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Limitations On the Right To Demonstrate

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LIMITATIONS ON THE RIGHT TO DEMONSTRATE

My subject tonight is the street demonstration - a relatively new phenomenon on the American scene. It has become a symbol of the civil rights movement, and therefore has been widely acclaimed across the land. Indeed, it has been quite fashionable to march in demonstrations - especially when television cameras provide a national audience.

But my concern this evening is not with the nature or justness of the causes, nor with the motives of those who march. We meet here tonight as lawyers, and I have chosen this subject because it relates to the first responsibility of our profession - the preservation of law and order. It is also a subject in which exploding developments have outdistanced the legal response - by public officials, the courts and the legislatures.

Each of us no doubt has his own mental image of a street demonstration. Depending perhaps upon one's prejudices (whether articulated or not), the image ranges

from that of a few dozen earnest citizens marching discreetly to the city hall to the savage street mobs shouting "Burn, Baby, Burn" in Watts, California.

The truth is that the spectrum of what might fairly be called a demonstration is very broad indeed.

But the typical street demonstration is usually a civic disorder in fact, whatever it may be in law. Fortunately, marchers in many civil rights demonstrations have been well disciplined, elaborately escorted by police and therefore essentially orderly. But there have been far more actual disorders than many suppose, both by the marchers and by those incensed by the demonstrations. And the threat of serious violence is ever present.

Even the non-violent demonstrations frequently exact a high price from the public. They engender fear and uneasiness, disrupt traffic, create discordant noises, litter the streets, and - most important of all - deny free and normal use of the streets and sidewalks to other citizens.

The typical demonstration also imposes a heavy responsibility upon police, and encourages crime in areas

left unprotected while police accompany marchers. Moreover, demonstrations are burdensome to the public treasury. The famous five-day Selma to Montgomery march required the protection of the National Guard, blocked the normal flow of traffic, and cost the taxpayers some $500,000.*

Most lawyers would agree, I think, that the payment of some price - in terms of taxpayers' funds and inconvenience to citizens - is justified to allow reasonable exercise of cherished First Amendment rights. But the rights of other citizens must also be protected, and the general public order must always be the overriding consideration.

The problem - and a very difficult one indeed where multitudes take to the streets and are told that only just laws need be obeyed - is to strike a balance which preserves the liberties of all. In my view, there is mounting evidence of serious imbalance. The use of coercive demonstrations, rather than lawful democratic processes, is already a problem of serious dimensions.

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*Marshall, The Protest Movement and the Law, 51 Va. L. Rev. 785, 788 (1965).

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The first question which lawyers must ask is whether public authorities are powerless under the law to impose reasonable restraints on ~~curb~~ demonstrations. The street demonstration is closely associated with the doctrine of civil disobedience. Indeed, the sit-in and the demonstration are the standard techniques of civil disobedience.

This specious doctrine, as the result of skillful propaganda and much respectable sponsorship, has attained an almost untouchable status in the mysticism of our time. Perhaps because of this, as well as toleration by timid politicians, there is a widespread belief that the street demonstration cannot be ~~controlled and~~ effectively regulated and that the only remedy is to muster enough policemen and troops to forestall rioting.

It seems to me that those who entertain this defeatist attitude have not read the decisions of the Supreme Court. It is true that many cases have been decided in favor of sit-ins and demonstrators. But each of these cases has turned on its facts, and in each a majority of

the Court has found discrimination - either in the context of the law or ordinance or in its application. Although reasonable minds could differ (and in fact did differ sharply) as to the facts in some of these cases, I incline to the view that most of them were correctly decided.

