General Const. Co., 269 U.S. 385, 391 (1926); *In re* Newbern, 53 Cal. 2d 786, 792, 350 P.2d 116, 120, 3 Cal. Rptr. 364, 368 (1960); People v. McCaughan, 49 Cal. 2d 409, 414, 317 P.2d 974, 978 (1957).

31 240 Adv. Cal. App. at 56, 49 Cal. Rptr. at 335.

32 Cox v. Louisiana [Cox I—No. 24, 1964 Term], 379 U.S. 536 (1965); Cox v. Louisiana [Cox II—No. 49, 1964 Term], 379 U.S. 559 (1965). See notes 55, 58 *infra* and accompanying text.

ably clear as to the proscribed conduct, and that the interest in protecting property outweighed appellants' constitutional right of free assembly.

> In the light of the principles declared in *Cox*, and the many decisions therein cited, we are led to the conclusion that although appellants undoubtedly possessed the constitutional right to express their grievances, these constitutional rights did not abrogate appellants' duty to refrain from violating laws of our state which are clear as to the conduct which they prohibit, which reasonably provide for the protection of the public and of public property and which are not arbitrarily applied by the authorities.[33]

The conclusion which may be drawn from the *Bacon* court's statements is that the protection of society, as provided for by section 409, takes precedence over the rights of individuals. This is true because section 409 is clear as to the conduct it prohibits, and because it is not subject to arbitrary application.

E. *Effectiveness of Sections 404, 406, 407, and 409*

The four Penal Code sections that have been examined illustrate that California did have laws relating to the preservation of the public peace before the enactment of section 404.6. Case decisions indicate that each section has been generally effective against the act or conduct which it proscribes.[34] However, sections 404, 406, and 407 are restricted in that all three require that two or more persons either be actively participating in, or be promoting, encouraging, or inciting the conduct before it becomes unlawful. Although section 409 may be invoked against only one individual if he fails to disperse, it is applicable only after an actual riot, rout, or unlawful assembly has occurred. Thus, if there existed an inadequacy in the above Penal Code sections, which necessitated the enactment of section 404.6, that inadequacy would have been those sections' restricted applicability to two or more persons.

Section 404.6 was earlier described as an aggressive measure designed to prevent the eruption of force or violence. Its aggressiveness, in part, is inherent in the wording "every person," which proscribes one individual, acting alone, from committing an act which urges others to riot.

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[33] 240 Adv. Cal. App. at 58, 49 Cal. Rptr. at 336.

[34] Rees v. City of Palm Springs, 188 Cal. App. 2d 339, 344, 10 Cal. Rptr. 386, 390 (1961) (*dictum*).

III. The Elements of Section 404.6—Urging to Riot

> Every person who with the intent to cause a riot does an act or engages in conduct which urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property, and at a time and place and under circumstances which produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of a misdemeanor. . . .[35]

Section 404.6 consists of three elements: (1) the intent to cause a riot; (2) an act or conduct which urges a riot; and (3) a time and place and circumstances which produce a clear and present and immediate danger. So that the effectiveness of section 404.6 may be evaluated, each of the constituent elements must be individually analyzed. The validity of possible constitutional attacks against the individual elements and the section as a whole will be important to the analyses.

A. *The First Element*

The first element of section 404.6 requires a specific intent, *i.e.*, the "intent to *cause* a riot." This specific intent should be distinguished from an "intent to riot," for it would appear that one could intend to participate in a riot without intending to *cause* a riot. Consequently, the first element is restrictive in that the mere intent to participate in a riot is not culpable under section 404.6. The specific intent requirement would also appear to be antithetical to the corresponding requirement in section 407 (as an example) wherein "knowingly" participating in an assembly for an unlawful purpose is deemed criminal, regardless of the presence or absence of a specific intent to participate in the assembly. The mere realization by the accused that he was part of this assembly would be sufficient to bring him within the prohibitions of section 407. Section 404.6 cannot be so broadly applied.

The "intent to cause a riot" requirement also sets section 404.6 apart from section 404, which does not require an intent to riot but

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[35] Cal. Pen. Code § 404.6, para. 2, is outside the scope of this note. It provides:

> This section shall not apply to, nor in any way affect, restrain, or interfere with, otherwise lawful activity engaged in by or on behalf of a labor organization or organizations by its members, agents, or employees.

