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The legal interests and responsibilities of a city attorney are varied. However, the main topic of conversation between city attorneys themselves for the past few years has been an area of law which currently is being refined and developed and which vitally concerns every citizen-lawyer. That topic is the law as it applies to and is applied by local governments with regard to the right of dissent and the control of disorder.

A brief review of Chicago's experience in the last decade illustrates the problems typical to most municipalities in this newly developing area of law.

The first "demonstration" at City Hall occurred in 1961 when members of the Harrison-Halsted community "sat in" the Mayor's office to protest the clearance of their neighborhood to make way for the Chicago Circle Campus of the University of Illinois. Their technique of expressing dissent by direct action was very effective as a means of attracting public attention. This technique evolved into an era of picketing. City Hall, the Board of Education, and the Real Estate Board all became targets. Variations included romantic incidents like the "Save Our Trees" efforts opposing tree removal in Jackson Park and the more mercenary antics of the coin-operated laundry owners who jammed the switchboard at City Hall with calls objecting to the ordinance that required an attendant for the laundromats that wished to operate all night.

By the middle of the decade, large demonstrations were becoming the order of the day. In the summer of 1966 Dr. Martin Luther King, Jr. led numerous nonviolent marches into residential areas of the city. Dick Gregory led marches from Buckingham Fountain to City Hall every day over an extended period of time. This form of protest finally proliferated to the point where the average pedestrian no longer took notice of the marchers but simply elbowed his way through the crowds

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and the newspapers failed to more than mention the event.

Parallel to, but different from, the organized demonstrations of dissent on specific topics, was the violent disorder that Chicago experienced. The riots around Division Street in the summer of 1966 and the West Side riots which occurred after Dr. King's death in April of 1968 are the chief examples of this. At this point demonstrations of dissent and incidents of riot were clearly distinguishable.

During the Democratic Convention in the late summer of 1968, Chicago experienced the employment of disorder as a technique for demonstrating political dissent: the Strategy of Confrontation had emerged.[1] Only recently Chicago witnessed the destructive tactics of the Weatherman faction of the Students for a Democratic Society as it rampaged through the Near North Side and the Loop in a senseless orgy of violence.

One hundred years ago Abraham Lincoln posed the problem in these words: "Must a government of necessity be too strong for the liberties of its own people, or too weak to maintain its own existence?"[2] A responsible government must respond to this problem on two levels. The first level is tactical: the government must maintain peace while protecting the rights of the dissenters and of the public. The second level is preventive: the government must develop programs and projects designed to cure social ills which, if unattended, often result in violent disorder.

Chicago has shown initiative in the preventive level of governmental response. To enumerate all that has been accomplished in the last decade to improve housing, to provide job training and attract industry, to provide jobs, to utilize available federal funds for Headstart and health programs, to try to assure open housing, to up-grade the police department, to protect the consumer, and to work out a viable Model Cities Program involves more statistics than could be digested in this article and could be the subject of a separate and more comprehensive discussion.[3]

The present situation, however, is far from ideal. Much remains to be accomplished in Chicago; however, no other city is doing better, and

1. *See generally* Simon, The Strategy of Confrontation: Chicago and the Democratic National Convention—1968; WALKER, RIGHTS IN CONFLICT, REPORT TO THE NATIONAL COMMISSION ON THE CAUSES AND PREVENTION OF VIOLENCE (1969).

2. 4 COLLECTED WORKS OF ABRAHAM LINCOLN 426 (Rutgers University Press 1953).

3. Some of the programs are discussed in Report of the Chicago Riot Study Committee ("Austin Report") 1968, at 123 *et seq.*

few are doing as well, in the task of confronting the challenges of modern urban life.

Because government administrators continually must make value judgments as to priorities in reform, it would be naive to hope for a utopia in which everyone is satisfied. Anguish speaks with many accents. The black man, the red man, the Appalachian, the Oriental, the Latin, the first-generation European immigrant and, yes, even the White-Anglo-Saxon-Protestant: each has his own needs, his own hopes. The special problems of the many groups that make up our society are frequently in conflict with each other. Often the conflict is simply a matter of priorities within a limited public budget. Thus, it seems unlikely that positive programs will cause dissent to wither away. Moreover, many of the overriding concerns of the people—such as the war in Vietnam—simply cannot be affected by local government. Yet it is local government that must deal with the public protest that these concerns evoke. Therefore, while we plan and work for improvements, we must hold the fabric of our society together and keep our government operating. Tactical responses to dissent and disorder must be forged.