But the important point is that no new principles have evolved. There may have been refinement and clarification, but the basic principles applied in recent demonstration cases are those which the Court has consistently enunciated over a period of many years.*

*See for example Davis v. Massachusetts, 167 U.S. 43 (1897) (Boston ordinance limiting use of public grounds for public speeches sustained); Hague v. CIO, 307 U.S. 495 (1939) (city ordinance prohibiting public assemblies without a permit held invalid as going too far in suppressing free speech and assembly); Niemotko v. Maryland, 340 U.S. 268 (1951) (conviction of Jehovah's Witnesses for disorderly conduct in holding a religious meeting without a permit was reversed, where ordinance contained no standards); Terminiello v. Chicago, 337 U.S. 1 (1948) (no "clear and present danger" of breach of peace found); Feiner v. New York, 340 U.S. 315 (1951) (a contrary result was reached where such danger was found to exist); Cox v. New Hampshire, 312 U.S. 569 (1941) (conviction of Jehovah's Witnesses for parading without a permit affirmed); and Poulos v. New Hampshire, 345 U.S. 395 (1953) (an ordinance requiring permit for public assembly held to have been arbitrarily applied).

Although this is neither the time nor place to review court decisions, it may be helpful to mention the companion decisions in Cox v. Louisiana, decided in 1965. The case of Edwards v. South Carolina*, decided two years earlier, was the first major decision involving demonstration tactics of the current civil rights movement. But the opinions in the two Cox cases contain the best summaries of the guiding principles.

You will remember the facts. Some two thousand Negro college students, protesting the arrest and trial of fellow students on picketing charges, assembled in Baton Rouge, marched two and one-half blocks to the courthouse, and demonstrated across the street - some 125 feet - from the courthouse during the trial.

Cox, the leader, was arrested and charged with various offenses, including violation of a "breach of the

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372 U.S. 229 (1963).

peace" statute.* A majority of the Court, in reversing the conviction, held that in fact there was no breach of the peace, and also that the statute itself was "unconstitutionally broad in scope." For both of these reasons, the Court concluded that Louisiana had "infringed appellant's rights of free speech and free assembly."

In the companion case, arising out of the same facts, Cox had been convicted under another Louisiana statute prohibiting picketing or parading at or near courthouses. Although this was deemed to be a valid statute, Cox's conviction was again reversed by five of the Justices on an entrapment theory, a policeman having advised the group it could assemble at this place.

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*The Louisiana statute provided: "Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . crowds or congregates with others . . . in or upon . . . a public street or public highway, or upon a public sidewalk, or any other public place or building . . . and who fails or refuses to disperse and move on . . . when ordered so to do by any law enforcement officer . . . shall be guilty of disturbing the peace." See 379 U.S. at 544.

Although Mr. Justice Goldberg had spoken for the majority in both cases, he was careful to say:

> "Nothing we have said here . . . is to be interpreted as sanctioning . . . demonstrations, however peaceful their conduct or commendable their motives, which conflict with properly drawn statutes and ordinances designed to promote law and order, protect the community against disorder, regulate traffic, safeguard legitimate interests in private and public property, or protect the administration of justice and other essential governmental functions. . . . [T]he right of peaceful protest does not mean that everyone with opinions or beliefs to express may do so at any time and at any place. There is a proper time and place for even the most peaceful protest and a plain duty and responsibility on the part of all citizens to obey all valid laws and regulations."*

In light of Cox and the long line of cases which preceded it, the following generalizations seem justified:

1. The First Amendment rights (free speech, free assembly and right to petition) apply to demonstrations, just as they do to parades and picketing.

2. The right to communicate ideas by conduct (i.e. demonstrations, marches and picketing) is not absolute

*379 U.S. at 594.

and, indeed, is not as broad as the right to "communicate ideas by pure speech."

3. States and localities have a duty to preserve the peace, and where there is a "clear and present danger" of disorder demonstrations may be inhibited, and continued participation therein may be valid grounds for conviction.

