FREEDOM OF ASSEMBLY AND FREE SPEECH: CHANGES AND REFORMS IN ENGLAND

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> Amongst our fundamental human rights there are, without doubt, the rights of peaceful assembly and public protest and the right to public order and tranquillity. Civilised living collapses – it is obvious – if public protest becomes violent protest or public order degenerates into the quietism imposed by successful oppression. But the problem is more complex than a choice between two extremes – one, a right to protest whenever and wherever you will and the other, a right to continuous calm upon our streets unruffled by the noise and obstructive pressure of the protesting procession. A balance has to be struck, a compromise found that will accommodate the exercise of the right to protest within a framework of public order which enables ordinary citizens, who are not protesting, to go about their business and pleasure without obstruction or inconvenience.[1]

A statement such as this, which appears in the Scarman Report on the disturbances in Red Lion Square, has to be the text of any discussion of public order in a free society. The difficulty in practice is that of striking or maintaining an acceptable balance between liberty and licence in the context of a particular breach of or threat to public order. Efforts to secure a balance of interests are not unfamiliar in other areas of law, and the problems raised in relation to freedom of assembly are not unique. This can be simply illustrated by reference to the general considerations underlying recent inquiries touching upon freedom of speech: the Franks Committee on Section 2 of the Official Secrets Act 1911 (U.K.) spoke of the need "to consider how the demands of Parliamentary democracy for the fullest information and for efficiency in operation can be reconciled";[2] the Phillimore Committee on Contempt of Court described the question as to how far the law should prohibit conduct which may unintentionally or inadvertently create a risk of prejudice as particularly "difficult and controversial", because "it is here that the main conflict arises between the public interest in the due administration of justice and the principle of freedom of speech";[3] and the Faulks Committee on Defamation said that the law of defamation is sound if it preserves "a proper balance" between the conflicting purposes of enabling the individual to protect his reputation and of preserving the right of free speech.[4] In the application of the law, the issue of freedom of assembly or freedom of speech is

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1. Report of the Inquiry by Lord Justice Scarman into the Red Lion Square disorder of 15 June 1974 Cmnd 5919 (Feb. 1975) para. 5.

2. Cmnd 5104 (Sept. 1972) para. 14.

3. Cmnd 5794 (Dec. 1974) para. 73. See also, *Attorney-General* v. *Times Newspapers Ltd* [1973] 3 WLR 298 (H. L.).

4. Cmnd 5909 (March 1975) para. 19.

frequently a question of degree, of determining which facet of the public interest tilts the final balance.

The need to recognize and apply a balancing of interests is perhaps self-evident in a country equipped with an entrenched Bill of Rights. In England human rights are not formally declared either in constitutional or in statutory form, despite the recent acceptance of certain international obligations.[5] Instead reliance has been placed, in the words of the Younger Report on Privacy, "on the principle that what is not prohibited is permitted and the main emphasis in the field of civil rights has been placed therefore on keeping within acceptable limits, and providing precise definitions of, the restrictions imposed by the civil and criminal law on the individual's freedom of action."[6] The impetus for such reliance comes from an assumption that certain freedoms, including freedom of assembly and freedom of speech, are essential features of a free society. In the absence of a Bill of Rights their protection is a widely-dispersed responsibility, involving legislators as much as judges and requiring political as well as legal remedies.

The law relating to public order could at first sight be considered largely as a branch of criminal law, much of the remainder belonging to the law of tort; and areas commonly giving rise to issues of free speech – such as contempt of court, obscenity, official secrets, and defamation – could likewise be assigned either to criminal law or to the law of tort. Yet in England, to almost the same extent as in the United States, many of these areas have become more and more regarded as branches of constitutional law. The outstanding exception is the law of defamation, in part because its excessive technicality has hitherto ensured the maintenance of a peculiar mystique.[7] Accepting that the boundaries of legal subjects are not and should not be inflexible, that the emphasis accorded to particular topics will fluctuate and that fashions will continue to change, it is nonetheless important to recognize that the constitutional lawyer's approach to problems such as those raised in relation to public order differs from that of the criminal lawyer. The law relating to public order can be technical and difficult, and the general principles of criminal law – involving, for instance, problems of accomplices and defences – have to be borne in mind in its application. But the constitutional lawyer, starting from a presumption in favour of freedom of assembly allied to free speech, has to take account of a variety of factors including political considerations, the element of discretion in the enforcement of the law, and the extensive employment of preventive devices. At all times he has to bear in mind the need to balance competing interests.

The Report of the Inquiry conducted by Scarman L.J. into the Red Lion Square disturbances provides a rare and valuable analysis, undertaken outside the courts of

5. See Sir Leslie Scarman, *English Law – The New Dimension* (Hamlyn Lectures, 1974) 10-21.

6. Cmnd 5012 (July 1972) para. 35.

7. See Cmnd 5909 (the Faulks Report) para. 20-21. The Committee adds (at para. 21) that it must "be borne in mind that some of the complexities stem from the need to maintain the balance between the individual's right to his reputation and the public interest to preserve free speech."

law, of the complexities of a single outbreak of disorder. The terms of reference of the inquiry were to "review the events and actions which led to disorder in Red Lion Square on 15 June and to consider whether any lessons may be learned for the better maintenance of public order when demonstrations take place." Twenty-three days of public hearing were devoted to investigating the facts and a further four days to the lessons to be drawn. The nature of the inquiry is explained early on in the Report:

> It has been a public inquiry into one aspect and one incident of policing – the maintenance of public order in the Metropolis when bitterly opposed political factions were demonstrating and counter-demonstrating on the same Saturday afternoon and in the same part of London. On the afternoon of 15 June 1974 public order broke down in Red Lion Square: one young man, a student at Warwick University, died: 46 policemen were injured: and, while it is known that at least 12 members of the public were injured, many more must have suffered unpleasant injuries of greater or less severity which were never reported. Public order broke down at 3.38 pm on the corner of Old North Street and Red Lion Square: it was restored by 4.26 pm, the last disorderly incident being an affair involving members of the International Marxist Group (IMG) and police in Boswell Street. The disorders, though they did reach a peak of vicious violence and encompassed the tragedy of Kevin Gately's death, were confined in area and limited in time.[8]

There have been surprisingly few investigations similar to the Scarman inquiry. Internal police inquiries and privately-sponsored inquiries have been held on several occasions; but the details of most specific incidents, if they are available at all, have to be sought in reports of legal proceedings and parliamentary debates, the accounts of journalists, historical studies and personal memoirs, and police publications such as the annual reports of the Commissioner of the Metropolitan Police. For reports based on official public inquiries into disorders occurring in England and Wales over the past hundred years, it is possible to refer to little beyond the Report of the Committee looking into disturbances in and around Trafalgar Square on 8 February 1886; the Report of the Committee under Lord Bowen into the disturbances at Featherstone on 7 September 1893; and the Report by Mr Chester Jones on Certain Disturbances at Rotherhithe on 11 June 1912, and Complaints against the Conduct of the Police in Connection Therewith.[9] Ireland has been more productive[10] – especially in connection with events in Ulster since 1968 – and Scarman L.J., who presided over an investigation of a series of disturbances in 1969, and Lord Widgery C.J., who inquired into the grave happenings at Londonderry on 30 January 1972, proceeded under the

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8. Cmnd 5919 para. 4.

9. C. 4665 of 1886; C. 7234 of 1893-94; Cd 6367 of 1912. Mr Chester Jones was appointed to consider disturbances which arose as a result of the Transport Workers' strike; he heard 136 witnesses over 8 days of hearing.