The Chicago police department and City officials have, through intensive training and experience, learned much about the tactics of coping with civil disorder and illegal action on the streets.

The early riots resulted in great confusion. For example, when a police van with arrestees pulled up to police headquarters, our lawyers would be on hand to prepare the charges. A lawyer would question the driver of the van as to what the prisoners had done. The driver would respond "Well—I don't know." "Where were they arrested?" "Well, uh—I don't know exactly." "What did they do wrong?" "Look, Mac, I just drive the van—I don't know anything!" Inexperience in processing riot arrests resulted in many such frustrating exchanges. It soon became clear that it was physically impossible to compose a detailed police report while a riot was in progress.

As a result of these early experiences, the evidence technician appeared in the police department. Now police department personnel and assistant corporation counsel go to the scene of each occurrence. A standard arrest procedure has been developed. For example, a police officer steps up to a protester lying in the middle of a thoroughfare. The officer identifies himself, requests the protester to identify himself, and then informs the protester what the law of obstructing traffic is. The officer requests that the protester desist from his unlawful action. This

entire exchange is taped by the evidence technician. The evidence technician also photographs the arresting officer and the arrestee for identification purposes. This procedure has proved invaluable. In a trial situation, evidence is readily available for purposes of identification, and for proving that the protester was informed, prior to his arrest, that his actions were illegal. Such evidence also serves the purpose of rebutting a defendant's claim of police brutality or denial of his civil rights.

Experience also teaches that with a serious disorder the call for additional outside forces should be made at the earliest possible moment. Even anticipation of a potentially dangerous situation is reason to alert the National Guard, as recommended by the National Advisory Commission on Civil Disorders.[4] The protection of the rights of the nonparticipating citizen is just as important as the protection of the rights of the dissenter. (An aspect all too often overlooked in our discussion.)

Another essential in the development of knowledge in response to dissent has been the realization that for several reasons mass arrests are a failure. When a municipality is confronted with the task of arresting hundreds or even thousands of people, the logistics of the problem are overwhelming. Where are the detention facilities to contain such a number of people? Where is the gigantic court machinery needed to try such a mass of defendants? Where are the lawyers to which each of the thousands are entitled?

Mass arrests not only clog the courts, but also result in a polarization of feelings between the police and the government on one side and the citizens arrested on the other side. Many times during mass arrests the infractions charged are very minor. If an arrestee does not post bond, his period of incarceration before his trial can exceed the amount of time a conviction would impose. Also the tactics of the arrestees in a mass arrest situation can further challenge the functioning of the courts—witness the recent statement of the Weatherman "legal advisers" that arrestees should "catch" the court and police "off guard" by demanding immediate jury trials upon being taken before the magistrate.

Hostility also develops in another group. Parents rarely believe that their children would do anything seriously wrong and often feel that the police took advantage of the situation to arrest their "innocent" offspring. Whether or not the actions of the children that result in mass arrests are lawful or unlawful, as a practical matter alienation and

4. Report of the National Advisory Commission on Civil Disorders ("Kerner Report") 488.

hostility on the part of some parents must be anticipated and dealt with responsibly. Such reactions on the part of some segments of the citizenry make it all the more difficult to solve fundamental problems that require cooperation and trust on the part of the entire community.

One alternative to mass arrests is what may be called a "symbolic" arrest. This is an arrest of the leaders of a mob engaged in unlawful protest. The leaders are charged with the most serious offense that a legal evaluation of their conduct justifies. A serious charge against a violent leader who goaded his followers into illegitimate dissent is more effective than several minor charges against those followers. This alternative also results in a lessening of the polarization of emotions. One *caveat* should be emphasized: In making a "symbolic" arrest, it is important to have a strong and almost uncontestible case against the arrestee. A weaker case may defeat the purpose of the "symbolic" arrest, by making a martyr of the arrestee.

There is no question but that situations occur in which dissenters force police into a confrontation-and-arrest situation. For example, in the face of a rampaging mob breaking windows with great abandon in a residential district, arrests are the only method of halting the violent tide.