4. States and localities have a duty to regulate traffic and to safeguard normal public use of the streets. There can be no question, therefore, as to the validity of properly drawn laws specifying "the time, place, duration or manner of use of the streets for public assemblies." The discretion vested in the administrative officials must be carefully defined, and exercised uniformly and without discrimination.*

5. It is probable that a state or locality could validly forbid, on a non-discriminatory basis, "all access

*Cox v. Louisiana, supra, at 558; see also Cox v. New Hampshire, supra, at 576.

to streets and other public facilities" for demonstrations. Such an absolute ban would be less vulnerable to attack if confined to certain streets or if applicable only at certain times, and if other public areas were available for assemblies of people.*

6. It is not clear whether a state or locality may forbid any march or demonstration without a prior written permit. This would be an invalid restraint if the granting of a permit lay in the unbridled discretion of the local officials. It would probably be valid if explicit and reasonable standards were prescribed and uniformly enforced.**

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Now, with these principles in mind - which outline the inherent power of local government to control

*See dictum of Mr. Justice Goldberg in Cox v. Louisiana, supra, at 555; see opinion of Mr. Justice Black, Cox v. Louisiana, supra, at 577; see concurring opinion of Mr. Justice Frankfurter, Niemotko v. Maryland, supra, at 282-83; see also Kovacs v. Cooper, 336 U.S. 77, 98. There is some indication in the opinions that the state is under no obligation "to supply a place for people to exercise freedom of speech or assembly", suggesting that all streets could be placed off limits for demonstrations.

**See Cox v. New Hampshire, supra, and Poulos v. New Hampshire, supra. The Supreme Court recently agreed to review an Alabama state court decision holding Dr. King and others in contempt for ignoring a court injunction against their demonstrating without a permit. 35 U.S.L. Week 3109 (U.S., Oct. 11, 1966).

demonstrations - it may be of interest to consider what actually happened in Chicago last summer.

As early as the summer of 1965 that city experienced a series of "non-violent" eruptions - numbering nearly 100 separate demonstrations.* But these were merely the prelude. In the spring of 1966, Dr. King announced a new campaign "to remove the gargantuan structures of injustice" in Chicago.** He warned:

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*These were directed against the Democratic Mayor and the Board of Education. The objective was to "get" the Superintendent of Schools for his reluctance to expand the busing of pupils and the dismantling of the neighborhood school system. Groups of demonstrators, purporting to be practicing civil disobedience, lay down in the streets during the rush hours, blocking traffic and causing extreme inconvenience to the public generally. More than 800 people were arrested during the summer.

**Martin Luther King, Address at Chicago Freedom Festival, the Ampitheatre, March 12, 1966 (References are to the mineographed text of this address as released to the press). It may surprise many - especially in the North - to have Dr. King also say: "While the South burst forth with the dynamic vibrancy of a new democracy, the Negro in the North found himself increasingly pressed down by the cruel weight of vicious and discriminatory forces."

> ". . . We will encourage sit-ins, stand-ins, rent strikes, boycotts, picket lines, marches, civil disobedience and any form of protest and demonstrations that are nonviolently conceived and executed."*

This was no idle threat. Chicago, during the mid-summer of 1966, was racked by massive civil disobedience - the full extent of which is still generally unknown across our country.

Public officials, proud of their city's record of non-discriminatory laws and genuine concern for minority rights, were stunned and incapable of decisive action. Hundreds of carefully planned and coordinated demonstrations disrupted the city's normal life and provoked disorder and violence, especially from citizens who opposed the demonstrations. The basic reaction was to rush police reinforcements from disorder to disorder - much like firemen dealing with planned arson.

But finally an outraged, but exessively timid, Mayor acted. On August 10, 1966, the city filed suit in the Circuit Court of Cook County against Dr. King, seven

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*King, Address in Chicago Ampitheatre, March 12, 1966, p. 8.

other individuals (including four other ministers of the Gospel), and three organizations, including the Southern Christian Leadership Conference.

Only a desperate situation would have prompted a politically sensitive mayor, in a city with a controlling racial vote, to invoke the law against the living legend of the civil rights movement.

But the situation was desperate. If the detailed Complaint of the City, sworn to by Orlando W. Wilson, Superintendent of Police, is accurate, it is a frightening description of what happened in the name of "peaceful demonstrations", led by an organization calling itself "Christian".* There is not time this evening to read the allegations of fact.

