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POLICE CONTROL OF DEMONSTRATIONS*

ASHER D. GRUNIS†
Tel Aviv

Introduction

Among the many tasks performed by the police, none is more onerous and unrewarding than that involving the control of meetings, marches and demonstrations in public thoroughfares, parks and squares. The trite expression "damned if they do, damned if they don't" is especially befitting in this context. There will almost always be someone dissatisfied with the performance and conduct of the police. Demonstrators complain about unwarranted curtailment of their rights, and accuse the police of using more force than necessary. Meanwhile, non-participants claim that the authorities should be more firm and decisive in their actions. Some feel that the police should intervene rather than take what they consider to be a passive stance, while others argue that the police should act even sooner.

The role of the police in respect of political assemblages in public places is not only extremely difficult, but also unique and unparalleled. In no other case do the police, as an agency of social control, play such a major and prominent part in the definition and circumscription of a basic political freedom. The activities discussed herein occur in public places and are therefore more visible than is similar conduct taking place on private premises. Furthermore, police officers have an equal right to be in these public sites and need

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† Asher D. Grunis, of the Faculty of Law, Tel-Aviv University.

no specific reason or justification for their attendance. Gatherings of people tend to attract the immediate attention of officers, due to the belief that groupings of individuals pose a greater potential threat to public order.

A comparison of the function of police in situations dealing with freedom of assembly as opposed to freedom of written expression will clearly manifest a more considerable involvement in the first. The actual exercise of freedom of assembly will usually be conducted in the presence of the police, whereas, in the case of the latter freedom, the police normally enter the picture only upon the distribution of the publication. Moreover, where alleged violations relating to written expressions are involved, swift action is not imperative; while in the case of demonstrations, instant, on-the-spot decisions are inevitable due to the fluidity of the situation and the danger of physical violence. This factor obviates the possible participation of other agencies of social control, such as the Crown Attorney or the courts, in deciding whether to take action and, if so, what type of action.

Another factor showing thé central role of the police with regard to demonstrations comes as a consequence of the specific tactic employed in many cases of assemblages, namely, crowd dispersal. In using dispersal the police terminate a certain conduct, but usually the normal criminal process is not initiated. If people are dispersed and not apprehended, it is doubtful that prosecution will follow. If no criminal charges are laid, the courts will not even have the opportunity to pass judgment upon the conduct of the police. It is true that in theory, though rarely in practice, issues stemming from demonstrations can reach the courts in three additional ways: first, when criminal charges are laid against a police officer; second, if an affected citizen sues in tort for alleged assault or false imprisonment; third, following disciplinary action against a policeman. A decision to acquit a participant in public protest may imply disapproval of police behaviour. Explicit disapprobation is apparent if a policeman is found guilty or is ordered to pay damages. Neither of these three outcomes, however, can restore the aborted opportunity to demonstrate. It is therefore submitted that in reality the police are the agency most instrumental in, and responsible for, defining the limits of public protest. Their function in this respect is of relatively greater moment than that of either the prosecution or even the judiciary.

The focus of this article is not the legal rules under which the police should operate when dealing with participants in public protest activities but rather it concentrates upon actual police operations during demonstrations, the considerations affecting police decision-making and the tactics employed. The legal norms designed to control and circumscribe police behaviour are only part

of the multitude of factors, considerations and pressures which ultimately determine the conduct and reaction of the police. It is important to review the main social and psychological factors which contribute to the moulding of police perception of, and attitude toward, public protest.

The conduct of crowds can take different forms and the offences committed can vary greatly. The type of conduct involved, for example, if it causes property damage or personal injuries, should have different weight in police decision-making regarding intervention during disorders. An attempt will be made to assess what relative weight should be given to each of these elements. Various courses of action are open to the police when making the decision if, when and how to intervene at a demonstration. The question is why to select one tactic in preference to another. The major tactical approaches will be considered in detail.

Afterwards, two instances of demonstrations, one in Vancouver, the other in Toronto, will be reviewed. These cases have been thoroughly investigated by commissions of inquiry and they can, therefore, present a precise picture of police handling of demonstrations. In addition, they can indicate how police performances can be improved. The case of a hostile audience, where one group is opposed at the scene by another, raises special problems for the police. The factors affecting police decision-making and the tactical considerations are completely different from the case where only one group is present at the site. This subject will therefore receive separate attention later in the article.

I. *Police Attitude and Perception Concerning Public Protest.*

The first and most basic problem which all citizens, including policemen, face is the recognition and appreciation of the value of freedom of assembly for the continued proper functioning of a democratic society.[1] The contribution of public protest in general, or a particular instance thereof, to the political process is an abstract proposition and, hence, difficult to perceive and appreciate. On the other hand, the resultant effects of even the most benign and peaceful demonstration are quite palpable. The noise, the commotion and the traffic jams are all directly perceivable and immediately comprehensible. In such an equation where tangible effects are juxtaposed with abstract virtues the first will determine the outlook in most cases. This factor is even more meaningful with regard to the police. The elimination of disorder is one of the most important objectives of this

[1] The inclusion of freedom of assembly in the Canadian Bill of Rights (R.S.C., 1970, Appendix III, s. 1(e)) is a necessary though not sufficient step for this value to be fully accepted.

agency, while in the case of public protest some amount of disorder may be inevitable.

It should never be forgotten that the freedom under discussion is especially appropriate and justified as a weapon for minorities who do not and cannot take advantage of the regular political channels. While the police should be impartial and independent in their attitude toward a specific instance of public protest, it is unrealistic to expect them to be completely immune from the realities of the community and the political system within which they operate. If a group resorting to a protest-march is a fringe group with views vehemently opposed by the great majority of the people in the community, it is inevitable that the resentment of the populace will be sensed by the police and it may affect their judgment to the detriment of the minority.[2]

The delicacy of the police task may be compounded if the protestors are part of a sub-culture which is perceived by the police to be antagonistic and offensive to their own sub-culture. Such a situation may arise when certain youth groups (part of what is sometimes imprecisely called the "drug sub-culture") resort to public protest to air their grievances. Mutual hostility and mistrust between that group and the police usually precede the confrontation in the street. Animosity and acrimony are already established due to previous encounters when the police have tried to enforce the drug laws.[3] The officers can and should be advised time and again to be polite and impartial and to conceal their emotions,[4] but they have to be superhuman not to be affected by their belief that the demonstrators threaten the basic values which they (the police) uphold and revere. The confrontation may be even more volatile if the purpose and target of the protest are the police themselves; for instance, if the protest is to denounce alleged police brutality or other misdeeds. Ideally, society should not rely on those who are the object of a public protest to be the arbiters of its bounds. The danger of tendentiousness and irrelevant considerations is all too clear.[5] Still, where does one find the organization to replace the police and undertake their task when such circumstances exist?

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[2] See The President's Commission on Law Enforcement and Administration of Justice—Task Force Report: The Police (1967), p. 25.

[3] Such was the background of the Gastown Disturbance in Vancouver, on Aug. 7th, 1971, which will be discussed in detail later.

[4] *E.g.*, an Ontario Provincial Police manual advises officers to ignore verbal abuse by a crowd: O.P.P., Crowd Control Manual (rev. ed., 1970), p. 29, hereinafter cited as O.P.P., Crowd Control Manual.

[5] A similar point was made in the case of *R.* v. *Belyea* (1915), 43 N.B.R. 375, 24 C.C.C. 395 (S.C. App. Div.). A police officer, the defendant, was attacked by one person. The attacker left town and returned only after several months. The

The necessary impartiality of the police can be seriously undermined if elected officials, in furtherance of their own political interests, have the capacity to influence police decision-making unduly with respect to public dissent. The problem transcends the issue of the formal legal links between the police and the elected representatives of the people. For whatever those links are, there is a continuing working relationship between them due to the fact that the police perform myriad social functions which are interconnected and related to the roles of other social agencies controlled by elected officials. The difficulty facing the police is to sift the proper influence and intervention from improper pressures. One example will clarify.

Under international law a state is obliged to give protection to visiting heads of states or governments,[6] to diplomats[7] and to diplomatic missions.[8] Some of these duties have recently been implemented in Canadian law with the addition to the Criminal Code of offences designed to protect "internationally protected persons".[9] Any infringement of these international obligations can put great strain on the relations between the two countries involved and cause embarrassment to the host state.[10] The legal obligation rests in

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officer saw him in the street and attempted to arrest him for the offence he had committed against the officer. A fight ensued during which the officer's revolver was discharged and the citizen was wounded. In the criminal trial of the officer for the wounding the question was whether the officer was justified in his actions. The court concluded that the officer could have arrested that person on the spot during the original incident, but because the attempted arrest was for a past offence the officer should not have performed the arrest himself as there was a danger that he would be unduly harsh and motivated by revenge.

[6] See Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, adopted by the United Nations General Assembly on Dec. 14th, 1973. The text of the convention appears in (1974), 13 Int. Leg. Mat. 43.

[7] *Ibid.* See also art. 29 of the Vienna Convention on Diplomatic Relations, 1961, 500 U.N.T.S. 96, at p. 110, which declares: "The person of a diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving state shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." The convention is part of the law of Canada: Diplomatic and Consular Privileges and Immunities Act, S.C., 1976-77, c. 31.

[8] Art. 22(2) of the Vienna Convention on Diplomatic Relations, 1961, *ibid.*, at p. 108, states: "The receiving state is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."

[9] S.C., 1974-75-76, c. 93, ss 2(1), 3, 33-34.

[10] One such incident occurred some years ago near the Soviet Embassy in Ottawa. About three hundred people gathered in the street outside the mission to demonstrate against the Soviet Union. It was during a reception marking the fiftieth anniversary of the Revolution. Stones were thrown at the windows and bottles with red paint were hurled at the steps of the Embassy. Few arrests were made: The Globe

Canada with the federal government.[11] It is quite proper then, and even mandatory, for the federal government to take appropriate measures directly and indirectly to protect the persons and premises needing protection. The Royal Canadian Mounted Police, as well as provincial police and municipal police forces in the cities where a visitor is due to arrive, will be advised of the need for protection. Such an intervention is proper and the police at all three levels should obviously be responsive to the concern expressed by the federal government.[12] It is a completely different story if, for example, an attempt is made to influence the police in the direction of limiting the right to demonstrate, in order to prevent groups who oppose the government from disseminating their views before a coming election. The question raised, therefore, concerns the ability of the police to discern between legitimate interest on the one hand and undue interference and pressure on the other. In other words, the danger is the illegitimate involvement of politicians in police decision-making and a commensurate decrease in police independence and impartiality. The combination of majority antagonism plus pressure from elected officials might be a heavy burden, difficult to resist and disregard in deciding how to approach and deal with specific cases of public protest.

The attitude of the officers in the line might also be influenced by their belief that due to tactical and other considerations[13] only few, if any, of those who in their opinion violate the law, will be arrested and brought to trial. If the officers presume that arrest and prosecution will not follow, they may use excessive force as a substitute punishment against those who allegedly break the law. The same consideration may be present if the police believe, on the

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and Mail (Toronto), Nov. 8th, 1967, pp. 1, 9. Following the demonstration the Canadian Minister of External Affairs criticized the Ottawa Police for their inadequate performance in protecting the Embassy: The Globe and Mail (Toronto), Nov. 9th, 1967, p. 1. The special sensitivity to such incidents is reflected in the extensive coverage in the newspapers: see The Globe and Mail (Toronto), Nov. 8th-10th, 1967.

[11] Report of the Royal Commission of Inquiry in Relation to the Conduct of the Public and the Metropolitan Toronto Police Force in the Vicinity of the Ontario Science Centre on October 25th, 1971 (1972) (Commissioner-Judge I. A. Vannini), p. 15, hereinafter cited as The Vannini Report.

[12] An example of such intervention and concern by the federal government can be found in the preparations for the visit by the Prime Minister of the Soviet Union, Alexei Kosygin, in October, 1971, The Vannini Report, *ibid.*, pp. 15-16, 18-19. The Report mentions the fact that the federal government established a special Task Force headed by the Canadian Ambassador to Cuba, *ibid.*, p. 16. The Ambassador relayed to the police "the views of the Prime Minister of Canada and of the Canadian Government that the visit of Premier Kosygin should be carried out with a minimum of embarrassment and with no attendant danger to the person of Premier Kosygin", *ibid.*

[13] These considerations will be discussed later.

basis of past experience, that, even if prosecution follows, the offenders will receive only light sentences. Here again, there is a risk that lack of restraint and unnecessary force will prevail so as to compensate in advance for what the police deem to be too lenient treatment at the hands of the courts.[14]

Proper handling of large demonstrations needs the deployment of large numbers of officers. To achieve deployment of maximum manpower at the scene and retain proper enforcement levels in regular police functions, the chief of police may decide to prolong the regular shifts[15] and to transfer officers from plain-clothes duties into uniform. Both these changes are not likely to be popular among the officers. To put it another way, from a personal standpoint the needs of the police as an agency might place an added burden on the shoulders of the individuals who comprise it, and thus influence their disposition towards the demonstrators.[16]

One factor which could have a major impact on the proclivity and behaviour of the police involves the perception by the officers of a demonstration as a challenge to their authority, as a provocation and as a show of disrespect, even in cases where the protest is not expressly directed at the police. Verbal abuse, taunting and derision—phenomena often found in cases of public protest—are the main causes of such perception. The attendant circumstances of a demonstration, especially the relatively high visibility of the confrontation, accentuate this perception. The point may be better comprehended when one takes cognizance of the fact that one of the most powerful weapons in the police arsenal is a psychological rather than legal one, namely, the authority of the police not as delineated in the books but as perceived by the public.[17] Most people do not know the exact limits of police powers. Their attitude towards the police during an encounter is a blend of fear, deference, respect, support and resentment; the extent of each element varies according to the person involved and the type of encounter. The police fully realize the existence of this mixture of feelings and they utilize it in order to further the performance of their duties. One striking example is the questioning of people for the purpose of extracting information. Generally, there is no legal duty imposed on citizens to

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[14] See Editorial, The Times (London), March 18th, 1975, p. 15.