But experience has taught that where possible (*i.e.* where permitted by the demonstrators) persuasion and restraint are the best responses possible. These tactics proved extremely successful in the summer of 1969 when the Black Coalition protested hiring and training programs in the construction industry. Very few arrests were made as a result. When large groups of labor union members attempted to disrupt hearings by the Department of Labor, persuasion and restraint again proved to be an effective response. Four thousand angry workers tried barring entrance to those who wanted to be heard at the hearings, but excellent police work involving persuasion and restraint resulted in the opening of the entrances. The group thereafter marched peacefully to the Civic Center and made their speeches. The protest had been heard. Peace had been preserved. Persuasion and restraint had proved the proper responses to a precipitous situation. The result was lawful, peaceful dissent.

It is essential in all such situations that the position of the municipality be made clear to the public. In other words, a necessary parallel to government's continuing self-education on the subject of dissent is the education of the public as to what constitutes lawful dissent. It must be made clear that protest is a legitimate activity provided it remains

lawful. It remains lawful only when it is peaceful, or free of any accompanying illegal behavior.

It seems proper at this point to observe that, despite what appears to be a pervasive popular attitude to the contrary, the judicial system in general, and the Supreme Court of the United States in particular, have laid down rules dealing with dissent that protect the public. Newspaper headlines sometimes suggest that this is not so. The legal profession, however, must go beyond the headlines to the cases themselves.

For example, in *Cox v. Louisiana*,[5] Mr. Justice Goldberg indicated the precedence which must be given to maintaining order:

> The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that every one with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy.[6]

Also, in the other *Cox* case, namely, *Cox v. New Hampshire*,[7] Chief Justice Charles Evans Hughes wrote that:

> The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend.[8]

When the late Dr. Martin Luther King, Jr. was leading marches through residential sections in Chicago during the summer of 1966, the City assured the protesters of police protection. When multiple marches on a given day plus numerous breakdowns in communications about where the marches were going to occur caused excessive manpower pressures on the police force, it became necessary to seek greater regulation of the marches. The City sought an order limiting the protest to one location at any one time and to a maximum of 500 participants; 24-hour notice of a demonstration was requested, as was a restriction of marches to daylight hours other than those of peak traffic periods. The order was granted and upheld by the Illinois appellate court; certiorari was denied by the United States Supreme Court.[9] The city's police department was saved from exhaustion, all citizens were

5. 379 U.S. 536 (1965).
6. *Id.* at 554.
7. 312 U.S. 569 (1941).
8. *Id.* at 574.
9. City of Chicago v. King, 86 Ill. App. 2d 340, 230 N.E.2d 41 (1967), *cert. denied*, 393 U.S. 1028 (1968).

assured of normal police protection, and at the same time the right of protest was protected.

In *Adderley v. Florida*,[10] the court affirmed the right of a State to deny access to public property for demonstrations, saying:

> The State, no less than a private owner of property, has the power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this 'area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . . .' Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected.[11]

These attitudes, along with a recognition that there is a distinction between "pure" speech on the one hand, and mass demonstrations, picketing, and parades on the other hand,[12] have been reaffirmed in more recent decisions.

One of these, *Walker v. City of Birmingham*,[13] upheld the injunctive power of a state court when civil rights demonstrators refused to seek a local permit before engaging in a protest parade, and in so doing disobeyed a court order. The majority opinion, lucidly written by Mr. Justice Stewart, makes several relevant distinctions that should serve as guideposts for public attorneys. In limiting its holding to the single issue of the deliberate disobedience of a court order, the Court expressed doubts concerning the "generality of the language contained in the Birmingham parade ordinance"; it worried about "the breadth and vagueness of the injunction itself" and it suggested that the "arbitrary or discriminatory administration of the ordinance" would have been a relevant consideration had the protesters chosen to contest the order.[14] In another recent case, *Cameron v. Johnson*,[15] the Supreme Court upheld Mississippi's anti-picketing laws which made it unlawful to interfere with free access to and from any courthouse or other public building. Mr. Justice Brennan's opinion, like Justice Stewart's in

10. 385 U.S. 39 (1966).
11. *Id.* at 47, 48.
12. *See, e.g.*, Cox v. Louisiana, 379 U.S. 536, 555 (1965). The distinction has been criticized by Professor Harry Kalven in Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 S. Ct. Rev. 1, 22-25.
13. 388 U.S. 307 (1967).
14. *See, e.g.*, Shuttlesworth v. City of Birmingham, 382 U.S. 87 (1965).
15. 390 U.S. 611 (1968).

Walker, is instructive on the question of the vagueness and unnecessary broadness of legislation.