For present purposes, it will suffice if I summarize briefly the conditions averred:

*Chicago v. Martin Luther King, et al, Cir. Ct. of Cook County, Complaint filed Aug. 19, 1966, sworn to on behalf of the City by Raymond F. Simon, Corporation Counsel, and Orlando W. Wilson, Supt. of Police. On the same day, the court entered a preliminary injunction against the defendants. Throughout the Complaint, the averments are made in terms of "one or more or all of the defendants". In the interest of brevity, I will refer to them merely as "the defendants".

The defendants started their planning many months in advance; they announced a massive program to develop "creative tension" in Chicago, the primary purpose being to force open housing in fact as well as in law.

There were more than 200 separate demonstrations organized and led by defendants. In some instances, parade permits were obtained; in other instances, the demonstrations were conducted without permits. "On only two occasions" ~~were~~ was the police department notified in advance of the "location, character and extent" of the planned demonstration. This failure to give adequate written notice occurred in spite of "repeated requests" by the Chicago authorities, and despite promises by the defendants to provide such notice.

The defendants frequently conducted multiple demonstrations in different areas at the same time, or with overlapping times, thereby contributing to the strain on police forces and the difficulty of maintaining law and order.

These demonstrations overwhelmed the police of Chicago, requiring at times the removal of hundreds of policemen "from their normal duty posts". This reduction

of police protection "resulted in a substantial increase in the crime rate during the periods of the demonstrations".

The Complaint described some of the conditions alleged to ~~which~~ existed as follows:

> "Access to the sidewalks was denied to non-participating citizens, the normal flow of traffic, both pedestrian and vehicular, was obstructed, substantial damage was done to private property, and hundreds of persons were arrested."

Most of the serious disorders resulted when crowds of angry persons reacted against the demonstrators, a situation requiring massive police protection - the providing of which was hampered by the absence of notice and the technique of multiple and simultaneous demonstrations.

There were, as you know, serious riots in Chicago during the period in question, requiring employment of the National Guard. The Complaint does not expressly charge defendants with any responsibility for these riots. But it is evident that the Chicago authorities considered the conduct of the defendants to have been a relevant factor. The City's Complaint averred as follows:

> "During the months of June and July, 1966, in several areas of the City of Chicago, where one or more or all of the defendants and others were actively engaged in organizing the people of specific communities, namely, the Near West Side, Wabash, Lawndale, Englewood and Woodlawn, to protest against alleged violation of their civil rights, and during a period of time when one or more or all of the defendants and others were making statements, issuing news releases, appearing on other communications media and publicly corresponding with public officials for the furtherance of their announced plan of "creative tension", major civil disturbances erupted in the aforesaid areas of the City resulting in damages in excess of several million dollars to private property, the death of 27 persons and injury to 374 persons, including 61 police officers."

The Complaint concludes with averments that the defendants "threatened . . . to expand the demonstrations into many other neighborhoods at simultaneous times"; that it would be impossible for the police to protect the public; and that the demonstrations "constitute a clear and present danger to the order, peace and quiet, health, safety, morals and welfare of the City of Chicago."

In briefest summary, this was the situation in Chicago described by City officials in their Complaint.

The Court issued a preliminary injunction restraining the defendants from "conducting, organizing or participating in unreasonable demonstrations", specifying the following conditions: Demonstrations must be limited to "one specific area" on any given date, and to not more than 500 persons; they must be confined to daylight hours and "at times other than peak traffic periods", and may be conducted only after "not less than 24 hours prior written notice to the police department."

Predictably, Dr. King denounced the injunction as "unconstitutional", reserved his right of civil disobedience to disobey it, and proclaimed "we are prepared to put thousands in the street if need be".*

A confrontation in the streets between King's "thousands" and the Chicago police was fortunately averted.

*See U.S. News & World Report, Aug. 29, 1966, p. 10.

A settlement of civil rights demands was worked out, and this series of demonstrations was terminated.

But the injunction still stands. Indeed, no answer was filed until October 27, 1966. As the City's allegations are broadly denied by defendants' answer, the trial will involve issues of fact as well as law. It remains to be seen whether this will become a historic case reaffirming the power and the duty of local authorities to protect the safety, property and welfare of innocent citizens against the excesses of those who take to the streets.