Los Angeles Municipal Court, Cases 752342 and 752343 (Nov. 21, 1966), in 44 Metropolitan News (Los Angeles) No. 212, p. 1, col. 2, at 8, col. 1 (Nov. 23, 1966) (para. 2 is mere surplusage; it does not exclude labor from the provisions of section 404.6 and thus does not violate the equal protection clause of the United States Constitution or the prohibitions against the granting of special privileges and immunities of the California Constitution).

only a general *mens rea.* Thus, under section 404 if two or more persons possessing the "intent to assault" other persons commit acts of force or violence which disturb the public peace, they are guilty of riot, even though they do not possess the intent to riot.

The insertion of the specific intent requirement as the first element of section 404.6 appears to be somewhat anomalous when aligned with the parent section—404—which has no such requirement. The anomaly is possibly due to the fact that section 404.6, unlike section 404, can be invoked against one individual; consequently, greater protection is to be afforded a defendant prosecuted under section 404.6. Unquestionably, the burden of proving a specific intent is more exacting than that of a general *mens rea.* However, if the specific intent requirement was inserted to protect the defendant, its insertion is incongruous with the purpose of section 404.6 to prevent one individual, acting alone, from urging others to riot.

B. *The Second Element*

The second element of section 404.6 is an "act or conduct which urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property." An understanding of the second element can be achieved only by properly interpreting the word "urges" within its context. When section 404.6 was first introduced in the California Legislature, 1966 First Extraordinary Session, as Assembly Bill No. 201 it was entitled: "An act . . . relating to incitement to riot . . . ." Since this title was retained in West's Penal Code,[36] it might be inferred that the words "urges" and "incites" were meant to be interchangeable. If one inserts "incites" for "urges," the second element would then consist of an act or conduct "which incites a riot, or incites others to commit acts of force or violence, or the burning or destroying of property."

Nevertheless, this interchange does little by way of explicitly defining the verb, "to urge," since there were no prior California statutes which used the word "incite." Furthermore, the only reported California case[37] which used "incite" used it in a wholly different context. There is only a handful of reported decisions in other jurisdic-

[36] Cal. Pen. Code § 404.6 is entitled "Incitement to riot" in West's Cal. Pen. Code (Supp. 1966) but is entitled "Urging to riot, or burning or destroying of property" in Deering's Cal. Pen. Code (Supp. 1966). Section 404.6 is commonly referred to as an inciting to riot statute, but the actual wording is "urges" and not "incites."

[37] Piluso v. Spencer, 36 Cal. App. 416, 418, 172 Pac. 412, 414 (1918). In an action for violation of the "personal rights" of the plaintiff brought under Cal. Civ. Code § 52, plaintiff alleged defendant had incited innkeeper to eject plaintiff.

tions which utilized "incite" in the same context as section 404.6; and one court which attempted to define incitement to riot merely inserted "lead" or "urge" for the word "incite."[38] Finding no apparent solace in equating "incites" with "urges," attention must be directed elsewhere in order to elucidate the meaning of this second element.

The Merriam-Webster *Third New International Dictionary* definition of "urge" includes, *inter alia*, "solicit or entreat earnestly." Perhaps then, the second element of section 404.6 might best be interpreted by drawing an analogy to the substantive crime of solicitation. In *State v. Blechman*, the Supreme Court of New Jersey, in commenting upon solicitation, stated: "At common law, it is a misdemeanor for one to counsel, incite or solicit another to commit either a felony or a misdemeanor . . . even though the solicitation is of no effect, and the crime counselled is not committed. The gist of the offense is the solicitation."[39] It may be argued that the counselling, inciting, or soliciting, as enumerated by the New Jersey court, encompasses essentially the same type of conduct which is intended to be reached by the second element of section 404.6. However, unless the verb "to urge" is precisely defined to mean "to incite" or "to solicit," the conduct proscribed by the second element of section 404.6 would remain somewhat vague and unclear. The second element would then be subject to a constitutional attack on the ground of vagueness.[40] Due to the possible vagueness of the second element the question may be posed whether the California Legislature should have enacted a "solicitation to riot" section in its attempt to devise a method for preserving the public peace.