In this connection, we should consider the recent decision in *Gregory v. City of Chicago*.[16] The United States Supreme Court did not strike down the City of Chicago disorderly conduct ordinance in deciding the *Gregory* case. In my opinion the reason why they did not was the narrow construction placed upon the ordinance by the Illinois Supreme Court, which construction, of course, was urged upon that court by the City of Chicago. In the context of the *Gregory* case, the Illinois Supreme Court[17] defined disorderly conduct to exist when:

(1) There is an imminent threat of violence;
(2) The police have made all reasonable efforts to protect the demonstrators;
(3) The police have requested that the demonstration be stopped;
(4) The police have explained the request, if there is time;
(5) The request has been refused.

Language almost identical to the foregoing was written into the revised City of Chicago disorderly conduct ordinance[18] at the time the *Gregory* case was being reviewed by the Supreme Court.

There are other examples of the way in which we have followed judicial guidelines in drafting ordinances. In response to the fact situation that led to the *Gregory* case, the Illinois General Assembly, in 1967, enacted a bill prohibiting residential picketing.[19] This provision is supported by a judicial awareness that there are places for protest and there are places *not* for protest.[20] The Second Circuit Court of Appeals, in *Wolin v. Port of New York Authority*,[21] describes the relevant factors in testing protest in public places in this way:

> [D]oes the character of the place, the pattern of usual activity, the nature of its essential purpose and the population who take advantage of the general invitation extended make it an appropriate place for communication of views. . . .[22]

The court there thought the Port Authority's bus terminal an appropriate place; we believe that by the same standards residential areas are

16. 394 U.S. 111 (1969).
17. Gregory v. City of Chicago, 39 Ill. 2d 47, 233 N.E.2d 422 (1968), *rev'd*, 394 U.S. 111 (1969).
18. 1968 J. Proc. City Council, City of Chicago 2561-2 (March 26, 1968).
19. ILL. REV. STAT. Ch. 38 § 21.1-2 (1967).
20. See Kamin, *Residential Picketing and the First Amendment*, 61 NW. U.L. REV. 177 (1967).
21. 392 F.2d 83 (2nd Cir. 1968).
22. *Id.* at 89.

clearly inappropriate, and that our residential picketing law does not violate First Amendment rights.

There is an additional aspect of *Gregory v. City of Chicago* that deserves comment. Although the marchers' audience was hostile, it is clear that the police provided every protection possible to the demonstrators. Only at night, when the crowds of onlookers threatened to become unmanageable, was any effort made to halt the demonstration. The question is thus raised by the situation in *Gregory* whether action might ever be taken to disperse demonstrators, who may themselves be relatively quiet and orderly, when crowd control taxes police resources and a riot seems imminent. *Gregory* did not answer this question. It is true that *Feiner v. New York*[23] upheld a breach-of-the-peace conviction, but there, unlike the *Gregory* situation, the demonstrators had undertaken "incitement to riot." Furthermore, *Feiner* uses the "clear and present danger" test, a judicial measuring rod that has not been employed in recent years and may have become of historical interest only.[24] Unhappily, one of the few judicial utterances on this subject is not encouraging, for it finds that speech "may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger."[25] The difficulty is that stirring people to anger may have physical, as well as philosophical, repercussions. We may hope that when the situation arises in case or controversy before the Supreme Court of the United States, the rationale for the decision will take into consideration the not inconsiderable body of information provided by sociology and psychology on the subject of crowd psychology, reaction and even manipulation as well as the stirring rhetoric describing inspirational oratory.

A remaining problem raised by the cases concerns the behavior of enforcement officials. As noted above in the discussion of *Walker v. City of Birmingham*, Justice Stewart thought the "arbitrary or discriminatory administration of the ordinance" was an important issue. Similarly, in *Cox v. Louisiana*,[26] the Court found that even though the challenged statute was valid, the manner in which it was applied by local officials was violative of due process. In the related case of the

23. 340 U.S. 315 (1951).
24. Professor Kalven, among others, has consigned "clear and present danger" to the conceptual ash heap, *see* Kalven, *The New York Times Cases: A Note on the "Central Meaning of the First Amendment,"* 1964 S. Ct. Rev. 191, 213-14.
25. Terminiello v. Chicago, 337 U.S. 1, 4 (1949).
26. 379 U.S. 559 (1965).

same title,[27] a breach-of-the-peace statute was struck down because of the unfettered discretion it placed in the hands of local officials. Clearly then, the dissenter is not the only beneficiary of precise legislation. It is just as important that the public official, whether he be a commissioner or a police officer, know exactly the nature of his duties. The official is frequently called upon to act in an atmosphere of heated emotions and public pressures. It is only fair that he be provided with standards to guide his performance. Clear standards serve the additional function of minimizing the possibility that policy-making officials will be embarrassed by the activities of their subordinates. Clarity and precision in matters involving the coercive power of government is not merely desirable, as a practical matter, in getting and upholding convictions; it is also a fundamental right of all Americans.

