

# SPONTANEOUS DEMONSTRATIONS AND THE FIRST AMENDMENT

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## SPONTANEOUS DEMONSTRATIONS AND THE FIRST AMENDMENT

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Consider a paradigm contemporary First Amendment issue: a group advocating for gun control plans a march and rally to be held on April 15, a date chosen for the group's convenience. The group's leadership identifies what it believes to be the line of march and ending point—a group of city streets and a city park—that will be maximally effective in getting its message across to its target audience. Contemporary First Amendment law holds that, in general, the city must make the route and the park available for the march and rally, subject to reasonable regulations aimed at protecting governmental interests unrelated to speech, and that a regulation that rejects the group's preferences in favor of another route or ending point is permissible as long as that regulation (taken together with others) leaves the demonstrators with an adequate alternative way of getting their message across.<sup>1</sup> The ordinary mechanism for identifying the conditions is a permit system: the group must apply for a permit within some reasonable period prior to the march.<sup>2</sup> The city must grant the permit but can impose conditions.<sup>3</sup> These conditions might include provisions for the group

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1. For a canonical formulation, see *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984) (“[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.” (first citing *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789 (1984); then citing *United States v. Grace*, 461 U.S. 171 (1983); then citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45–46 (1983); then citing *Heffron v. Int’l Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647–48 (1981); then citing *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); then citing *Consol. Edison Co. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 535 (1980)).

2. See *NAACP v. City of Richmond*, 743 F.2d 1346, 1357 (9th Cir. 1984) (holding unconstitutional an ordinance with a twenty-day notice requirement, observing that, up to that point, courts had upheld only notice requirements with much shorter (two-day) periods (first citing *A Quaker Action Grp. v. Morton*, 516 F.2d 717, 735 (D.C. Cir. 1975); then citing *Powe v. Miles*, 407 F.2d 73, 84 (2d Cir. 1968))). I note that the decisions tend to deal with marches fitting the factual presuppositions of Variants Two and Three rather than with marches planned substantially in advance; for myself, I do not believe that twenty- or thirty-day notice requirements are unconstitutional when used in connection with demonstrations that reasonably can be planned that far in advance.

3. For a case illustrating these rules, see *Sullivan v. City of Augusta*, 511 F.3d 16, 32–40 (1st Cir. 2007) (upholding conditions dealing with traffic control and cleanup costs but invalidating a thirty-day notice requirement).

to pay what we can call the “excess cleanup” and excess policing costs associated with the march and rally—the costs attributable to the march and rally beyond those arising when the streets and parks are used for ordinary traffic and recreation. So, for example, some traffic officers ordinarily assigned to other parts of the city will be assigned to the march route so that they can divert traffic to alternative routes.<sup>4</sup> The system of permits and conditions is enforced by declaring demonstrations and marches that fail to obtain permits or fail to comply with the conditions “unlawful assemblies.”

This Essay considers several variants on the paradigm case—variants that have received only passing attention in the scholarly literature and case law.<sup>5</sup> Variant One is the demonstration on a symbolically significant date—for example, on the anniversary of the Sandy Hook school shootings. Variant Two is the demonstration triggered by an event that the group’s organizers know will happen at some time but not how far in advance that event will occur—for example, a demonstration on the eve of an important Senate vote on gun-control legislation.<sup>6</sup> A convenient shorthand for this variant is the *occasional* demonstration—that is, a demonstration on the occasion of some event. Variant Three is the truly spontaneous demonstration—for example, a “flash mob” organized