[15] Among the measures taken by the Metropolitan Toronto Police Force to prepare for the demonstration during the visit by the Soviet Premier, Alexei Kosygin, all outside uniformed officers were put on shifts of twelve hours instead of the normal eight: The Vannini Report, *op. cit.*, footnote 11, p. 23.

[16] The saying that "a police officer is on duty at all times" (*R.* v. *Johnston*, [1965] 2 O.R. 729 (C.A.)) is a nice truism but one can hardly expect all policemen to accept it without reservation.

[17] See Report of the Canadian Committee on Corrections (1969), p. 49.

divulge information to the police in answer to questions.[18] Yet many people respond positively to police requests for information. Some do so out of a sense of social or moral duty,[19] others due to fear of the unknown; what might be the reaction of the police if they refuse to help and co-operate? Compliance with police orders can also serve as an example. Apprehension of what might follow non-compliance may lead to obeying the order. From the perspective of the police this perceived authority gives them the ability, in some cases, to achieve their objective in a specific case without resort to arrest or the use of force. A certain amount of fear and deference among the citizenry leading to voluntary compliance and acquiescence with police demands will make the officers' task easier and less messy.

In the context of a demonstration this analysis assumes added salience. Where many people are involved, both as participants and as observers, and where the news media are present, the conduct of the police in the face of a challenge is highly visible. The police might conclude that if they neither react in a decisive manner that will re-establish respect nor try to reassert their authority, there is a danger of a corresponding reduction in the level of respect and fear shown towards them by the public. The result, according to this perception, will be to make the performance of their duties in the future more difficult, since the people will be less inclined to respond voluntarily to police requests. In short, the less deference and trepidation the police command, the more arduous their task becomes.[20]

The performance of the police may be adversely affected by the operational difference between routine police work and the handling of demonstrations. The mainstay of any police department is the outside uniformed force—the patrolmen. They will be the first to be used in public order situations. The routine police function is performed by one individual or a pair who themselves make the decisions on the spot when and how to react and intervene in what occurs in the street. The duties of patrol are not normally carried out by middle or high-ranking personnel. In other words, the decision-

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[18] *E.g.*, *R.* v. *Katchmer* (1961), 36 W.W.R. 467, 132 C.C.C. 135, 36 C.R. 380 (Sask. Mag. Ct); *R.* v. *Byrd* (1969), 12 Cr. L.Q. 207, at p. 209 (B.C. Prov. Ct).

[19] See *Rice* v. *Connolly*, [1966] 2 Q.B. 414, at p. 419, [1966] 2 All E.R. 649, at p. 652, per Lord Parker C.J.

[20] It is interesting to note that in a survey conducted in one American police department it was revealed that a show of disrespect was mentioned by the officers as the prime justification for the use of force: W. A. Westley, Violence and the Police: A Sociological Study of Law, Custom and Morality (1970), pp. 121-128, 138-139. See Also R. Stark, Police Riots: Collective Violence and Law Enforcement (1972), pp. 60-62, and materials cited therein.

making power rests with the lowest-ranking officers.[21] The best drafted laws, police manuals and directives can moderately reduce the wide scope of discretion of the patrolman, although it cannot be eliminated altogether. Technological advances, immediate and constant communication between the officers at the scene and headquarters, have done little to change this situation. Patrolmen can call for reinforcements more easily and rapidly today, but current means of communication do not enable supervisory personnel in headquarters to substitute their judgments for those of the officers in the street.

In the case of non-spontaneous demonstrations, the police may deploy large numbers of officers even before the start of the event,[22] relying first on the outside uniformed force. The foremost variance from routine work is the presence at the scene of middle and high-ranking officers. The patrolmen do not perform their duties individually and independently, but rather they operate as a unit,[23] and the decision-making power shifts from the constables to the commanding officers.[24] Problems may arise if the force is neither prepared nor adequately trained to work as a unit, where the individual officers should act following orders rather than make the operational decisions themselves. In situations of public protest, then, the conduct of the force will reflect to a larger extent the disposition of the ranking officers commanding the operation.

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[21] It has been pointed out that within the police organization, unlike many others, those at the bottom of the rank ladder have the widest discretion: J. Q. Wilson, Varieties of Police Behavior (1968), pp. 7-8. See also Report to the Solicitor General by the Task Force on Policing in Ontario (1974), p. 12.

[22] In non-spontaneous protests the police will be ready beforehand and it can therefore be expected that supervisory personnel will be at the scene from the start. In the case of a spontaneous demonstration, with no advance planning and publicity, the police will obviously not have prior knowledge of the event, and the first officer to be at the scene will usually be a patrolman. He will have to make the initial decisions. When reinforcements arrive the ranking officer will take charge. Due to the fact that one of the main objectives of public protest is to reach the largest number of people possible, it can be assumed that spontaneous demonstrations are a rarity. Only in the case of the pre-planned protest can people be called to join in advance and the news media be alerted ahead of time.

[23] It is then that the police are most similar to the military. Wilson has remarked that it is misleading to make an analogy between the police and the military, since in routine police work the officer operates alone or with another officer, while in the military, normal operations are carried out by units: *op. cit.*, footnote 21, p. 80. 80.

[24] Generally on the discretion of top echelon officers see Wilson, *op. cit.*, *ibid.*, Ch. 3.

II. *The Activities of the Crowd and Their Effect Upon Police Decision-making.*

The fact that the police have the power to intervene in a demonstration, for example, by dispersal or arrest, does not mean that they will or should exercise the power. In other words, there is no necessary coincidence between the legality of police actions and the desirability of the exercise of their powers under specific conditions. The conduct of the crowd can take various forms and the considerations of the police if, when and how to intervene should be related to the behaviour of the people gathered. The illegal activities of the demonstrators will be divided into three different categories, each necessitating different evaluation and each receiving different weight in the overall strategy of the police. The activities considered involve violations where the only unlawful element is related to the content of the message, where the conduct concerns damage to property and where it involves personal injuries.

A. *Violations Involving Content of Speech.*

The first type of conduct encompasses those cases where the unlawfulness inheres in the content of what is said or graphically displayed in a demonstration, with no immediate physical impact on the situation. Suppose a demonstrator carries a sign which in the opinion of the police is obscene and contrary to section 159(2)(a) of the Criminal Code.[25] The reason behind this limitation on the freedom of the individual is to avoid offending the sensibilities of viewers, or, as some may suggest, to prevent the corruption of their morals. The effect sought to be averted by this offence has no physical characteristic such as damage to property; the illegality is in the words.[26] The person who carries the allegedly obscene banner can immediately be arrested by the police on the spot, before the end of the demonstration.[27] It should not be forgotten that in this case, as

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[25] R.S.C., 1970, c. C-34.

[26] The distinction drawn approximates one which is resorted to in the United States between expression and action for the purpose of defining the scope of, and protection by, the First Amendment: see *e.g.*, T. I. Emerson, The System of Freedom of Expression (1970), pp. 292-298.

[27] According to s. 165 of the Criminal Code an offence under s. 159 is either indictable or summary conviction. Such optional offences were put in the same position with regard to arrest as summary conviction offences (s. 450(2) of the Criminal Code, R.S.C., 1970, c. 2 (2nd Supp.), s. 5). Accordingly, arrest should not be resorted to in certain circumstances, but instead the invocation of the criminal process should be by way of issuing an appearance notice to the alleged offender. Arrest is not to be invoked if a police officer "has reasonable and probable grounds to believe that the public interest" will be satisfied without arrest (s. 450 (2)(d)). Among the circumstances to be considered in making the decision is that of preventing "the continuation or repetition of the offence" (s. 450 (2)(d)(iii)). In

in others, the conclusion by the police that the sign is obscene is only tentative, and the court which will eventually hear the case may reach a contrary conclusion and acquit the defendant. Nonetheless, the action of the police, that is, the immediate arrest before the completion of the demonstration, effectively terminates the freedom of that person. Clearly, an acquittal by a court cannot restore, and is not designed to restore, the lost opportunity to take part in the protest until its conclusion. This unsatisfactory result can be avoided quite simply if the police make the arrest (or issue an appearance notice) at the end of the demonstration.[28] It seems that this is a better solution to square the divergent considerations involved in such a case. If the court finds the defendant guilty he will, of course, be punished, and if he is acquitted his freedom to demonstrate cannot be said to have been curtailed in fact by the police. The same rationale can apply to the case of a speaker who addresses a crowd. If, in the opinion of the police, he is committing sedition,[29] or any other offence which involves speech content, and the danger therefrom is not immediate at the scene, the speaker should not be arrested in the midst of his speech. Delayed enforcement should be the course adopted by the police.

B. *Conduct Involving Property Damage.*

Damage to property is apparently a factor weighing heavily in police decisions to suppress a demonstration immediately. It is distinctly illustrated in the case of the Gastown Disturbance, where the commanding officer's decision to advance upon the crowd had been triggered by his belief (found later to be erroneous) that some demonstrators were causing property damage.[30] The position of private property under the common law and in Western-capitalist societies may explain why preserving its integrity is of such high importance. What is disputed here is not the validity of this

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instances of public protest, especially where more than a handful of people are involved, the procedure of issuing an appearance notice will require roughly the same number of officers as does arrest, but it may not achieve the desired termination of the incident. The alleged offender has to be taken aside, his identity verified and a form has to be filled out. After the notice is handed over to the person, there is nothing to prevent him from resuming his activities. This procedure would, therefore, not prevent the continuation or repetition of the alleged unlawful behaviour, and hence arrest would be the proper procedure.

[28] *Ibid.* If there is no danger of resumption of the alleged illegal activities at that stage, the criminal process should be invoked through the issuing of an appearance notice.

[29] Contrary to s. 62(a) of the Criminal Code.

[30] Report of the Commission of Inquiry into the Gastown Disturbance (1971) (Commissioner-Judge T. Dohm), pp. 3-4, 9, hereinafter cited as the Gastown Report. This demonstration is reviewed in detail later in this article.

consideration as a prime law-enforcement objective, but rather its weight compared to other considerations which may be present.

Under the English Riot (Damages) Act, 1886, liability is imposed on the police authority to compensate a property owner whose property has been damaged by rioters.[31] The liability does not depend on negligence on the part of the authorities in quelling the riot.[32] The reason behind the imposition of the duty to pay damages was discussed by Lord Mansfield in 1776,[33] where he dealt with the statute imposing the duty at the time, and which lay it on the hundred. The idea was, according to Lord Mansfield,[34] to encourage the inhabitants to take part in the suppression of riots. If no actions were taken to quell a riot and property damage resulted, the owner was to be indemnified by the hundred. This meant that all taxable inhabitants contributed to the compensation. Knowing this, the people would prefer, it was apparently believed, to take preventive action than to pay for the damages later.

One can doubt the assumption behind this rationale, that the inhabitants perceived the link between their non-participation in the suppression of a riot and higher taxes to pay for compensation. In any event, the underlying factual circumstances are different today. At the time there were no established and professional police forces and law enforcement depended heavily on private citizens. There is little need or inclination to depend in modern times on private citizens to participate in actual law enforcement.[35] Still, compensation by the whole community to an owner whose property is damaged by rioters can be justified on a different footing. In many cases the damage to property is caused by a small minority in the crowd. If the police try to extract those people from the gathering, greater disorder might ensue. If all the people are ordered to disperse, the question may be asked why the freedom of the many non-violent has to be abridged. Of course, if the police decide not to intervene one can ask why the property owner should carry the burden himself. Compensa-

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[31] 49-50 Vict., c. 38. The following cases involved suits for such compensation: *Field* v. *the Receiver of Metropolitan Police*, [1907] 2 K.B. 853; *Ford* v. *Receiver for Metropolitan Police District*, [1921] 2 K.B. 344; *Pitchers* v. *Surrey County Council*, [1923] 2 K.B. 57; *Munday* v. *Metropolitan Police District Receiver*, [1949] 1 All E.R. 337; *J. W. Dwyer Ltd* v. *Metropolitan Police District Receiver*, [1967] 2 Q.B. 970, [1967] 2 All E.R. 1051. For a detailed discussion of this Act see A. Samuels, Compensation for Riot Damage: The Riot (Damages) Act 1886, [1970] Crim. L.R. 336. See also D. Williams, Keeping the Peace (1967), pp. 36-41.

[32] *Pitchers* v. *Surrey County Council*, *ibid.*, at p. 65.

[33] *Ratcliffe* v. *Eden* (1776), 98 E.R. 1200.

[34] *Ibid.*, at p. 1202.

[35] Yet, under certain circumstances the police may approve of the use of marshals chosen by the organizers to help in the preservation of order during a demonstration.

tion by the whole community may adequately reconcile the interests involved. The non-violent demonstrators and the bystanders would not be affected physically and the police can and should attempt to apprehend those causing the damage at the natural termination of the incident.[36] Obviously the foregoing should not be taken to mean that the police should refrain from on-the-spot enforcement in all or even most cases of property damage caused by demonstrators. Nevertheless, the fact that property owners will be compensated should decrease the importance and relative weight of terminating property damage as a consideration in the police decision-making process.