The argument for a "solicitation to riot" section, as opposed to the "urging to riot" offense defined by section 404.6, has several bases. First, the crime of solicitation resembles the common law crimes of riot and inciting to riot which had no specific intent requirement. Second, Penal Code section 653(*f*) already makes the solicitation of crimes such as murder, robbery, burglary, grand theft, and rape a crime in itself. Section 653 (*f*) could possibly be expanded to proscribe solicitation to riot, or more appropriately, an entirely new section might be inserted in the Penal Code under Title II, Crimes Against the Peace. Third, under a "solicitation to riot" section, every

38 Commonwealth v. Hayes, 205 Pa. Super. 338, 209 A.2d 38, 39 (1965).

39 135 N.J.L. 99, 50 A.2d 152, 154 (1946); 22 C.J.S. *Criminal Law* § 78 (1961). "Solicitation . . . may consist of any conduct conveying the idea of an invitation to commit a crime."

40 See cases cited note 30 *supra* and accompanying text.

person who solicits another to riot could be prosecuted even though the solicitation was of no effect.[41] If a riot actually erupted, every person who had solicited others to riot could be prosecuted for riot as a principal.[42] Fourth, whereas section 404.6 is intended to be applied to explosive situations involving the inciting of large groups or crowds, the "solicitation to riot" section could have broader effect in that it could be applied to much smaller groups in comparatively tranquil situations. Fifth, "solicitation," because it is a common law crime, would be less vulnerable to a constitutional attack for vagueness than section 404.6 which utilizes the word "urges," the word in itself being relatively undefined and unknown both to the common law and recent case law.[43]

In addition to the problem of interpreting the word "urges," the second element presents another matter for consideration. The element consists of an "act or conduct which urges a riot," and ostensibly, this act or conduct could be any overt manifestation, including spoken or written words.[44] If the second element could be interpreted to include with its provisions "speech which urges a riot," section 404.6, in its entirety, might well be viewed as an attempt by the state to restrict the freedom of speech. This attempt must necessarily be considered in light of the constitutional guarantees enumerated in the first and fourteenth amendments to the United States Constitu-

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41 People v. Burt, 45 Cal. 2d 311, 288 P.2d 503 (1955). "[T]he crime . . . does not require the commission of any overt art [act?]. It is complete when the solicitation is made, and it is immaterial that the object of the solicitation is never consummated, or that no steps are taken towards its consummation. . . ." *Id.* at 314, 288 P.2d at 505. See People v. Haley, 102 Cal. App. 2d 159, 165, 227 P.2d 48, 51 (1951); People v. Gray, 52 Cal. App. 2d 620, 653, 127 P.2d 72, 90 (1942).

42 14 CAL. JUR. 2d *Criminal Law* § 39 (1954). A person who solicits the commission of a crime, which is actually committed, is liable as a principal under Cal. Pen. Code § 31 which provides:

> All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed.

43 Los Angeles Municipal Court, Cases 752342 and 752343 (Nov. 21, 1966), in 44 Metropolitan News (Los Angeles) No. 212, p. 1, col. 2, at 8, col. 1 (Nov. 23, 1966), held that:

> Paragraph one [of Cal. Pen. Code § 404.6] is a lawful exercise of the police power and is not an unconstitutional deprivation of the rights of free speech, or assembly. . . .
>
> The section is not unconstitutionally vague nor uncertain. The verb "urges" may be defined "to present in an earnest or pressing manner; insist upon; advocate; demand; to exhort; to goad." The law is by its terms reasonably clear of meaning.

44 See, *e.g.*, State v. Cole, 249 N.C. 733, 107 S.E.2d 732, 742 (1959); 77 C.J.S. RIOT § 1 (1952); Commonwealth v. Apriceno, 131 Pa. Super. 158, 198 Atl. 515, 517 (1938).

tion. Thus, the California Legislature was undoubtedly confronted with a constitutional problem in drafting the second element of section 404.6. Essentially, this problem was to proscribe acts or conduct, which may consist of speech, while at the same time avoiding unconstitutional restrictions on the exercise of that speech. In searching for appropriate guidelines, the legislature very likely resorted to recent decisions of the United States Supreme Court.