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4. I note several issues that my formulations conceal. First, to describe something as an “excess” cost requires that we have a baseline of “ordinary” costs. It might be, though, that the costs associated with marches and demonstrations should be treated as ordinary. (A city might, for example, calculate the costs of traffic policing in a way that includes both daily traffic policing and the annual outlay for assigning traffic officers to divert traffic around a line of march.) Second, the solution most people assume for the “hostile audience” problem is that a group cannot be charged the costs associated with protecting the group from attacks by hostile onlookers. *Forsythe County v. Nationalist Movement* appears to hold that it is impermissible to impose such costs on a group where the costs are determined according to some highly discretionary standard. 505 U.S. 123, 133–37 (1992). The courts have been skeptical about high levels of discretion in determining other costs as well. *Id.* at 130. Third, there may be circumstances in which the organizers’ preferred route and rallying place would be so disruptive to traffic and the like that the city can condition the permit on the marchers following some other route, as long as the alternative route offers the group “reasonable” access to its intended audience. The resolution of these and perhaps other questions with respect to ordinary permit processes is irrelevant to this Essay’s topic, because the Essay’s argument is that *whatever* conditions are permissible when imposed through a permit system in the paradigm case are permissible when applied to the “spontaneous” demonstrations with which the Essay is concerned—or, more precisely, such conditions appropriately adapted to a largely post hoc assessment are constitutionally permissible.

5. For earlier discussions, see Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1524–27, 1567–68 (1970) (asserting that “[a]s a basic constitutional proposition, forty-eight hours should be the maximum limit for per se advance-filing requirements” and describing “spontaneous demonstrations” as truly spontaneous or “organized on short notice in response either to local grievances—such as the arrest of a protest leader—or to monumental national events—such as the assassination of Martin Luther King or the intervention in Cambodia”), and C. Edwin Baker, *Unreasoned Reasonableness: Mandatory Parade Permits and Time, Place, and Manner Regulations*, 78 NW. U. L. REV. 937, 1010–11 (1984) (discussing spontaneous demonstrations). In the course of this Essay, I will discuss in passing some reasons why the variant cases have not arisen with much frequency.

6. For examples of this phenomenon, see *Long Beach Area Peace Network v. City of Long Beach*, 522 F.3d 1010 (9th Cir. 2008), and *Vodak v. City of Chicago*, 639 F.3d 738 (7th Cir. 2011), each involving demonstrations scheduled to occur when the U.S. Congress voted to support military intervention in Iraq.

immediately after a police shooting of an unarmed civilian to take place the next day.<sup>7</sup>

The first variant is interesting because dates can be symbolically important to groups on various sides of issues like gun control. Thus, it is important to develop criteria for determining which of the competing applications should be granted when more than one is submitted. The second and third variants are interesting because the system for the paradigm case—applying for a permit that will have some reasonable conditions attached to it—is difficult to implement in Variant Two and almost certainly impossible to implement in Variant Three.

It is important to emphasize that the general context for demonstrations has changed since the law regulating the paradigm case developed. In the 1940s, the paradigm case was *Hague v. Committee for Industrial Organization*.<sup>8</sup> In the 1960s, the paradigm cases involved demonstrations against local race discrimination and U.S. involvement in the Vietnam War. In different ways, those cases involved demonstrations clearly at odds with city officials—directly in *Hague*, where the named defendant was Frank “I Am the Law” Hague (the city’s mayor);<sup>9</sup> directly in most civil rights demonstrations;<sup>10</sup> and indirectly in antiwar marches held in cities such as Chicago, where local officials were political allies of the national government.<sup>11</sup> Regulations of the paradigm cases were, in short, typically based upon the content of the demonstrators’ political messages. First Amendment law, as it developed, was responsive to that fact.

Today, we cannot assume that local officials will generally be hostile to the causes promoted by demonstrators in Variants One and Two. Rather, I think they will be inclined to deal with such demonstrators in good faith, attempting to accommodate the demonstrators’ interests with the city’s non-content-based interests such as traffic and litter control.

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7. See, e.g., *Robinson v. Coopwood*, 292 F. Supp. 926, 934 (N.D. Miss. 1968), *aff’d per curiam*, 415 F.2d 1377 (5th Cir. 1969) (holding unconstitutional a one-hour notice requirement adopted in the aftermath of the assassination of Martin Luther King Jr., the court observed that “[a]dvance notice is impossible where the demonstration results from a spontaneous group desire”). In affirming the district court’s judgment in *Robinson*, the court of appeals referred to “the particular facts and circumstances of this case.” *Robinson*, 415 F.2d at 1377.

8. 307 U.S. 496 (1939).

