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Hostile-Audience Confrontations: Police Conduct and First Amendment Rights

For nearly thirty-five years, courts have vainly attempted to reconcile the first amendment rights of a speaker to communicate provocative, unpopular messages to the public with the interest of the state in preventing violence that might be precipitated by the communication.\(^1\) In view of the failure of the courts in this area to overcome what are admittedly formidable practical and theoretical difficulties, it is understandable that police departments in major cities have not adequately formulated procedures to deal with hostile-audience confrontations.\(^2\) Departmental regulations currently either fail to reconcile properly the important individual and state interests involved or are framed so vaguely that they provide no real guidance to patrol officers on the limits of police interference with the exercise of first amendment rights.\(^3\) Yet it is the local law-enforcement official who must make the on-the-spot decision of whether to silence a speaker confronted with a hostile audience.

This Note first suggests an explicit standard for police conduct in the hostile-audience situation that defines procedures the police must follow at various stages to avoid violating the first amendment. The standard reflects the fact that first amendment free speech rights are not absolute and that such rights must be weighed against both compelling state interests\(^4\) and the competing constitutional

1. While the Supreme Court recognizes the duty of the government to afford police protection for the exercise of first amendment rights, it has not clarified the limits of this duty. See T. Emerson, The System of Freedom of Expression 342 (1970). A recent Supreme Court case that involved a classic hostile-audience problem was Gregory v. City of Chicago, 394 U.S. 111 (1969). Eighty-five peaceful marchers attracted a crowd of over 1000 spectators who became riotous despite the crowd control efforts of one hundred uniformed police officers. When the demonstrators refused to disperse, they were charged and later convicted of disorderly conduct. For a discussion of the lower court's analysis, see note 8 infra. The Supreme Court's majority opinion, without commenting on the hostile audience issue, overturned the disorderly conduct conviction on grounds of lack of evidence and an erroneous jury charge.

2. This Note does not attempt to survey the practices of police departments in a cross section of American cities. Questionnaires were sent only to major metropolitan police forces, with the following responding: Berkeley, California; Boston, Massachusetts; Detroit, Michigan; Kansas City, Missouri; Miami, Florida; New York, New York.

3. For typical police guidelines, see authorities cited notes 29, 32-33 infra.

It seeks to reconcile the interest in public order with our constitutional commitment to open discussion and robust debate. Finally, to deter police abuse of first amendment rights in the hostile-audience context, reforms of tort law are suggested that provide redress for speakers who have been wrongly silenced.

I. STANDARD FOR POLICE CONDUCT IN THE HOSTILE-AUDIENCE SITUATION

The proposed standard for police practices in the hostile-audience context is as follows:

A. Police may limit otherwise lawful speech—
   (1) only if there is a clear and present danger of imminent violence; and
   (2) not on the basis of (a) the character of the speech or (b) the intent of the speaker to arouse audience hostility.

B. The police may order the speaker to depart only—
   (1) after the police have made all reasonable efforts (a)


6. The opportunity for free political discussion is a basic tenet of a democratic society. See, e.g., New York Times v. Sullivan, 376 U.S. 254 (1964), where the Supreme Court in overturning a libel conviction of the New York Times stated: "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." 376 U.S. at 270.

7. Although such factors as advocacy of unlawful conduct or inappropriateness of the time, place or manner of the speech activity may provide a basis for the termination of speech, it will be assumed that the speech is otherwise lawful for the purpose of focusing upon the issue of when speech activities may be limited solely because of audience hostility. Time, place, and manner concerns are only explicitly considered by the standard to the extent that these factors contribute to audience hostility. Thus, the standard deals only with situations in which the time, place, and manner of speech have been approved by appropriate agencies but, notwithstanding this approval, a hostile audience appears. State power to regulate the time, place, and manner of public assemblies is well established. See, e.g., Cox v. New Hampshire, 312 U.S. 569 (1941); Schneider v. State, 308 U.S. 147 (1939). The right of landowners to invoke trespass laws and thereby curtail assemblies held on land dedicated to private use is also settled. See T. Emerson, supra note 1, at 307. However, private owners possessing land open to public use may be limited in their discretion to invoke trespass ordinances. See, e.g., Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, 391 U.S. 309 (1968); Marsh v. Alabama, 326 U.S. 501 (1946). But see Hudgens v. NLRB, 424 U.S. 507 (1976); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).

It should be noted that the hostile-audience standard would be meaningless if it provided that the police could either arbitrarily determine the inappropriateness of an assembly's time, place or manner or unilaterally invoke trespass ordinances. That amount of discretion would subject the rights of all parties to the whim of the police.
to control the spectator audience and (b) to order
the audience to disperse;
(2) the order to the speaker to depart has been explained;
and
(3) safe escort has been offered to the speaker, with the
permissible exception that time constraints may make
the tendering of such an offer impossible.

C. Safe escort must be provided to a speaker ordered to depart.
D. If the speaker departs within reasonable time he may
not be charged with any offense incidental to the events
of the otherwise lawful assembly.
E. If the speaker fails to depart within a reasonable time,
he may be—
(1) subject to immediate removal by the police; and
(2) subject to sanctions for noncompliance with the order
to depart.8

A. Limitations on Lawful Speech

In reconciling the competing interests of public safety and free
speech in a hostile-audience context, the courts have relied heavily
upon variations of the clear and present danger doctrine.9 The
earliest Supreme Court case that considered an explicit hostile-
audience situation was Cantwell v. Connecticut.10 In that case,
a Jehovah's Witness who aroused the anger of a group of Roman
Catholics by playing a phonograph record containing verbal at-
tacks on Catholicism was convicted of the common-law offense of
breach of the peace. The Supreme Court held that, although the

8. This standard is similar to the construction that the Illinois Supreme Court
gave to a disorderly conduct ordinance, CHICAGO, ILL. MUNICIPAL CODE § 193-1(d)
ordinance and affirming the convictions of peaceful demonstrators charged with dis-
orderly conduct for the hostile, uncontrollable reaction of their audience, the Illinois
State Supreme Court stated: "It is only where there is an imminent threat of vio-
lence, the police have made all reasonable efforts to protect the demonstrators, the
police have requested that the demonstration be stopped and explained the request,
if there be time, and there is a refusal of the police request, that an arrest for
an otherwise lawful demonstration may be made." 39 Ill. 2d at 60, 233 N.E.2d at 429.

While the Illinois Supreme Court's construction is similar to the hostile audience
standard proposed by this Note, it does not provide support for the proposed stand-
ard's constitutionality. The United States Supreme Court's reversal in Gregory did
not reach this issue. See note 1 supra. Interestingly, when the Chicago disorderly
conduct ordinance was redrafted after the United States Supreme Court's reversal of
Gregory, little of the Illinois state supreme court's construction was incorporated by
the drafters. See note 88 infra.

9. The clear and present danger test was first stated in Schenck v. United States,
10. 310 U.S. 296 (1940).
contents of the record aroused animosity, the communication, considered in the light of constitutional guarantees, raised no clear and present menace to public peace and order.\textsuperscript{11} In overturning the conviction, the Court discussed the proper balance between public safety and free expression: “[B]reach of the peace embraces . . . not only violent acts but acts and words likely to produce violence in others . . . . When the clear and present danger of riot, disorder, interference with traffic upon the public streets, or other immediate threat to public safety, peace, or order appears, the power of the State to prevent or punish [speech] is obvious.”\textsuperscript{12}

While the \textit{Cantwell} case did not explicitly use the proposed standard's “imminent violence” terminology, imminent violence certainly connotes the immediate threat of serious harm with which the Court in \textit{Cantwell} was concerned. Unfortunately, subsequent Supreme Court decisions have avoided a direct consideration and elaboration of the scope of free speech rights in the hostile-audience context, for the Court's decisions have rested on such narrow grounds as improper jury instructions,\textsuperscript{13} overbroad statutes,\textsuperscript{14} or an overbroad grant of administrative discretion tantamount to prior restraint.\textsuperscript{15}