Perhaps the most influential decision was that of *Terminiello v. Chicago*.[45] Terminiello had spoken at a meeting under the auspices of the Christian Veterans of America. A crowd of several hundred persons had gathered outside the auditorium to protest the meeting. Upon leaving the auditorium Terminiello criticized various political groups, and his speech, which included anti-Jewish epithets, provoked from the crowd expressions of immediate anger, unrest, and alarm. At trial the jury was instructed that it might find Terminiello guilty of disorderly conduct if his behavior was of the type that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[46] On appeal, the Supreme Court reversed his conviction by finding that the ordinance,[47] as construed by the trial court, invaded the province of free speech. In holding that even the most provocative speech should be constitutionally protected, Mr. Justice Douglas, writing for the Court, argued that restrictions should not be placed on the freedom of speech unless the speech produces a clear and present danger of a serious substantive evil.

> [A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of *speech,* though not absolute . . . is nevertheless *protected* against censorship or punishment, *unless* shown *likely to produce a clear and present danger of a serious substantive evil*[48] that rises far above public inconvenience, annoy-

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45 337 U.S. 1 (1949).

46 *Id.* at 1.

47 *Id.* at 2. The ordinance provided: "All persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance of the peace . . . shall be deemed guilty of disorderly conduct." CHICAGO, ILL., MUNICIPAL CODE § 193-1 (1939).

48 Justice Holmes first espoused the clear and present danger test in *dictum* in Schenck v. United States, 249 U.S. 47 (1919), when the Court upheld a conviction of conspiracy to violate the Espionage Act of June 15, 1917, 40 Stat. 217, 219. Speaking for the Court, 249 U.S. at 51-52, Justice Holmes stated:

> ance or unrest. . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas, either by legislatures, courts, or dominant political or community groups.[49]

The conclusions drawn by Justice Douglas are clear. First, the freedom of speech is reaffirmed as a basic and fundamental freedom. Second, though this freedom is not absolute, any legislative attempt to restrict the freedom of speech must be couched in terms that show, on their face, that the speech sought to be restricted would "likely produce a clear and present danger of a serious substantive evil." When the proscribed act or conduct consists of speech, the second element of section 404.6 would appear to be a restriction on the freedom of speech.

C. *The Third Element*

As Justice Douglas noted in *Terminiello*, the constitutional protection of speech does not extend to speech which is likely to produce a clear and present danger of a serious substantive evil. Accordingly, the California Legislature set about to qualify the first two elements of section 404.6 by requiring that the intent to cause a riot and the act or conduct accompanying that intent occur "at a time and place under circumstances which produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property." Nevertheless, Justice Douglas' qualification on the freedom of speech is substantially different from the qualification set forth by the California Legislature. The *Terminiello* qualification on free speech is predicated on the *speech,* itself, rather than the circumstances. But, in the third element of section 404.6 the legislature has provided that the *circumstances,* alone, can give rise to the "clear and present danger." The argument that follows will point out the constitutional impact of section 404.6's "clear and present danger" test.

While the third element of section 404.6 may be divided into three basic phrases,[50] in light of the *Terminiello* decision it would appear

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> [The] character of every act depends upon the circumstances in which it is done. . . . The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that have all the effect of force. . . . The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.

[49] Terminiello v. Chicago, 337 U.S. at 4-5. (Emphasis added.)

[50] The three phrases of the third element are: (1) "at a time and place and under

that the "clear and present and immediate danger" phrase was intended by the legislature to be the focal point in the third element. It is well to note that the word "immediate" has been added to the traditional "clear and present danger" phrase, but it should probably be ignored as being redundant.[51] The first phrase of the third element—"at a time and place and under circumstances which produce" —and the third phrase—"of acts of force or violence or the burning or destroying of property"—define the conditions under which the "clear and present and immediate danger" test is to take effect. More precisely, the first phrase suggests that the time, the place, and the existent circumstances in and of themselves are to create the danger which is so "clear and present and immediate" that it warrants a restriction on the freedom of speech. Likewise, the third phrase defines the requisite "serious substantive evil," which *Terminiello* required be imminent before the restriction could be imposed. Clearly, these "acts of force or violence or the burning or destroying of property" constitute a "serious substantive evil that rises far above public inconvenience, annoyance or unrest."

Considering each of the three phrases separately raises no particular constitutional objection. However, conceding that the third element of section 404.6 represents a good faith attempt on the part of the legislature to adhere to the constitutional guidelines as set out in *Terminiello*, the three phrases when read together appear to contain an inherent defect, rendering the entire statute unconstitutional. The "clear and present danger" test as originally promulgated by Mr. Justice Holmes in *Schenck v. United States* permits the restriction of free speech only if "the words used are used in such circumstances and are of such a nature as to create a clear and present danger."[52] The wording of the third element of section 404.6, however, would permit the restriction of speech if the *time*, the *place*, and the *circumstances*, as opposed to the *speech*, itself, create the

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circumstances which produce" (2) "a clear and present and immediate danger" (3) "of acts of force or violence or the burning or destroying of property."