9. Respondents’ Brief at 8, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939) (No. 651), 1939 WL 48838, at \*8.

10. The facts in *Robinson* are instructive. 292 F. Supp. 926. The case dealt with civil rights demonstrations in 1968 in Holly Springs, Mississippi—a town that was a focal point for such demonstrations through the 1960s. *Id.* at 928. For a brief journalistic account, see Chris Elkins, *Rust College: A History in Civil Rights*, DAILY J. (Jan. 17, 2010), [https://www.djournal.com/news/rust-college-a-history-in-civil-rights/article\\_fb279ac7-283b-508b-ba37-669d997fad04.html](https://www.djournal.com/news/rust-college-a-history-in-civil-rights/article_fb279ac7-283b-508b-ba37-669d997fad04.html).

11. See generally NORMAN MAILER, *MIAMI AND THE SIEGE OF CHICAGO* (1968) (describing the political context of antiwar demonstrations in 1968).

The likelihood of good-faith interaction may be enhanced by the very fact that the law dealing with the paradigm case is well settled.<sup>12</sup> At least where marches and demonstrations are more common—meaning in large and middle-sized cities—I am reasonably confident that local officials and their lawyers have internalized First Amendment doctrine for the paradigm case and worry—again, mostly in good faith—only about the non-content-based problems such demonstrations cause.<sup>13</sup> And, having internalized the rule that they can invoke only non-content-based reasons when regulating the paradigm case, they are likely to apply that rule to the variant cases as well.<sup>14</sup>

### I. VARIANT ONE: THE SYMBOLICALLY SIGNIFICANT DATE

We can imagine that specific dates might be symbolically significant to people with competing political views. For example, the Sandy Hook anniversary might mean one thing to supporters of gun control and another to those who think that much of the publicity around mass shootings is fake news. Or, to take a more realistic example, two groups interested in celebrating Irish heritage might want to hold a St. Patrick's Day parade, with one group excluding and another including representatives of the local Irish-American LGBTQ community. Both groups submit an application for a permit for a parade on the same date and using the same route. If only one march is possible, how does the First Amendment constrain the city's choice?

Conflicts over St. Patrick's Day parades have produced a consistent answer.<sup>15</sup> The city can award the permit using reasonable non-speech-related criteria. The most obvious is “first come, first served”—that is, the permit goes

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12. The paradigm case involves marches and demonstrations using traditional public forums. The rules applicable to demonstrations in “nonpublic” forums owned by public authorities may be different, and I do not address it here. *See, e.g.*, *McDonnell v. City & County of Denver*, 878 F.3d 1247, 1252–56 (10th Cir. 2018) (vacating a preliminary injunction against enforcement of a regulation applicable to Denver's airport requiring notice seven days before a planned demonstration in connection with spontaneous demonstrations against the initial implementation of the Trump Administration's “Muslim ban”; the court observed that the city had a twenty-four-hour notice requirement for spontaneous demonstrations in traditional public forums and suggested that such a requirement might also be constitutionally permissible).

13. Cases involving so-called “protest zones” in connection with major political conventions and (sometimes) presidential appearances might be an exception to this optimistic assessment. For a discussion, see Timothy Zick, *Speech and Spatial Tactics*, 84 TEX. L. REV. 581 (2006). My personal impression is that these cases involve officials' exaggerated concerns for physical security, but exaggeration is a characteristic concern for defining the contours of First Amendment doctrine generally. It is not clear to me that the situations involving the variants discussed in this Essay have triggered similar exaggerated concerns on the part of local officials, but I am open to correction. For a brief discussion of the doctrinal implications of pervasive exaggeration, see *infra* text accompanying notes 49–50 (discussing the “pathological perspective” on the First Amendment).

14. As we will see, one reason for thinking that such internalization has occurred is that reported cases deal with problems at the margins—not deliberate efforts to obstruct the demonstrations but, at worst, modest failures to reach the right accommodation of interests.

15. *See Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 651 (2d Cir. 1998) (denying a permit formally on the ground that a prior permit for the same time and location had already been granted). This was not a pure first-come-first-served case, though, because the city's ordinance generally required permits

to the group that completed the application first. Another is a random choice from all those whose applications were submitted within some defined window. Another might be a rotation system: one group gets the permit in year one, another in year two, and so on.