Government must be receptive to these signals and suggestions of the Supreme Court. The problems of mass demonstrations as to political questions are relatively new in our recent history, inasmuch as they have become widespread, at least in the Chicago area, only within the last few years. As a result, the supply of legal remedies available tends to be limited and government has been forced to rely upon "catchall" ordinances.[28] Thus, at the time of the Gregory marches in Chicago, there was no residential picketing statute that could be relied on. The corporate authorities believed that if the totality of circumstances were considered, including the clear and present danger of riot, the disorderly conduct ordinance would be applicable. The Supreme Court of Illinois agreed; the U.S. Supreme Court did not. The interest protected by the First Amendment is so great that the Supreme Court has felt compelled to resolve all doubts against broad enactments intended to control the myriad minor disturbances that every community must contend with. The answer, of course, will require hard thinking with reference to the specific evils that must be dealt with.

Justices Black and Douglas, concurring in *Gregory*, commented:

> [O]ur Federal Constitution does not render the States powerless to regulate the conduct of demonstrators and picketers, conduct which is more than 'speech', more than 'press', more than 'assembly', and more than 'petition' as those terms are used in the First Amendment . . . [N]arrowly drawn statutes regulating these these activities are not impossible to pass if the people who elect their legislators want them passed.[29]

27. 379 U.S. 536 (1965).
28. *Cf.* Kamin, *Residential Picketing and the First Amendment*, 61 Nw. U.L. REV. 177, 223 n.155 (1967).
29. 394 U.S. 111, 124 (1969).

Perhaps, but the burden this places upon municipal legislative draftsmen is obvious: the need for anticipating potential sources of disruption and for carefully isolating those interests which should be—and constitutionally may be—protected through local regulation becomes greater than ever. The difficulty, of course, is that the things that need protection are often unidentifiable until they are attacked—and then it is too late to begin passing "narrowly drawn statutes." The necessity for anticipation becomes critical when the locale for protest is an urban area of high population density, where communications are instantaneous and public services are highly centralized. The situation clearly is one that calls for the thoughtful, sustained efforts of the organized municipal bar. The collective body of experience and concern of local government lawyers must be put to work in meeting the challenge posed by the ideal of ordered liberty. For in much of the current sloganeering, the impression is prevalent that the "establishment" is in favor of "law and order" and against, or at least indifferent to, the freedoms of speech and of association. But while this kind of attitude may be emotionally satisfying to some, it ignores the fact that the First Amendment—to the extent that it truly encourages the dissemination of information—provides the central mechanism of representative government. It is, after all, in the awareness of public needs and desires, and in the availability of relevant data and their interpretations that government makes possible its own continuity.

Of course, while an analysis of developing doctrine in reviewing court opinions suggests that First Amendment freedoms and public order are not mutually exclusive, a realistic appraisal of the fact situations in these same cases forces us to concede that, for some people, governmental respect for constitutional rights is quite beside the point. These are people who are determined to be violent and lawless, for whom arrest and trial are an integral part of a strategy of publicity.

Professor Paul Freund has written:

> Not only do civil liberties vary in their quality. In some cases it is far from clear with which side the interests of civil liberties are to be identified.[30]

In pondering this constitutional "principle of uncertainty", we would also do well to recall an observation of Justice Robert H. Jackson:

> The choice is not between order and liberty. It is between liberty with order and anarchy without either.[31]

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30. Freund, *The Supreme Court and Civil Liberties*, 4 VAND. L. REV. 533, 534 (1951).

31. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (dissenting opinion).

In choosing liberty with order, the government lawyer must commit himself to a reading and understanding of both the daily newspapers and the advance sheets; an awareness of local problems which are newsworthy is necessary to anticipate the possible evolution of a minor police problem into a major legal problem. An awareness of the latest legal precedents is essential to deal with the new and novel legal situation. The endeavor of the government lawyer in seeking and promoting the fine balance between dissent and anarchy is an ever-continuing one. The reward, however, is great: the playing of a constructive role in an important historical development in the law.