Yet the common thread of concern for the state's interests in preventing violence is nonetheless evident. Many cases that have articulated justifications for police termination of speech activities have identified the critical factor in terms such as “public danger, actual or impending,”\textsuperscript{16} or “serious substantive evil that rises far above public

\begin{itemize}
\item \textsuperscript{11} 310 U.S. at 296.
\item \textsuperscript{12} 310 U.S. at 308; see Feiner v. New York, 340 U.S. 315, 320 (1951), which, in upholding a hostile audience speaker's disorderly conduct conviction, relied in part on this passage quoted from \textit{Cantwell}. Cf. Note, \textit{Protecting Demonstrators from Hostile Audiences}, 19 Kan. L. Rev. 524, 530 (1971) (condemning the “hecklers’ veto” but concluding that “although free speech would be suppressed, dispersal of the demonstrators is certainly preferable to a bloodbath . . . .”); Note, \textit{Free Speech and the Hostile Audience}, 26 N.Y.U. L. Rev. 489 (1951) (speakers can be dispersed by police when bloodshed is imminent). \textit{But see} A. MIBBLEJOHN, \textit{FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT} 91 (1st ed. 1948) (“The unabridged freedom of public discussion is the rock on which our government stands. With that foundation beneath us, we shall not flinch in the face of any clear and present—or, even, terrific—danger”).
\item \textsuperscript{13} E.g., Gregory v. City of Chicago, 394 U.S. 111 (1969), \textit{discussed in note 1 supra}; Terminiello v. Chicago, 337 U.S. 1 (1949).
\item \textsuperscript{14} E.g., Cox v. Louisiana, 379 U.S. 536 (1965).
\item \textsuperscript{15} \textit{See} Kunz v. New York, 340 U.S. 290 (1951).
\item \textsuperscript{16} Thomas v. Collins, 323 U.S. 516, 530 (1944). \textit{Cf. In re Brown}, 9 Cal. 3d 612, 510 P.2d 1017, 108 Cal. Rptr. 465 (1973), which, in overturning the convictions of students arrested in a boisterous college demonstration, stated: “Although the public may fear a large, noisy assembly, particularly an assembly that espouses an unpopular idea, such an apprehension does not warrant restraints on the right to assemble unless the apprehension is justifiable and reasonable and the assembly poses a threat of violence.” 9 Cal. 3d at 623, 510 P.2d at 1024, 108 Cal. Rptr. at 472.
\end{itemize}
inconvenience, annoyance, or unrest." Thus, the use of a hostile-audience standard that employs the clear and present danger of imminent violence as a point of departure in reconciling the state interests in protecting lives and property and the countervailing interests of free speech seems appropriate.

The proposed standard expressly rejects the use of two additional criteria that have frequently been suggested as justifications for terminating speech activities: character of the speech and intent of the speaker. As for the first, although certain classes of speech have been defined that do not merit first amendment protections, the courts have repeatedly held that the voicing of unpopular views does not justify silencing a speaker. As Justice Douglas made clear in *Terminiello v. Chicago*, "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." The first amendment obviously was not conceived to protect only those views with which others agree. Although unpopular views may contribute significantly, or in fact may be the sole cause of audience hostility, the expression of such views, by itself, is not a constitutionally permissible criterion for terminating speech.

17. *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). *See also* Edwards v. South Carolina, 372 U.S. 229 (1963), a civil rights case which, in overturning the disorderly conduct convictions of peaceful demonstrators, summarized the spectators' mood and distinguished it from the more serious situation arising in *Feiner v. New York*, 340 U.S. 315 (1951) (*discussed in note 12 supra*): "This therefore was a far cry from the situation in *Feiner v. New York*, where two policemen were faced with a crowd which was 'pushing, shoving and milling around,' where at least one member of the crowd 'threatened violence if the police did not act,' where 'the crowd was pressing closer around [the speaker] and the officer,' and where 'the speaker passes the bounds of agreement or persuasion and undertakes incitement to riot.'" 372 U.S. at 236 (citations omitted).

18. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942), originally formulated the "fighting words" doctrine and with it the theory that some speech is of such low value so as not to merit first amendment protection: "There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting words.'" 315 U.S. at 571-72. Incitement to riot also falls outside of the first amendment's protection. *See, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 (1940).

19. *E.g.*, Bachellar v. Maryland, 397 U.S. 564, 570 (1970), which overturned picketers' disorderly conduct convictions holding: "Of the record, we find that petitioners may have been found guilty of violating (the disorderly conduct ordinance) simply because they advocated unpopular ideas. Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners convictions." 397 U.S. at 570; Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Street v. New York, 394 U.S. 576 (1969). *But cf.* Guzick v. Drebus, 431 F.2d 594 (4th Cir. 1970), cert. denfd, 401 U.S. 948 (1971); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

20. 337 U.S. 1, 4 (1949).

The second suggested, but inappropriate, justification for the termination of speech is the intent of the speaker to arouse audience hostility. Although this use of speaker intent would have the merit of punishing culpable troublemakers, a hostile-audience standard incorporating speaker intent as a criterion for silencing speech has several substantial defects. Police officers at the scene can hardly be expected to draw fine distinctions between such permissible motives as explicit confrontation with an audience known to harbor antithetical views or generation of mass media interest and such an impermissible motive as inciting the audience to violence.

The difficulty of discerning impermissible intent in the exercise of first amendment rights is manifest in the Supreme Court cases dealing with the advocacy of unlawful conduct. In *Brandenburg v. Ohio,* the most recent in this line of cases, the Supreme Court overturned the conviction of the leader of a Klu Klux Klan group under an Ohio criminal syndicalism statute. A close reading of this case suggests that a showing of explicit advocacy “directed to inciting or producing imminent lawless action” has now been made necessary because of the extreme difficulties inherent in discerning actual, unlawful intent of the speaker to foment unlawful conduct.

In the context of a hostile-audience confrontation, where such
an external manifestation of intent as specific advocacy of unlawful conduct does not exist, intent becomes too indefinite and subjective a criterion on which to predicate speech rights. Given the difficulties that courts have had in identifying unlawful intent, it is clear that such a standard would be applied inconsistently and capriciously by the police officer on the street. There is, for example, too great a likelihood that the police would claim unlawful intent whenever speech activities engendered a strongly negative reaction from a crowd or from policemen themselves. To allow termination of speech on these grounds would establish "a simple and readily available technique by which cities and states [could] with impunity subject all speeches . . . to the . . . censorship of the local police."

Police department regulations, despite the availability of some guidance from the courts, fail to define precisely when a dispersal order is justified in a hostile-audience situation. This failure, when combined with built-in police biases against the speaker, threatens first amendment rights. This Note suggests that the "imminent violence" test is appropriate and feasible for triggering a dispersal order, provided that other procedures required by the standard (e.g., reasonable efforts to control audience) have been followed.

It is fair to say that current police procedures do, at least, comport with constitutional limitations upon the use of speech character and speaker intent. Police manuals thus urge caution in making arrests even for such constitutionally unprotected speech as "fighting words," or incitement to riot. The New York Police Department, for example, instructs officers that "[y]our job is to protect all . . . speakers even if you find their views wrong, perverted, disloyal, or disgusting." Moreover, speaker intent is not enumerated as one of the proper grounds for dispersal, and to this extent the police regulations counsel a proper respect for first amend-


29. See Police Department, City of New York, Guidelines for Demonstrations 8 (undated) (hereinafter New York Guidelines): "It is not yet definitely settled whether a New York verbal harassment law can apply to abuse of policemen in demonstration situations."

30. See id. at 9, which carefully interprets New York's riot act for policemen:

The persons to whom the speaker is talking must be called upon to do something, to take action. There is no incitement to riot where the crowd is stirred up and made angry by a speaker who merely states his beliefs or facts (true or false doesn't matter). For example, it may be incitement to shout to the crowd "let's go right now and burn down the corner liquor store," but it is not incitement to state facts about or an opinion concerning the liquor store owner which makes the listeners furious and thus possibly likely to resort to violence.

See also Letter from Wesley A. Pomeroy, Chief of Police, Berkeley Police Department, Berkeley, California, to author, October 3, 1975 (on file at Michigan Law Review) (hereinafter Berkeley Letter): "Caution and judgment govern actions directed toward inciteful speakers: the use of powers of arrest or protective custody would depend exclusively on the attendant circumstances."

ment rights. It is unfortunate, however, that the regulations do not explicitly caution that the audience hostility generated by the speaker's views neither lessens the duty of the police to provide protection for the speaker nor provides, by itself, sufficient grounds for terminating speech.

A major defect in police regulations is that they do not clarify the level of danger to public order needed to trigger dispersal or arrest of speakers or of members of the audience. Some focus on the duty of police to act when there is actual violence and ignore the question of "imminent violence." Others, such as the New York City Police crowd control manual, state only that police department attorneys must advise the officers at the scene whether speech should be terminated.\textsuperscript{32} The Boston Police procedures are similarly deficient in addressing the imminent violence issue and merely suggest that when police are confronted by a hostile-audience situation, (1) other police should be summoned immediately, and (2) the crowd's agitators may be removed and arrested. However, the Boston procedures never define a crowd agitator.\textsuperscript{33}

This lack of specificity in police procedures, in effect, relegates the first amendment rights of a speaker who is confronted by a hostile audience to the individual discretion of the police officer on the scene. Because of the many biases within police administration that work against recognition of these rights, such unbridled discretion is extremely objectionable. First, there is a natural inclination to regard unfavorably those who may generate disruption,\textsuperscript{34}

\textsuperscript{32} POLICE DEPARTMENT, CITY OF NEW YORK, INSTRUCTIONS FOR MEMBERS OF THE FORCE AT MASS DEMONSTRATIONS 8 (undated) (hereinafter NEW YORK DEMONSTRATION INSTRUCTIONS). ("Department attorneys shall be utilized to advise and assist members of the force at the scene and the stationhouse"). The City of Detroit has a similar procedure. Letter from Michael J. Falvo, Police Officer, Special Projects Section, Department of Police, Detroit, Michigan, to author, November 12, 1975 (on file at Michigan Law Review) (hereinafter Detroit Letter) ("The Detroit Police Department . . . has a staff of legal advisors that are available on a twenty-four hour basis to give legal opinions to command officers").

\textsuperscript{33} BOSTON POLICE DEPARTMENT, CROWD CONTROL TACTICS 50 (undated) (hereinafter BOSTON CONTROL TACTICS).