The only difficulty lurking here is that some facially neutral criteria might have a disparate speech-related effect. Awarding the permit to the group most likely to attract the largest crowd, for example, might systematically favor traditionalists in some communities and favor modernizers in others. Even first come, first served might have a disparate effect. The rule makes it likely that groups more able to get their act together will be at the head of the line, and it might be that such groups—the “better organized”—will, in particular settings, have distinctive views.

The disparate-impact problem can morph into a disparate-treatment one when the authorities deliberately choose a specific, facially neutral criterion for the very purpose of awarding the permit to a favored group.<sup>16</sup> A rule that awards the permit to the group with the most experience in organizing St. Patrick’s Day parades, for example, would be subject to this problem—as might a rule that awards it to the group with the most diverse organizing committee.

Much here depends upon one’s assumptions about the good faith of city officials in charge of developing the permit system. In cities with relatively heterogeneous populations—“big cities,” as a shorthand—ordinary politics is likely to lead officials to act in good faith.<sup>17</sup> The problem of disparate impact or deliberate distortion might arise in smaller cities and towns, though even here my guess would be that, almost everywhere, officials would act in good faith. The bottom line, I think, is that the solution to Variant One problems—use facially neutral criteria to award permits—is likely to work reasonably well.

## II. VARIANT TWO: THE OCCASIONAL DEMONSTRATION TRIGGERED BY A PREDICTABLE EVENT OCCURRING AT AN UNPREDICTABLE TIME

The organizers of an occasional demonstration know that they are going to hold a demonstration, but they cannot know when the demonstration will take place until shortly before the occasion that triggers it. The notice system in the

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but exempted from the permit requirement organizers of parades that had been marching annually for more than ten years before July 1914. *Id.* at 643. This certainly looks like a gerrymandered requirement, though the court did not explore that possibility because of the case’s procedural posture. *See id.* at 646; *see also* Larry W. Yackle, *Parading Ourselves: Freedom of Speech at the Feast of St. Patrick*, 73 B.U. L. REV. 791, 869 (1993) (meditating on the problem of competing applications but failing to offer strong prescriptions beyond advice to avoid content-based discrimination among applicants and—relevant to the question of disparate impact—advice to “comb existing procedures . . . [and] cleans[e] existing law of the favoritism that has crept into the statute books and common practice over the years”).

16. This can be described as gerrymandering using the facially neutral criterion.

17. *Cf.* Yackle, *supra* note 15, at 862 (“As the gay and lesbian civil rights movement proceeds apace, gathering ever more support from younger and more progressive residents of Manhattan and Southie, the parades will either change or die. Simple as that.”).

paradigm case can still apply here: once they decide that they will (probably) hold a demonstration, the organizers can notify the relevant city officials and indicate their preferred venue or route, estimate likely crowd size, and provide similar information—the information they would be asked to provide for a demonstration planned for a certain date.

Yet *requiring* a demonstration's organizers to provide more than the most minimal notice might run up against *Reed v. Town of Gilbert*.<sup>18</sup> There, the U.S. Supreme Court struck down a town's ordinance regulating signs on private property.<sup>19</sup> The ordinance allowed signs with political messages to be displayed more readily than signs directing viewers to a venue where a nonprofit organization was holding an event.<sup>20</sup> According to the Court, this constituted content discrimination and received strict scrutiny, which requires that the distinction between signs for nonprofit events and political signs track rather precisely some important non-speech-related government interests.<sup>21</sup>

Content discrimination might well pervade local regulations of occasional events.<sup>22</sup> Cities and towns routinely allow funeral processions to occupy the streets in ways that would violate traffic laws in other circumstances—for example, by allowing the entire procession to go through intersections even if the lights are red.<sup>23</sup> Traffic officers often police the intersections and sometimes escort the processions. And, of course, funeral processions are about as close to the occasional events in Variant Two as one could imagine. As I understand their practices, funeral directors regularly notify city officials as soon as they know when and where the procession will occur, but sometimes that means notifying them a day before the funeral.<sup>24</sup>

On its face, *Reed* might be taken to require that notification requirements for occasional political demonstrations be no more stringent than those for funeral processions. Might there be differences between the two types of traffic disruption that could satisfy the strict scrutiny requirements? Funeral processions typically involve cars rather than people, though not universally so, and

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18. 135 S. Ct. 2218 (2015).