10. See the Report of the Commission (under Lord Cameron) into Disturbances in Northern Ireland, Cmd 532 (Belfast), September 1969; the Report of the Tribunal of Inquiry into Violence and Civil Disturbances in Northern Ireland in 1969. Cmd 566 (Belfast) of 1972 (the Scarman Report); the Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day, H.L. 101, H.C. 220, April 1972 (the Widgery Report).

formalities of the Tribunals of Inquiry (Evidence) Act 1921.[11] The Scarman inquiry into the Red Lion Square disorders takes on an added importance when one notes the total absence of any general investigations into the law of public order akin to the recent official studies of privacy, official secrets, contempt of court, and defamation.[12] It was stressed in the Report, however, that its proposals for law reform arose strictly from the lessons to be learnt from the disturbances in Red Lion Square, which threw no light on such broad questions as the case "for codifying our law as to public order so as to ensure that the fundamental human rights set out in the United Nations Declaration of 1948 and the European Convention of 1950 are protected by statute."[13] The inquiry was concerned with certain specific areas of law – including, for instance, the offence of inciting racial hatred – but it concentrated principally upon the role of the police in controlling major demonstrations on the public highway. It is understandable, however, that a number of the law reform proposals submitted to Scarman L.J. bore no relation to the disorders under inquiry.[14] The disturbances in Red Lion Square have to be assessed against a background of developments in the law of public order in recent years.[15]

The Law of Public Order: the Prelude to Red Lion Square

It is not easy to describe or classify the offences related to the preservation of public order. Some are directly related to the maintenance of the Queen's Peace: these include riot, unlawful assembly, affray, and contraventions of such statutes as the Public Meeting Act 1908 (U.K.) and the Public Order Act 1936 (U.K.). Others are "ordinary" criminal offences, including those (such as assaulting or obstructing the police in the exercise of their duty) which are commonly associated with public disorder and those (such as criminal damage) which are less obvious in this context. Byelaws, regulations and local statutes add to the number and variety of offences. One reason for the wide variety is that the law has to be flexible enough to cover more-or-less spontaneous disorderly behaviour – drunken brawls, hooliganism, gang fights – as well as the consequences of more-or-less organized processions, meetings and demonstrations. Another reason is that the response to many waves of disorder in our history has simply been to add to or to adapt the law in a haphazard fashion. The law of public order in no way resembles a code of public order. It is an amalgam of particular offences which have been devised to meet particular problems at particular times. It fluctuates wildly in its emphasis and usage. Some offences disappear through statutory repeal, others fade away through what is effectively a process of desuetude, while a few rest in a state of suspended animation awaiting resuscitation at the behest

11. Royal Commissions – such as the one appointed in South Australia to investigate the September Moratorium Demonstration of September 1970 (Adelaide 1971) – have long ceased to be used to inquire into specific events.

12. The Law Commission, however, is publishing a series of Working Papers on the criminal law: see Working Paper No. 54, 28 June 1974 (Offences of Entering and Remaining on Property).

13. Cmnd 5919 para. 115.

14. *Id.* para. 133.

15. See I. Brownlie, *The Law Relating to Public Order* (1968); D. Williams, *Keeping the Peace* (1967).

of an ingenious prosecutor. New offences are enacted by Parliament or other bodies vested with legislative power, and, where these do not suffice or where the supplementation of the criminal law by civil remedies is deemed inadequate, the courts may from time to time be tempted to mould old precedents to make new law.

The role of the courts has been particularly important in recent years. Despite the serious nature and scale of many of the threats to public order, the legislative response of Parliament has been remarkably slight. It has generally taken the form of amendments to existing law, the one exception being the enactment of the offence of incitement to racial hatred in section 6 of the Race Relations Act 1965 (U.K.). The judicial response has been more consistent and formative. This doutless in part reflects public concern about public order, but it has to be remembered that the courts can only act when proceedings are instituted. It was the prosecutors who took the initiative in reviving the offence of affray,[16] bringing riot and unlawful assembly back into prominence,[17] exploring the outer limits of the law of conspiracy,[18] and – under the guise of conspiracy – invoking even provisions of official secrets legislation in the aftermath of a public demonstration.[19] In each of those areas the House of Lords or the Court of Appeal has been obliged to make important rulings. Moreover appeals from summary trials in magistrates' courts, over which the Divisional Court held pride of place until 1960, may on occasion proceed to the House of Lords.[20] The importance of this change in avenues of appeal should not be under-estimated, for the overwhelming majority of cases related to public order are tried at summary level. Only in the past ten to fifteen years has it been possible for the House of Lords to bring its influence to bear directly upon some of the most fertile areas of the law. This has already occurred in relation to obstruction of the highway and in relation to the offence of threatening, abusive or insulting words or behaviour.

The charge of wilful obstruction of the highway brought in *Broome* v. *Director of Public Prosecutions*[21] arose from picketing during an industrial dispute. The House of Lords declined to hold that a provision concerning peaceful picketing in the Industrial Relations Act 1971 (U.K.) could be construed as conferring by implication a right to stop and detain a vehicle on the highway for the purpose of peaceful persuasion. Lord Salmon emphasized that everyone "has the right to use the highway free from the risk of being compulsorily stopped by any private citizen and compelled to listen to what he does not want to hear": the wide interpretation urged by the appellant – which would have been "an astonishing interference with the liberty of the subject" – could

16. See *Button* v. *D.P.P.* [1966] A.C. 591; *Taylor* v. *D.P.P.* [1973] 2 All E.R. 1108. "For some reason which I have not discovered," said Lord Reid in the latter case (at 1113), "there were few prosecutions for this offence for a very long period before the middle of the century. But then the practical advantages to the prosecution of using this offence must have occurred to somebody."

17. See *Caird* (1970) 54 Cr. App. 2.499; *Kamara* v. *D.P.P.* [1973] 2 All E.R. 1242.

18. See e.g. *Kamara* v. *D.P.P.* [1973] 2 All E.R. 1242.

19. *Chandler* v. *D.P.P.* [1964] A.C. 763.

20. Administration of Justice Act 1960 (U.K.) s. 2.

21. [1974] 1 All E.R. 314. See also, *Kavanagh* v. *Hiscock* [1974] 2 All E.R. 177 (Div. Court).

only have been accepted, he added, if Parliament had used express and unambiguous language.[22] In Lord Dilhorne's view, to have accepted the wide interpretation would involve going "far beyond the task of judicial interpretation" and amount to judicial legislation.[23] The judgments in the House of Lords were in effect an unequivocal assertion of the priority accorded by English law to the right of passage on the highway. This assertion has been made since *Broome* v. *Director of Public Prosecutions,* though without reference to that decision, both judicially (in relation to the picketing of a firm of estate agents by a group of people campaigning against the activities of property developers) and extra-judicially (in relation to the events in Red Lion Square). In the picketing case, *Hubbard* v. *Pitt,*[24] Forbes J. in the High Court considered at length the nature of the public right in a highway. He cited such well-known cases as *Harrison* v. *Duke of Rutland*[25] and *Hickman* v. *Maisey*[26] as authority for defining the right of the public to use a highway as "a right to use it reasonably for passage and repassage and for any other purpose reasonably incidental thereto", adding that – in the absence of special provision in the dedication of the highway or in statute – "whether or not a use of a highway is reasonable can only be determined by reference to the fact that the purpose of dedication is that the public may pass and repass".[27] It was argued on behalf of the picketers, against whom an interlocutory judgment was sought, that there is a democratic right to picket, that they were not resorting to violence or intimidation, and that they were strung out in a line along the length of the footway leaving "room either side of the picket line, and even room between individual members of it, for members of the public to pass along or across the footpath".[28] Forbes J. was "content to assume" that there was no violence or intimidation, but he vigorously denied "that the democratic right of political expression is sufficient warrant for the performance of acts which, in the absence of any political content, would plainly be illegal".[29] He proceeded to grant the injunction, principally upon the ground that, save where statute provides otherwise, picketing is an unreasonable user of the highway unless it is so fleeting or insubstantial as to bring the *de minimis* rule into play.[30] The entire judgment in *Hubbard* v. *Pitt*[31] was referred to, in the context of a discussion of demonstrations and the public highway, in a paragraph of the Scarman Report which contained this comment:

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22. [1974] 1 All E.R. 314, 324.
23. *Id.*, 322.
24. [1975] 2 W.L.R. 254.
25. [1893] 1 Q.B. 142.
26. [1900] 1 Q.B. 752.
27. [1975] 2 W.L.R. 254, 260.
28. *Id.*, 262.
29. *Id.*, 267. At 265 Forbes J. said that freedom of expression "was never one of the attributes of highway dedication."
30. It was held that the plaintiffs had suffered damage as a result of the picketing and were entitled to the preservation of their business and the restoration of unimpeded access to their premises.
31. This decision was affirmed by a Divided Court of Appeal in *Hubbard* v. *Pitt.* [1975] 3 W.L.R. 201. See esp. the dissenting judgment of Lord Denning M.R.