\textsuperscript{34} The lack of sympathy with demonstrators likely stem from a basic disrespect for dissidents and a feeling that protecting demonstrators is not the best use of men and equipment given the other needs of the community. See Lipez, The Law of Demonstrations: The Demonstrators, The Police, The Courts, 44 DENVER L.J. 499, 509 (1967) ("In their guts . . . [most police officers] . . . regard . . . demonstrators as foolish, potentially dangerous, nuisances"); Fox, The CD Man, 33 THE POLICE CHIEF 20 (Nov. 1966) (Chief Inspector of Philadelphia Police Department writes that "[a] new monster, gorging itself on countless manhours and utilizing needed patrol equipment, has poked its ugly head into the busy offices of police executives throughout the country. This growing giant [is] known as 'The demonstration'"). See also Lewis v. Kugler, 446 F.2d 1343 (3d Cir. 1971) (holding that the district court improperly dismissed a complaint seeking to enjoin state police from subjecting "long-haired highway travelers" to unconstitutional searches and seizures); Hairston v. Hutler, 334 F. Supp. 251 (W.D. Pa. 1971) (enjoining police
whether or not the speaker's conduct is legally protected. Negative attitudes of the community and police administrators toward radical views may also contribute to the innate hostility of police to provocative speakers. This dislike may be further compounded by irritability aroused in police officers by a dislike of crowd control duties as well as by the natural inclination of the officer given a choice between stopping a large, hostile crowd or stopping a few provocative speakers, to proceed against the speakers. Finally, there is the reality that the speaker has no effective remedies should the police violate his first amendment rights.

There are, of course, objective difficulties in articulating meaningful, operational standards and definitions for clarifying police conduct in hostile-audience situations. It is essential to recognize that police discretion is inextricably involved in determining the point at which the rights of free speech are outweighed by the state's interest in preventing violence. Considering the volatile and often dangerous atmosphere surrounding hostile-audience situations, police procedures can hardly be expected to provide a precise blueprint for officer conduct and must by necessity be written in general terms.

Still, the proposed standard is an improvement over the vague or nonexistent regulations prevalent today. The standard expressly from searching Blacks on the streets without having probable cause); Siedel, Injunctive Relief for Police Misconduct in the United States, 50 J. Urb. L. 681 (1973); Note, Regulation of Demonstrations, 80 Harv. L. Rev. 1773 (1967).

35. See generally J. Wilson, Varieties of Police Behavior 83-87 (1968).

36. Fox, supra note 34, at 24 (“The average policeman doesn’t enjoy guarding a picket line or protecting and preventing demonstrators from being attacked. It usually means long, hot, boring hours in one spot”).

37. See Lipetz, supra note 34, at 509.

38. See section III infra.

39. See Berkeley Letter, supra note 30 (“Unfortunately this Department has no formal procedures or manuals which address the [hostile-audience] situation. . . . Evaluating what constitutes a clear, present, and immediate danger of violence is a subjective matter which cannot be articulated satisfactorily in a written policy”); Detroit Letter, supra note 32 (“[M]y review of department orders has failed to disclose specific policies or procedures that deal with the narrow issue of police response when the rights of peaceful protesters are threatened by hostile spectators”).

But cf. Letter from Captain C.M. Woods, Miami Police Department, Miami Florida, to author, October 2, 1975 (on file at Michigan Law Review) [hereinafter Miami Letter] (“We try to handle demonstrations by standing by as impartial observers to insure that all remains peaceful and only take police action when it becomes clearly evident that a disorderly situation is imminent . . . ”).

40. See Detroit Letter, supra note 32: “Not surprisingly, many of the constitutional issues in which law enforcement activity operates are likewise not amenable to strict and steadfast interpretations that cover the myriad of conceivable situations. Perhaps the best way to view the dilemma of the police administrator in setting policy in this area would be to look to the somewhat analogous situation of a law school attempting to set exhaustive policy guidelines as to when an attorney should advise his client to plead guilty to a criminal offense and forfeit his constitutional right to trial. Obviously, the role of sound discretion and judgment cannot be discounted in either case.”
prohibits reliance on character or intent of speech. By focusing on "imminent violence," the standard also posits that actual violence need not have occurred to justify speaker removal. The use of the term "clear and present danger of imminent violence" will at least allow police department legal personnel to receive guidance from the courts from other free speech contexts. Although the policeman's discretion remains important, the standard focuses attention on the point at which police efforts to control a crowd are about to be overwhelmed, and does not allow silencing the speaker for a lesser cause. 41

Most importantly, the remaining portions of the proposed hostile-audience standard address the difficulties inherent in delineating a workable, substantive definition of imminent violence by advancing specific, procedural prerequisites that must be fulfilled before speech activities may be terminated and that define the manner of termination. Thus, police have the duty to take all reasonable steps to control the crowd and must provide a safe escort in case speaker departure is needed. The standard presents a solution to the hostile-audience situation that is appropriate for police application and is fully compliant with current judicial doctrines of free speech.

B. Police Measures Against the Hostile Audience

In attempting to achieve the permissible objective of maintaining law and order, the police are constitutionally required to employ the means that least drastically interfere with the exercise of first amendment rights. 42 In the hostile-audience context, this principle of law would seem to require that the police first take measures against the audience rather than passively wait for a situation of imminent violence to develop, which could then justify speaker dispersal. Thus, the proposed standard requires that before an assembly can be curtailed, the authorities must exert all reasonable efforts to control the audience and order it to disperse.

Although the Supreme Court has never directly addressed the issue of whether reasonable efforts must be first exerted against the crowd rather than against the speaker, 43 several lower federal courts have held that the police not only have a duty to maintain the peace

41. See Note, 26 N.Y.U. L. Rev. 489, supra note 12, at 492, reasoning that if police can no longer control the hostile audience, thus making violence and bloodshed imminent, no effective address could be delivered and hence there is no real alternative to police action limiting the demonstrators' speech.


43. However, in Hague v. CIO, 307 U.S. 496, 516 (1939), the Supreme Court, in overturning the convictions of labor leaders who distributed leaflets and held public meetings that were in violation of certain ordinances, stated: "[T]he uncontrolled official suppression of the [right to speak] cannot be made a substitute for the duty to maintain order in connection with the exercise of the right."
but also have a constitutional responsibility to take all reasonable steps to defend the speech rights of speakers confronted by a hostile audience. This requirement was explicitly endorsed by Justice Black in his dissenting opinion in Feiner v. New York: "If in the name of preserving order, [the police] ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him . . . even to the extent of arresting [members of the hostile audience]." Failure by the police to take reasonable, affirmative action against the audience would effectively make the police a party to the abridgment of first amendment rights.

The test of reasonableness, recognized by numerous courts and commentators, has been incorporated into the standard proposed by this Note. The police procedures reviewed seem to comport with the general requirement that reasonable crowd control efforts be taken prior to silencing, dispersing or detaining the speakers. Clearly crowd control must be a necessary police measure, both to protect speakers' constitutional rights and to maintain order.

44. E.g., Wolin v. Port of New York Authority, 392 F.2d 83, 94 (2d Cir.), cert. denied, 393 U.S. 940 (1968); Kelley v. Page, 335 F.2d 114, 119 (5th Cir. 1964); Hurwitz v. Oakland, 247 F. Supp. 995, 1001 (N.D. Cal. 1965); Williams v. Wallace, 240 F. Supp. 100, 109 (M.D. Ala. 1965). See Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 425 (1948) ("The sound constitutional doctrine is that the public authorities have the obligation to provide police protection against threatened disorder at lawful public meetings in all reasonable circumstances"). See also Downie v. Powers, 193 F.2d 760 (10th Cir. 1951); Sellers v. Johnson, 163 F.2d 877, 881 (8th Cir. 1947), cert. denied, 352 U.S. 851 (1948).

45. 340 U.S. at 326-27.

46. Cf. Downie v. Powers, 193 F.2d 760, 764 (10th Cir. 1951).

47. See authorities cited notes 43-46 supra.

48. See BOSTON CONTROL TACTICS, supra note 33, at 48 (emphasizing that police must protect the rights of all persons to assemble peacefully); Berkeley Letter, supra note 30 ("Our mission in dealing with public assemblies and gatherings is to protect life and property, while at the same time allowing for full exercise of First Amendment liberties"); Miami Letter, supra note 39. ("With respect to peaceful demonstrators among hostile spectators we would be duly bound to protect their rights of assembly and speech where ever possible . . . . Naturally once a riot begins it becomes imperative that we restore calm and order quickly. The usual non-violent tactics of crowd control would be employed such as breaking the crowd into small groups, isolating and dispersing them. If the crowd became combative, tear gas might have to be employed, but this would be avoided if at all possible"). UNITED STATES NATIONAL ADVISORY COMM. ON CIVIL DISORDERS, REPORT 267 (1968) [hereinafter CIVIL DISORDERS REPORT]. For example, the members of the Philadelphia Civil Disobedience Unit all receive a week of lectures from a sociologist who counsels the unit in overcoming prejudices, Lipez, supra note 34, at 508. Efforts are also being made to teach officers toleration of divergent viewpoints. E.g., NEW YORK GUIDELINES, supra note 29, at 3:

"To have a meaningful vote the voters must have all opinions put before them . . . . History shows that often the ideas of unpopular groups have later become generally supported . . . . Of course, policemen, as other citizens, may have strong feelings for or against the position taken by a particular group of demonstrators. But our private feelings cannot affect our professional conduct—they cannot if our democracy is to work."