19. *Id.* at 2226–33.

20. *Id.* at 2224.

21. *Id.* at 2227.

22. Lower courts have tended to limit the reach of *Reed*. See, e.g., *March v. Mills*, 867 F.3d 46, 49 (1st Cir. 2017) (upholding a statute making it a civil rights offense to “mak[e] noise” with the intent to “jeopardize the health of persons receiving health services” because the communicative content of the “noise” was irrelevant to the statute’s application (quoting ME. REV. STAT. ANN. tit. 5, § 4684-B(2)(D))).

23. See Baker, *supra* note 5, at 954–56 (discussing funeral procession exceptions from permit requirements as of the early 1980s). Baker conducted an informal survey and found that of eighteen cities with permit ordinances, nine explicitly exempted funeral processions from the permit requirements and “internal features” of other ordinances, such as a requirement that notice be given thirty days before the event, and “made it relatively clear that these ordinances were not intended to apply to funerals.” *Id.* at 954 n.33.

24. Though I have no simple citation for that proposition, it must be true in connection with funerals conducted according to religious traditions such as Judaism and Islam that (subject to exceptions) require burial within twenty-four hours of death.

they typically go through intersections more quickly than people on a march do and thereby disrupt traffic less. Some occasional demonstrations are small, though, and some funeral processions are large, which means that the distinction between the two types of traffic disruption may not satisfy strict scrutiny's narrow-tailoring requirement. Put another way, perhaps funeral processions and occasional demonstrations *generally*, though not universally, cause different degrees of traffic disruption. If so, a city could impose loose notice requirements on small funeral processions and demonstrations and stringent notice requirements on large funeral processions and demonstrations. That differentiation would not be content-based.<sup>25</sup> But, as we will routinely see, from the city's point of view, the game might not be worth the candle: the political losses from irritating participants in funeral processions might outweigh the modest gains in traffic control from such a differentiation.

Even if *Reed* does not stand in the way of a "notice as soon as you can" rule, uncertainty not about *when* the demonstration will take place but about *whether* it will take place at all might cause problems. Suppose the triggering event is a congressional vote, with protestors expecting the Senate to do *something*, such as authorize an invasion or refuse to vote for gun control. There is nothing to protest if the vote never occurs or if the Senate votes against the invasion or in favor of gun control. Further, negotiations over whether to hold the vote might extend until moments before it occurs or is canceled. With such uncertainties in the background, protest organizers might reasonably think it not worth the effort to plot out a route and calculate how many people they might be able to mobilize.

Under these circumstances, "notice as soon as you can" becomes "notice as soon as you are reasonably sure that it is clear that the occasion for the demonstration will occur (sometime)." Yet many cities may reasonably think—to echo the thinking on the other side—that attempting to enforce such a requirement is not worth the effort. A recurrent feature of Variants Two and Three of the paradigm case is that the fact that rules that might, in the abstract, be constitutionally permissible might well be pointless or exceptionally difficult to administer; in this, the problems resemble those associated with trying to fit the funeral procession into the same category as the occasional political demonstration. The First Amendment allows cities to impose conditions when it grants permits in the paradigm case—the demonstration planned weeks in advance.<sup>26</sup> Some such conditions might be applied, with modest adjustments, in a "notice as soon as you can" regime for occasional demonstrations. The most obvious are that the notice include a designation of the preferred route of march

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25. Cf. *Grossman v. City of Portland*, 33 F.3d 1200, 1207–08 (9th Cir. 1994) (suggesting the possibility of upholding regulations that distinguished between large groups and small ones where the demonstration was conducted by a group of six or eight people at a venue near a much larger festival).

26. See *supra* notes 3–4 and accompanying text.



or venue for the assembly and a good-faith estimate of the number of participants. City officials then can deploy traffic officers to help minimize the disruption of traffic flow and to maintain order.