[51] The writer contends that the word "immediate" is redundant of the word "imminent," which has been an element of the clear and present danger test since Whitney v. California, 274 U.S. 357 (1927) (Brandeis, J., concurring). See note 52 *infra*.

[52] 249 U.S. at 52. See Whitney v. California, 274 U.S. at 373, 377 wherein Justice Brandeis declared:

> That the necessity which is essential to a valid restriction does not exist unless speech would produce, or is intended to produce, a clear and imminent danger of some substantive evil which the State constitutionally may seek to prevent has been settled. . . . [N]o danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion.

necessary danger. Therefore, the writer contends that the entire third element, which makes the circumstances rather than the speech the creator of the clear and present danger, would be unconstitutional in light of the *Terminiello* decision. Furthermore, since the third element is inextricably connected with the other two elements of section 404.6, the entire statute is vulnerable to constitutional attack.

The writer would argue also that the statute is unconstitutional on another ground. By virtue of the due process clause of the federal constitution, a statute will succumb to a constitutional attack if it is overly broad in scope.[53] It is submitted that the language in the third element in section 404.6 lies within this constitutional prohibition.

A recent case in which a disturbing the peace statute was declared unconstitutionally broad in scope is *Cox v. Louisiana.*[54] In that case the defendant, Cox, had led a civil rights' demonstration protesting segregation. The demonstration was prompted by the arrest and imprisonment of twenty-three Negro students, who had picketed stores maintaining segregated lunch counters. At the conclusion of the demonstration, Cox had exhorted his followers to engage in "sit-ins" in segregated restaurants. Cox was arrested and charged with four offenses under Louisiana law—criminal conspiracy, disturbing the peace, obstructing public passages, and picketing before a courthouse. He was acquitted of criminal conspiracy but convicted of the other offenses.

In *Cox I*, the Court, speaking through Mr. Justice Goldberg, reversed the disturbing the peace conviction upon the ground that the statute,[55] as interpreted by the Louisiana Supreme Court, was unconstitutionally broad in scope. Justice Goldberg ruled that if the statute

[53] A statute is subject to attack for being overly broad (overbreadth) if it sweeps within its ambit constitutionally protected behavior. See, *e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940) (statute void on its face for prohibiting going near business premises with intent to publicize labor dispute or persuade others not to trade with the business); Cantwell v. Connecticut, 310 U.S. 296, 306-307 (1940); Cox v. Louisiana, 379 U.S. 536 (1965), notes 54-55, 58 *infra* and accompanying text; Sperber & Solomon, *Preserving the Peace: Vagueness, Overbreadth and Free Speech*, 3 LAW IN TRANS Q. 161.

[54] [Cox I], 379 U.S. 536.

[55] *Id.* at 544. The statute provided:

> Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregates with others . . . in or upon . . . a public street or public highway, or upon a public sidewalk, or any other public place or building . . . and who fails or refuses to disperse and move on. . . . when ordered so to do by any law enforcement officer . . . shall be guilty of disturbing the peace.

LA. REV. STAT. § 14:103.1 (Cum. Supp. 1962).

swept within its scope constitutionally free speech and assembly, then that statute must fall.

> The statutory crime[56] consists of two elements: (1) congregating with others "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned. . . ." While the second part of this offense is narrow and specific, the first element is not. . . . [It] would allow persons to be punished for peacefully expressing unpopular views. . . . Therefore, as in *Terminiello* and *Edwards*[57] the conviction under this statute must be reversed as the statute is unconstitutional in that it sweeps within its broad scope activities that are constitutionally free speech and assembly. . . ."[58]

In *Cox II*, after reversing the conviction of picketing before a courthouse, Justice Goldberg reiterated the proper relationship between free speech and the statutes which would restrict it.