See also CIVIL DISORDERS REPORT, supra note 48, at 171 which quotes an FBI manual
The proposed test obviously cannot be applied uniformly and allows both police discretion in the field and judicial discretion on review. It must be recognized that the pragmatic considerations of police training, effectiveness of equipment, and quantity of police manpower all combine in varying proportions in each community to render any more specific standard for crowd control inappropriate for general application. Illustrative of the great variation in factors that affect police conduct is the availability to departments of crowd control training, which has been described as "the most critical deficiency of all" in the preparedness of police departments for handling civil disorders. Thus, while many large metropolitan police departments generally have crowd control training programs, the situation in smaller communities is often less satisfactory. For example, according to one study, more than forty per cent of Illinois officers outside the City of Chicago have never received formal training of any kind.

The availability of police manpower, irrespective of the level of training, is also subject to wide variation. Although department size should be geared to a city's population size, and population size will often be determinative in limiting the scale of a hostile-audience situation, it is clear that small cities with small police forces will be unable to cope with certain emergencies that would be within the capability of large cities.

prepared for law enforcement officers: "A peaceful or lawful demonstration should not be looked upon with disapproval by a police agency; rather, it should be considered a safety valve possibly serving to prevent a riot . . . ."

49. Few departments, for example, can furnish the protective clothing needed by officers in their forays with a hostile audience. Unfortunately, the only adequate equipment available is handguns, an ineffective civil disorder control weapon. See CIVIL DISORDERS REPORT, supra note 48, at 271.

50. "The capability of a police department to control a civil disorder depends essentially on two factors: proper planning and competent performance. These depend in turn upon the quantity and quality of police manpower, the training of patrolmen, and the effectiveness of their equipment." CIVIL DISORDERS REPORT, supra note 48, at 267.

51. CIVIL DISORDERS REPORT, supra note 48, at 270. See also THE PRESIDENT'S COMM. ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 107 (1967) which states that "substantially raising the quality of police personnel would inject into police work knowledge, expertise, initiative, and integrity that would contribute importantly to improved crime control."

52. CIVIL DISORDERS REPORT, supra note 48, at 174. However, even in many large cities, the crowd control training is primarily received only by recruits. Id.


54. See, e.g., Gregory v. City of Chicago, 394 U.S. 111, 127 (1969) (Black, J., concurring), where 100 police officers, having made advance crowd control preparations in the form of barricades, street closings, and strategic deployment of officers prior to the demonstrators' arrival, were unable to control a hostile crowd of 1200 persons. Whenever an initial incident erupts into a major crowd control problem, most police departments are confronted with a difficult manpower problem. Of
Even if the total number of officers in the police department were sufficient, two other factors impede the formulation of a specific standard for crowd control. First, it is clear that there are legitimate, competing demands on police resources and that diversion of officers to a hostile-audience situation necessarily will result in leaving areas of the city unpatrolled.\textsuperscript{55} Second, if the police do not have advance notice of an impending hostile-audience situation, manpower limitations are compounded by the enormous and time-consuming task of mobilizing police personnel.\textsuperscript{56} Even if forces adequate to handle a hostile-audience situation were potentially available, there is an inevitable time lag between recognition of the need for such forces and their mobilization. During the period of mobilization, riotous conditions may intensify beyond police control.\textsuperscript{57} Thus, this time lag may render impractical the activation of such outside forces as the National Guard, which has often been considered to be a stand-by police force, to protect the speech.\textsuperscript{58} Although reasonable efforts of crowd control would, in many circumstances, include the dispatch of additional forces to the scene, a requirement to call out additional force in every case is too rigid in light of the time and manpower constraints under which the police must realistically operate.

The standard of reasonableness in assessing police efforts of crowd control should not only encompass the levels of manpower and equipment allocated to crowd control, but also should be used

\textsuperscript{55} CIVIL DISORDERS REPORT, supra note 48, at 173.
\textsuperscript{56} See id. at 268, quoting an anonymous police commissioner in a large city where a major civil disorder had erupted: "It cannot be emphasized too strongly that mobilization is inherently a time consuming operation, no matter how efficient. After a man is notified, he must dress and travel to his reporting point. Once he has checked in and has been equipped, he must be . . . transported to an . . . assembly point . . . . He must then be actually committed to the area of involvement. The time lapse in this entire procedure ranges from 1\(\frac{1}{2}\) to 2 hours."

\textsuperscript{57} In order to control a riotous situation effectively, large numbers of police must be mobilized as soon as possible: "While a time lag is unavoidable, its crippling effects can be diminished greatly by the development of prearranged civil disturbance procedures which are swiftly and intelligently applied in time of stress." Leary, The Role of Police in Riotous Demonstrations, 40 NOTRE DAME LAW. 499, 503-04 (1965).

\textsuperscript{58} The National Guard may appear as an adjunct police force, available to quell hostile audiences whenever local police efforts are exhausted. The Report of the National Advisory Committee on Civil Disorders, however, suggests that the Guard is neither continually available to nor easily integrated with the local police. This is largely because the Guard's primary commitment and preparation is for augmenting the army and air force. See CIVIL DISORDERS REPORT, supra note 48, at 275.

It is generally preferable to use local police rather than the Guard or state forces. Repeated deployment of the military against rioters demoralizes the community and may reduce the "deterrent" or "shock" value of troops. It is best to keep the Guard in reserve for extreme emergencies. D. FARMER, supra note 53, at 4-5.
to evaluate the types of crowd control techniques applied by the police. One type of crowd control effort that merits special attention is the use of the arrest power to expel belligerent members of the audience. The hostile-audience context creates some subtle legal and practical difficulties that preclude the imposition on police of a strict duty to arrest. It must first be recognized, as a general rule, that the expression of contrary views on the part of a spectator or "counter-demonstrator," although disquieting, is protected by the first amendment. Arrest is only warranted when the spectator's actions transgress the bounds of constitutional protection and, for example, either amount to a specific incitement to unlawful activity or, under some circumstances, materially and substantially disrupt a person's lawful speech. Thus, the New York Police Department guidelines advise that, while a certain amount of heckling is a part of our tradition, "[f]reedom of speech does not include the right to become so disruptive at meetings that the meeting cannot continue." Once a spectator has engaged in unlawful conduct or has begun to incite disruption, arrest may sometimes prove to be an effective means of removing those persons before the situation escalates to an uncontrollable level. Even under circumstances in which a heckler would be subject to arrest, however, officers should not have an absolute duty to do so, for this would deprive them of vital discretion in controlling a crowd and could spark disastrously counter-productive results. Many police administrators warn that even simple arrests for summary offenses can precipitate a riot, and police guidelines counsel officers not to make indiscriminate arrests. New York City police instructions, for example, caution that application of indiscriminate force can convert a peaceful assembly into a hostile mob. Moreover, mass arrests will not only deplete needed police manpower but may, through an overloading of the jails, bail process and courts, also place substantial burdens on the criminal justice system of a given community. At the same time, a low rate of convictions may result from the inability of the arresting officer to recall the circumstances of one specific arrest out of many. Thus, the practi-
cal problems in determining whether arrests should be made in the hostile-audience context render unworkable a stringent duty to arrest.

It has been argued that because of the complexity and diversity of hostile-audience situations, the standard of police conduct toward the audience should, as a general rule, merely be one of reasonableness under the particular facts and circumstances that confront the police. There are, however, some specific duties that can be required of the police that are derived from their constitutional obligation to protect first amendment rights. In particular, no serious operational problems would appear to arise from a requirement that the police must order the hostile audience to disperse and that, if time permits, they must explain the order. An order to disperse, now incorporated in many police manuals, seems far less likely than arrests or the use of force to inflame an already aroused audience and, additionally, it warns innocent spectators of a potential escalation of police tactics. Although certainly not conclusive evidence that all reasonable efforts of crowd control were actually undertaken, the giving of such an order would provide a clear, objective manifestation that police efforts were first directed at protecting the rights of free speech, and is therefore mandated in the proposed standard.

Under some circumstances, the police should not only give a dispersal order, which they are compelled to do, but should also explain fully their reasons for taking this extreme step. Such a procedure may contribute greatly to audience compliance with the dispersal order. Still, while always desirable, a complete explanation may be made impossible by the exigencies of a particular hostile-audience situation. Thus, the proposed standard submits that the explanation be encouraged but not required in all cases.

C. Prerequisites to Speaker Removal

Contrasted with the flexibility given to the police concerning the the explanation of a crowd dispersal order is the firm requirement, that have a high probability of resulting in convictions. Therefore, it is important that officers recall the circumstances surrounding each arrest. This can be facilitated by limiting the number of persons an officer takes into custody at any one time. See, e.g., NEW YORK DEMONSTRATION INSTRUCTIONS, supra note 32, at 10: "No officer should arrest more defendants than he can identify. Where possible one (1) officer should be assigned to arrest one (1) prisoner, but no more than three (3) or four (4) prisoners to an officer. If possible, when a female is arrested, the arresting officer should arrest only females due to separate transportation, detention, and arrest procedures."