What if the demonstration's organizers designate a route of march or venue that city officials think would be too disruptive? We can expect ad hoc and unsystematic negotiations in a compressed time period. Those negotiations might not yield an outcome that satisfies both sides. But, again, the law dealing with the paradigm case provides the solution: the city's preferences prevail as long as the route of march or the venue chosen by the city offers a fair chance for the demonstrators to get their message across to a significant portion of their intended audience.<sup>27</sup>

As noted at the outset, sometimes cities impose financial conditions on demonstrations to cover the excess policing and cleanup costs associated with the demonstration.<sup>28</sup> In the paradigm case, these conditions take the form of bonds to be posted, with the amounts calculated with reference to the estimates organizers provide of the likely number of marchers. A "notice as soon as you can" regime can require that the organizers provide such an estimate, but it would not be reasonable to require them to post bonds in the limited time they have. The obvious alternative is to assess demonstrations' organizers after the event has occurred with the actual costs incurred.

A post-event assessment has one obvious advantage over a bond requirement even in the paradigm case. Before the event, cities can only estimate excess policing and cleanup costs, and they might have some—mostly bureaucratic but partly political—incentives to overestimate those costs. The possibility of overestimated costs, in turn, might reduce the number of demonstrations that actually occur if the estimate means that the cost of supplying the bond exceeds the political advantages the organizers hope to gain from holding their event.<sup>29</sup> After the event, officials know what the costs actually were because the event will have occurred.

There is one problem associated with a post-event assessment of costs. A demonstration's organizers sometimes solicit participants at the event for contributions to cover the event's costs. Such solicitations might be less effective if the people collecting the contributions cannot tell participants how much

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27. This is an application to the present problem of the "reasonable alternatives" component of the law dealing with the paradigm case.

28. See *supra* notes 3–4 and accompanying text.

29. I formulate this as a balance between financial costs and political gains. I believe that standard analysis of the paradigm case leads to the conclusion that cities can require groups to post bonds—that is, incur financial costs—only up to their financial capacity to do so. If overestimating the excess policing and cleanup costs makes the bond too expensive financially for the group, that analysis would require the city to reduce the amount of the bond. I believe that this follows analytically from the doctrinal structure in the paradigm case, but I am not aware of judicial authority supporting my conclusion. *But cf.* *Sullivan v. City of Augusta*, 511 F.3d 16, 43–45 (1st Cir. 2007) (reversing a district court decision holding a regulation requiring parade organizers to pay a permit fee unconstitutional because it lacked an exception for indigency).

they need to raise. The very act of participating, though, suggests that those attending the event have some sense of solidarity with the organizers, and though uncertainty about the amount that is needed to pay for the event might reduce contributions somewhat, my guess is that this decrease will generally be small.

For occasional demonstrations, then, cities can require “notice as soon as is reasonably possible” rather than before some predetermined deadline. They can require that the notice provide the same information elicited in permit applications in the paradigm case: planned route of march or venue, expected size, and the like. Further, they can assess actual costs after the event. In short, they can apply the non-content-based rules they apply in the paradigm case before the event when that is reasonably possible, and after the event, they can assess costs that they are allowed to anticipate through bond requirements in the paradigm case.

So much for theory. What of practice? The facts of the two leading cases dealing with occasional demonstrations are quite instructive, though the holdings are less so.

#### A. Long Beach: *The Facts*

The following is a description of the *Long Beach Area Peace Network v. City of Long Beach* facts as recounted by the Court of Appeals for the Ninth Circuit:

[T]he Long Beach Area Peace Network is “an unincorporated, loosely organized group of peace activists without an office, organizational phone, organizational email or insurance.” On February 15, 2003, before the beginning of the Iraq War, the Peace Network sponsored a protest march and rally in the City of Long Beach, California. In preparation for the event, Dr. Eugene Ruyle (“Ruyle”), a retired professor and Peace Network member, submitted an application for a “special event” permit . . . . After negotiating the march route with Ruyle, the City approved the permit.

The march was conducted on public streets along the route suggested by the City. The event concluded with a rally in Bixby Park, a public park in the City. Several elected officials, including a City Council member and a State Assembly member, participated in the rally. According to some estimates, between 1,000 and 1,500 people attended the event.