It has been held in Canada that no liability is imposed by the common law on municipalities to compensate property owners for damage caused by rioters and that the only possible basis for such liability is in statute.[37] Yet, in the Province of Quebec, such a liability may be found to exist based on quasi-delict.[38] Moreover, in that province municipal councils are empowered to make by-laws to indemnify property owners in cases of damage caused by rioting.[39] The liability obviously depends on the decision of each municipality to adopt a by-law. It seems to be a better and more desirable solution if all provinces adopt laws directly obligating municpalities and other local authorities to recompense owners for damages suffered during demonstrations. The police would then be able to pay greater heed to the other factors involved thus diminishing the relative significance of protecting proprietary interests.

C. *Conduct Involving Personal Injuries.*

The last type of acts by demonstrators to be discussed are those resulting in personal injuries. Here there are a few possibilities: violence directed at the police, against adversaries or against a visiting dignitary. In such cases, where violence to the person occurs, its termination should receive the highest priority in the calculations of the police. Protecting the integrity of the person, be it in the framework of public protest or otherwise, should always remain a paramount concern of law enforcement agencies. The reasoning applicable in instances of speech content violations and

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[36] The owner of the damaged property can, of course, bring action in tort against those who caused the damage. This would depend on the tortfeasors being identified, and even then it might be that they are insolvent. This option of tort action is more theoretical than real.

[37] *Globe and Rutgers Fire Insurance Co.* v. *Glace Bay,* [1927] 1 D.L.R. 180 (N.S.S.C.); *Darmet* v. *Montreal* (1939), 67 Que. K.B. 69; *Peloquin* v. *Sorel,* [1945] Que. K.B. 324. See also *Baker* v. *Toronto* (1919), 45 O.L.R. 256 (H.C.). For a case where such a duty was found to exist under statute, see *Quebec City* v. *United Typewriter Company* (1921), 62 S.C.R. 241, 68 D.L.R. 280.

[38] *Quebec City* v. *Berube,* [1949] Que. K.B. 77.

[39] The Cities and Towns Act, R.S.Q., 1964, c. 193, s. 473 (1).

damage to property are inapposite here. Later punishment at the hands of a court cannot restore a broken arm, for example, nor will damages in tort paid by the offender nor compensation by the municipality. Immediate action at the scene to terminate violence to the person should be a prime objective. Still, there would be cases where the injuries suffered are minor ones affecting only a few people, while instant police intervention may lead to many more injuries and serious ones at that. The police should weigh these factors very carefully. In such an equation the proper course for the authorities may be to delay action due to the expected higher costs of immediate enforcement of the law.

III. *Tactical Approaches and their Implications.*

Various courses of action are open to the police at the scene of a demonstration in terms of the tactics which they may use. The selection of the proper tactic would be based upon a multitude of factors. The examination will now proceed to review the different tactical approaches and the considerations involved in deciding which one should be employed.

A. *Show of Force.*

Show of force means the display by the police of their presence in a manner designed to impress upon the crowd the futility of any attempt to resort to violence.[40] The reasoning is that when the crowd sees the strength of the police and their weapons and realizes their determination to employ force, if necessary, those gathered will not escalate the encounter. The display by the police should come prior to the actual use of force, as a preventive measure. Although it could be that on some crowds the effect of a show of force will be a restraining one, it could have exactly the reverse effect on others.[41]

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[40] One police manual states that ". . . if control weapons are brought into prominent view and are employed at proper times, the effect created is a feeling of futility of further resistance by the riotous force." O.P.P., Crowd Control Manual, *op. cit.*, footnote 4, p. 23.

[41] An interesting point was raised in the case of *R.* v. *Thomas*, [1971] 2 W.W.R. 734, 2 C.C.C. (2d) 514 (B.C. Co. Ct). A group of demonstrators occupied a certain street in Vancouver and as a result traffic was completely blocked for over two hours. A police inspector asked the crowd several times to clear the road and they refused. The tactical squad, with riot gear, was then called in and dispersed those gathered. In the trial for participating in unlawful assembly and riot it was argued that the appearance of the tactical squad provoked the demonstrators. The court answered in these words (at pp. 742 (W.W.R.), 522 (C.C.C.)): "The Vancouver City Police were performing a lawful public duty, which was to clear Fourth Avenue to permit other members of the public to exercise their rights to use Fourth Avenue as a public highway. The police would have been derelict in their duty if they had not cleared Fourth Avenue." It is submitted that the fact that the use of force was legal does not necessarily mean that it was desirable. If the police decide not to intervene for fear of the costs in human terms, one could hardly describe them as derelict.

With some crowds the display of force may be the triggering element in a highly volatile situation.[42] An American writer concluded that "[o]n the contemporary campus a massive show of police escalates the confrontation".[43]

The different impact on different gatherings may cause a paradoxical result. It can be safely assumed that the more timid and less militant groups will back down in the face of a show of force, while with the militant ones the effect will be to inflame the situation. The police may therefore decide to be less firm with the more militant groups for fear of escalation. The result may then be greater latitude to the more militant crowds.

The resort to this tactic of a show of force may have detrimental implications both at the scene, and on a long range basis. The appearance of police officers in a threatening posture may transform the emotions of the crowd into hostility towards the police and redirect their attention from the original purpose and target of the protest. The police may then be perceived as the adversaries and as taking sides in the conflict rather than assuming a neutral stance.[44] At the scene this process may exacerbate rather than calm the atmosphere. In the long run, perceiving the police as the opponents may reduce the willingness of people to co-operate with the police and it may widen the already existing gulf between the police and certain sectors of society.

Even something less than a show of force—the mere presence of police—may be inflammatory in certain circumstances. This can happen if tension already exists between the protestors and the police prior to a demonstration, owing to past encounters. If that is the case, the police face a difficult dilemma. If many officers are present at the scene, even without a display of strength, this of itself may aggravate the potentially fulminating situation. If, on the other hand, there are too few officers at the scene, it may encourage the crowd or part of it into violent action and the situation may become unmanageable due to lack of manpower. This predicament can be at least partially avoided if large numbers of officers are not within the sight of the protestors but close to the site of the demonstration. This can be achieved by concealing their presence, stationing them near

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[42] The O.P.P., Crowd Control Manual, *op. cit.*, footnote 4, p. 22, declares: "The show and employment of offensive weapons such as gas, firearms, *etc.*, must be properly timed or the action can be misinterpreted and become inflammatory."

[43] Stark, *op. cit.*, footnote 20, p. 132.

[44] See W. A. Westley, The Formation, Nature, and Control of Crowds (1956), p. 38, hereinafter cited as Westley.

the route or the location of the demonstration. In short, they should be readily available but not readily visible.[45]

In certain cases the nature of the demonstration might prevent the police from lowering their visibility at the scene. A distinction should be drawn here between a march or a procession on the one hand, and a public meeting near a building or a specific place on the other. In the case of the moving demonstration—the march—part of the energy which inheres in the participants, is used by their actual physical movement. The energy radiates in different directions and is not pointed towards a specific target. Furthermore, there need not be physical contact between the police and the protestors. It is quite different in the case of the stationary demonstration, if it takes place near a specific place or building, which for the demonstrators represents the object of the protest. In such a case the attention and energy of the crowd points in one direction, and as it does not spread, it has greater potency and strength.

Suppose a group of people demonstrates near a certain diplomatic mission. In case of a large gathering the police will have to establish a cordon around the building. In other words, there is no alternative to the presence of a fairly large number of officers, due to the fact that a specific site has to be protected. This would also entail physical contact between the police and the demonstrators, unlike the case of the march where no specific site needs protection. Thus, in the case of the stationary demonstration near a target identified with the object of the protest, there is a greater possibility of the demonstrators identifying the police with the object. The human cordon around the building, consisting of police officers, may then be perceived as biased and as siding with the person or body against whom the protest is aimed. This reasoning may explain why in cases of small stationary demonstrations near specific buildings, the police often order the crowd to be on the move, and to circulate, not allowing them to stand still. As explained, the continuous movement may defuse some of the pent-up energy of the crowd and prevent it from being concentrated and routed in one direction only.

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[45] A good example of the successful implementation of these principles by the police is a huge anti-Vietnam War demonstration which was held in London, England, on Oct. 27th, 1968. For a detailed description see J. D. Halloran, *et al.*, Demonstrations and Communication: A Case Study (1970), Ch. 2, esp. p. 75. The London police had used the same tactic years before during Chartist disturbances: F. C. Mather, Public Order in the Age of the Chartists (1967), p. 104.

See also J. F. Ahern, Police in Trouble (1972), Ch. 2, esp. pp. 39-40. The Chief of Police of New Haven, Connecticut, describing the preparations for, and handling of, a massive demonstration held in the city.

B. *Non-Intervention.*

The police may decide that even though the demonstrators commit an offence, it is preferable under the circumstances not to enforce the law.[46] Such a determination will be based on evaluation of the costs versus benefits of intervention. One long-range consideration which should be a factor is the maintaining rather than straining of police-public relations. The immediate concerns, however, will play a greater role in the decision-making process and they should receive due consideration.

Obviously one such important element is the type of offence involved. There should be some, though not necessarily direct, correlation between the severity of the crime allegedly committed by demonstrators and the resolve of the police to take prompt action to terminate the unlawful conduct. As argued earlier, if the activities of the demonstrators involve damage to property there should be less concern than if their conduct results in personal injuries. Even if it is a case of injuries to people the proclivity of the police to intervene may have different dimensions if those injured are police officers or innocent bystanders. It would be only natural if injuries to fellow officers would more readily lead to intervention.

There is one factor which is present in many cases of public protest and should receive special attention. It touches upon the fact that rarely is the crowd homogeneous and seldom does each and every member thereof commit an offence. On the contrary, in many cases only a small minority of those gathered actually engages in unlawful conduct,[47] and they use the rest as a shield to preserve their anonymity.[48] Many of the people at the site of the event may be bystanders who simply come to observe a demonstration by others.[49] Their mere presence does not transform them into law-breakers.[50] Although the police can apparently legally disperse all people

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[46] For such an example see in *R.* v. *Patterson* (1930), 66 O.L.R. 461, 55 C.C.C. 218, [1931] 3 D.L.R. 267 (S.C. App. Div.).

[47] See *e.g.*, The Kosygin Protest and the Gastown Disturbance, both of which will be discussed later, where small minorities initiated the disorders.

[48] The anonymity of persons submerged in a crowd is one of the socio-psychological explanations for the different behaviour of people when they are part of a crowd: see Westley, *op. cit.*, footnote 44, pp. 4, 21, 54.

[49] As early as 1822, an English court observed perceptively that "in an assembly of this kind, many persons would go from different motives; some would go from mere curiousity; there would be others who would think there were public grievances, which a meeting of this description might prevent; others might go meditating mischief immediately; others again might go there, who meditated mischief at some future time." *Redford* v. *Birley* (1822), 171 E.R. 773, at p. 787.

[50] See *R.* v. *Graham* (1888), 16 Cox C.C. 420, at p. 433; *R.* v. *Cesarone* (1958), 1 Cr. L.Q. 348 (B.C. Mag. Ct).

present and not only the actual violators,[51] due regard should be given to the interests of the lawful participants and of the bystanders. It could very well happen that if the police advance upon the crowd this would cause great confusion, panic, and a stampede, as a result of which more people will be injured than would have been the case had the few law-breakers among the demonstrators been allowed to continue in their unlawful conduct. The Royal Commission of Inquiry into the Kosygin Protest put it succinctly:[52]

> At all times the safety of the many is to be preferred to the dispersal or apprehension of the few.

The characteristics of the site may have a bearing as well. One of the prime considerations in any planning by police before a large demonstration is that those assembled should have an escape route.[53] The danger of injury to many people is considerably magnified if the crowd is trapped with no physical outlet. If, then, the site is such that the size and number of escape routes is disproportionately small in relation to the number of people gathered at the scene, the commanding officer should consider a non-intervention stance.

The fact that the police decide not to enforce the law forthwith does not necessarily mean that there will be no enforcement at all. The police may wait until the end of the demonstration and only then arrest, or issue appearance notices, to those who have been identified during the event as the violators.[54] Or those people may be proceeded against at a later time. In such cases, there is a delayed enforcement of the law, and at the same time the police avoid the risks associated with immediate enforcement. It should be admitted, however, that if the law-breakers are not identified at the scene, delayed enforcement is more difficult.

The non-intervention posture on one occasion may open the door to the charge of discriminatory enforcement by the police with

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[51] See *Redford* v. *Birley, supra,* footnote 49, at p. 783.

[52] The Vannini Report, *op. cit.*, footnote 11, p. 141. The Commission of Inquiry into the Gastown Disturbance addressed the same issue and said: "In attempting to catch a person who threw a bottle or stone, one is not justified in endangering the safety of other persons in the area. The common good must be given top priority in these matters." The Gastown Report, *op. cit.*, footnote 30, p. 15.

[53] The R.C.M.P. Manual of Tactical Training (1971) (unpaginated), states (in para. 199(5)) that "the basic rule in crowd control is to leave an avenue of escape for the rioters." See also The Gastown Report, *op. cit.*, *ibid.*, p. 15.

[54] *E.g.*, *R.* v. *Duyker*, [1970] 4 C.C.C. 318 (B.C. Co. Ct). The Prime Minister of Canada attended a fund-raising dinner in a certain building. A group of demonstrators gathered near the entrance, shouting and chanting. The accused led the chanting. The protest continued for a few hours, during which the accused was not arrested. He was arrested while walking away from the scene, and charged with causing a disturbance in a public place. The commanding officer testified (see at p. 322) that he had thought it best if the officers would not advance upon the crowd.

respect to another occasion. One group of protestors asserts that its demonstration was terminated by the police while a similar occurrence conducted by another group, the argument goes, had been allowed to continue. One of the most sacred rules to which the police should scrupulously adhere is that of impartiality.[55] In this context it would mean that considerations such as the character of the demonstrating group and its political beliefs should not be a factor in the decision-making process. Unfortunately, there is little that can be done through the judicial process to remedy injudicious and unwarranted discriminatory enforcement of the law by the police. It has been repeatedly held that an allegation of discriminatory enforcement is not a proper defence to a criminal charge.[56] Likewise, it is quite unlikely that in Canada a court will enjoin the police from enforcing the law in a specific instance on the basis of an allegation that the law has not been enforced in the past. The problem can, however, be approached from a different angle, which might open the way to some relief to those affected by discriminatory enforcement of laws relating to public order.