67. Lipez, supra note 34, at 510-11; BOSTON CONTROL TACTICS, supra note 33, at 52; NEW YORK DEMONSTRATION INSTRUCTIONS, supra note 32, at 9, 22.

68. Police officers should always explain their actions. Because demonstrators are often suspicious of police motives, an explanation will improve the chances of demonstrator cooperation. See Note, supra note 34, at 1787.
if reasonable measures of crowd control fail, for both the issuance and explanation of an order requiring a speaker to depart. It is submitted that the mere necessity of departure does not provide a basis for the arrest of a speaker absent the announcement and explanation by police of an order to depart. This conclusion is based both on the nature of the first amendment rights that are being suppressed and on the practical realities of the hostile-audience situation.

First, the proposed standard assumes that the speaker is engaged in lawful speech activity that could not be interfered with apart from the hostile-audience context. The belligerent response of the crowd cannot, in itself, convert such lawful speech into speech that is unlawful. Although in a situation of imminent violence the state's interests in law and order may surpass the individual rights of free speech, and, thus, justify termination of speech activities, there is no compelling justification for the arrest and punishment of the speaker. Such drastic measures should only be permitted when the speaker fails to obey a lawful police order to depart.

Another first amendment interest that implies a need for an order prior to direct police action is the prevention of a chilling effect that might accrue from the threat that speech might without notice bring criminal liability. An arrest prior to the issuance and explanation of an order to disperse would effectively shift responsibility from the police to the speaker to determine whether the police will be able to control the audience and to discern that violence is imminent. Since the speaker will usually be unaware of both the minute-to-minute plans of the police and the quantity and effectiveness of police resources, the speaker's judgment of the appropriateness of the police order would inherently be little more than speculation. If speakers could be arrested and punished because they incorrectly assessed the situation and continued speaking, it is likely that many would succumb to a heckler's veto rather than take the risks inherent in exercising their rights of free speech to the fullest.

To minimize the premature termination of speech, the proposed hostile-audience standard places the burden upon police to order a speaker to depart and to explain that order. The speaker may then make an informed evaluation of the situation and knowingly accept the consequences of either disregarding or obeying the police order.

The final justification for the requirement that orders be explained derives from the proper relationship between the state's authority and the individual in our society. As Justice Black noted in his dissent in *Fiener v. New York*, "[a] man making a lawful address is


70. See section II infra.
certainly not required to be silent merely because an officer directs it. [He is] entitled to know why he should cease doing a lawful act . . . I understand that people in authoritarian countries must obey arbitrary orders. I had hoped that there was no such duty in the United States."

An important objective of the explanation requirement is the reduction of the kind of police arbitrariness in stifling speech that is unacceptable in our society.

The necessity of lawful and controlled police behavior was affirmed by the Supreme Court in Cox v. Louisiana. In that case the Court reversed the conviction of several demonstrators for failure to obey a sheriff's order to disperse and concluded that failure to comply was not unlawful where that order was supported by an invalid reason. Although in Cox the arbitrariness of the dispersal order was heightened because the sheriff had first granted and then, shortly thereafter, had withdrawn permission for the demonstration, the use of an arbitrary order for a speaker to depart in a hostile-audience situation would be similarly invalid. Even though the Court did not address the issue of whether an order to a speaker had to be explained, the reasoning of Cox would seem to imply that there is such a duty. It would be anomalous to strike down an improper order where the invalid reason was stated yet condone an order that may have been equally improper but the impropriety of which cannot be proved because no explanation was given at the time. If a speaker has a right not to obey an improper order, then the speaker should have a right to know the basis for any order that is given and to have the stated basis on the record for later judicial proceedings.

It should finally be noted that the benefits from an explained order are not confined to the speaker but will also accrue to the police. For example, the explanation is likely to generate greater speaker compliance with the order, and the police will thus have to arrest only those who willfully refuse to obey. As was indicated in the discussion of crowd dispersal, a reduction in arrests not only reduces the immediate burdens of making the arrest itself but will also reduce the subsequent duties of filing reports, and,

71. 340 U.S. at 327-28 (Black, J., dissenting).
72. See Note, supra note 68, at 1787. Explanations may also increase the likelihood of speaker cooperation.
73. 379 U.S. 559 (1965).
74. 379 U.S. at 572.
75. See note 68 supra.
76. See Note, supra note 68, at 1787. See generally Leary, supra note 57.
77. See text at notes 64-65 supra.
78. See, e.g., NEW YORK DEMONSTRATION INSTRUCTIONS, supra note 32, at 13, detailing the many responsibilities of an arresting officer.
ultimately, making courtroom appearances. Additionally, the major strains that could occasionally be placed on a city's criminal justice system by mass arrests may also be avoided. Given these benefits, it is not surprising that police procedures typically direct the superior officer at the scene to follow an order to a speaker with an explanation.

D. The Requirement of Safe Escort

In addition to explaining an order requiring a speaker to depart, the police must provide a safe escort for the speaker and must, if time permits, actually extend an offer of safe escort before ordering departure. This requirement is derived from the general duty of the police to protect from physical harm citizens engaged in lawful conduct and also from concern that lack of such protection will intimidate all speakers and will discourage them from exercising fully their first amendment rights. Absent a police duty of safe escort, even assured police compliance with a standard requiring reasonable crowd control efforts and orders to disperse would not remove the chill on speakers engendered by the probability of ultimate physical harm. It may of course be argued that since the police were unable to control the spectator audience they will also be unable to provide the speakers safe egress; but such a contention ignores the fact that relative police strength will increase as officers concentrate on providing an escort for the speakers rather than on restraining the entire crowd, and that audience belligerency may diminish as the speakers' departure becomes evident.

The proposed standard also suggests that, where possible, the police should make an offer of safe conduct to a speaker who has been asked to depart. This practice would often be in the police officer's self interest, since it could significantly increase the likelihood of speaker compliance. Although police procedures do not generally include an offer for safe escort for the speakers, the recommendation of such an offer could easily be incorporated into the explanation of the order.

79. Courtroom appearances are not only time-consuming but also may subject the arresting officer to the hostile cross examination of defense attorneys. See Lipez, supra note 34, at 511.

80. See note 65 supra.

81. The dispersal proclamation "should be clear and unequivocal. It should state the legal basis for the proclamation, issue a firm order to disperse and designate the avenues of exit." Boston Control Tactics, supra note 33, at 52. See Lipez, supra note 34, at 510-11.

82. See text at notes 67-68 & note 72 supra.

83. See Gregory v. City of Chicago, 394 U.S. 111, 129 (1969) (Black, J., concurring), which relates the dispersal order given to a group of demonstrators because their hostile audience could no longer be restrained by police: "[Polie] Commander Pierson told Gregory the situation was dangerous and becoming riotous. He asked
situations in which they are compelled to terminate speech activities, the police should not be burdened with a rigid duty to provide nonessential instructions or explanations. Thus, as was the case with the explanation of an order to the hostile audience to disperse, an offer of safe escort to a speaker is not an absolute requirement.

II. SANCTIONS FOR SPEAKER NONCOMPLIANCE WITH AN ORDER TO DEPART

Even when a police order to a speaker is lawful and is accompanied by a complete explanation with an offer of safe conduct, the speaker may still refuse to comply. This Note now focuses upon the sanctions to which a speaker may be liable for disobeying a lawful police order and suggests a means less drastic than arrest and prosecution for furthering the state's interest in law and order.

The proposed hostile-audience standard provides that, if the speaker obeys an order to disperse, he may neither be arrested for having caused audience hostility nor charged with any offense incidental to the events of an otherwise lawful assembly. Until the time at which violence becomes imminent and an explained, speaker dispersal order is given, the speaker has been engaging in the lawful exercise of first amendment rights and should not be subject to arrest. Once violence is imminent, however, failure to comply with a lawful police order to disperse renders a speaker liable for arrest and prosecution under clear, narrowly written laws.

A speaker who disobeys a dispersal order may be criminally liable under numerous statutes, including those that prohibit refusal to obey an officer's command, obstructing an officer in the performance of official duties, and disorderly conduct. Although

84. See text at notes 67-68 supra.
86. Failure to obey the command of a police officer is a traditional form of breach of the peace as long as the command is itself lawful. See Wright v. Georgia, 373 U.S. 284, 292 (1963).
87. See cases discussed in Annot., 12 A.L.R.2d 382 (1950).
88. An example of a disorderly conduct ordinance that provides for crowd dispersal orders is CHICAGO, ILL. MUNICIPAL CODE § 193-1(d) (1974), discussed in note 8 supra:
A person commits disorderly conduct when he knowingly:

(d) Fails to obey a lawful order of dispersal by a person known to him to be a peace officer under circumstances where three or more persons are com-
these charges typically carry small fines or short jail terms, they nevertheless "mark" the accused with an arrest record and, possibly, with a criminal conviction. Since most prosecutors are elected officials and are therefore sensitive to public opinion, they may feel substantial pressure to prosecute those speakers who have provocative and unpopular views. However, even if a prosecution is not commenced, the fact of arrest will usually remain on record. Such arrest records may severely damage the violators' job prospects, credit rating, and status within the community.

mitting acts of disorderly conduct in the immediate vicinity, which acts are likely to cause substantial harm or serious inconvenience, annoyance, or alarm.