> Nothing we have said here . . . is to be interpreted as sanctioning riotous conduct in any form or demonstrations, however peaceful their conduct or commendable their motives, which conflict with properly drawn statutes and ordinances designed to promote law and order, [and to] protect the community against disorder. . . . We reaffirm the repeated holdings of this Court that our constitutional command of free speech and assembly is basic and fundamental and encompasses peaceful social protest, so important to the preservation of the freedoms treasured in a democratic society. We also reaffirm that there is no place for violence in a democratic society dedicated to liberty under law, and that the right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations. There is an equally plain requirement for laws and regulations to be drawn so as to give citizens fair warning as to what is illegal; for regulations of conduct that involves freedom of speech and assembly not to be so broad in scope as to stifle First Amendment freedoms, which "need breathing room to survive," *NAACP v. Burton*, 371 U.S. 415, 433; for appropriate limitations on the discretion of public officials where speech and assembly are intertwined with regulated conduct. . . . We believe that all of these requirements can be met in an ordered society dedicated to liberty. . . .[59]

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56 *Ibid.*

57 372 U.S. 229 (1963) (breach of the peace statute overly broad as construed and thereby infringed upon constitutionally protected rights of speech, assembly, and redress of grievances).

58 Cox v. Louisiana [Cox I], 379 U.S. at 551.

59 Cox v. Louisiana [Cox II], 379 U.S. at 574.

While reaffirming the basic and fundamental right of free speech, Justice Goldberg also reaffirmed the right of society to function free from violence. The conflict arises when these two rights clash. The resolution of this conflict, in Justice Goldberg's view, lies in having the citizen abide by all "valid laws and regulations." To determine the validity of the law, he offers three criteria: (1) the law must give fair warning as to what is illegal; (2) it must not be overly broad in scope; and (3) it must place appropriate limitations on the discretion of public officials especially where speech and assembly are inextricably connected with the regulated conduct.

While section 404.6 might be subject to attack on each of these three criteria, for the sake of brevity the writer subjects only the third element to constitutional attack, and then only upon the second and third of Justice Goldberg's criteria. The decision rendered by the Second District Court of Appeal in *People v. Huss*[60] suggests that section 404.6 might be judged unconstitutionally broad in scope if applied against persons merely espousing an unpopular view, albeit under circumstances which produce a clear and present danger of a serious substantive evil. The *Huss* decision also indicates that section 404.6 would be declared unconstitutional in that it places no appropriate restrictions upon the discretion of public officials. In *Huss*, five members of the American Nazi Party were convicted of conspiracy to riot and assault. Dressed in Nazi uniforms with swastika armbands and steel helmets, they had picketed a celebration of the fifteenth anniversary of Israel. They carried placards mounted on poles some of which read: "Zionism is Treason"; "85% of the Atom Spies were Radical Jews"; "Sig Heil, UAR." The celebrants were mostly Jewish, and as the Nazis passed through the crowd, fighting broke out and general disorder ensued. Under these facts, the writer contends that a clear and present danger of a serious substantive evil existed.

On appeal, the defendants, relying on the *Terminiello* decision, argued that the trial court's instructions allowed the jury to find a conspiracy to riot if defendants knew their signs would tend to arouse or inflame the Jewish celebrants. The appellate court noted that notwithstanding the provocative nature of the picketing, such picketing cannot be constitutionally restricted simply because it might invite dispute.

> We think the existence of a constitutional right to speak, demonstrate, and picket on behalf of causes known to be highly offensive

[60] 241 Adv. Cal. App. 455, 51 Cal. Rptr. 56 (1966).

> to those picketed was settled in *Terminiello*, where the court upheld such a right in sweeping terms and ruled under the First Amendment it cannot be made an offense merely to invite dispute, or to bring about a condition of unrest.[61]

Thus, it would appear that the *Terminiello* decision is being applied in full force in California, and that speech will be afforded protection even though "known to be highly offensive." Likewise, the *Terminiello* and *Huss* decisions appear to be in substantial agreement on several points. First, the constitutionally protected speech which invited dispute and brought about a condition of unrest actually culminated in physical force and violence. Second, the acts of force and violence in both cases would appear to be a serious substantive evil of which there was a clear and present danger. Third, it would seem that if both courts had found that the speech, itself, had produced the clear and present danger, the convictions would have been upheld. Apparently then, the logical conclusion to be drawn from the *Terminiello* and *Huss* decisions is that the circumstances rather than the speech created the clear and present danger, and that a clear and present danger created solely by the circumstances does not permit statutory restrictions on the freedom of speech. Therefore, this writer submits that section 404.6 would be declared unconstitutionally broad in scope if applied in a *Terminiello-Huss*-type situation, because section 404.6, like the statute in *Cox I*, would "allow persons to be punished for peacefully expressing unpopular views."[62]