Two different situations may be posited, both raising a similar issue: (1) Group A demonstrates in a certain place and the police allow the participants to go on with the activity, with no action being taken either during the protest or upon its conclusion. Group B follows at a later date with the same activity and at the same site, yet, this time the police immediately intervene and charge the participants with the commission of some criminal offence. (2) A group of protestors demonstrates and the police initiate the criminal process only after some time, even though the character of the conduct has not changed during the progression of the protest. In other words, the police resort to delayed enforcement.

In both these cases the people charged may argue that on the basis of the omissions of the police—in the one case not acting against group A altogether, and in the other, not acting promptly—they were led to believe that their actions were lawful. This contention is vividly illustrated by a discourse between a police officer and a demonstrator described in the case of *Despard* v. *Wilcox*.[57] A group of women was assembled near the official

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[55] The oath taken by members of the Royal Canadian Mounted Police states in part: "I, A.B., solemnly swear that I will faithfully, diligently and *impartially* execute and perform the duties required of me." Royal Canadian Mounted Police Act, R.S.C., 1970, c. R-9, s. 15(1), emphasis added. Similar language appears in provincial laws: see the Saskatchewan Provincial Police Act, R.S.S., 1965, c. 114, s. 7(1).

[56] See *e.g.*, *Lacasse* v. *The King* (1939), 66 Que. K.B. 74, 72 C.C.C. 168; *R.* v. *Collins* (1839), 173 E.R. 910.

[57] (1910), 22 Cox C.C. 258.

residence of the British Prime Minister for the purpose of presenting him with a petition urging the extension of the franchise to women. They were told that the Prime Minister could not see them; nonetheless they continued in their picketing. When, on the second day of the picketing, a police officer told the women that they would not be allowed to stand there any longer, one of them asked: "It was legal to stand here yesterday, why not today"?[58] The officer answered: "It was illegal yesterday and it is illegal today".[59] The question asked by the woman clearly reflected the impact of the police inaction during the first day on the woman's state of mind. For her the police personified the law and the officer was the one who prescribed the limits of lawful conduct. The woman interpreted the initial passive attitude of the police as meaning that it was legal to stand at the spot. The court, however, did not deal with the legal implication of this point.

The Commission of Inquiry into the Gastown Disturbance, whose report will be discussed later, referred to the question of police inaction and its effect upon the demonstrators. There, a group of people blocked public thoroughfares and as a result traffic had to be re-routed. The Commission stated:[60]

> But this [the blocking of the streets] was tolerated by the police for at least two hours before the decision was made to clear the streets. I feel there was [*sic*] reasonable grounds for the young people to assume their presence in that area had tacit approval of the authorities when the police were standing around visible to the crowd and nothing was done to give the members of the crowd any reason to believe otherwise.

The problem is whether the effect of the non-intervention approach on the demonstrators' perception has any repercussions on their culpability when they are charged before the courts. A distinction should be drawn between those instances where the illegality involved in the conduct of the protestors must be clear to them and the cases where the offence is amorphous and vague, and great reliance is put on police conduct as an interpretive means. Obviously every person should know, and in fact knows that it is illegal to pelt the police with stones, whether or not he knows which specific offence is committed with such conduct. In such a case the fact that the police do not intervene cannot imply, even for the person with the wildest imagination, that it is lawful to lapidate other people. But suppose that all that the demonstrators do is stand near the entrance to a building. If the police do not tell them to go away (assuming the police can so order), does not this mean for laymen that their standing at the place is perfectly legal? More so if they

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[58] *Ibid.*, at p. 261.

[59] *Ibid.*

[60] The Gastown Report, *op. cit.*, footnote 30, p. 8.

recall that on a previous occasion, when another group held a demonstration at that same site, the police did not interfere either.

The issue came to a head in the English case of *Arrowsmith* v. *Jenkins*.[61] A public meeting was held in a street and the defendant was the speaker. She addressed the crowd for about twenty minutes. For the first five minutes both the sidewalks and the roadway were completely blocked. Then the police cleared a way for vehicles, with the help of the defendant. They asked her to tell the crowd to clear the street, and so she did. For the remainder of her speech the thoroughfare was only partially blocked. Prior to this gathering others had held public meetings at the same location and apparently no action had been taken by the police. This time, however, the defendant was charged with wilful obstruction of the highway, contrary to section 121(1) of the Highways Act, 1959 (U.K.).[62] It should be noted that the facts of this case present a coalescence of the two sets of circumstances posited earlier. The police had not interrupted similar events in the past, nor did they terminate this meeting promptly, but instead resorted to delayed enforcement.

The argument put forth by the defendant was that the prosecution had to prove that the obstruction resulted from a knowingly wrongful act on her part, and that under the specific facts involved she believed she was acting lawfully. In an impatient and poorly reasoned decision, Lord Parker C.J. rejected the contention. The Lord Chief Justice capsuled the defendant's contention in the phrase "Why pick on me"?[63] and simply said that such an assertion "of course, has nothing to do with this court".[64]

What was actually argued in this case and what is really enshrouded behind the contention of discriminatory enforcement in similar cases is the claim that the demonstrators made a mistake regarding the legality of their actions, a mistake induced by the conduct of the police. If the problem is treated in this fashion, that is, as a question of a mistake of law, then the simple answer should be that neither in Canada[65] nor in England[66] is such a defence generally

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[61] [1963] 2 Q.B. 561, [1963] 2 All E.R. 210.

[62] 7 & 8 Eliz. II, c. 25. The subsection provides: "If a person, without lawful authority or excuse, in any way wilfully obstructs the free passage along a highway he shall be guilty of an offence and shall be liable in respect thereof to a fine not exceeding forty shillings."

[63] *Supra*, footnote 61, at pp. 566 (Q.B.), 211 (All E.R.).

[64] *Ibid*.

[65] S. 19 of the Criminal Code states clearly: "Ignorance of the law by a person who commits an offence is not an excuse for committing that offence." See *e.g.*, *R.* v. *Currie* (1975), 26 C.C.C. (2d) 161, at p. 180 (Ont. C.A.), application for leave to appeal to the Supreme Court dismissed, *ibid.*, at p. 161 n.

[66] See *e.g.*, *Cambridgeshire and Isle of Ely County Council* v. *Rust*, [1972] 2

available to a defendant in a criminal case. Still, it would be useful to consider the argument which could be advanced by accused demonstrators in their defence. Their contention would be as follows: the conduct of the police led the people gathered to believe that their actions were legal. Relying on this representation they continued in their conduct—conduct which was later alleged by the police to have been unlawful. The demonstrators should consequently be absolved of criminal responsibility. Admittedly, under the current state of the law, both in Canada and in England, it is unlikely that this line of reasoning would be accepted.

In the United States, however, the contention may have legal significance. In one American case, directly involving a public protest, the doctrine of entrapment was employed, resulting in the reversal of the conviction of a demonstrator.[67] A demonstration was held near a courthouse to protest the arrest of some people on the previous day. The police gave on-the-spot permission to hold the demonstration. The United States Supreme Court held that the appellant (who was the leader) could not be convicted under such circumstances since it would amount to the sanctioning of entrapment by the State.[68] The interesting point is not so much the specific doctrine applied, but rather the ultimate vindication of the defendant. It seems to be an injustice to declare a person to be a criminal offender when the person acts upon a representation or advice by an agent of the State, and when the representation leads to the belief that the conduct engaged in is lawful.[69]

One point which should be analyzed further relates to the conduct-representation by the police. This conduct may encompass various forms, from utterly passive presence or complete inaction at the one extreme, to explicit permission by the police for the conduct engaged in, at the other extreme. Between the two poles there are countless numbers of possibilities where the conduct of the police

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Q.B. 426, [1972] 3 All E.R. 232. Yet recently in England the private law doctrine of estoppel was employed and resulted in recognizing the defence of mistake of law under certain circumstances: See *Lever Finance Ltd* v. *Westminister (City) London Borough Council*, [1971] 1 Q.B. 222; *Norfolk County Council* v. *Secretary of State for the Environment*, [1973] 3 All E.R. 673. These cases, which involved representations made by employees of local authorities, are in conflict with a few Canadian decisions: see *Ottawa Electric Railway Co.* v. *Ottawa*, [1934] O.W.N. 265 (H.C.); *Spiers* v. *Toronto*, [1956] O.W.N. 427, [1956] 4 D.L.R. (2d) 330 (H.C.); *R.* v. *Laister*, [1969] 1 O.R. 580, 3 D.L.R. (3d) 272 (H.C.).

[67] *Cox* v. *Louisiana II* (1965), 379 U.S. 559.

[68] *Ibid.*, at p. 571.

[69] For a discussion of this issue of reliance upon a representation by officials as the basis for a defence of mistake of law see L. Hall and S.J. Seligman, Mistake of Law and Mens Rea (1941), 8 U. Chi. L. Rev. 641, at pp. 675 *et seq.*; A. J. Ashworth, Excusable Mistake of Law, [1974] Crim. L. R. 652, at pp. 657-661.

amounts to more than mere passive presence but less than express permission. The facts in the already mentioned case of *Arrowsmith* v. *Jenkins*[70] present a good example. There, it may be recalled, the police cleared the roadway and even asked the speaker to help. There was no explicit permission to hold the meeting at the site, but neither was it a case of mere passive presence. As the conduct of the police moves closer to explicit permission and further away from total passivity, there is a correspondingly greater justification to absolve the demonstrators who relied on that conduct from criminal responsibility.

While the acquittal of the demonstrators may be viewed by an outside observer as properly adjusting their interests, the police may consider it in a completely different light. It should be remembered that the motive behind the non-intervention strategy is to prevent greater harm than that which might ensue from disallowing the allegedly illegal activity to continue. In the opinion of the police the activity is unlawful and they simply delay the enforcement. The knowledge by the police that their non-intervention would later lead to acquittal of the demonstrators might change the equation in their decision-making process. In other words, knowing that the alleged offenders will ultimately be acquitted, the police may decide that this added element does not justify the initial decision not to intervene. It may tip the scale in favour of prompt intervention. This conundrum has a very simple solution. When the police decide not to enforce the law forthwith at the scene of a demonstration, they should publicly advise the crowd, through a public address system, that in their view the conduct of those present is unlawful, and further, that they do not take action only in order to avoid escalation. Such a statement made promptly and openly at the scene will neutralize any future assertion by a defendant that he was led by the non-intervention to believe that his conduct was legal.

The discussion of the effect of non-intervention started by proferring two sets of circumstances—one where reliance was based on the conduct of the police in an earlier demonstration, the other on the conduct during the demonstration under review. The suggestion which has been advanced, namely, that the police advise the people why the law is not immediately enforced is applicable only in the latter case. It is of no value when the police treat differentially two separate demonstrations and act promptly against the latter of the two. Clearly, if the police deliberately discriminate against the second group this discrimination will not come after they have declared at the early demonstration that the conduct was unlawful. So, in the final analysis, the demonstrators who claim that their

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[70] *Supra*, footnote 61.

protest was terminated while similar conduct had not been handled likewise in the past under identical factual circumstances remain without judicial recourse.

To sum up, the police should assess very carefully the pros and cons of intervention. If they decide to refrain from prompt enforcement of the law at the scene of a demonstration they should openly declare their decision to those gathered. Apparently, under the current state of the law in Canada a representation by the police that a certain conduct is lawful will not result in absolving a criminal defendant. The fact that demonstrators relied on police representation should at least be a mitigating factor in imposing the sentence.[71]

C. *The Resort to Arrest.*

When discussing arrest in relation to public protest one has to distinguish between the case where arrest is the main objective of the police and where it is resorted to only as an incidental element in a dispersal operation. Different considerations apply, and here the first type will be probed, while the second will be treated later when dealing with the use of force.

It seems that the decision whether or not to arrest during a demonstration will depend in the main on two related but distinct factors, the size of the demonstration and the numerical ratio between protestors and policemen. In regular encounters between one or two suspected offenders and a few officers, the latter will not have great difficulty in most cases in accomplishing arrest. If the number of demonstrators is small and they are confronted by roughly the same number of officers, the situation is quite similar. By arresting all present the police will effectively terminate the demonstration.

The situation is vastly different in the medium and large scale demonstrations. One cardinal consideration of the commanding officer is not to weaken numerically the force at his disposal, a situation which will result when people are arrested.[72] It should be clear what the arrest involves: the taking of the alleged offender away and accompanying him, usually to a wagon, where he will be detained. A recurring phenomenon in many such cases of arrest during public protest is that more than one officer has to accompany

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[71] See *R.* v. *Campbell*, [1973] 2 W.W.R. 246, 10 C.C.C. (2d) 26, 21 C.R.N.S. 273 (Alta Dist. Ct); *R.* v. *Arrowsmith* (1974), 60 Cr. App. R. 211.

[72] Testimony by Superintendent Victor James Telford of The Metropolitan Toronto Police Force, Royal Commission of Inquiry into the Circumstances respecting the Conduct of the Public and of Members of the Metropolitan Toronto Police Force at the Ontario Science Centre on October 25th, 1971 (Commissioner-Judge I. A. Vannini), Hearings, Vol. XI, p. 2092, hereinafter cited as The Vannini Hearings.

the arrested person.[73] Consequently, the simultaneous arrest of some people may sharply deplete the police strength at the time. This consideration of maintaining the manpower will be of special salience if the case involves a public protest near a certain site that needs protection. In the case of the moving demonstration this reasoning is less viable for then no specific target has to be secured and a relatively brief reduction in strength may not be of great consequence.