> There is a conflict of interest between those who seek to use the streets for the purpose of passage and those who seek to use them for the purpose of demonstration. English law recognises as paramount a right of passage: a demonstration which obstructs passage along the highway is unlawful. The paramount right of passage is, however, subject to the reasonable use of the highway by others. A procession, therefore, which allows room for others to go on their way is lawful: but it is open to question whether a public meeting held on a highway could ever be lawful, for it is not in any way incidental to the exercise of the right of passage.[32]

The House of Lords, apart from helping to re-assert familiar principles relating to the right of passage on the highway, has taken a leading part in seeking to clarify the law concerning threatening, abusive or insulting words or behaviour under section 5 of the Public Order Act 1936.[33] The offence under section 5 arises from "conduct conducive to breaches of the peace" and is one of the most important and flexible weapons available to prosecutors. In recent cases it has been invoked against troublesome football supporters;[34] in circumstances of political[35] or racial[36] tension; where a man threw a stink bomb at both the Queen and the Prime Minister outside the Royal Opera House[37] and where a woman threw three eggs at the Queen during a royal visit to Yorkshire;[38] and in the case of an Essex teacher who barked back at an alsatian dog and had a scuffle with its owner.[39] The full definition of the offence requires both a determination that the conduct in question is threatening, abusive or insulting and a finding that either there is an intent to provoke a breach of the peace or that the conduct is calculated to cause a breach of the peace. A typical charge under section 5, for instance, would be one of conduct amounting to insulting behaviour in a public place whereby a breach of the peace was likely to be occasioned. Such a charge

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32. Cmnd 5919 para. 122. The traditional distinction between stationary assemblies and processions was also drawn by Forbes J. in *Hubbard* v. *Pitt id.*, (265-266) with reference inter alia to *Lowdens* v. *Keaveney* [1903] 2 I.R. 82 and *R.* v. *Clark (No. 2)* [1964] 2 Q.B. 315. It is questionable whether such a distinction ought to be maintained: see Williams, *supra* note 15, 216.

33. It is one offence only: see *Vernon* v. *Paddon* [1974] Crim. L.R. 51; *R.* v. *John* [1971] Crim. L.R. 283.

34. See e.g. *The Times*, 6 January 1975, 2 (the aftermath of a cup-tie at Nottingham); 13 September 1974, 3 (a supporter at Cardiff was jailed for six months for threatening behaviour). See generally, Report of the Working Party on Crowd Behaviour at Football Matches, HMSO (1969); and a speech on violence at football games by Mr Howell (the Minister of State for Sport and Recreation), reported in *The Times*, 27 August 1974, 3.

35. See *The Times*, 15 September 1973, 2 (Miss Pat Arrowsmith acquitted of charges relating to her efforts to secure the withdrawal of troops from Northern Ireland); 3 August 1974, 3 (a student was fined for insulting behaviour in Red Lion Square).

36. See *The Times*, 3 December 1969, 3 (a Black Power Leader was convicted at the Old Bailey of behaviour contrary to s. 5); *The Guardian*, 12 November 1969, 5 (an anti-apartheid supporter was acquitted of insulting behaviour during a South African rugby match at Twickenham).

37. *Daily Telegraph*, 5 January 1973, 3. The man, who was fined £10 for insulting behaviour, was protesting against entry to the Common Market – though it turned out that a stink bomb still in his possession had been made in Germany and had instructions in French and Spanish. On arrest the defendant told the police: "My old woman has been getting on at me because of the price of food."

38. *The Times*, 15 November 1974, 4. The defendant, who was fined £25 for threatening behaviour, was protesting about an alleged denial of justice to her young son.

39. *The Times*, 11 October 1973, 3.

was brought against the defendant in *Brutus* v. *Cozens*.[40] He had joined in a brief demonstration at a Wimbledon tennis match in which a South African was playing, and the critical question in the case was whether his conduct was insulting. It was stated in the Divisional Court that "behaviour that affronts other people, and evidences a disrespect or contempt for their rights, behaviour which reasonable persons would foresee is likely to cause resentment or protest such as was aroused in this case ... is insulting for the purpose of this section";[41] but the House of Lords took a different view and issued a salutary reminder that section 5 was never intended to prohibit all speech or conduct likely to occasion a breach of the peace. Lord Morris commented that "there may be many manifestations of behaviour which will cause resentment or protest without being insulting" and Lord Reid insisted that "vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting."[42] Cases under section 5 are virtually always tried in magistrates' courts, and the effect of this first ruling by the House of Lords must be to discourage a tendency to interpret and apply the section too loosely.[43] The decision brings out clearly the value of having allowed this further avenue of appeal from appellate judgments of the Divisional Court.

Both trial and appellate courts have an exceptionally difficult responsibility thrust upon them whenever there is an upsurge in public disorder or when new methods of protest test all the resources of the existing law. The difficulty of balancing interests is all the greater when the disorder is widespread or the methods of protest become violent. On the one hand there is pressure for strict application of the law and the imposition of severe penalties: Lord Parker C.J., for instance, told a meeting of magistrates in 1969 that vicious assaults on the police "must be dealt with by some form of incarceration" and Roskill J. in the same year urged stern sentences for football hooligans,[44] Sir Robert Mark, the Metropolitan Police Commissioner, publicly complained in 1975 about the lenient punishments meted out to participants in violent demonstrations in London;[45] and Scarman L.J., in his Report on Red Lion Square, noting that "it is a serious offence to depreciate the currency of freedom by resorting to violence and public disorder", commented that "there may well be good reason to wonder whether magistrates do always appreciate the gravity of an offence against public order."[46] On the other hand, however, the courts are well aware of the perils of misplaced severity, which may in the context of inevitably selective prosecutions provide for a legacy of resentment, or offer instant martyrdom to

40. [1972] 2 All E.R. 1297.
41. [1972] 2 All E.R. 1, 5 *per* Melford Stevenson J.
42. [1972] 2 All E.R. 1297, 1301. See *R.* v. *Arrowsmith* [1975] 2 W.L.R. 484, 489.
43. See Williams, "Threats, Abuse, Insults" [1967] Crim. L.R. 385.
44. *The Times*, 22 November 1969, 1 and 10 October 1969, 2.
45. See *The Times*, 18 March 1975, 1. Addressing a meeting at the Police College at Bramshill, he claimed on the basis of statistics that the courts "are unlikely to impose sentences that will be a practical deterrent, save in exceptional cases." He added that conduct "which would provoke widespread condemnation in a football hooligan is condoned in a political demonstrator." See the leading article in *The Times*, 18 March 1975, 15.
46. Cmnd 5919, para. 150.

political demonstrators. Severe sentences can, of course, generate resentment or martyrdom in any circumstances, and from time to time a particular case boils over into the field of political controversy. The Home Secretary has recently declined to intervene in the case of the so-called "Shrewsbury Two" – where two trade unionists were convicted, in the aftermath of a building workers' strike, of unlawful assembly and conspiracy to intimidate, and were sentenced to long terms of imprisonment.[47] It may well be that the law of conspiracy is in urgent need of legislative reform, but at the same time it would surely be wrong for a Minister "to substitute himself for a judge except where, after the end of the judicial process, new circumstances relevant to culpability come to light."[48]

Charges of conspiracy, with their notorious range and flexibility, are by no means uncommon in the application of the law relating to public order. There have been cases involving prosecutions for conspiring to commit serious substantive offences (such as breaches of section 1 of the Official Secrets Act 1911)[49] and less serious substantive offences (such as threatening behaviour),[50] and there have also been charges of conspiring to effect a public mischief[51] and conspiring to trespass.[52] The House of Lords produced the important ruling in relation to conspiracy to trespass: this was in *Kamara* v. *Director of Public Prosecutions,* the effect of which "is that there is now a wide, but loosely defined, area where an agreement to trespass may be a criminal offence, and that where there is a trespass by two persons acting in concert criminal proceedings may in certain circumstances be brought although such a trespass would not be criminal if committed by one person alone."[53] Conspiracy to trespass was the unexpected trump card in a series of efforts which have been made to counter the problem of "sit-in" demonstrations and "squatting" in private premises.[54] But in all areas of public order the common law has shown remarkable resilence, not only

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47. See *R.* v. *Jones and Others* [1974] Crim. L.R. 663 (a useful case to note on conspiracy, unlawful assembly, and affray): *R.* v. *Warren* [1975] Crim. L.R. 111; article by Bernard Levin in *The Times* 14 January 1975, 14. See also *Sargeant* [1975] Crim. L.R. 173 (sentencing for affray), which provides an unusual explanation by the courts of the principles behind sentencing; and *R.* v. *Ravenhill* [1974] Crim. L.R. 127 (sentencing for assaulting the police). For a recent study in picketing see Kidner and Trice, "Picketing in Perspective" [1975] Crim. L.R. 256 (2 separate articles).

48. *The Times* (leading article), 20 December 1974, 13.

49. *Chandler* v. *D.P.P.* [1964] A.C. 763. In the context of "terrorism" activity there have been conspiracy charges in relation to explosives: *The Times,* 20 June 1973, 4; 21 June 1973, 4; 7 December 1973, 5; 2 November 1973, 1.

50. *The Times,* 10 October 1973, 2.

51. *The Times,* 6 October 1966, 6. But see now, *D.P.P.* v. *Withers* [1974] 3 A11 E.R. 984.

52. *R.* v. *Kamara* [1973] 3 W.L.R. 198 (H.L.).