The specific question is whether the conditions and limitations imposed on demonstrations by the Chicago court are consistent with the principles of Cox and similar cases. A related question, of even wider interest, is whether local laws may validly authorize public officials to impose similar limitations against all demonstrations without a showing of prior abuse?

It is ~~hoped and~~ believed that these questions will be answered affirmatively. The need for genuinely effective regulation becomes more evident when one reflects tha the use of demonstrations is not confined to appealing civil rights causes.

The anti-Vietnam protest movement is an example. Here, I refer - not to responsible dissent and discussion (which must always be welcomed) - but to the extremist groups who have sought to undermine their own country's war effort by street demonstrations, sit-ins, attempts to stop troop trains, incitements to burn draft cards, and even by anonymous telephone calls to families of servicemen.

J. Edgar Hoover, testifying before a Congressional Committee, has recently said:

> "Demonstrations protesting U. S. policy toward Vietnam . . . have been held throughout the United States.
>
> "Since February 1965, scarcely a day has gone by without a demonstration in some city.

> "The Communist party and other subversive groups . . . have actively supported and participated in (such) demonstrations. . . ."*

A significant new development, and one which may surprise those who have encouraged civil disobedience in the streets, is the emerging participation by the "radical right". The marching of King's legions in Chicago has produced a counter force. George Lincoln Rockwell and his American Nazi Party have apparently decided to employ similar tactics.

Rockwell recently announced a march and demonstration into a southside Chicago Negro neighborhood. An injunction prohibiting the demonstration was sought on the ground that it would "create a breach of the peace and provoke disorderly conduct". A federal judge denied the injunction and held that the right of free speech and assembly entitled Rockwell to march.** The judge could

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*Testimony of J. Edgar Hoover, before the House Subcommittee on Appropriations, Feb. 10, 1966, as released by the FBI on Sept. 22, 1966, pp. 56, et seq.

**Chicago Tribune, Sept. 10, 1966. The news report does not disclose what conditions, if any, were imposed by the court.

hardly have held otherwise in the face of precedents allowing others to demonstrate.

If the type of demonstrations described above are justified for Dr. King and his Southern Christian Leadership Conference, they are equally justified for George Lincoln Rockwell, for Stokley Carmichael, or for Robert Sheldon and their respective organizations. In the words of Mr. Justice Black, "if the streets of a town are open to some views, they are open to all."* Or putting it differently, the Bill of Rights protects the unworthy as well as the worthy, and this is the way it should be.

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And now a word in closing: The ultimate danger of the spiraling use of street demonstrations is to the rule of law itself. We must, of course, allow wide scope to the exercise of First Amendment freedoms. But these

*Cox v. Louisiana, supra, dissenting opinion, at p. 580.

freedoms can only exist in an ordered society. There can be no public order if every group, pursuing its own ends and causes, may resort at will to coercion in the streets, rather than relying upon the ballot box and democratic institutions.

It is in times such as these that lawyers have a special responsibility. We must develop a capacity for rational detachment in the face of emotional causes, however appealing. We must bring about a far wider public understanding that once a society condones organized defiance of law and disregard of due process, it becomes increasingly difficult to protect its institutions and to safeguard freedom.

With these thoughts in mind, I close these remarks by suggesting that we all heed the warning of a great liberal judge, whose concern for civil rights and freedom of dissent is exceeded only by his concern for our country.

Mr. Justice Black has recently said:

"Governments like ours were formed to substitute the rule of law for the rule of force. Illustrations may be given where crowds have gathered together peaceably by reason of extraordinarily good discipline reinforced by vigilant officers. 'Demonstrations' have taken place without any manifestations of force at the time. But I say once more that the crowd moved by noble ideals today can become the mob ruled by hate and passion and greed and violence tomorrow. If we ever doubted that, we know it now. The peaceful songs of love can become as stirring and provocative as the Marseillaise did in the days when a noble revolution gave way to rule by successive mobs until chaos set in . . . . It (is) more necessary than ever that we stop and look more closely at where we are going."*

*Brown v. Louisiana, 383 U.S. 131, 168 (1966).