In the case of medium and large demonstrations the ratio of demonstrators to officers will be high, for obviously the human resources available to the police are finite.[74] In such a case the police will have physical contact, if at all,[75] with the crowd only at the perimeter of the gathering. If the violent demonstators are at the periphery of the crowd, it will be relatively easy to arrest them.[76] If, however, those who behave violently are in the midst of the crowd the arrest is virtually impossible. In order to arrest in such a case some officers will have to enter the crowd in an attempt to reach the alleged offenders. This may prove highly risky to the officers since they might be engulfed and attacked by the many demonstrators surrounding them. It is therefore very unlikely that such a manoeuver will be undertaken. There is another possibility for arrest in the midst of the crowd, but this as well is more theoretical than real. The police in some cases place a few plain-clothes officers in the crowd, to circulate and assess the mood of those assembled and report on this to the commanding officer. If such an officer attempts to arrest a person in the middle of the crowd he may find himself in grave personal danger.[77]

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[73] The question was put to the Chief of the Metropolitan Toronto Police Force as to why it takes so many officers to arrest one person at a demonstration, and he answered: "Some people act up at demonstrations for the benefit of the news media, and it takes more than one officer to take them into custody without injurying either the policeman or them." The Telegram (Toronto), May 30th, 1970, p. 10. While one may dispute the two assertions included in the answer, there is little doubt that the premise in the question is factually correct.

[74] It is true that every citizen is under a legal duty to assist the police in the suppression of a riot when called upon (*R.* v. *Brown* (1841), 174 E.R. 522; see also s. 32(3) of the Criminal Code). It is very unlikely, however, that the police would ask citizens to assist in the suppression of disorders. The citizens are neither trained nor equipped to handle crowds and their intervention may exacerbate the problem facing the police. The duty to assist was established at a time when there were no police forces as one knows them today, and law enforcement was heavily dependant on the citizenry.

[75] It should be repeated that physical contact with the crowd should be avoided, if possible.

[76] See *e.g.*, the circumstances in *R.* v. *Caird* (1970), 54 Cr. App. R. 499, at pp. 508-509.

[77] If the plain-clothes officer is assaulted by the surrounding demonstrators the

The only alternative available, then, if arrest is still sought, is to arrest some people at the fringe of the crowd and especially attempt to arrest the leaders.[78] The police apparently believe that special effort should be made to arrest the leaders.[79] The view that particular attention should be given to the arrest of the leaders is based on two suppositions: (1) the arrest of the leader and his removal from the scene will have a moderating, restraining and deterring effect on his followers, and there will not be anyone to follow; (2) the responsibility of the leader for the illegal conduct is greater than that of the followers, hence he should be singled out and handled differently.

The first postulation may have validity in some cases, but may prove wrong and counter-productive in others. As to the second, though it is a valid one, other considerations may have countervailing cogency. The arrest of some people in the crowd and especially the leaders, may inflame the crowd and propel the hitherto non-violent participants to aggressive and even violent conduct.[80] They might attempt to free the arrested leaders from the hands of the police.[81] Moreover, there is a danger that a new leader will instantly emerge on the spot,[82] and that he will be more militant than the one just arrested. The police again face a very difficult decision, since the arrest of a leader (or even a mere participant) may cause the exact adverse reaction to the one initially sought as it may escalate the situation and turn a relatively minor incident into a full scale confrontation between the crowd and the police.

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question will arise as to whether they can be charged with assault of an officer in execution of duty (contrary to s. 246(2)(a) of the Criminal Code), even if they did not know that he was a policeman: compare the Canadian case of *R.* v. *McLeod* (1955), 14 W.W.R. 97, 111 C.C.C. 106, 20 C.R. 281 (B.C.C.A.) with the English case of *Kenlin* v. *Gardiner*, [1967] 2 Q.B. 510, [1966] 3 All E.R. 931.

[78] For a discussion of different types of leaders and their relationships with their followers in the context of public order, see G. Rude, The Crowd in History: A Study of Popular Disturbances in France and England 1730-1848 (1964), pp. 247-252.

[79] Westley, *op. cit.*, footnote 44, pp. 52-53; The R.C.M.P. Manual, *op. cit.*, footnote 53, para. 199(5): see the quote from it *infra*, footnote 94.

[80] See Ahern, *op. cit.*, footnote 45, p. 41. See also *Globe and Rutgers Fire Insurance Co.* v. *Glace Bay*, [1927] 1 D.L.R. 180 (N.S.S.C.). In the incident that led to this case both the mayor and the police thought it unwise to make arrests in a crowd of about two thousand people. The court concluded that there was neither misconduct nor neglect of duty by the authorities.

[81] In *R.* v. *Caird*, *supra*, footnote 76, at p. 507, Sachs L.J. said that it is "... impracticable for a small number of police when sought to be overwhelmed by a crowd to make a large number of arrests. It is indeed all the more difficult when, as in the present case, any attempt at arrest is followed by violent efforts of surrounding rioters to rescue the person being arrested."

[82] It is possible in a crowd situation that hitherto unknown leaders may come out and even replace the leaders who initiated the gathering: K. Lang and G. E. Lang, Collective Dynamics (1961), p. 143.

Regarding the second postulate—the greater responsibility of the leader—this seems to be a well-founded consideration.[83] Decisions based on assessment of different degrees of culpability are sometimes made by police officers and Crown attorneys. For example, when a secondary participant in a crime is not prosecuted in return for testimony against the leader of the operation. Similarly, if a leader of a group initiates violence and urges his followers to pursue his cue, there is justification to treat him differently. Nevertheless, in the context of a specific demonstration it may very well be that the other considerations, especially the avoidance of deterioration, may outweigh the justified desire to pick out the leader. Furthermore, the fact that a certain person is the leader of a public protest affords easier opportunity to identify him and he can be proceeded against at the natural conclusion of the demonstration[84] or even at a later date. It should, however, be clear that the police should not direct their efforts against non-violent leaders only because they have a following. The police should not manipulate situations by concentrating on, and singling out, leaders whose sole vice in the eyes of the police is that they can galvanize and lead people into action. Being a leader is not an offence.

One type of arrest operation which needs mention is the use of mass arrests.[85] The peculiar virtue of arrest as opposed to dispersal through the use of force is that arrest can and should be discriminate. The police survey the crowd and observe and single out visually the offenders from the rest of the crowd. If the gathering is relatively small, the officers can physically cull the offenders from the rest, after assessing the situation and the risks associated, as explained earlier. In the case of mass arrests, however, the tactic is used more as an instant punishment than as a genuine effort to enforce the law. Because the emphasis is on arresting as many people as possible, it will lead to the arrest of some merely due to their presence at the scene, and the attribute of arrest as a discriminate mechanism is lost. A prosaic reason why mass arrests should be rejected as a viable tactic, except in the most extreme situations, is the lack of facilities to accommodate large numbers of arrested persons. Detention

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[83] *R.* v. *Duyker*, *supra*, footnote 54, at p. 331. It should be noted as well that in England it is a specific offence, if certain conditions exist, to organize or assist in organizing a public procession: The Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6, s. 3(4). As to the meaning of *organize* in that section and its relationship to a leadership role, see *Flockhart* v. *Robinson*, [1950] 2 K.B. 498, [1950] 1 All E.R. 1091.

[84] See Westley, *op. cit.*, footnote 44, p. 42. Also *R.* v. *Duyker*, *supra* footnote 54.

[85] It seems that the Metropolitan Toronto Police Force does not endorse this tactic: Testimony by Chief Harold John Adamson, The Vannini Hearings, *op. cit.*, footnote 72, Vol. XXXVIII, p. 7754.

facilities in most cities are limited and, as a result, the police will have either to free the excess[86] or use makeshift facilities;[87] these will be the most visible effects of mass arrests. Furthermore, a complete breakdown of the criminal justice system may result due to the sudden inundation with, and the need to process, large numbers of arrested persons.[88]

D. *Dispersal Through the Use of Force.*

The discussion will focus now on the use of force by the police as a means of achieving the disperal of crowds. Attention will be given to the application of direct physical force and use of horses, not to the more extreme and exotic modes such as gas or deadly force, reflecting their fortunate rarity of use in the Canadian scene. Actually, little remains to be said about dispersal altogether. The considerations which have been expounded when dealing with show of force, non-intervention posture and especially the resort to arrest, point to the pros and cons in respect of the use of force.

With all the reservations regarding the use of force to achieve dispersal, obviously situations will arise where the commanding officer has no alternative but to order this procedure. When such a decision is reached, the police should first advise the people gathered of the intention to use force. In some cases this may give those who are not bent on violence or who do not seek a forcible confrontation with the police an opportunity to extract themselves from the crowd and disperse voluntarily.[89]

The dispersal, when executed by police on foot, involves the actual, physical pushing of the crowd. There are different formations for such a manoeuver, the most common being the wedge. A number of officers, a squad, position themselves in the shape of a wedge,

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[86] A group of women was arrested during a demonstration in Montreal. According to one woman, when the detention room was full the rest of the arrested women were allowed to go: The Globe and Mail (Toronto), Dec. 1st, 1969, p. 4.

[87] An interesting example is the arrest of about seven thousand people during one day in Washington, D.C., when thousands of anti-Vietnam War protestors descended upon the American capital attempting to bring it to a standstill. When the jails were filled up a football field was used as a temporary detention facility: The New York Times, May 4th, 1971, pp. 1, 32.

[88] For an American perspective regarding the collapse of the system following mass arrests during civil disorders, see R. H. Dodds and R. R. Dempsey, Civil Disorders: The Impact of Mass Arrests on the Criminal Justice System (1969), 35 Brooklyn L. Rev. 355.

[89] This may not be easy to accomplish. It could happen that the people who wish to leave the scene peaceably will not be able to do so if they are trapped between the police who are in the front and the more violent demonstrators who are at the rear. In such a case there is also greater danger of people being trampled upon: see Halloran *et al., op. cit.*, footnote 45, p. 78.

with the officer at the tip being the first to enter the crowd.[90] The most important factor in effective dispersal is for the officers comprising the squad to work as a well-co-ordinated unit. They should operate in unison and the individuals should not leave the formation.[91] This cardinal rule is important for three reasons: (1) the unit has greater physical might than the sum of its components; (2) there is mutual restraining between the members of the squad, thus reducing the danger of excessive and unwarranted force,[92] and (3) it affords for better discipline, control and accountability.[93]

The fact that the chief objective is dispersal does not necessarily mean that arrests will not be performed, though arrests will be only an incidental element in the overall operation. Police manuals stress that only arrests of leaders are of interest during dispersal.[94] This will be possible only if the leaders are to be found at the periphery of the crowd, close to the point of physical contact between the demonstrators and the police. To avoid the breaking and dissolution of the squad which carries out the actual dispersal, a special arrest squad should follow behind, having a mop-up function. This squad will handle protestors who offer special resistance and refuse to disperse, and those left behind during the advance of the dispersal squad.

The alternative to the use of police on foot in dispersal is the employment of horses. Their use may seem very attractive to the commanding officer, due to the fact that a small number of horses equals multifold numbers of officers on foot, for dispersal purposes.[95] The commanding officer, however, should not call in the mounted unit if the officers on foot at his disposal can accomplish the task. It seems that there is greater danger of injury from horses than from officers on foot. Only if the manpower is insufficient should the

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[90] In assigning officers to such squads due regard should be given to their proclivity regarding the use of force, their tempers and cool posture: see Ahern, *op. cit.*, footnote 45, pp. 37-38.

[91] The O.P.P., Crowd Control Manual, *op. cit.*, footnote 4, p. 60, states: "The front line members when in formation and particularly when in physical contact with a crowd *cannot* leave the formation or perform other duties." Emphasis in original.

[92] See Ahern, *op. cit.*, footnote 45, p. 37. See also Halloran *et al.*, *op. cit.*, footnote 45, p. 77, concerning a police cordon.

[93] See Ahern, *op. cit., ibid.* It is not a mere coincidence that one of the findings of the Gastown Inquiry was that most of the officers who had used excessive force had left their squad formation: The Gastown Report, *op. cit.*, footnote 30, p. 11.

[94] *E.g.*, The R.C.M.P. Manual, *op. cit.*, footnote 53, declares (para. 199(5)): "Remember your purpose is to disperse the crowd and restore order. Arrests of the leaders and agitators *only* are of concern to you." Emphasis in original.

[95] It was suggested that a horse, with a rider of course, equals ten officers on foot (Metropolitan Toronto Police Chief, Harold Adamson, in the Toronto Star, Jan. 7th, 1972, p. 31) or even twenty (the Gastown Report, *op. cit.*, footnote 30, p. 15).

horses be used. Here again the mounted unit will be followed by officers on foot whose function will be to protect the riders, and, more importantly, to perform arrests. Clearly, the officers riding the horses are not expected to effect arrests.[96] In order for a rider to perform an arrest he has to dismount his horse, thereby losing his advantage. Furthermore, it can be expected that when horses are used, more people will be left behind during the advance than will be the case with dispersal by officers on foot. There will be space between the horses since they cannot operate in the same way as a squad of officers, and therefore the use of a squad of officers on foot which follows behind is almost an operational necessity.