53. See Law Commission Working Paper No. 54 (Criminal Law: Offences of Entering and Remaining on Property), 28 June 1974, 15. A recent trial for conspiracy to trespass is reported in *The Guardian,* 7 May 1975, 7 (9 members of the Ukrainian community in the United Kingdom were charged as a result of a protest demonstration against Soviet Russia).

54. See generally, Law Commission Working Paper, No. 54; Picciotto and Davies, "Sit-Ins and the Law", *New Society* 16 April 1970, 634; articles on "Squatting and the Criminal Law" [1971] Crim. L.R. 317; Ron Bailey, *The Squatters* (Penguin Special, 1973). One of the matters discussed in the Law Commission paper was the revival of the offences of forcible entry and forcible detainer in recent years.

through prosecutions for conspiracy but also through prosecutions for riot, unlawful assembly and affray. Where the common law has been deemed inadequate in providing a response to serious challenges to public order, there has also been an inviting residue of statutory offences. Two recent decisions perhaps serve to illustrate the choice available to prosecutors.

The case of *O'Moran* v. *Director of Public Prosecutions*[55] arose from a prosecution under section 1 of the Public Order Act 1936 which, subject to certain exceptions, makes it an offence (in any public place or at any public meeting) to wear a uniform signifying association with any political organization or with the promotion of any political object. The enactment of section 1 came about as a result of Fascist uniforms being worn provocatively up to 1936: a contemporary leading article in *The Times* referred to "the synthetic swagger of Sir Oswald's legionaries" and said that at the time the Fascists were the only political organization "addicted at all conspicuously" to the wearing of uniforms.[56] Prosecutions were brought in 1974, after the section had largely lain dormant in the period since 1936, as a result of two gatherings in London where participants had worn clothing which allegedly signified association with certain Irish political organizations. The two problems dealt with on appeal were those of defining a uniform[57] and of interpreting the requirement that a uniform shall signify the wearer's association with any political organization. On neither matter does section 1 itself provide any guide, and there were no previous cases reported in the Law Reports. Lord Widgery C.J., who delivered the judgment of the Divisional Court, took the view that "uniform" must be construed in a common sense way and considered as a matter of fact and degree;[58] and he was not prepared to ask for strict and specific proof of association with a political organization. The appeals were dismissed. It has to be borne in mind in assessing the Divisional Court's ruling that prosecutions under section 1 of the Public Order Act require the Attorney-General's consent,[59] a safeguard which is sometimes offered in English statutory law as

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55. [1975] 2 W.L.R. 413. It was coupled on appeal with *Whelan* v. *D.P.P.* [1975] 2 W.L.R. 413 arising from events on a different occasion.

56. *The Times,* 2 November 1936, 15. Cases under s. 1 have been relatively few: see (1937) 81 Sol J. 108 (and *The Times*, 28 January 1937, 16); (1937) 81 Sol. J. 108 (and *The Times*, 30 January 1937, 7); *The Times*, 3 June 1937, 24; *The Times*, 8 October 1965, 6. The charges in the case in 1965 arose out of an alleged Ku-Klux-Klan cross-burning rite. See generally, Ivamy, "The Right of Public Meeting" (1949) Curr. L. Problems 183, 185-87.

57. "The lawyers fight shy, and no wonder at defining a uniform" *Manchester Guardian*, 5 November 1936, 10.

58. See [1975] 2 W.L.R. 413, 424: "I would reserve the case of de minimis but apart from that I see no reason why a beret in itself, if worn in order to indicate association with a political body, should not be a uniform for present purposes." On the alleged wearing of black shirts by National Front members at Red Lion Square, see the Scarman Report, Cmnd 5919 para. 119. See s. 2(1) of the Prevention of Terrorism (Temporary Provisions) Act 1974 (U.K.) on the display of support in public for a proscribed organization: this speaks of wearing any item of dress or wearing, carrying or displaying any article "in such a way or in such circumstances as to arouse reasonable apprehension that he is a member or supporter of a proscribed organisation."

59. The Attorney-General's consent is also required for prosecutions under s. 2 which concerns quasi-military organizations. See D. Williams, *Keeping the Peace* (1967) 216-223 and Williams, "Protest and Public Order" (1970) Cambridge L.J. 96, 102-3.

compensation for what might be regarded as unacceptable elasticity in words or terms used in the definition of offences.

The decision of the Court of Appeal in *R* v. *Arrowsmith*[60] also arose in relation to offences where there is a restriction upon the right to prosecute. Miss Arrowsmith, the appellant, had been sentenced to eighteen months' imprisonment after conviction on two counts under the Incitement to Disaffection Act 1934 (U.K.): of endeavouring to seduce a member of Her Majesty's forces from his duty or allegiance to Her Majesty (contrary to section 1) and of possessing a document of such a nature that the dissemination of copies among members of the forces would constitute an offence under section 1 (contrary to section 2(1)). The background was somewhat unusual. After an earlier arrest for distributing literature to soldiers in Colchester, the Director of Public Prosecutions had decided to refuse authority for a prosecution under the 1934 Act; and Miss Arrowsmith claimed that this decision had encouraged her in the belief that the leaflet was not regarded as subversive.[61] But further efforts by her to distribute the leaflet to soldiers at Warminster led to a change of mind on the part of the Director: proceedings under the 1934 Act were authorized. The appellant's claim that she was entitled to a defence of mistake – based on her mistaken belief about the likelihood of prosecution – was rejected by the Court of Appeal, and there was certainly no evidence of mistake about the facts constituting the offences charged. In the interests of the appearance of justice, however, her sentence was reduced to allow for immediate release upon the grounds that she may have drawn the inference from the Director's earlier decision that she would not be prosecuted and that no warning had been issued about a change of attitude.

The judgment of Lawton L.J. on behalf of the Court of Appeal deals with some important points of interpretation under the Incitement to Disaffection Act, which – designed as a streamlined version of the Incitement to Mutiny Act 1797[62] – was one of the most controversial statutes passed between the wars. It was unsuccessfully argued on the basis of the phrase "duty or allegiance" (as opposed to "duty and allegiance" in the 1797 Act) that two offences can be committed under section 1 and that an accused should know whether he is being charged with seducing soldiers from their duty or from their allegiance. Lawton L.J. stressed that the offence "is the act of seducing with a particular intent" and the intent "may be to seduce from duty or from allegiance or both": accordingly there was no question of duplicity.[63] Other points dealt with in the judgment concerned the meaning of "maliciously" (the Court of Appeal adhered to the normal direction given in relation to the word in other statutes) and whether a defence of "lawful excuse" could be read into the Act by necessary implication (the Court of Appeal thought not, but added that the ordinary common

60. [1975] 2 W.L.R. 484. s. 3(2) of the Incitement to Disaffection Act 1934 requires the consent of the Director of Public Prosecutions for any prosecution.

61. It is interesting to note that defendants in one of the political uniform cases also claimed that they had understood that their actions would not contravene the law: see *The Guardian*, 20 November 1974, 5.

62. See generally, Williams, *Keeping the Peace* (1967) 187-191.

63. [1975] 2 W.L.R. 484, 491.

law defences such as mistake could be pleaded). But, amid the technicalities, the Court of Appeal had no doubt that the leaflet distributed at Warminster was properly the subject of prosecution under the 1934 Act:

> This leaflet is the clearest incitement to mutiny and to desertion. As such, it is a most mischievous document. It is not only mischievous but it is wicked. This court is not concerned in any way with the political background against which this leaflet was distributed. What it is concerned with is the likely effects on young soldiers aged 18, 19 or 20, some of whom may be immature emotionally and of limited political understanding.[64]

The case of *Arrowsmith* is a striking reminder that the law relating to public order is supplemented by a bunch of statutory crimes of incitement – especially incitement to disaffection under the 1934 Act, incitement to disaffection among members of the police contrary to section 53 of the Police Act 1964 (U.K.), and incitement to racial hatred under section 6 of the Race Relations Act 1965 – which do not require any proof of a threat to the peace. These offences constitute what might be described as the modern law of sedition. They represent a departure from what Gladstone described in 1871 as "a great and just unwillingness to interfere with the expression of any opinion that is not attended with danger to the public peace";[65] and it is right that their continued presence on the statute-book should never be taken for granted. The definitions of the relevant offences, which were originally enacted in response to particular problems, tend to be either too sweeping or too complex. Incitement to disaffection may well be defined too widely: seducing someone from "duty" as opposed to "allegiance" could cover, as was suggested in argument in *Arrowsmith*, a girl who "persuaded her boy friend serving in the Army to disregard the sergeant major's legitimate order to get his hair cut."[66] By contrast the definition of incitement to racial hatred may well be too complex. It has certainly been invoked remarkably few times since its enactment as an offence in 1965,[67] though the Government stated in 1973 that nothing would be gained by its repeal.[68] Statutory restriction upon the right to prosecute, which applies under the 1934 and 1965 Acts, provides only limited reassurance. Infrequency of prosecution can produce an unacceptable arbitrariness in prosecutions – unacceptable from the standpoint of the police as well as of defendants. "Neither the rule of law nor race relations," commented a Select Committee of the House of Commons with reference to racial incitement, "are best served by treating such a recent provision as a dead letter. It should either be repealed or occasionally brought to bear against publications and