See Comment, The Proposed Criminal Code: Disorderly Conduct and Related Offenses, 40 Tenn. L. Rev. 725 (1973); 1 J. Bishop, Criminal Law § 539 (9th ed. 1923).

89. See O. Wilson, Police Records, Their Installation and Use 89 (1942); Comment, Police Records of Arrest: A Brief for the Right to Remove Them from Police Files, 17 St. Louis L.J. 263 (1972).

90. Courts are divided on whether it is appropriate to restrict access to police files or to expunge the records altogether. See, e.g., United States v. Kalish, 271 F. Supp. 968 (D.P.R. 1967) (a citizen being haunted by past criminal records violates his right of privacy); Eddy v. Moore, 487 P.2d 211 (Wash. App. 1971) (penumbra of specific guarantees of the Bill of Rights entitles individuals to the return of their criminal files upon acquittal). But see Spock v. District of Columbia, 283 A.2d 14 (D.C. Ct. App. 1971) (demonstrators against whom criminal charges were dropped have no entitlement to destruction of police records); Cissell v. Brostron, 395 S.W.2d 322 (Mo. Ct. App. 1965) (denial of injunction against dissemination).

Expungement statutes have been enacted in a minority of states but have not succeeded in removing the taint of criminality from an individual. See Comment, Criminal Records of Arrest and Conviction: Expungement from the General Public Access, 3 Calif. West. L. Rev. 121, 125 (1967). Unfortunately, criminal records are so scattered that it is impractical to fashion an order expunging them all. See Kogan and Loughery, Sealing and Expungement of Criminal Records—The Big Lie, 61 J. Crim. L.C. & P.S. 378, 383-84 (1970). Often substantial state interests demand that records be kept of some criminal activity, leaving expungement statutes riddled with debilitating exceptions. See generally Note, The Effect of Expungement on a Criminal Conviction, 40 S. Cal. L. Rev. 127, 132-43 (1967).


92. Credit bureaus have files on over one hundred million persons and write an additional one hundred million credit reports each year. See H. Black, Buy Now and Pay Later 57 (1961); M. Brenton, The Privacy Invaders (1964). In fact, the Credit Bureau of Greater New York City has a division that compiles the
While the sanctions of criminal statutes may thus be applied reasonably and in a "neutral" manner against disobedient speakers, and may in fact facilitate speedy removal of the speakers from danger, the resulting "stamp" of criminality seems a drastic punishment for individuals seeking to exercise their first amendment rights to the fullest. When such a fundamental, constitutional interest as free speech is at stake, the fact that the state has a compelling interest in the maintenance of order does not free the state from the requirement that it employ the least drastic means possible to achieve that interest. The use of criminal sanctions is frequently not necessary to achieve the legitimate purpose of maintaining the peace and, therefore, is not the least drastic means. The proposed standard suggests the alternative of temporary protective custody, which imposes fewer restraints on a speaker's personal liberty than does the operation of the criminal justice system and which does not leave the permanent stigma of an arrest.

Temporary protective custody as an alternative to arrest and prosecution has been traditionally employed by the American legal system in connection with classes of persons who are unable to care for themselves—the mentally incompetent, juveniles, disabled persons, drug addicts, and drunks—or for the confinement of names of civil litigants and criminal defendants in local courts. The resulting file contains reports on over fourteen million suits, judgments, and other actions. Hearings on Commercial Credit Bureaus Before the Special Subcomm. on Invasion of Privacy of the House Comm. on Govt. Operations, 90th Cong., 2d Sess. (1968); Karst, "The Files": Legal Control over the Accuracy and Accessibility of Stores Personnel Data, 31 LAW & CONTEMP. PROB. 342 (1965); Note, Credit Investigation and the Right to Privacy: Quest for a Remedy, 57 GEO. L.J. 509 (1969).

93. See note 42 supra.

94. See Blasi, Prior Restraints on Demonstrations, 68 MICH. L. REV. 1481, 1513 (1970) ("perhaps the problem of an unexpected and uncontrollable hostile audience ought to justify some form of minimal, though involuntary, restraint such as placing the demonstrators in temporary protective custody although this solution presents the danger that the minimal nature of the restraint may lead to its abuse by overly cautious, or personally hostile, police").


96. Section 6(a)(5) of the Uniform Juvenile Court Act provides that "[a probation officer] shall take into custody and detain a child who is under his supervision or care as a delinquent, unruly or deprived child if the probation officer has reasonable cause to believe that the child's health or safety is in imminent danger, or that he may abscond or be removed from the jurisdiction of the court, or where ordered by the court pursuant to this Act." Georgia and North Dakota have enacted substantially similar laws: GA. CODE ANN. §§ 24A-101 to -4001 (1975); N.D. CENT. CODE §§ 27-20-01 to -59 (1974). California and New York provide protective custody for juveniles: CALIF. WELF. & INST. CODE ANN. §§ 602, 625 (West 1976); N.Y. FAMILY COURT ACT § 721 (McKinney 1963).

97. Section 3(e) of the Uniform Duties to Disabled Persons Act states: "A [law enforcement officer] who determines or has reason to believe that a disabled person is suffering from an illness causing his condition shall promptly notify
terial witnesses whose appearance at trial is deemed necessary to fulfill the requirement of a fair trial or to protect the constitutional right of confrontation. The use of this device in the hostile-audience context does not rest explicitly on these rationales, although protection of the speaker from a hostile crowd is an important reason for taking the speaker into custody. The primary interest here, however, is to use a means of advancing the state's legitimate interest in preserving order that will not overburden the speaker's first amendment right. Although the application of temporary protective custody in this context may be unique, it appears warranted by a proper respect for freedom of speech.

A possible defect in this proposal is that "the minimal nature of the restraint may lead to its abuse by overly cautious, or personally hostile, police." This concern is reasonable in light of the in-the-person's physician, if practicable . . . [If not practicable] the officer shall make a reasonable effort to cause the disabled person to be transported immediately to a medical practitioner or to a facility where medical treatment is available. If the officer believes it unduly dangerous to move the disabled person, he shall make a reasonable effort to obtain the assistance of a medical practitioner." This model law has been enacted in Colorado, Minnesota and North Dakota: COLO. REV. STAT. ANN. §§ 25-20-101 to 25-20-108 (1973); MINN. STAT. ANN. §§ 145.851 to 145.858 (1975); N.D. CENT. CODE §§ 23.28-1 to 23.28-9 (1973).

98. The Uniform Drug Dependence Treatment & Rehabilitation Act § 503(a) provides that "Whenever a police officer or public health officer is notified by an interested person that a person appears incapacitated by a [drug], the police officer or public health officer may bring the person to a treatment facility for emergency medical services . . . . A police officer or public health officer, in bringing a person to or detaining him in a treatment facility, takes him into protective custody and shall make every effort to protect his health and safety. This taking is not an arrest, and no entry or other record may be made to indicate that he has been arrested for or charged with a crime." This Act has not yet been enacted by any state.

99. The Uniform Alcoholism & Intoxication Treatment Act § 126 states that "A person who appears to be incapacitated by alcohol shall be taken into protective custody by the police or emergency service patrol. A taking into protective custody is not an arrest." Legislation similar to this has been enacted in nine states: ALA. STAT. §§ 47.37.010 to 47.37.270 (1972); COLO. REV. STAT. §§ 25-1-301 to 25-1-316 (Supp. 1975); GA. CODE ANN. §§ 99-3901 to 99-3921 (1976); IOWA CODE ANN. § 125.1 to 125.37 (Supp. 1976); KAN. STAT. ANN. §§ 65-4001 to 65-4058 (Supp. 1975); ME. REV. STAT. ANN. tit. 22, §§ 1361 to 1383 (Supp. 1975); R.I. GEN. LAWS §§ 40.1-4-1 to 40.1-4-19 (Supp. 1974); S.D. COMP. LAWS §§ 34-20A-1 to 34-20A-97 (Supp. 1974); WASH. REV. CODE §§ 70.96A.010 to 70.96A.930 (1975).

100. See, e.g., N.Y. CODE OF CRIM. PROC. § 618-b (McKinney 1958).

101. Whereas arrest justifies the indefinite holding of persons by police either until bail is obtained or a trial conducted, the permissible period of temporary protective custody absent judicial intervention, is usually statutorily limited to a specific time. Given that temporary custody's duration for hostile audience confrontations need only be sufficient to allow removal of the speakers, custody could be limited, for example, to two hours barring a judicial determination that longer detention is necessary to prevent truly determined speakers from immediately renewing the confrontation. The Uniform Arrest Act allows police detention of up to two hours on the "reasonable ground," as determined by the police officer, that the suspect is committing, has committed or is about to commit a crime." UNIFORM AR-
herent difficulty in the traditional application of temporary protective custody in determining whether a particular person is properly within the class of persons to which the statute applies, e.g., whether a person is drunk, an addict or merely sick. Thus, it is arguable that the police may be more inclined to terminate speech prematurely if the consequences for the speaker are lessened. However, the potential for such abuse would be substantially reduced in situations governed by the proposed hostile-audience standard. The issue of whether to apply temporary protective custody will not arise until all the prerequisites outlined in the standard have been met, including failure of the speaker to comply with an explained order to depart.