However, the reversal in *Huss* is the more noteworthy because the court found that the defendants' speech, *i.e.*, picketing, served no laudable purpose, but that the real motive for defendants' conduct was "mischief-making and quarrelsomeness."[63] The court, by its own admission, had some difficulty in connecting the defendants' speech with the laudable aspects of free speech, such speech traditionally having been involved with attempts to broaden civil rights and to secure equal treatment for different races. The court resolved its own difficulty by looking upon speech "as a tool that is neutral, good or bad according to its use . . . ."[64] But, in restricting this "bad speech" the court found two formidable and inherent difficulties. The court's learned discussion of these two difficulties and the conclusion it draws will probably be the basis for the California courts to declare section 404.6 unconstitutional. The *Huss* court stated:

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[61] *Id.* at 470, 51 Cal. Rptr. at 59-60.

[62] Cox v. Louisiana [Cox I], 379 U.S. at 551. See discussion in text accompanying note 58 *supra.*

[63] People v. Huss, 241 Adv. Cal. App. at 461, 51 Cal. Rptr. at 60.

[64] *Ibid.*

> One difficulty is that of boundaries—how [to?] determine what advocacy is permissible dissent and what is pernicious mischief beyond the pale. . . . In an attempt to suppress subversive, pernicious, and antisocial doctrines inevitably we find ourselves enmeshed in the task of establishing the boundaries for orthodox thought and drawing the line between the thinkable and the unthinkable.
>
> The second difficulty is that of censors. Who is to make the determination? Courts? Juries? Legislators? Police? Prevailing public opinion? Who has the final say when censors disagree? . . .
>
> Because of the difficulties in defining orthodoxy and determining who shall define it, it has always seemed preferable in the normal operation of our democratic society to put up with a considerable amount of bad speech in public places from demagogues and psychopaths rather than undertake to regulate the content of speech and determine which slogans and doctrines will be allowed the freedom of the market place. Speech is free under the First Amendment, not so much because free speech is inherently good as because its suppression is inherently bad. In the American garden we let a hundred flowers bloom, knowing that among them may be skunkweed and thistle, dandelion and poison oak. For us excess of speech involves a lesser evil than does restriction on its exercise. In our Eden, Satan and the Archangel Gabriel may both be heard.[65]

Although the court in the *Huss* case was directing its remarks toward a conspiracy to riot conviction, those remarks would be equally appropriate to a conviction under section 404.6. First, what are the prescribed boundaries of section 404.6? It might be argued that the "boundaries" of section 404.6 are prescribed by the "clear and present and immediate danger" test, but the writer has shown that section 404.6 would misapply that test and would consequently unduly restrict constitutionally protected speech. Therefore, section 404.6 would be unconstitutional under Justice Goldberg's second criteria—a valid law is not overly broad in scope. Second, who are the "censors"? The only answer is the police, who, before making an arrest, would have to determine whether or not the speech should be restricted. Section 404.6 attempts to limit police discretion by requiring that the time, the place, and the circumstances be of such a nature as to create a clear and present and immediate danger. However, such a limitation is inappropriate in that it would allow the police to restrict the freedom of speech even though the speech itself did not create the clear and present and immediate danger. By the same token, it would appear that the police could arbitrarily determine that the time, the place, and the circumstances warrant the restriction of the freedom of speech. Therefore, section 404.6 would be un-

[65] *Id.* at 461-62, 51 Cal. Rptr. at 60-61.

constitutional under Justice Goldberg's third criteria—a valid law places appropriate limitations on the discretion of public officials.

IV. CONCLUSION

The Watts riots and the subsequent fear that riots might again erupt led to the enactment of section 404.6. Section 404.6 is intended to bolster the preexisting law by allowing the police to arrest every individual who is "urging" acts that would disturb the public peace. While the preservation of the public peace is a legitimate end, the means provided by section 404.6 appear to lack a rational connection to that end due to vagueness, overbreadth, and unlimited discretion in public officials. Unless the collective right of society to exist free from violence is to completely overshadow the individual's right of freedom of speech, section 404.6 should be declared unconstitutional.

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