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64. *Id.*, 488.
65. H.C. Deb. vol. 205 (3rd series) cc. 574-575 (24 March 1871).
66. [1975] 2 W.L.R. 484, 491.
67. See Report from the Select Committee on Race Relations and Immigration: Police/Immigrant Relations. H.C. 471-1 (August 1972), para. 259; Police/Immigrant Relations in England and Wales (Observations on the above Report). Cmnd 5438 (Oct. 1975), p.8. The Government stated in the latter Document that incitement to racial hatred had been the source of only 7 cases, involving a total of 15 people, since the Act came into force.
68. Cmnd 5438, p. 8.

speeches manifestly seeking to stir up racial hatred."[69] The Scarman Report took the matter further:

> Section 6 of the Race Relations Act is merely an embarrassment to the police. Hedged about with restrictions (proof of intent, requirement of the Attorney-General's consent) it is useless to a policeman on the street... The section needs radical amendment to make it an effective sanction, particularly, I think, in relation to its formulation of the intent to be proved before an offence can be established.[70]

The principal concern of the Scarman Report, of course, was the law relating to demonstrations. But the elements in any demonstration can vary dramatically, and it is not surprising that the Report had to take account – so far as Red Lion Square was concerned – of such additional elements as racial incitement. Other matters which needed to be considered included section 1 (political uniforms), section 4 (offensive weapons)[71] and section 5 (threatening, abusive or insulting conduct)[72] of the Public Order Act 1936. It is perhaps inevitable, however, that discussion of specific aspects of the criminal law relating to public order took second place in the Report to an assessment of the conduct of the police and the options open to them in the control of demonstrations.

The Protection of Public Order: Lessons of Red Lion Square

"A police constable," we are reminded in the Scarman Report, "is a public servant, holding office under the Crown, who has a specific responsibility for the maintenance of the Queen's Peace."[73] In the discharge of this responsibility the police in Great Britain have, since about 1968, faced unusually difficult problems. The Hunt Committee, which reported in 1969 upon Police in Northern Ireland, spoke of "the growing cult of violence in society, the increasing tendency of a minority to flout the law, undermine authority and create anarchy";[74] and it added that this trend was not peculiar to Ulster. The Annual Reports of the Chief Inspector of Constabulary and of the Metropolitan Police Commissioner reflect something of the pressures faced in the area of public order through industrial disputes, political demonstrations, student troubles, football hooliganism, and many other types or sources of disturbance. The

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69. H.C. 471-I (August 1972), para. 259.

70. Cmnd 5919, para. 125. It was pointed out (para. 120) that s. 2 of the Public Order Act (quasi-military organizations) had no relevance to the events in Red Lion Square. See recent proposals for amending s. 6 of the Race Relation Act: *Racial Discrimination,* Cmnd 6234 (September 1975), paras 124-127.

71. *Id.*, para. 120. The Prevention of Crime Act 1953 (U.K.) was also presumably regarded as relevant. Scarman L.J. rejected the suggestion made by the Metropolitan Police Commissioner that the law be extended to enable a police constable, when a public procession is taking place, to direct that any article which in his opinion is likely to provoke a breach of the peace may not be carried or worn by any person taking part in the procession. It is perhaps questionable whether the Commissioner was thinking solely in terms of offensive weapons in making this proposal.

72. No specific comments were made in the Report concerning s. 5.

73. Cmnd 5919, para. 116.

74. Report of the Advisory Committee on Police in Northern Ireland, Cmd 535 (Belfast) (October 1969), para. 9.

Report of the Metropolitan Police Commissioner for 1972, for instance, stated that there were 470 major events requiring police arrangements during the year; and the Commissioner commented:

> Public order is a matter of constant concern. Not only is it difficult to maintain the nice balance between freedom and restriction – preserving the rights of ordinary citizens as well as the right to demonstrate – but there is the continual interference with police duty rosters and entitlement to time off and the constant strain on the tolerance of police officers in dealing with those who seek to achieve political objectives by coercion and force.[75]

Events in Northern Ireland have unquestionably had a profound influence upon the range and severity of public disturbances elsewhere in the United Kingdom. Mounting public anger at a series of bombing attacks in major cities ultimately led to the speedy enactment of the Prevention of Terrorism (Temporary Provisions) Act 1974 (U.K.) designed to proscribe certain organizations concerned in terrorism and to empower the Home Secretary to exclude certain persons from Great Britain or the United Kingdom in order to prevent acts of terrorism.[76] It is a measure of the seriousness and urgency associated with that statute that the Home Secretary's powers are couched in the widest possible terms. Section 3(1), for instance, provides that his powers as to exclusion orders (which are dealt with in sections 3, 4, 5 and 6) may be exercised "in such way as appears to him expedient to prevent acts of terrorism (whether in Great Britain or elsewhere) designed to influence public opinion or Government policy with respect to affairs in Northern Ireland."[77] Judicial review is not expressly excluded, but the terminology of the Act must be sufficient to have entrusted unfettered discretionary power to the Home Secretary in relation to most, if not all, important matters. The statute also gives the police extensive powers of arrest.[78] For several years prior to its enactment, however, the police had been deeply involved with demonstrations and other activities stemming from the troubles in Ulster.[79] They had become fully aware, in the context of serious public protest or disruption arising from Irish problems and a variety of other sources, of the need for effective deployment of the police and the maintenance of discipline, flexibility and impartiality in their enforcement of the law. The Scarman Report, for instance, stated that it "is vital, if the police are to be kept out of political controversy, that in a public order situation

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75. Report of the Commissioner of Police of the Metropolis for the year 1972, Cmnd 5331 (June 1973), 11.

76. See H. Street, "The Prevention of Terrorism (Temporary Provision) Act 1974" [1975] Crim. L.R. 192. For a report of the bombings at Birmingham, see *The Times*, 22 November 1974, 1: it was this attack which finally led to legislation.

77. See leading article ("Use of the New Powers") in *The Times*, 6 December 1974, 17: "Exclusion orders are the exercise of large, discretionary, extra-judicial powers over the freedom of movement of citizens and quasi-citizens."

78. The statute needs to be reviewed every six months if it is to remain in operation (s. 12).

79. A demonstration organized by the Anti-Internment League in London on 5 February 1972, involved the deployment of 1743 officers: 128 persons were arrested (see Cmnd 5331, pp. 11-12). For the activities of the Special Branch in one particular case, see Report from the Metropolitan Police Commissioner on the Actions of Police Officers concerned with the case of Kenneth Joseph Lennon, H.C. 351 (31 July 1974).

their sole immediate concern is, and is seen to be, with public order."[80] This may well be a counsel of perfection, but it is an indication of the subtle balancing of interests which the police have to take into account in actions taken to prevent disorder, in the actual handling of demonstrations and protests, in the process of investigation and arrest, and in the complicated options of prosecution.

The police were exposed to heavy criticism for their handling of the disorders in Red Lion Square. This criticism, according to the Scarman Report, "ranged from accusations of political motivation manifesting itself in unnecessary and brutal interference with a peaceable and orderly left-wing demonstration to complaints of errors of judgment in police planning and tactics."[81] The allegations of political motivation involved the suggestion that the police should in effect have banned or prevented the original march planned by the National Front,[82] especially since they knew "that on previous occasions in London and elsewhere National Front demonstrations had aroused vigorous, and in some instances, violent, opposition."[83] In truth the police faced the kind of situation with which law students have become familiar ever since the ruling in *Beatty* v. *Gillbanks*[84] in 1882. It will be recalled that the Divisional Court in that case denied, against a background of clashes between the Salvation Army and the so-called Skeleton Army, "that a man may be punished for acting lawfully if he knows that his doing so may induce another man to act unlawfully",[85] a denial which stands in contrast to the firm assertion in *O'Kelly* v. *Harvey*[86] that "any needless assemblage of persons in such numbers and manner and under such circumstances as are likely to provoke a breach of the peace" is itself unlawful. The difficulty of reconciling such views is well known,[87] though attempts at reconciliation have perhaps under-estimated the extent to which a *Beatty* v. *Gillbanks* situation presents problems for the police much more frequently than for the courts. In the Scarman Report it is looked at from the standpoint of the police, and the conclusion arrived at is both an implicit endorsement of *Beatty* v. *Gillbanks* and an affirmation that interferences with free speech and free assembly cannot be justified merely on the basis that the expression of certain views is odious or distasteful to people of a different persuasion. The following passage from the Scarman Report is arguably of immense importance in any contemporary assessment of civil liberties:

> The police are not concerned with the politics of a demonstration: if they were, we should be a police state. Their duty is to maintain public order and to act, if need be, to prevent or suppress a breach of the peace. Offensive to many as were

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80. Cmnd 5919, para. 7.
81. *Id.*, para. 67.
82. The National Front was described as "a political group on the extreme right wing of politics." (*Id.*, para. 8). Its march had been planned as a prelude to a meeting in Conway Hall (at 25 Red Lion Square) to protest against the Government's recent decision to grant an amnesty to illegal immigrants and to allow such immigrants to bring their relations into the United Kingdom.
83. *Id.*, para. 11.
84. (1882) 15 Cox C.C. 138.
85. See generally, Williams, *Keeping the Peace*, (1967) 101-110.
86. (1883) 15 Cox C.C. 435, 447 (Ct. of Appeal in Ireland).
87. See I. Brownlie, *The Law Relating to Public Order*, (1968) 45.