IV. *Two Cases of Demonstrations.*

If and when acts of lawlessness come before the courts the approach is inevitably narrow and segmented, the foci being the criminal culpability or tortious liability or both of the defendants. There is no overall review of the events or the decision-making process at the various levels of the police hierarchy, or of the conduct of all involved, apart from the plaintiff and defendant. Furthermore, the normal judicial process and procedure are neither intended nor suited to such a task. It is usually before a commission of inquiry that the detailed story of a single demonstration unfolds. If there is an appointment of such a commission it would likely come after public criticism of the conduct of the police during a demonstration.[97] It is useful to consider two cases of public protest which led to the establishment of commissions of inquiry, one in Toronto, the other in Vancouver.[97A] This will provide a measure of concretization and substantiation of many of the propositions advanced earlier in this article and will also afford a more vivid and illustrative backdrop for the issues discussed.

A. *The Kosygin Protest.*

Prime Minister Alexei Kosygin of the Soviet Union was on an official visit to Canada in October, 1971. His visit to Toronto on

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[96] Testimony by Inspector Edward Sutherland Johnson, the officer in command of the mounted unit of the Metropolitan Toronto Police Force: The Vannini Hearings, *op. cit.*, footnote 72, Vol XVII, p. 3404.

[97] Of course, not every case of a public outcry after a demonstration will lead to such an appointment. It is interesting to note the reaction of the Attorney General of Ontario shortly after the large demonstration against Prime Minister Kosygin of the Soviet Union, which will be discussed *infra*. Before the Royal Commission of Inquiry was established and after the public clamour against the police, the Attorney General remarked that although similar incidents had occurred in the past this time he was particularly disturbed because the demonstrators "come from a segment of the community which normally believes firmly in law and order": The Globe and Mail (Toronto), Nov. 4th, 1971, p. 1.

[97A] For an example of an English commission, see Report of Inquiry into the Red Lion Square Disorders on June 15th, 1974 (Cmnd. 5919).

October 25th gave an opportunity to a variety of ethnic and religious groups to protest the visit as well as to express publicly their objection and opposition to the Soviet Union and its policies.[98] During a large public protest, which involved thousands of people, the mounted unit of the Metropolitan Toronto Police Force was used, several people were injured, and more than a dozen arrests were made. The conduct of the police caused a public uproar and consequently the Government of Ontario appointed a Royal Commission of Inquiry. The Commission was composed of one person, Judge I. A. Vannini, and its functions were to investigate and report upon the conduct of the public and the police during the demonstration. The Commission published a detailed, 181-page report which was rather critical of the police.

The Soviet Premier had been invited to speak at a dinner to be held at the Ontario Science Centre in Toronto. That area was the stage for the demonstration against the visitor. Different groups gathered near the Centre, not in one spot, but in various surrounding locations. There was great apprehension among the security authorities, even a fear that an attempt might be made on the life of the Soviet Premier.[99] Over twelve hundred officers from the Metropolitan Toronto Police Force, about one-third of the Force, were assigned to the operation.[100] The violent encounter between the police and the demonstrators occurred in one location and it involved mostly members of the Ukrainian-Canadian community.

A committee of Ukrainian-Canadians was responsible for the organizing effort for the demonstration on the part of their community. About a week before the event they contacted the Metropolitan Toronto Police Force. They selected a site near the Science Centre for their demonstration and a police official expressed no objection to the location. The Ukrainian-Canadian community was advised of the specific location for its expression of public protest. Due to poor communication within the police bureaucracy the organizers were not advised of a later decision which resulted in prohibiting the use of the site that had already been chosen. The organizers learned of the change only an hour or two before the demonstration. In addition, a most senior officer at the scene refused to assist and redirect the people to a new location. Consequently, there was some confusion among the Ukrainian-

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[98] Kosygin's visit caused security problems in every Canadian city he visited. See *Knowlton* v. *The Queen* (1973), 10 C.C.C. (2d) 377, 21 C.R.N.S. 344 (S.C.C.) and the reference in the case to the attack on Kosygin by one person on Parliament Hill (at pp. 381 (C.C.C.), 347 (C.R.N.S.)).

[99] The Vannini Report, *op. cit.*, footnote 11, pp. 16-19, 22-23.

[100] *Ibid.*, p. 23.

Canadians due to the fact that the original plan was disrupted. For instance, the organizers could not effectively utilize the services of the many marshals they had recruited to keep the crowd in order. Many of the Ukrainian-Canadians assembled eventually at one spot in a street near the Centre where the conflict later occurred.[101]

The crowd at that spot amounted to a few thousand people and was twenty-five to thirty deep. It was faced by a loose line of police officers. Initially there was no physical contact between the bulk of the crowd and the police; the space between them was used by marching groups of demonstrators. The mood was relaxed, although there was singing and chanting and a few missiles were thrown.[102] Then the situation started to change. The space between the crowd and the line of policemen was closed and there was direct physical contact. The mass of bodies of protestors began to pressure the police line.[103] The pushing and shoving was apparently initiated by a small number of people at the rear of the crowd.[104] The crowd swayed back and forth quite involuntarily. People were caught between those pressing from behind and the line of officers in front. The pressure increased gradually and the police line, by now two or three deep, lost ground and a bulge developed.[105] The turmoil was growing and the lighting used by the photographers contributed to the commotion.[106] A few arrests were made at the point of contact

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[101] *Ibid.*, pp. 41-55. [102] *Ibid.*, pp. 56-64.

[103] *Ibid.*, pp. 65-66. [104] *Ibid.*, pp. 67, 132.

[105] *Ibid.*, pp. 66-68.

[106] *Ibid.*, pp. 66, 147. This view of the Commission regarding the effect of the presence of photographic equipment is in line with the often-heard argument that demonstrators behave in a more disorderly manner if they know that their actions are filmed by the news media (see *e.g.*, Halloran *et al.*, *op. cit.*, footnote 45, pp. 163-164. In that case, therefore, cameras were positioned so the demonstrators would not be aware of their presence). Interestingly enough the Commission remarked critically upon the fact that the police did not have adquate photographic equipment (The Vannini Report, *ibid.*, pp. 81-82, 135). Somewhat inconsistently the Commission stated that such equipment might have had a restraining effect on those bent on violence (*ibid.*, p. 135).

The subject of photographic equipment was also raised in the Report on the Gastown Disturbance. The Commission of Inquiry pointed out (The Gastown Report, *op. cit.*, footnote 30, p. 12) that the police at the scene of the demonstration resented the taking of photographs by members of the news media, claiming that the lighting interfered with the operation. The Commission suggested that the problem be studied independently before the police act to curb the news media and it added that it did not share the view that the lighting interfered with the work of the police.

The Report also dealt (p. 16) with the use of photographic equipment by the police. It endorsed its use so that a record would be made of a demonstration and urged the police to acquire such equipment. In the opinion of the Commission, such a record would enable the police to refute charges of the use of excessive force, it would have a restraining effect on the demonstrators knowing that they might be identified from the film, and for the same reason it may have the same effect on the conduct of the officers in the line.

and this led to protestations and to further excitement in the crowd.[107]

The Commission made two interesting observations with respect to the police performance up to that point. The first was that had there been adequate numbers of officers at the perimeter of the crowd, the problem which started at the rear might have been prevented.[108] This suggestion which seems quite obvious at first glance, may not be so simple to implement and may prove counter-productive. For one thing, the police may not have enough manpower to station sufficient officers at the periphery of the crowd. If it is a large crowd, the police will need many officers to assume effective positions on the whole perimeter. For another, the stationing of officers at the circumference may cause the crowd to feel trapped, having no avenue of escape, thus exacerbating the tension.

The second observation related to the use of plain-clothes officers, of whom about a dozen mingled in the crowd. Their functions were to assess the mood of the people gathered, to identify trouble-makers and by their mere presence inside the crowd be a restraint upon those who recognized them to be policemen. These officers, however, did not have the necessary communications equipment to report their findings to the officers in command of the operation. If they had such equipment, the Commission asserted, the agitators might have been thwarted in their design.[109]

In any event, as the pressure on the line intensified and as the bulge grew in size there was a danger that demonstrators would break through and rush to the Science Centre. The officer in charge ordered the mounted unit into action to disperse the crowd.[110] Before they were called in no attempt was made to address the crowd, to persuade it to withdraw or to warn it of the imminent use of the horses. The police did not have the necessary public address system for this purpose.[111] Another side of the deficiency in equipment was the lack of adequate means of mechanical communication between the officer-in-charge and the senior officers under his command, who directed the different units. As a result, there was loose co-ordination and poor control over these units, the officer-in-charge being unable to keep in continuous contact.[112]

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[107] The Vannini Report, *ibid.*, pp. 67, 114.

[108] *Ibid.*, pp. 68, 133.

[109] *Ibid.*, pp. 33, 68-69, 133.

[110] *Ibid.*, pp. 77, 89.

[111] *Ibid.*, pp. 34, 81, 133.

[112] *Ibid.*, pp. 33, 80-81, 136.

When the horses approached, the crowd retreated somewhat, and the pressure on the police line subsided. Verbal abuse was directed at the officers and various objects were thrown at them, though there was no other act of violence on the part of the crowd.[113] The horses entered the crowd without first being displayed in a show of force.[114] As the horses entered the crowd, the tumult reached a new peak. People started to run away, a few fell down in the rush and were trampled upon by the horses and by others attempting to flee. Several people attacked the horses and the riders. The horses made two forays into the crowd.[115] At some point, though not initially, the special unit, the Emergency Task Force,[116] appeared at the scene. They were ordered into action by the unilateral decision of their commander.[117] The members of the Task Force with other officers at the scene (those who had originally comprised the police line) made a few arrests and re-established the line after the crowd had been pushed back and dispersed.[118]

Fifteen demonstrators were injured, aside from injuries suffered by some of those arrested, and six police officers were hurt as well. The injuries to thirteen of the demonstrators were caused during the operational use of the horses. Some were injured when they fell to the ground and were run over by the fleeing demonstrators or by the horses, and some were struck with the riding crops used by the riders.[119] In all, thirteen people were arrested,[120] less than half of them during the use of the horses. It should be noted that excessive force was used during some of the arrests, also when some of the people arrested were accompanied to the police wagon, and while they were positioned so their pictures could be taken for the purpose of identification.[121] The Commission suggested the use of handcuffs to reduce the possibility of excessive force. Less force will have to be used; it will reduce the danger of injuries to the arrested, and in

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[113] *Ibid.*, pp. 90-91.

[114] *Ibid.*, pp. 77 *et seq.*

[115] *Ibid.*, pp. 94-99.

[116] This is a mobile unit whose functions are to deal with problematic and specially difficult situations. For example, saturation of high crime areas, protection of important visitors and crowd control. For the latter function the unit has riot gear at its disposal, though it was not used in the incident under discussion (*ibid.*, pp. 102-103).

[117] *Ibid.*, pp. 100, 105-107.

[118] *Ibid.*, pp. 100-101, 106-107.

[119] *Ibid.*, pp. 109-114.

[120] When recounting the names of the arrested people and the circumstances of their arrests the number adds to thirteen (*ibid.*, pp. 114-118, and also p. 119), while in the summary of the report the figure mentioned is fifteen (*ibid.*, p. 137).

[121] *Ibid.*, pp. 114-118, 137.

addition, fewer officers will be needed in the process.[122] The use of handcuffs, however, to achieve these objectives may not be legal. Apparently, they can be used only in the case of danger of escape.[123]

The Commission was critical of various aspects of the preparation by the police before, and their performance during, the demonstration. Reference has already been made to the inadequate communications equipment, both to address the crowd and to maintain constant contact with, and control upon, the different units. As a result of the latter, the mounted unit, after being ordered in by the officer-in-charge, operated on its own, was not subject to continuous reassessment of the situation and acted over and above what was objectively required and expected of it.[124] Furthermore, the Emergency Task Force was brought in by a decision of its own commander and not of the officer-in-charge, and it, too, was not subject to constant supervision.[125]

Perhaps the most important conclusion reached by the Commission was the necessity for close liaison and co-operation between the police and demonstrators.[126] The significance of collaboration, it may be added, is based on two reasons: (1) Co-operation will eliminate or at least reduce the possibility of misunderstanding between the organizers and the police. Better liaison in the Kosygin episode would have forestalled the confusion which resulted when the organizers learned, only a short while before the event, that they could not congregate at the original site. (2) If the police and the organizers work together in the planning stage it may dissipate or even stave off completely the oft-found feeling among protestors that the police try to put obstacles in the way of their endeavours. It may reduce the perception that the police are the adversaries. The Commission repeatedly stressed that the Ukrainian-Canadians and most other demonstrators wished to conduct their protest in a peaceful and orderly manner.[127] It was not a case of a group looking for a violent confrontation with the police. When the police deal with a group such as this, it can safely be assumed that collaboration can only assist in bringing a demonstration to a non-violent conclusion, satisfying both sides. With groups seeking violent confrontation the situation may be much more complex, since they may be uninterested in and even hostile to any co-operation with the authorities.

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[122] *Ibid.*, pp. 119-120, 137.

[123] *Hamilton* v. *Massie* (1889), 18 O.R. 585 (C.P.); *Fraser* v. *Soy* (1918), 52 N.S.R. 476, 30 C.C.C. 367, 44 D.L.R. 437 (S.C.).

[124] The Vannini Report, *op. cit.*, footnote 11, pp. 81, 136.

[125] *Ibid.*, pp. 105-107, 136.

[126] *Ibid.*, pp. 47-48, 131-132, 138, 142-143. See also *op. cit.*, footnote 2, p.192.

[127] The Vannini Report, *op. cit.*, footnote 11, pp. 48, 58, 138.