At this point, the alternatives to temporary protective custody are either arrest, a more drastic sanction made permissible by the likely existence of probable cause; forcible removable by the police without arrest, which is essentially equivalent to temporary protective custody; or taking no action at all, which may expose the speakers to physical assault from an uncontrollable audience. Thus, temporary protective custody represents an abuse only if the speaker would have voluntarily complied with the order to depart but was prevented from doing so. Moreover, even if such an abuse occurs the consequences are relatively insubstantial, since the termination of speech activity has already been determined to be necessary and the incursion upon the speaker's liberty is minor.

Thus, the critical question is not whether the availability of temporary protective custody will spawn abuses, but rather in what situations arrest should be applied as an alternative. In most hostile-audience contexts, rapid removal of the speaker is likely to be essential if the paramount state goal of preventing violence is to be achieved. If a speaker who has refused to obey voluntarily an order to depart submits to temporary protective custody and does not materially interfere with police efforts, then formal arrest would seem unwarranted. Through the use of temporary protective custody, the state will thus be able to defuse a volatile situation without unnecessarily stigmatizing the speaker with an arrest record and, at the same time, the speaker may avoid the appearance of too


The use of temporary protective custody should not be viewed as the equivalent of compliance with an order to depart. Although the restraints are temporary, they are real, and a speaker may be subjected to incarceration which can be a harsh and humiliating experience.

102. Of course, what constitutes material interference cannot be explicitly delineated. There are many varying factors that may affect such a determination, such as the number of police officers at the scene, the type and degree of speaker resistance and the vehemence of the hostile audience during speaker removal.
easily capitulating to police demands. More importantly, the speaker will have been able to push his first amendment rights to their outer limits and will suffer only a minor sanction for exceeding the bounds of the permissible. In contrast, a speaker who refuses to obey a police order to depart and also materially interferes with police efforts should be liable to arrest. Not only must such conduct be punished, but the potential sanction of arrest will also substantially deter affirmative speaker resistance to an order or to the application of temporary protective custody.

Although temporary protective custody thus appears to be an appropriate technique for hostile-audience situations, current police procedures do not include it as a means for removing speakers. It is, of course, well established that the police have the constitutional power to arrest when there is probable cause to believe that an unlawful act has been committed. Yet it is unclear whether an officer can take a person into temporary protective custody without having an underlying statutory basis, not only for the suspected crime, but also for the procedure of temporary protective custody itself. Until municipalities explicitly empower police to use temporary protective custody to remove speakers from hostile-audience confrontations and provide clear procedural guidelines, police departments, fearing the bad publicity and litigation that can arise from a charge of false arrest, will likely continue to avoid its use.

103. Temporary protective custody is not generally established in case law and, thus, lacks definitive, procedural protections.

104. The explicit procedural protection required for temporary protective custody in the hostile-audience context should include limitation on the amount of time a speaker may be held pursuant to his removal by the police. Police custody, however, should be no longer than is reasonably necessary to effectuate escort from the confrontation and may include a brief “cooling” time to prevent an especially determined speaker from immediately returning to his former audience to renew the hostile confrontation. For example, The Uniform Arrest Act discussed at note 101 supra limits custody to 2 hours for suspicious persons held for questioning but not arrested or charged with a crime. It would seem appropriate that the procedural protections for temporary protective custody should be significantly less than those attendant to arrest. Temporary protective custody, although effectuated by police, is unlike arrest because it does not involve the focusing of the criminal justice system on a particular individual which may result in severe infringements of liberty, significant social stigma, and the personal degradation stemming from being detained as an “officially” suspected criminal.

105. See Miami Letter, supra note 39: “As to the use of 'Protective Custody' there seems to be no clear understanding as to the specifics involved therein. Consequently since for all practical purposes there is no clear delineation between 'Protective Custody' and actual 'Arrest', the practice of protective custody is not used. Most Law Enforcement Officials we have talked with, feel that placing someone under protective custody in most circumstances is a certain invitation to a false arrest charge.” But see Berkeley Letter, supra note 30: “Caution and judgment govern actions directed toward inciteful speakers: the use of powers of arrest or protective custody would depend exclusively on the attendant circumstances.”
III. Speaker Remedies for Unlawful Removal

The proposed hostile-audience standard was devised to safeguard the first amendment rights of a speaker confronted by a belligerent crowd. Despite the specificity of the standard, however, police discretion is unavoidable, and true protection of first amendment rights cannot prevail unless the police themselves appreciate the importance of free speech. Conscientious implementation by police of the proposed standard will be promoted if there are effective remedies available to speakers who have been unlawfully silenced and detained. This section of the Note assesses the limitations inherent in present remedies for false imprisonment and proposes reforms to make such remedies more effective.

Currently the causes of action available to a speaker who has been unlawfully arrested in the hostile-audience context include the common-law tort actions of false imprisonment and malicious prosecution, as well as monetary and injunctive relief against state officials provided by the federal Civil Rights Acts of 1871. There is also an arguable cause of action for damages against federal officials based on a direct violation of first amendment rights.

Police Department does not have formal procedures to deal with protective custody and hostile-audience speaker removal.

106. See text at notes 39-40 supra.
107. When there is a false arrest there is a false imprisonment, see Manos, Police Liability for False Arrest or Imprisonment, 16 CLEV.-MAR. L. REV. 415 (1967); RESTATMENT (SECOND) OF TORTS § 35 (1963).
108. A malicious prosecution is a cause of action that is begun without probable cause that it will succeed and which finally ends in failure. See generally 52 AM. JUR. 2d, Malicious Prosecution § 4 (1970).
109. 42 U.S.C. § 1983 entitled Civil Action for Deprivation of Rights reads: “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” The Federal Civil Rights Act of 1968 also has criminal provisions embodied in 18 U.S.C. §§ 241, 242 (1970), which authorizes federal prosecution of state officials or private persons who deprive an individual of constitutional rights. However, in practice, these provisions have been invoked only where the deprivation was brought about by violence and have never been used to redress denial of first amendment rights. T. EMERSON, supra note 1, at 374.
110. See Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), on remand, 456 F.2d 1339 (2d Cir. 1972), establishing a cause of action against federal officials comparable to that established against state officials under the Federal Civil Rights Act, 42 U.S.C. § 1983 (1970). Bivens arose from an alleged violation of a person’s fourth amendment rights by an illegal search and seizure by federal officials. The Supreme Court held that a cause of action for damages could be judicially created for a direct violation of the Constitution notwithstanding the lack of any legislative basis. Whether the scope of Bivens encompasses a violation of first amendment rights has not yet been definitely established. Limiting the Bivens rationale to violations of the fourth amendment seems unjustified. The lower federal courts are split on whether violations of first amendment rights create a cause of action. Cases
Finally, speakers may obtain immediate relief from improper confinement by filing writs of habeas corpus, although this remedy provides no damages.


111. Habeas corpus is a term applicable to several writs. However, as generally used it is the remedy provided for a person illegally deprived of liberty. See, e.g., Carbo v. United States, 364 U.S. 611 (1961); Armstrong v. Vancil, 169 Ore. 320, 128 P.2d 951 (1942). The writ is designed to effectuate speedy release from confinement and is essentially a writ of inquiry to test the right under which the person is detained. See, e.g., Ex parte McGuire, 135 Cal. 339, 67 P. 327 (1902); Porter v. Porter, 60 Fla. 407, 53 S. 546 (1910); Smith v. Henson, 298 Ky. 182, 182 S.W.2d 666 (1944). See generally R. SoxoL, FEDERAL HABEAS CORPUS (2d ed. 1969).

112. See Comment, Compensation of Persons Erroneously Confined by the State, 118 U. Pa. L. Rev. 1091, 1097 (1970): "Although the immediate problem of incarceration is obviously ended by the prisoner's release, freedom from imprisonment is inadequate compensation and does not satisfy the government's liability. Release simply reverses the course of tragedy; it does nothing to repair the damage. The liability should be satisfied by monetary compensation."

113. Justifications for municipal tort immunity include: the municipality derives no profit from exercise of government functions which are solely for the public benefit; cities cannot carry on government functions if tax revenues must pay off employee's torts; and it is unreasonable to hold a city liable for negligence in the performance of duties dictated by the legislature and not assumed voluntarily by the municipality. See Note, Municipality's Common Law Liability for Police Torts, 1973 Wash. U. L.Q. 908 (1973). Select government authorities are granted privileges to ensure that they exercise their duties uninhibited by the fear of damage suits. In this way, duties will be performed in a "fearless, vigorous, and effective" manner. Barr v. Matteo, 360 U.S. 564, 571 (1959). See Imbler v. Fachtman, 424 U.S. 409 (1976); Booth v. Fletcher, 101 F.2d 676, 680 (D.C. Cir. 1938), cert. denied, 307 U.S. 628 (1939).