> the slogans and chants of the National Front, their march was orderly and appears to have been treated by the public with indifference: some may have felt contempt, but, with the exception of some of the counter-demonstrators, nobody was provoked into any breach of the peace. And the "provocation" to the counter- demonstrators was not anything that they saw the National Front do, but the mere idea that they were marching at all.[88]

A statement of this kind, of course, requires immediate qualification. The police cannot adopt an ostrich-like attitude. In any assessment of a threat to the public peace inherent in a proposed demonstration, they have to take account of the likely strength of feeling arising from the political beliefs of both demonstrators and counter-demonstrators; they have to determine the stage at which the public expression of political views may spill over into provocative conduct (for instance, contrary to section 5 of the Public Order Act or section 6 of the Race Relations Act) requiring their intervention; and, in controlling demonstrations which in the event have got out of hand, they cannot but be aware of the political implications of their actions on the spot and of subsequent decisions whether and for what to prosecute. What they must not do, in a country which purports to accept freedom of speech and freedom of assembly, is to convert the preservation of public order into an exercise of censorship directed against unwelcome, unfashionable or inconvenient expressions of opinion which do not in themselves contravene the law. At the same time, the public generally should accept as a corollary of this principle that the problems of maintaining public order – especially in the context of large demonstrations and gatherings – do not lend themselves to easy, neat, textbook solutions. This is made abundantly clear in the Scarman Report's examination of the actions taken by the police in relation to Red Lion Square.

The claim that the police had used more force than was necessary to quell the disorders arose from allegations concerning the conduct of the mounted police (which Scarman L.J. described as "an invaluable tool for a police force which has decided to manage without riot equipment");[89] the role of the Special Patrol Group (which was established in 1965 as a reinforcement for any police job felt to be beyond the strength of the local police);[90] the use of truncheons by both the foot police and the mounted police (the Police Instruction Book makes it clear that truncheons are to be used only in self-defence);[91] and the several forceful arrests which were made (Scarman L.J., taking the view that "in all probability" excessive force was employed in some of these arrests).[92] The public inquiry, however, did not enter into an investigation of specific allegations of misconduct by individual police officers, except

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88. Cmnd 5919, para. 69.

89. *Id.*, para. 71. See also *id.*, para. 143-144.

90. *Id.*, para. 77. Some witnesses described the Special Patrol Group (SPG) as "a riot squad". See also *id.*, para. 145-146. The recruitment of anti-riot squads elsewhere in the country is reported in *The Times*, 17 October 1974, 4.

91. *Id.*, para. 81-84. The Report was concerned only with the use of short truncheons. Scarman L.J. (at para. 82) thought that there was a case for dispensing altogether with the long truncheons which are carried by mounted police (but not in fact used at Red Lion Square).

92. *Id.*, para. 85.

where these were necessarily bound up in an overall assessment of the disturbances.[93] In reviewing the evidence as a whole, Scarman L.J. concluded "that the police response to the disorders, though forceful, as it had to be, was with some possible exceptions, disciplined and necessary."[94] Some suggestions were made for improvements in practice: for instance, that "it would be a good general principle that where they propose to take action against a static crowd, the police should first give a warning",[95] that a warning should be given before mounted police are used;[96] and that, in the aftermath of a demonstration, there should be an effective debriefing of police officers to receive reports on such matters as the use of truncheons and violent incidents.[97] No recommendations were made which would have the effect, as it was put, "of reducing the ability of the most lightly equipped urban police force in the world to deal swiftly and decisively with disorder."[98]

Police action in advance of a planned demonstration was as much a concern of the Scarman Report as police action on the spot. In dealing with processions the police can already take advantage of the terms of section 3 of the Public Order Act, which allows a chief officer of police to give directions to the organizers of a public procession and provides for the banning of processions in some circumstances.[99] The obscure drafting of the section leaves it unclear, as the Report explains, whether conditions may be imposed after a procession is under way. It does not, of course, impinge upon the common law powers of the police to prevent breaches of the peace or to ensure free traffic; but the Report nonetheless recommends that the Public Order Act should be amended so as to confer upon the senior officer present a power to give a direction as to the route to be taken, if he thinks such a direction necessary in the interests of public order. Scarman L.J.'s rejection of the suggestion that there should be an appeal to the courts from any decision to ban or impose conditions on a demonstration is, if anything, reinforced by that suggestion for amendment. In any subsequent prosecutions for contravening a ban or condition, however, it should be possible for the courts to question the exercise of discretionary power under section 3

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93. The public inquiry held by Scarman L.J. was ordered under s. 32 of the Police Act 1964 (U.K.). Such an inquiry, indicated Scarman L.J. (*id.*, para. 78) "need not be conducted by a member of the judiciary. It has no rules of evidence to protect the interests of those against whom allegations are made: and its findings have no force in law."

94. *Id.*, para. 95.

95. *Id.*, para. 142. It should be noticed in this regard that the Riot Act 1714 was repealed by the Criminal Law Act 1967 (U.K.): Scarman L.J.'s suggestion implies that its preventive function should be maintained in another guise (namely, police practice).

96. *Id.*, para. 113. "Public order," commented Scarman L.J. "is an exercise in public relations."

97. *Id.*, para. 149: "Following major demonstrations senior officers should consider whether there are any lessons to be learned for the future. Public inquiries cannot, and should not, be held after every disorderly demonstration; police officers concerned with public order need to develop a continuing capacity for analysing, assessing and learning from their own operations."

98. *Id.*, para. 146. "Our police methods," it was said (at para. 72), "are designed to limit the degree of force that the police can use in a public order situation. The police go on duty unarmed save for the truncheon: they carry no riot equipment: there are no water-cannons, no armoured cars, no firearms, no gas."

99. *Id.*, para. 131.

in accordance with familiar principles of administrative law.[1] The constitutional accountability of the police is much too unsettled for the courts to abdicate altogether in this sensitive area of discretion.[2]

In a submission to the Inquiry held by Scarman L.J. it was suggested by the Metropolitan Police Commissioner that the law should be amended to require seven clear days' notice of a public procession.[3] Precedents for the requirement of notice exist in some local statutes (which, incidentally, Scarman L.J. felt should be brought into line with national law on processions)[4] and in the laws of several other countries. The suggestion was rejected in the Scarman Report, largely because – since the police "are seldom ignorant of what is planned"[5] – it would be generally unnecessary. Another "superficially attractive" proposal,[6] which was also turned down, was that a chief officer of police should have power to order the cancellation of one demonstration where two opposing parties are planning to march in the same area. As a matter of general policy, it was agreed in the Report that "speakers' corners" should be provided in towns and cities,[7] but recommendations for specific changes in statutory law relating to processions and demonstrations were kept to a bare minimum. No fundamental reforms were proposed. The underlying assumption was that a more restrictive law can be avoided provided that demonstrators co-operate with the police.[8]

The cautious approach of the Scarman Report towards changes in the law is to be welcomed, especially since it would be difficult to make substantial changes in relation to processions and demonstrations without taking into account many other aspects of public order which were not the concern of the Inquiry into Red Lion Square. Sit-down demonstration, sit-in demonstrations, squatting, isolated acts of disorder and minor breaches of the peace, sporadic hooliganism and vandalism, and – at a different level – terrorist activity: all of these demand varying responses from the police, the prosecutors and the courts. While it is true that legislative clarification or amendment of the law is sometimes unavoidable – as it may well be, for example, in relation to sit-in demonstrations – it would be unfortunate if the practice of voluntary co-operation between police and public were to be prejudiced by too ready an

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1. See Williams, *Keeping the Peace* (1967), 58-59; S. A. de Smith, *Judicial Review of Administrative Action* (3rd ed. 1973), 252-3.