The Commission endorsed, in principle, the use of horses as a weapon of last resort to control and disperse disorderly crowds, in preference to officers on foot with riot gear.[128] While the officer-in-charge was justified in ordering the mounted unit into action he made a few errors in the process. First, the crowd should have been addressed in an attempt to calm them down, and they should have been forewarned regarding the use of the horses.[129] Second, the mounted unit should have been brought forward in a show of force.[130] It seems that the Commission rightfully believed that with the type of crowd involved, where most protestors came with peaceful intentions, a show of force might have been a sufficient deterrent. Moreover, the warning and the show of force would have given these people a chance to break away before the actual employment of the horses. Third, the Emergency Task Force should have been used from the start in conjunction with the mounted unit; initially as a show of force, then, to protect the riders and horses, to disperse those left behind during the advance of the horses, and to perform arrests and re-establish the line.[131]

In conclusion, one finds that a series of equipment deficiencies and errors of judgment combined in this case to contribute to an unfortunate and violent encounter between the police and the protestors. It should not be forgotten that the majority of the demonstrators came with the idea of expressing themselves publicly in a perfectly legal and orderly way. One can only speculate as to the deeper impact which the conduct of the police had upon the perceptions of the public at large, and especially the Ukrainian-Canadian community, but a worsening of police-community relations could have been a likely result.

B. *The Gastown Disturbance.*

A commission of inquiry, with Mr. Justice T. Dohm as commissioner, investigated and reported upon a demonstration which occurred on August 7th, 1971, in the area of Vancouver known as Gastown, and which ended in violence.[132] The demonstration was promoted in an article in an underground newspaper with the declared objective of protesting against the law on the use of marijuana and an alleged "crack-down" by the police against drug

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[128] *Ibid.*, pp. 133-134.

[129] *Ibid.*, pp. 81, 142.

[130] *Ibid.*, pp. 77 *et seq.*, 134, 141.

[131] *Ibid.*, pp. 134, 141-142.

[132] The Gastown Report, *op. cit.*, footnote 30. This report is a short one and many of the factual findings, conclusions and recommendations are made repeatedly throughout. For these reasons no reference will be made to specific pages in the report.

users in Gastown which was known to be centre of the "drug sub-culture" in Vancouver. The real intent of the organizers, however, was to have a violent confrontation with the police, in line with their general purpose of defying all authority.[133]

The gathering of people commenced in a *cul-de-sac* and after a while, as the crowd grew in number, the participants moved into a city square, at the confluence of four streets. The police were at the scene but they did not intervene to prevent the blocking of the square, as a result of which traffic had to be re-routed. The crowd increased to about two thousand people, though only a small minority of fifty to a hundred of them were seeking the confrontation. There were also non-participants in the area, people who were there for a variety of reasons. Some people in the crowd smoked marijuana, but the police, in keeping with their policy of non-intervention under such circumstances, did not attempt to enforce the drug law. There was no violence, either to property or people, though abusive and obscene language was directed at the police. This situation lasted for a few hours.

At a certain point in time the officer-in-charge received a report, later found to be incorrect, that a window had been broken in a nearby hotel. Following police policy, he decided to intervene. The officer-in-charge then gave a warning to the crowd to clear away within two minutes; the amplifying equipment at his disposal was inadequate for the purpose. The warning was not heeded and the dispersal operation began. Four horses were brought in, followed by officers on foot in riot gear. With this, panic and confusion erupted, and bedlam reigned. The horses followed people on to the sidewalks and the entrance of buildings, and fighting broke out between the police and some of the demonstrators. Seventeen people were injured, among them, six police officers.

The Commission criticized the police for their performance, and in many respects the criticism resembled that expressed later in the Vannini *Report*. There were four major points in the critique: First, the police should have attempted to persuade the crowd to disperse, then warnings should have been given, and of course, the police should have had the proper amplifying equipment. Second, the Commission agreed that it was sensible to take action only when there was a report that property damage was caused.[134] At the same time, it was critical of the policy of non-intervention taken by the police at the earlier stage of the incident. The Commission held the

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[133] This may explain why apparently there was no direct contact between the organizers and the police to prepare for the forthcoming event. The police learned about it from the advance publicity.

[134] Remember that it was later found to have been erroneous.

view that the police should not have allowed the original group of demonstrators to move from the dead-end street into the square, thus disrupting normal traffic on a public thoroughfare.

Third, the operation of the horses was faulty. While the Commission endorsed their use as an effective crowd-control weapon, they should be used only as a last resort after persuasion and warning had failed, and after officers on foot had encountered difficulty in accomplishing the task of dispersal. Furthermore, the horses should not have been used on sidewalks and entrances to buildings. The interests of the non-participants should receive precedence. Fourth, some officers used excessive force, and this, of course, should not have happened. One should note in this respect that the Commission found out that most of these officers abandoned their squad formations. It recommended that when officers wear riot gear they should be identifiable by a number on their helmets.[135]

V. *The Control of Hostile Audiences.*

If, as has been shown, the police have a most difficult job in the case of a demonstration involving one group, their task becomes momentous when a hostile audience is involved. The term "hostile audience" is used to identify the situation which arises when a public speaker or a group of demonstrators (to be referred to as the original demonstrators) is opposed at the scene by others who hold contrary views.[136] Obviously, from the perspective of the police the situation is more complex. In the case of the unopposed demonstration the police face the questions of whether, when, and how to intervene. If hostile opponents are present, the difficulties are further compounded by the new element. Mr. Justice Black of the United States Supreme Court went so far as to say that,[137]

> . . . when groups with diametrically opposed, deep-seated views are permitted to air their emotional grievances, side by side, on city streets, tranquility and order cannot be maintained even by the joint efforts of the finest and best officers and of those who desire to be the most law-abiding protestors of their grievances.

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[135] The fact that a person in a crowd feels he is anonymous and unidentifiable partly explains the difference in behaviour when a person is in a crowd and when he is in an individual encounter. The same socio-psychological factor is present in police collective behaviour, for example, when a squad of officers attempts to disperse a crowd. The anonymity and knowledge by the officers that they cannot be identified may explain the use of excessive force. This can be countered if the officers are more easily identifiable (*e.g.*, with numbers on their helmets). If they know that they are liable to be identified, it can be safely assumed that they will be more prudent in the use of force.

[136] The situation is completely different from the case where no hostile audience is involved. For this reason, among others, cases such as *Chaput* v. *Romain*, [1955] S.C.R. 834 and *Lamb* v. *Benoit*, [1959] S.C.R. 321 are inapplicable.

[137] *Gregory* v. *Chicago* (1969), 394 U.S. 111, at p. 117.

The problem arising from the existence of opposition at the site of a demonstration has several aspects. The aspect to be examined here centres around one major question, namely, how the police should react when a hostile audience is present at the scene of a demonstration.[138] It must be clear from the outset that it cannot be suggested that the opponents must be completely docile and quiet. It is only natural that some degree of heckling and antagonism will occur, especially if the subject-matter of the protest is an emotional one that has divided public opinion. The real problem arises when the clash of views deteriorates and is transformed into a violent confrontation. The police have before them four basic options: (1) non-intervention, (2) intervention directed against both sides, (3) action against the original demonstrators, or (4) action against the hostile audience and protecting the original demonstrators.

Under the first option the police will not intervene at any stage of the confrontation even if violence erupts between the two sides. The parties will be allowed to settle their differences on the basis of force, not moral or rational cogency, but sheer physical might. In other words, let the stronger side win. The police may be tempted to follow such a course of omission out of utter exasperation and disgust with the attitudes of the two groups. No one will seriously recommend such an approach by the police. The police should never abdicate their legal and social responsibilities, even in the most trying circumstances.[139] They cannot and should not permit the introduction of the law of the jungle into organized and civilized society.

The second option is for the police to act simultaneously against the two rival groups. The police will refrain from making instant decisions as to who is more responsibile or blameworthy for the mounting conflict but would rather resort to the regular enforcement measures against both sides, through orders to desist or disperse, arrest or actual dispersal. One example will demonstrate how a situation necessitating such measures may arise, when both sides commit criminal offences. Suppose a public speaker in a city square surrounded by both supporters and opponents uses language which

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[138] The celebrated case of *Beatty* v. *Gillbanks* (1882), 9 Q.B.D. 308, is not applicable here. There, the Divisional Court discussed the question of whether the conduct of the Salvationists amounted to unlawful assembly, and it did not consider the issue of police intervention.

[139] The Commissioner of Police of the Metropolis (London, England) recently remarked: "His [the policeman's] every instinct, when trying to keep rival factions apart, is to let them fight it out and to clear up the mess, but his sense of duty persuades him that the public interest requires the prevention or containment of disorder no matter what the risks or adverse consequences for him." R. Mark, The Metropolitan Police and Political Demonstrations (1975), 48 Police J. 191, at p. 195.

amounts to a violation of the hate propaganda provisions of the Criminal Code.[140] His inflammatory speech immediately enrages some of those present and they start throwing rocks at the speaker. Under the circumstances posited, both the speaker and those throwing rocks commit criminal offences. Surely the fact that the speaker was the first to commit an offence and that he provoked his adversaries does not mean that the latter were entitled to resort to force.[141] Should not the police act against both?

Surprisingly, this option of police action against the two groups is mentioned rarely, if ever, as an alternative in either court cases or in learned commentary, and apparently the police do not consider it a viable option. The explanation seems to be that, from a tactical point of view, the option is unsatisfactory. In order to handle both camps the commanding officer will have to split the effort and divide the manpower at his disposal. It may result in the officers being in the middle, literally and figuratively. One part of the force controlling the speaker and his sympathizers, the other part handling the opponents. Obviously, this entails a weakening of the overall strength of the police. One might even conceive of a turn around of events whereby the two opposing groups will unite on the spot in a combined effort to resist the police. These reasons may explain why, in practice, this alternative is unrealistic, even though it seems suitable in theory when the two sides have committed offences within a short space of time.

The two remaining options which will be discussed jointly are: moving against the original demonstrators, or protecting them and proceeding against the hostile audience. The police are confronted with almost a hopeless choice, for whichever route they follow will elicit complaints. As Professor de Smith said:[142]

> Whether he [the policeman] protects an unpopular speaker against the crowd . . . or tries to disperse a gathering in order to preserve the peace, he can expect to be criticized for taking sides or stifling freedom of expression.

As a general rule the first of these two alternatives, that of acting against the original demonstrators merely because of fear or violence from their adversaries, should be dismissed. It would be a subversion of all principle if the police succumb to the threats of the hostile audience and act against those who attempt to express their

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[140] See s. 281.2(1) of the Code, R.S.C., 1970, c. 11 (1st Supp.).

[141] The element of provocation may, however, be taken into account as a mitigating factor in meting out sentence. Similarly, under the English Riot (Damages) Act, 1886, *supra*, footnote 31, s. 2(1), one of the considerations in deciding the amount of compensation is the fact that the persons assembled were provoked.

[142] Constitutional and Administrative Law (1971), p. 494.

views in the public forum. It would mean that the law of the mob has become supreme.[143] In a system based on the rule of law, it is unthinkable that the unruly and lawless will be able to establish their rule and silence those with whom they disagree. The intolerant should not be allowed to prevail and impose their will through threats of, or actual resort to, violence. The police should therefore take the bolder and admittedly more difficult route. They should protect the original demonstrators from those who seek to prevent them from exercising their rights, and they should resort to decisive measures against the threatening opponents.[144] If this proposition needs buttressing, one can find it in the fact that sometimes the disturbance of, or interference with, an assembly is made a specific criminal offence.[145]

While these axioms are highly laudable, it must be conceded that in reality they are difficult to put into effect. There are several impediments in the way of their implementation by the police. The first problem may be loosely termed the chain of "causation" or the "but for" rationale.[146] The police reasoning goes as follows: the sequence of events started when the original demonstrators arrived at the scene. If it had not been for them, their opponents would not have shown up, and would not have threatened violence.[147] Hence, those first at the place should be proceeded against. Such perverted logic cannot be accepted. It was best answered by the eminent English lawyer A. V. Dicey. He said[148] that the right of a person (A) to walk in the street cannot be taken away from him due to threats by another. And he added metaphorically:[149]

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[143] See the opinion of Fitzgerald J. in *Humphries* v. *Connor* (1864), 17 Ir. C.L.R. 1, at p. 9.

[144] See *e.g.*, A. V. Dicey, The Law of the Constitution (10th ed., 1965), pp. 278-279; Z. Chafee, Free Speech in the United States (1967), pp. 161, 425. In the United States, where freedom of assembly is guaranteed by the First Amendment, it was stated: "There is certainly no constitutional right to disturb a meeting, but there is a constitutional right to hold one." D. Fellman, The Constitutional Right of Association (1963), p. 29.

[145] S. 172(2) and (3) of the Criminal Code; s. 71 of the Canada Elections Act, R.S.C., 1970, c. 14 (1st Supp.). In England see: The Public Meeting Act, 1908, 8 Edw. 7, c. 66, as am.; the Representation of the People Act, 1949, 12 & 13 Geo. 6, c. 68, s. 84(1). In the United States: N.Y. Penal Law, §1470 (McKinney 1967); Ore. Rev. Stat., §166.025(1)(d) (1971); S.D. Comp. Laws Ann., §22-13-2 (1967); Wash. Rev. Code Ann., §9.27.010 (1961).

[146] See de Smith, *op. cit.*, footnote 142, p. 492; Note, Free Speech and the Hostile Audience (1951), 26 N.Y.U.L. Rev. 489, at pp. 490-492.

[147] See *e.g.*, the police testimony in *Pierson* v. *Ray* (1967), 386 U.S. 547, at p. 553.

[148] *Op. cit.*, footnote 144, pp. 273-274.

[149] *Ibid.*, p. 274.

> A no more causes the breach of the peace than a man whose pocket is picked causes the theft by wearing a watch. A is the victim, not the author of a breach of the law.