116. See Leflar & Kantrowitz, Tort Liability of the States, 29 N.Y.U. L. Rev. 1363, 1407-15 (1954). Legislatures may waive governmental immunity by enacting legislation with the following characteristics: Legislation creating a right to have the courts or another arm of government recommend to the legislature that it pass private relief bills on specific occasions or legislation delegating to an administrative agency the duty to hear claims. Typically, either type of legislation takes one of
relief to a speaker whose speech has been unlawfully terminated.\textsuperscript{117} For example the Federal Torts Claims Act\textsuperscript{118} waives immunity only for conduct of federal government agents that would be actionable if done by a private individual. Thus, a person whose speech rights have been abridged not only must prove that the termination of his speech was unlawful and was proximately caused by the police, but also must often make highly artificial analogies of private tort claims to acts peculiar to government, such as the power to arrest and imprison.\textsuperscript{119} Of course in those states retaining full immunity, common-law actions against governmental units or their agents are, for all practical purposes, barred.\textsuperscript{120}

Although actions against the state itself appear to be precluded, the sovereign immunity defense for state and federal law enforcement officials may be overcome in actions brought under the federal civil rights law\textsuperscript{121} and in tort claims based on the violation of a constitutional right,\textsuperscript{122} respectively. However, courts realize that the police officer may be in the difficult position of having to choose between a possible charge of dereliction of duty if he does not arrest or being mulcted for damages if he does. They have therefore held that both state\textsuperscript{123} and federal\textsuperscript{124} officers accused of constitutional violations may use as a defense a good faith belief that their conduct was lawful and a reasonable belief in the validity of the laws under two forms: (a) It may be a device to avoid state constitutional provisions proscribing suits against the state, or (b) it may result in an actual exercise of legislative discretion in making awards in response to judicial or agency recommendations. 2 F. Harper & F. James, The Law of Torts, g.3 (1956).

\textsuperscript{117} See Comment, supra note 112, at 1099-104.


\textsuperscript{119} See Comment, supra note 112, at 1096-97.

\textsuperscript{120} Although causes of action in tort are sustainable where a government official acts outside the scope of official authority, such suits are very difficult to prove because "scope of authority" is not well defined and is usually broadly construed. See Larson v. Domestic & Foreign Commerce Corp., 337 U.S. 682 (1949); Byse, Proposed Reforms in Federal "Nonstatutory" Judicial Review: Sovereign Immunity, Indispensable Parties, Mandamus, 75 Harv. L. Rev. 1479 (1962).

It may be possible to extend the Bivens rationale (see note 110 supra) to a suit commenced against a state or a municipality. It would seem unreasonable to allow the common-law concept of sovereign immunity to preclude mechanically an action in damages against the state or municipality for a violation of an explicit constitutional provision. See Dellinger, Of Rights and Remedies: The Constitution as a Sword, 85 Harv. L. Rev. 1532, 1556 (1972).

\textsuperscript{121} Pierson v. Ray, 386 U.S. 547 (1967).

\textsuperscript{122} Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971), on remand, 455 F.2d 1339 (2d Cir. 1972).

\textsuperscript{123} Pierson v. Ray, 386 U.S. 547 (1967) (state officers).

which the arrest was made. This defense, involving the so-called "moral aspects of the case," is very difficult to overcome.

It is never easy to prove that a police officer was derelict in his duty, especially in a jury trial in which jurors, as average members of the community, are likely to be much more sensitive to the need for law and order than to the need for open, robust debate. This general problem may be compounded by the commonly held feelings that a person who publicly makes provocative statements is assuming the risk of being confronted and subsequently stopped from speaking. Moreover, if the speaker holds views that are generally unpopular in the community, the jury is likely to reflect this bias and depreciate the value of his rights. At the outset, such attitudes render a favorable verdict for such a speaker extremely difficult to obtain, notwithstanding the legal merits of his claim.

Even if the speaker receives a favorable verdict, these same attitudes may affect the extent of his recovery. In proving damages, the speaker would likely be able to show only nominal actual damages for his short incarceration. To make his lawsuit sufficiently remunerative, the speaker would therefore also have to establish injuries stemming from the violation of his first amendment rights and from loss of reputation. Unfortunately, the valuation of the abridgment of first amendment rights, though admissible as proof of damages, is speculative, and those persons most likely to be abused by improper police conduct in a hostile-audience situation typically do not have the status or reputation that a jury would consider worthy of protection. In fact, many juries and judges might perceive that the reputations of certain dissidents have actually been enhanced by oppressive police procedures. A likely consequence of this bias against speakers is that many attorneys will be dissuaded from taking on a case that may incur the displeasure of the police

125. This phrase was coined in Ker v. Illinois, 119 U.S. 436, 444 (1886), where the Court, in commenting that a defendant had redress against a police officer for false imprisonment, stated: "Whether [the plaintiff] could recover a sum sufficient to justify the action would probably depend upon moral aspects of the case, which we cannot here consider."


128. See Foote, supra note 127, at 500. Butcher v. Adams, 310 Ky. 205, 220 S.W.2d 398 (1949), provides a vivid example of the sometimes unfortunate consequences of the reparations system. In this case, a judgment for the defendant was affirmed despite evidence disclosing that as a matter of law there had been a false arrest and a false imprisonment. The court explained that although the plaintiff should have received a directed verdict, reversal was inappropriate since there could be no significant damages. It reasoned that the plaintiff, having a criminal record, could not have been humiliated by the arrest. This opinion also highlights the disadvantages of a criminal record. See notes 90-92 supra. See also Cardello v. Double-day & Co., 518 F.2d 638 (2nd Cir. 1975).
while offering only a small potential recovery. 129 Thus, while the proposed hostile-audience standard can resolve some of the difficulties associated with proving a breach of the police duty to protect a speaker's first amendment rights, the problem remains that damages will often be insufficient either to encourage speakers to maintain a cause of action or to deter police abuse.

This situation may be remedied by replacing the current process of the determination of damages at trial with a statutory provision for liquidated damages. Such a use of liquidated damages to encourage private enforcement of statutory violations is not a novel device in our legal system. Liquidated damages currently provide incentives for actions against public officers 130 and for several types of consumer actions 131 where the individual's demonstrable damages are insubstantial but where broad deterrence of certain conduct is deemed necessary.

It must be conceded that there are strong arguments that weigh against general exposure of the police to substantial liability for performance of their duties. Such liability may not only inhibit law enforcement officials from protecting legitimate state interests but may also discourage some persons from entering public service. In the hostile-audience context, however, the standard proposed by this Note provides explicit guidelines for measuring the propriety of police conduct. Adherence to this standard, coupled with invocation of the general defenses available to police officers in tort actions, 132 should immunize those officers who execute their duties in good faith.

Thus, while the dangers inherent in the remedy can be minimized, its advantages in terms of protecting free speech are considerable. Removing the necessity of showing harm to reputation would, for instance, reduce the danger that evidence on this issue might influence the jury's determination concerning fault. 133 Additionally, use of the proposed remedy could provide some inducement for attorneys to litigate cases for persons deprived of their free speech

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130. E.g., NEB. REV. STAT. § 33-147 (1974) (if any officer takes greater fees than allowed, "he shall forfeit and pay the sum of fifty dollars to the party injured"); Foote, supra note 127, at 496.

131. See Note, Federal Preemption of State Law: The Example of Overbooking in the Airline Industry, 74 MICH. L. REV. 1200, 1201-02 (1976) (liquidated damage remedy for passengers "bumped" by airlines); UNIFORM COMMERCIAL CODE § 9-507(1) (minimum recovery for secured party's failure to comply with part 5 of article 9 if collateral is consumer goods).

132. See text at note 123 supra.

133. See text at notes 125-26 supra.
Most importantly, the use of liquidated damages, rather than damages determined by compensation hearings or by juries, is essential if the speaker is to be compensated not merely for actual pecuniary loss but also for difficult-to-prove deprivation of first amendment rights, and if police abuse is to be deterred. These benefits warrant serious consideration by legislators of provisions for liquidated damages in tort actions where there is a breach by the police of a duty to protect first amendment rights in the hostile-audience context.

Even if the suggestions for the use of temporary protective custody and liquidated damages are not adopted, the proposed hostile-audience standard will still provide a constitutional framework within which police may resolve the inherent conflict between society's legitimate interest in maintaining order and the speaker's constitutionally protected right to free speech. Under a standard that requires the police to exert all reasonable efforts against the hostile crowd and that delineates specific action that must be taken before speech can be silenced, police discretion in preventing riots and in protecting human life may, after all, be made compatible with the most fundamental of constitutional rights.

134. One federal Commission recommended "that Congress consider amending section 1983 to provide that in all cases brought under this Section—actions for injunctions, as well as damages—the court, in its discretion, may allow the prevailing party reasonable attorney's fees as part of the costs." UNITED STATES COMMISSION ON CIVIL RIGHTS, LAW ENFORCEMENT, A REPORT ON EQUAL PROTECTION IN THE SOUTH, 179, 180 (1965).


136. It has been argued that to induce a truly systemic change in law enforcement practices a cause of action should be created against municipalities and the state utilizing the Bivens rationale. Dellinger, supra note 120.