2. See e.g. G. Marshall, *Police and Government* (1965), ch. 1; L. H. Leigh, *Police Powers* (1975), ch. 1.

3. Cmnd 5919, para. 127.

4. *Id.*, paras. 126, 134(4).

5. *Id.*, para. 129. But it was suggested (at para. 130) "that in planning for major demonstrations and in other suitable cases the police should confirm in writing the route agreed or acceptable to them – always provided that it is made clear that at any time thereafter, even in the course of the demonstration itself, the police retain the right to change the route if they consider it necessary."

6. *Id.*, para. 134(8). The powers under s. 3 were felt to be sufficient.

7. *Id.*, para. 134(7).

8. See *Id.*, paras 129 and 154. At para. 138 it was suggested that consideration should be given to the publication of a pamphlet under some such title as "Ways and means of co-operation between demonstrators and police."

assumption of regulatory or coercive powers through legislation.[9] As if to underline the point that this co-operation must be a two-way process, the Scarman Report contains a strong recommendation for the early introduction of an effective independent element into the procedure for investigating complaints against the police.[10] The events in Red Lion Square are in themselves an indication of the desirability of this reform – yet another variant of the ombudsman idea – as a means both of protecting the police against unfair allegations and of ensuring continued public confidence in the police.[11]

There are doubtless few people who would wish to dispute the primacy of the police in the maintenance of law and order. Yet it has to be borne in mind that organized, efficient and professional police forces are a relatively recent creation, and it would be wrong to take for granted their role in any area of law enforcement. Moreover, the demonstrations and protests of the past few years have been attended by unprecedented publicity – especially through the medium of television.[12] The difficulties of preserving order must also have been affected, when compared even to disturbances between the two World Wars, by such factors as increased mobility (through national and international travel) and easier communication through postal, telephonic and other services. Constant adjustments have to be made by the police, often on the spur of the moment, and exposed to maximum public scrutiny.[13] Their resources are in danger of being stretched to the limit, and the police themselves are acutely aware of problems of manpower, pay and morale. Increased recruitment of volunteer special constables has provided some relief;[14] but some of the functions which one would normally expect to be performed by police forces have in recent

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9. See *Id.*, para. 154: "The law and police practice must of course be such as to convince fair-minded people that the police are not politically motivated but concerned only to maintain or, if need be, to restore public order."

10. *Id.*, para. 134(9). See Report of the working group for England and Wales on the handling of complaints against the police, Cmnd 5582 (March 1974). See, as to complaints in the area of public order, *The Times*, 11 September 1970, 2 (inquiry into police conduct at South African rugby match at Swansea) and 17 September 1974 (inquiry into police conduct at the Windsor "pop" festival in 1974).

11. See also, Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland", Cmnd 5847 (January 1975), para. 98 (urging an independent means of investigating complaints against the Royal Ulster Constabulary).

12. See J. D. Halloran, P. Elliott, G. Murdock, *Demonstrations and Communication: A Case Study* (Penguin Special, 1970) (based on the anti-Vietnam demonstration in London on 27 October 1968); Williams, "Protest and Public Order" (1970) *Cambridge L.J.* 96, 117-19. The Scarman Report incidentally, rejected (at para. 134(2)) the suggestion that a public officer, who molests or interferes with a journalist or press photographer, should be dismissed from the force.

13. "Wisdom after the event is an occupational hazard for judges and armchair critics. Policemen are men of action: their duty requires them to assess a situation quickly, to make up their minds, and then to act before the situation slips out of control." See Cmnd 5919 para. 96.

14. See a useful report in *The Times*, 11 December 1974, 4, on the recruitment and use of special constables, especially in London. The Special Constabulary was created in its modern form in 1928. In London the "Specials" do not work at demonstrations but provide the extra manpower to allow regular officers to do so.

years passed into the hands of private security companies.[15] Amid threats of terrorist activity and prophecies of a breakdown in society, there have been proposals in the last year for volunteer forces such as GB 75 and Civil Assistance.[16] The police are anything but enthusiastic for organized private assistance in maintaining law and order. They would accept the orthodox constitutional position that, if a crisis occurred where the police were unable to cope, the Government would be asked to bring in the armed forces of the Crown. Once again the influence of events in Northern Ireland should not be ignored: the Tribunal of Inquiry into Violence and Civil Disturbances in 1969 discussed the constitutional implications of calling in the army,[17] and the Tribunal of Inquiry investigating the occurrences in Londonderry on 30 January 1972 examined the circumstances in which troops would be justified in opening fire.[18] In a newspaper article in late 1973, one commentator said that "if five years ago any Army officer had been warned that by 1973, 203 soldiers would have been shot dead in the United Kingdom, that the Army would have become the major source of domestic intelligence working with the police and Special Branch, and that it would be presiding over a camp containing more than 1,000 prisoners detained without trial, few surely would have chosen this as fact rather than fantasy."[19]

The Army was in fact used on several occasions in aid of the civil power in Great Britain during the earlier part of this century. After troops had opened fire and killed strikers in Llanelli and Liverpool in August 1911, a demonstration was held in Trafalgar Square "to protest against the unwarrantable extension of military authority and the unconstitutional imposition of martial law by the arbitrary ukase of the Home Secretary."[20] Not many months later the Incitement to Mutiny Act 1797 – the forerunner of the Incitement to Disaffection Act 1934 – was brought into play against those attempting to dissuade soldiers from obeying orders in the suppression of

15. See Williams, "Crime Prevention and Private Security: Problems of Control and Responsibility" (1974) 48 A.L.J. 380, esp. at 382, 384. The chief Constable of Hampshire expressed concern in 1974 (see *The Times*, 23 April 1974, 2) about the employment of private security men to deal with industrial unrest and to patrol social functions such as "pop" festivals. See also, *Spanner, Poulter and Ward* [1973] Crim. L.R. 704, (offensive weapons and security guards).

16. See *The Times*, 17 September 1974, 2 (report of a former Metropolitan Police Commissioner criticizing the formation of volunteer forces); 23 August 1974, 2 (Colonel David Stirling discusses GB 75, which he describes as an organization of "apprehensive patriots"); 26 February 1975, 4 (General Sir Walter Walker discusses Civil Assistance). See also, *The Times*, 29 July 1974, 2 ("Privately preparing for the Worst"); and esp. *The Observer*, 22 September 1974, 12 ("The Colonel and the Strikers" by Dr Richard Clutterbuck) and *The Times*, 10 April 1975, 4, reporting a speech by Dr Clutterbuck on terrorism.

17. Report of the Tribunal of Inquiry on Violence and Civil Disturbances in Northern Ireland in 1969, Cmd 566 (Belfast) (April 1972) ch. 20.

18. Report of the Tribunal appointed to inquire into the events on Sunday, 30 January 1972, which led to loss of life in connection with the procession in Londonderry on that day, H.L. 101, H.C. 220 (18 April 1972) paras. 89-104. The Report sets out the instructions issued to soldiers on the so-called Yellow Card.

19. *The Times*, 19 December 1973, 14 (Charles Douglas Home). It was pointed out in the article that there were then 14,000 troops on active service operation in the Province.

20. *The Times*, 28 August 1911, 5. Reports of the respective inquests at Llanelli and Liverpool appear in *The Times*, 30 August 1911, 6 and 1 September 1911, 6. See also, Captain K. O. Fox, "The Tonypandy Riots" (1973) 104 *Army Qtly. and Dfnce J.* 72.

industrial disturbances.[21] In the preliminary proceedings in one of the prosecutions, it was stated on behalf of the Director of Public Prosecutions that the military had been extremely useful during the industrial disturbances of 1911; and it was asserted that, under certain conditions of riotous and tumultuous conduct, the soldiers were "the last resort of the State to preserve the property and persons of peaceable citizens."[22] There are doubtless many people today, as in the period before the First World War, who would prefer to call in the army in times of crisis rather than rely upon assistance from private sources or, alternatively, who would seek the formation of highly professional anti-riot or anti-terrorist squads from among the ranks of the professional police forces.[23] As a precaution against possible terrorism at Heathrow Airport in 1974, the Army was in fact brought in – though subject to the overall direction of the police.[24] In a debate in the House of Lords on the Heathrow operation, Viscount Colville of Culross said on behalf of the Government that there "is no ground whatsoever for any sort of apprehension that this is the thin end of the wedge and that the Army is encroaching upon the field of police duty."[25] But it has to be remembered that the armed forces can be called upon without the need for any statute or proclamation: the responsibility rests upon the Government of the day, and troops could be called upon to assume orthodox police duties in the context of widespread civil disorder as well as upon the pretext of terrorist activities.

