AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 9: Liberalism Divided – Individual Rights/Personal Freedom and Public Morality

**Ervin v. State of Wisconsin, 41 Wis.2d 194 (WI 1968)**

*A Wisconsin state statute authorized city mayors to declare emergencies and in such emergencies to take various actions, including prohibiting “all unnecessary traffic, both vehicular and pedestrian.” On July 1967, the mayor of Milwaukee declared a state of emergency due to rioting and closed all streets and sidewalks to vehicular and pedestrian traffic after 7:00 pm, prohibited the sale of firearms, and closed all gas stations.*

*William Ervin was arrested for walking on a city street at 8:25 pm. When searched, Ervin had no weapons but was in possession of marijuana. He was convicted for possession of marijuana. He appealed on the grounds that the arrest and search were illegal because the curfew proclamation was unconstitutional. The state supreme court unanimously affirmed the conviction and upheld the constitutionality of the curfew as within the police powers of the state and not an undue interference with the freedom of movement.*

Justice HANSEN.

. . . .

[I]t is neither possible nor necessary to recreate the combination of widespread lootings, sniping from rooftops and multiple arsons that led the common council and the mayor to impose the curfew. The defendant is asserting that no matter how widespread the community chaos, anarchy and disorder, under no possible set of circumstances can the imposition of a community-wide curfew be upheld.

. . . .

Defendant asserts that imposing a curfew involves a restriction of movement of people within the community. Obviously, restriction of movement is a predictable and inescapable result of a curfew proclamation or ordinance if it is enforced. Defendant then argues that full freedom of movement is protected by the First Amendment to the United States Constitution, made applicable to state and local governments by the 14th Amendment to the United States Constitution. Defendant concludes that the curfew proclamation was violative of the rights of the defendant under the First and Fourteenth Amendments.

We would not deny the relatedness of the rights guaranteed by the First Amendment to freedom of travel and movement. If, for any reason, people cannot walk or drive to their church, their freedom to worship is impaired. If, for any reason, people cannot walk or drive to the meeting hall, freedom of assembly is effectively blocked. If, for any reason, people cannot safely walk the sidewalks or drive the streets of a community, opportunities for freedom of speech are sharply limited. Freedom of movement is inextricably involved with freedoms set forth in the First Amendment.

The freedom to move about is a basic right of citizens under our form of government, in fact, under any system of ordered liberty worth the name. It was not added to our United States Constitution by the enactment of the first ten amendments. It is inherent, not only in the Bill of Rights, but in the original document itself. It has properly been termed “engrained in our history and a part of our heritage.” However, freedom to walk under sniper’s bullets, to travel under a fusillade of gunfire, to leave one’s home only to encounter milling mobs blocking every thoroughfare is not freedom of movement. A municipal curfew as was imposed in Milwaukee, is an emergency measure undertaken to restore order in the community. There is no claim made here and the fact may well be that the only alternative was accelerating community anarchy. The cause of liberty is never served by surrender to anarchy.

. . . . Whatever the cause, given the fact of widespread riotous conditions and criminal activities, the restoration of “domestic tranquility” becomes, not alone a constitutional right, but a constitutional obligation. The temporary imposition of a curfew, limited in time and reasonably made necessary by conditions prevailing, is a legitimate and proper exercise of the police power of public authority. To argue contrariwise is to give to a mob a power to oppress that under our Constitution is not given to the state itself. The Constitution protects against anarchy as well as tyranny.

. . . .

It is unreasonable searches and seizures that are prohibited by state and federal constitutions. When a person is lawfully arrested, it is not unreasonable for the arresting officer to make a contemporaneous search of the person of the accused for weapons. It is not only proper but prudent for the arresting officer to make certain that the person arrested is not carrying a gun, knife or other dangerous weapon. . . .

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*Affirmed*.