Another problem arises if, on the basis of tactical considerations, the safest and easiest way to handle the situation is to stop the speaker or terminate the march rather than move against the rival group.[150] This will be the case if the original demonstrators constitute the smaller group of the two or if the hostile audience shows greater militancy and less reluctance to use violent means. If the police face, on the one hand, a single speaker and a few supporters and, on the other, a large hostile crowd, it is obvious that it will be much simpler to avert disorder by removing the speaker than by attempting to arrest or disperse the larger group. The same applies to differing degrees of militancy. If the opponents are thought to be more prone to violence, the safer way will be not to act against them but against the original demonstrators. Nevertheless, the police must attempt to overcome the weight of normal tactical reasoning and deviate from it, even if it means a more violent confrontation and a harder task. Otherwise, the mob will achieve its objective; and with the assistance of the police.

The attitude of the police and their decision-making may also be influenced by the general sentiment of the community in respect of the demonstrating group; especially if it is a small minority intensely resented by the majority of people, and even more so if this popular vehemence expresses itself in a concrete form at the scene through the presence of a hostile audience. The police find themselves in such a case under considerable pressure to act in line with the desires of the opponents who represent the larger community. Naturally it is not so facile to resist such pressure. If the police protect the minority and take action against the opponents, they may lose the goodwill and co-operation of the community at large. This complex dilemma is compounded even further in the not unlikely event that from a personal standpoint the officers identify with the majority. In other words, they are required to proceed against their own personal convictions regarding the subject matter of the protest. Striking examples of such conditions, where citizens' hostility was coupled with police officers' partiality, were prevalent in the United States during the early and middle 1960's.[151] Those protesting racial

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[150] See J. Carson, Freedom of Assembly and the Hostile Audience: A Comparative Examination of the British and American Doctrines (1969), 15 N.Y.L.F. 799, at p. 807.

[151] On this basis one can explain the circumstances resulting in cases such as *Pierson* v. *Ray*, *supra*, footnote 147.

Adverse feelings by the citizenry and the authorities was apparently an important determinant in Weston-super-Mare, where the events leading to the case of

segregation faced formidable obstacles in their quest to publicize their views by way of public protest. Perhaps the only hope one can entertain is that the upper-echelon officers, those commanding the operation, will have the fortitude to withstand the pressure to act against the original demonstrators and, instead, protect them and move against the hostile audience.

The foregoing discussion was based on a latent assumption that the danger to public order and the threat of violence were solely attributable to the hostile audience while the original demonstrators behaved in an exemplary manner and did not share any responsibility for the evolving chain of events. There was a need to advance from such a premise to counterbalance the apparent bias of the police in many cases in favour of the hostile audience. Nonetheless, in reality, the original demonstrators—be it a public speaker or a group of marchers—may contribute by their conduct to the reaction of their adversaries. The difficulty is in drawing the line, that is, deciding between the actions of the original demonstrators which justify their removal from the scene, on the one hand, and, on the other, when their actions do not justify their removal since their conduct is of a secondary import in relation to the behaviour of the hostile audience. The issue has baffled and eluded the United States Supreme Court which failed to establish a coherent doctrine in this matter.[152] The cases demonstrate the problem involved. The question is, what type of conduct on the part of the original demonstrators justifies the police in acting against them, rather than against their opponents.

The conduct of the original demonstrators can take varied forms and it would be of benefit if they could be classified on the basis of their causality to the ensuing events. The simplest situation arises when the mere presence of the original demonstrators is enough to incense the hostile crowd and propel it into violent action. This may be termed passive provocation. To take the example of the speaker; even before he utters a word there is a rush upon him in an effort to prevent him from speaking. It can be assumed that the behaviour of the opponents in such a case is founded on the already known views of the speaker based on what he has said in the past. Under such circumstances there is no doubt that the police must protect the would-be speaker and act against those attacking him. It is unthinkable that what he has said in the past, whatever it was, can justify the police in acting against him at present.

The situation is more complicated if more than mere presence

Beatty v. *Gillbanks*, *supra*, footnote 138, took place: O. Hood Phillips, Constitutional and Administrative Law (5th ed., 1973), p. 438, n. 50.

[152] Compare *Terminiello* v. *City of Chicago* (1949), 337 U.S. 1, with *Feiner* v. *New York* (1951), 340 U.S. 315.

serves as an affront to the opposing crowd. To revert to the example of the speaker at a public meeting: suppose the speaker is able to start his speech but when he expresses certain opinions which are at odds with the views of the crowd the tension boils. Here again there may be different variables. The manner of delivery, the language used, references to the characteristics of the crowd, will make the difference. A dispassionate speaker whose inflection is dull and uninspiring will draw a different reaction from one versed in speechcraft and demagoguery. The choice of words is most important as well. The speaker can select the least offensive words or he can express the same thoughts in the most arousing and odious language. The greatest difficulty will occur, in practice, if the speaker viciously attacks the crowd in personal terms, referring to characteristics such as race or religion. This may be referred to as a case of extreme active provocation.

The question remains as to when the conduct of the original demonstrators reaches the point whereby they should be acted against. A solution which seems both simple and logical on the surface is to say that the police can intervene only if, in their opinion, these people act unlawfully. For example, consider the case of the public speaker, when the police conclude that his speech violates the provisions of the Criminal Code with respect to hate propaganda,[153] or any other violation of the law. Several objections can be raised to such a rule: (1) There is a qualitative distinction between words that are considered unlawful on the one hand and illegal, violent behaviour on the other. The fact that the address led to forceful reaction by the agitated, hostile audience does not vindicate the audience. Physical violence is inherently and imminently more harmful than words, even the most offensive and vile language. (2) It is more appropriate, if possible, to prevent physical violence at the scene of an incident than to punish later through prosecution and trial. The situation is the reverse with language. (3) The decision whether a speech constitutes a violation of the law or whether the conduct of the rival group is illegal is easier in the latter case. It is simpler to identify physical violence than to determine that a certain use of language is beyond what is permissible by law. (4) The illegality associated with the speaker may be a mere peccadillo while that on the part of the antagonists could be a serious offence. Suppose the speaker's transgression involves a city by-law regarding noise,[154] while the hostile crowd assaults the speaker and his

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[153] *Supra*, footnote 140.

[154] See *e.g.*, the anti-noise by-laws in these cases: *Methot* v. *Therrien et Cote*, [1961] Que. S.C. 601; *R.* v. *Harrold*, [1971] 3 W.W.R. 365, 3 C.C.C. (2d) 387, 19 D.L.R. (3d) 471 (B.C.C.A.); *R.* v. *Young* (1973), 1 O.R. (2d) 564, 14 C.C.C. (2d)

sympathizers. It would be a gross injustice to suggest that, because the speaker is chronologically the first to break the law, though it be a minor offence, he should be removed, while the attackers who commit a more serious infraction should not be acted against.

To sum up this point, it must be admitted that it is impossible to prescribe detailed directives to guide the police in this matter. The variables are too many and each incident has its unique circumstances. One thing must be clear, however. The initial disposition of the police should be to proceed against the hostile audience. If they resort to violence, they should be dispersed or arrested and the original demonstrators whose presence they detest should be protected. Even if the original demonstrators commit an offence and actively provoke their opponents, it need not automatically follow that they should be removed. Only if the offence on their part is a serious one should they be acted against.

This recapitulation is subject to a very important exception—the case of necessity.[155] In some incidents, where two opposing groups clash, the only way to prevent and restore order is to move against the original demonstrators, even if they neither commit an offence nor actively provoke their opponents. If these are the circumstances, the police can legally take measures against the original demonstrators. This principle was established in two Irish cases, *Humphries* v. *Connor*[156] and *O'Kelly* v. *Harvey*.[157] The facts in the first case were as follows: the plaintiff walked in a street wearing a party emblem, an orange lily. A hostile crowd was attracted, there was a commotion and a danger of the plaintiff being attacked.[158] A police officer, the defendant, with the view of preventing a breach of the peace, requested the plaintiff to remove the orange lily. When she refused, he gently removed the lily. The officer was sued for assault. The question before the court, based on the pleadings, was whether the defence of necessity was good in law. The court[159] concluded that such a defence was available to the defendant if his action was necessary to prevent a breach of the peace, even though the plaintiff committed no offence.

In *O'Kelly* v. *Harvey*, the defendant, a Justice of the Peace, was

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502, 42 D.L.R. (3d) 622 (C.A.); *R.* v. *Nakashima*, [1975] 1 W.W.R. 673, 19 C.C.C. (2d) 279, 51 D.L.R. (3d) 578 (B.C.S.C.).

[155] See Dicey, *op. cit.*, footnote 144, pp. 278-279; Note, Free Speech and the Hostile Audience, *op. cit.*, footnote 146, at p. 492.

[156] *Supra*, footnote 143.

[157] (1883), 14 L.R. Ir. 105.

[158] The facts should be understood on the basis of the special circumstances in Ireland. The orange lily was highly provocative to Roman Catholics.

[159] O'Brien and Hayes JJ. Fitzgerald J., although deferring to the opinion of his two colleagues, filed what amounted in effect to a very eloquent dissent.

sued for assault, and again the issue rested on the pleadings. The defendant learned of the intention by a group of people, including the plaintiff, to hold a public meeting. It also came to his knowledge that a counter-meeting was planned by a rival group. During the assembly the defendant concluded that there was a danger of breach of the peace and he therefore asked the plaintiff and others to disperse. When they refused, he laid his hands on the plaintiff in an attempt to remove him.[160] The question was whether the defendant could rely on the defence of necessity. The court answered this query in the affirmative. It stated that,[161]

> . . . even assuming that the danger to the public peace arose altogether from the threatened attack of another body on the Plaintiff and his friends, still if the Defendant believed and had just grounds for believing that the peace *could only be preserved* by withdrawing the Plaintiff and his friends from the attack with which they were threatened, it was I think, the duty of the Defendant to take that course.

The principle of necessity should be carefully circumscribed, otherwise it may be used by the police to justify unwarranted action against the original demonstrators. Three conditions must be fulfilled before recognizing the actual existence of necessity. First, as in all other cases of police intervention to prevent public disorder during demonstrations, the danger must be imminent.[162] Second, the police should act honestly without bias towards either side.[163] Third, and most important, removing the original demonstrators must be the *only viable and realistic alternative*; it is not sufficient to claim that such a course was the easier and safer one, easier and safer, that is, than proceeding against the hostile crowd.[164]

Situations calling for action against the original demonstators, even if they violate no law and even though their opponents are the transgressors, will usually occur when there is an imbalance in the relative strength of the three elements involved: the police, the original demonstrators and the hostile audience. If there are only few officers at the scene, and if the original demonstators are small in number, while the hostile opponents amount to a large crowd, the police may have no choice but to remove the smaller group.[165] Otherwise, both the police and the original demonstrators may be

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[160] It should be indicated, however, that in the statement of defence it was not averred that the opponents had actually been present at the scene: *supra*, footnote 157, at p. 109.

[161] *Ibid.*, at p. 110. Emphasis in original.

[162] See *Connors* v. *Pearson*, [1921] 2 Ir. R. 51; *M'Laughlin* v. *Scott*, [1921] 2 Ir. R. 92, at pp. 100-101, per O'Connor M.R.

[163] See *Coyne* v. *Tweedy*, [1898] 2 Ir. R. 167, at p. 197, per Lord Ashbourne C.

[164] But see *Coyne* v. *Tweedy*, *ibid.* This case, read as a whole, seems to have detracted from the principle of the only alternative, as established in *O'Kelly* v. *Harvey*, *supra*, footnote 157.

[165] This may explain the majority view in *Feiner* v. *New York*, *supra*, footnote

overwhelmed. If the actual facts match this description, the police should first request the original demonstrators to desist their activities, and only if they refuse can they be physically handled. This is a unique case of a legal police action against persons who have not committed, or been alleged to have committed, a criminal offence.

Conclusion

The way in which the police treat a demonstration will determine the actual scope of the freedom of the participants. The decision of the police at the scene will be based upon a multitude of considerations, and, regrettably, many of them may lead in the direction of undue restrictions upon freedom of assembly. Two basic factors are at the root of the problem. First, there is apparently a lack of understanding of the important nature of this freedom. Second, the police (and the community at large) do not realize that a certain degree of inconvenience to some people is not too high a price to pay; and furthermore, various civic and recreational activities which cause similar difficulties are not as important, in the long run, to the well-being of a democratic society.

As in other issues involving the police, there are no easy answers nor simple solutions. At the operational level the police should always assess the costs of intervention as against the benefits derived from such a course. If a minority of people out of a large crowd is involved in violent activity, the rights of the majority—bystanders and non-violent participants—should receive paramount consideration. The fact that the law is not immediately enforced does not mean no enforcement altogether, since there is the remaining option of delayed enforcement at the conclusion of the protest.

A measure of improvement of police performance may be achieved if the officers in the line are well trained in crowd control. It should be remembered that in such an operation the police operate with large units and not with one or a pair of officers as is the case with regular police work. Special training is therefore needed to prepare the officers for this difficult task. Improvement can also be achieved through the use of a public address system at the site of a demonstration. Talking to the protestors may sometimes convince them not to escalate the conflict. Even more important is the use of the public address system to warn the people gathered to disperse before the actual use of force. In the final analysis, however, it should be realized that the police have a rather limited function in society and the community's expectations of them should not be too high in relation to their social and legal responsibilities.

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152. There, only two police officers were present at the scene. In two later American cases the indication was that there were enough policemen to handle the adversaries: *Edwards* v. *South Carolina* (1963), 372 U.S. 229, at pp. 232-233, 236; *Cox* v. *Louisiana I* (1965), 379 U.S. 536, at p. 550.