An investigation of an outbreak of public disorder, such as that attempted by the Scarman Inquiry, has to be interpreted against this wider constitutional background. The existence of professional police forces in this country, with their tested assumptions and traditional methods, is of fundamental importance in ensuring a disciplined and balanced effort to maintain public order in difficult times. In the Scarman Report it is pointed out that the principle that lies behind the Metropolitan Police method for the maintenance of public order – and the same would apply elsewhere in Great Britain – "is that it is the job of ordinary policemen operating without firearms, without special equipment, but enjoying the support and, if necessary, the co-operation of the general public."[26] There may be many defects in the constitutional responsibility and organization of the police and much doubtless needs to be improved in their methods of law enforcement, but the continued support and co-operation of the general public are essential if the police are to retain their effectiveness.[27] This is the principal lesson to be drawn from the Scarman Report.

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21. *R.* v. *Bowman and Others* (1912) 76 J.P. 271; and (the trial of Tom Mann), *The Times*, 10 May 1912, 10.

22. *The Times*, 11 March 1912, 4 (trial of Bowman and others).

23. See generally, Major-General Richard Clutterbuck, "A Third Force?" (1973) 104 *Army Qtly and Dfnce J.* 22.

24. See *The Times*, 7 January 1974, 1, 8 January 1974, 1; H.L. Vol. 348, cc. 1036 ff. (16 January 1974).

25. H.L., Vol. 348, c. 1050 (16 January 1974). Full responsibility for all security at Heathrow was taken over by the Metropolitan Police (from the British Airways Authority) in later 1974: see *The Times*, 1 November 1974, 3.

26. Cmnd 5919, para. 135.

27. "The real issue arising from the disorders is not whether our law recognises and protects the right to march and protest (it plainly does), but whether our law confers upon those whose duty it is to maintain public order sufficient powers without endangering the right of peaceful protest." *Id.*, para. 115.

Conclusions

The Scarman Inquiry was, as we have seen, not concerned with broader questions such as the codification of the law of public order in accordance with our international obligations. But Scarman L.J., in the Hamlyn Lectures for 1974, has drawn on international developments of the post-war years in formulating his ideas for an entrenched Bill of Rights for this country.[28] The European Convention for the Protection of Human Rights and Fundamental Freedoms, which the United Kingdom ratified in 1951, has already featured prominently in inquiries into events and practices in Northern Ireland,[29] though it is not as yet part of the municipal law of the United Kingdom. Proposals for an entrenched Bill of Rights, whether or not modelled upon the European Convention, have been made on a number of occasions over the past few years by judges, politicians and others;[30] and the Gardiner Committee, which reported in early 1975 on civil liberties and human rights in Northern Ireland, suggested that consideration should be given to the enactment of some such measure in the province.[31] Formal recognition of human rights and freedoms has also been sought, with varying degrees of success, in countries with a similar legal and constitutional background sharing "the traditional Anglo-Saxon distrust of bills of rights."[32]

The familiar arguments against an entrenched Bill of Rights include the assertion that it would be an unwarranted derogation from the sovereignty of Parliament (an assertion which wears increasingly thin when one takes account of the implications of membership of the European Economic Community, of other international or regional agreements, and of proposals for devolution along lines set out in the Kilbrandon Report);[33] the suggestion that it would endanger the independence of the judiciary by involving the courts directly in political controversy (a suggestion which perhaps makes insufficient allowance for the extent to which the judges, acting in court or in extra-judicial capacities, are already closely involved in sensitive and important

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28. Sir Leslie Scarman. *English Law – The New Dimension* (1974). See leading article "A Bill of Rights against Parliament" in *The Times,* 27 February 1975, 15.

29. See Report of the Committee of Privy Counsellors appointed to consider authorized procedures for the interrogation of persons suspected of terrorism (in Parker Report), Cmnd 4901 (March 1972), para. 5; Report of the Commission to consider legal procedures to deal with terrorist activities in Northern Ireland, Cmnd 5185 (Dec. 1972) (the Diplock Report); Report of a Committee to consider, in the context of civil liberties and human rights, measures to deal with terrorism in Northern Ireland, Cmnd 5847 (Jan. 1975). See *The Times,* 22 February 1975, p. 1 for a report of a decision of the European Court of Human Rights concerning the United Kingdom.

30. See e.g. report of the Haldane Memorial lecture by Salmon L.J., *The Times,* 4 December 1970, 3; Quintin Hogg, "A New Bill of Rights", *The Listener,* 24 April 1969, 549-51; H.L. Vol. 313, cc. 243-319 (2nd Reading of a proposed statute called the Bill of Rights), 26 November 1970; A. Lester, *Democracy and Individual Rights* (Fabian Tract 390, 1968).

31. Cmnd 5847, para. 21.

32. Evans, "An Australian Bill of Rights" (1973) 45 Aust. Qtly 4, 9. See also, E. Campbell and H. Whitmore, *Freedom in Australia* (2nd. ed. 1973), ch. 23; K. J. Keith (ed.) *Essays on Human Rights* (1968), ch. 8 ("A Bill of Rights for New Zealand?" by G. W. R. Palmer); and the text of proposed Human Rights legislation in Australia.

33. See Sir Leslie Scarman, see *supra* note 28.

political issues);[34] and the claims that it would be difficult to enact (it may be that the new-found device of a referendum would assist in this regard) and that, if enacted and accompanied with all the trappings of judicial review, it would bring about little difference in the protection of human rights and freedoms. The last of these arguments may be the most powerful: at the present time the protection of rights and freedoms depends upon an established if imprecise blend of legal and political remedies, and if we are to seek to shift the emphasis towards the courts through the entrenchment of a Bill of Rights the possible consequences of that change must be accepted from the outset. There could be a rapid decline in reliance on access to members of Parliament for the redress of grievances, which may indeed be a desirable development enabling Parliament to concentrate more upon its broader legislative and policy functions; an acceleration of changes in the legal profession and especially the judiciary designed to ensure that they are both competent and responsive enough to adjust to a different constitutional role; and the prospect of an extension of entrenched provisions beyond the protection of rights and freedoms, ultimately resulting in a supreme written constitution. For his part, Scarman L.J. in the Hamlyn Lectures saw "no difficulty in principle in the common law adjusting itself successfully to a written constitution and entrenched provisions."[35]

Even if an entrenched Bill of Rights is found to be unacceptable, there are various ways in which a formulation of human rights and freedoms could be achieved without necessarily involving judicial review of legislative action.[36] One of the suggestions made to the Scarman Inquiry on Red Lion Square, for instance, was that a positive right to demonstrate should be enacted; this was not adopted in the Report because Scarman L.J. felt that it would be unnecessary save as part of a general codification of the law relating to public order.[37] On the other hand the Scarman Report plainly recognizes that the law does and should recognize the right to march and protest, and this positive approach to something which is set out in article 11 of the European Convention – "Everyone has the right to freedom of peaceful assembly. . ." – is reflected in recent judicial remarks in court. In *Hubbard* v.*Pitt,* Forbes J. said at first instance that there is "a democratic right to public assembly, and any attempt to suppress the meeting together of members of the public merely because it is a public meeting would rightly be regarded as tyrannical";[38] and Lord Denning M.R. in a dissenting judgment on appeal endorsed the statement made by the Court of Common Council of London, in the wake of the Peterloo Massacre, in favour of "the undoubted right of Englishmen to assemble together for the purpose of deliberating upon public grievances."[39] The importance of such judicial statements should be recognized. They

34. See Note, Williams "The Commission on the Constitution" (1974) 33 *Cambridge L.J.* 15.
35. Sir Leslie Scarman, see *supra* note 28, 20.
36. See e.g. the proposals of Sir Keith Joseph reported in *The Times,* 18 March 1975, 3; but see the comments of Mr Peter Archer, the Solicitor-General, reported in *The Times,* 14 December 1974, 3. See Peter Archer, *Human Rights* (Fabian research series 274), 1969.
37. Cmnd 5919, para 134(6).
38. [1975] 2 W.L.R. 254, 266.
39. [1975] 3 W. L. R. 201, 212-213.

stand in stark contrast to the approach adopted by some judges in the past[40] and suggest that the ground is already being laid for the enactment of a Bill of Rights in one form or another. In the meantime the Scarman Report on Red Lion Square has provided a timely reminder of the complexities of just one area of human rights and freedoms and of how many of the problems can be solved only in an atmosphere of good sense and public tolerance.

40. See e.g. the judgment of Lord Hewart C.J. in *Duncan* v. *Jones* [1936] 1 K.B. 218.