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On March 20, 2003, approximately one month later, the United States launched an aerial assault on Baghdad. In anticipation of the assault, the Peace Network had already organized another march and rally, to be held on March 22. Ruyle had submitted a letter to the City on or about March 18 describing the anticipated “spontaneous” event. Section 5.60 defines a “spontaneous” event as one “occasioned by news or affairs coming into public knowledge within five (5) days” of the event. *See* [Long Beach Municipal Code] § 5.60.030(A)(5). A “spontaneous” event does not require a formal permit, but it does require twenty-four hours advance notice to the City. The City

Manager may refuse permission to hold such an event, and may impose “reasonable time, place and manner restrictions.” *See* [Long Beach Municipal Code] § 5.60.030(B). An initial email from Ruyle to the City, sent two weeks earlier, had indicated that the Peace Network planned to ask for the closure of at least one lane of traffic for the march and to reserve a bandshell in Bixby Park for the rally. In his email, Ruyle estimated that the March event would be “at least twice as big” as the February march and rally.

In a letter addressed to Ruyle dated March 21, the City granted permission to conduct a march and rally on March 22. In the letter, the City imposed a number of conditions, including the route of the march and the location of the rally. The letter contained a summary of estimated departmental services charges for “Police,” “Public Works,” “Park, Recreation & Marine (Park Staff),” “Parks, Recreation & Marine Maintenance,” “Space Permit Fee,” and “Junipero Parking Lot.” The total estimated charges were \$7,041. The letter set forth a schedule of payments in four equal installments during the next year. Ruyle and other members of the Peace Network signed the last page of the letter under a heading reading “Conditions Accepted.” As signed, this page contained a handwritten notation at the top, stating that the “signers reserve[d] the right to challenge the total,” but that they would pay the first of the four installments on March 22. Ruyle paid the first installment on March 22, in accordance with the handwritten notation.

The march on March 22 took slightly more than one hour, and the event concluded with an anti-war rally at Bixby Park. The district court found that approximately 1,000 people participated in the March event. According to Ruyle’s declaration, in contrast to the pre-war rally at the park in February, no elected officials participated in the March anti-war rally.

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In his initial email, Ruyle had stated that Peace Network planned to request a waiver of insurance and departmental services charges. In its March 21 letter granting the permit, the City waived the insurance requirement but did not waive event-related charges. As he had done after the February march and rally, Ruyle wrote a letter to the City after the March event asking for a waiver of charges. . . .

The City did not waive the departmental services charges for the March event. In April 2003, the City sent a letter to the Peace Network members whose signatures (or, in the case of Diana Mann, whose name had been signed by someone else) appeared at the bottom of the March 21 letter. The letter requested payment of \$7,041, in the installments specified in the March letter. The total amount was exactly the same as the estimate contained in that letter. . . . The City’s April letter noted that the first check, which Ruyle had given to the City on March 22, had been misplaced. The letter asked that payment on that check be stopped and that a new check be written for that amount. Peace Network members did not write a new check or make any of the requested payments.<sup>30</sup>

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30. Long Beach Area Peace Network v. City of Long Beach, 522 F.3d 1010, 1015–17 (9th Cir. 2008) (fourth alteration in original) (quoting Long Beach Area Peace Network v. City of Long Beach, No. CV 04-851OSJO (SSx), 2004 WL 7334505, at \*1 (C.D. Cal. Nov. 15, 2004).

Here are some features of the facts that seem to have some bearing on how we ought to think about the problems the case poses: First, the city did not manifest obvious hostility to the marchers. Two public officials attended the first march, and the communications from the city's officials to the march organizers seem quite civil and business-like. Second, perhaps indicating how First Amendment doctrine has been internalized by public officials, the city's permit rules specifically addressed the distinctive problems associated with "spontaneous" (or, in my terms, "occasional") demonstrations, substituting a twenty-four-hour notice requirement for the permit requirement applicable to other demonstrations. Third, the notice requirement gave both sides enough time to engage in nontrivial interactions about some of the demonstration's details, and those interactions resulted in a for-the-moment acceptable solution. Fourth, the city estimated "police" and "public works" costs—which appear to be what I have described as "excess costs"—before the event and attempted to collect them after it; the march organizers apparently disputed the estimates, though not, it seems, the proposition that they could be assessed some costs.

### B. *Vodak: The Facts*

The following is a description of the *Vodak v. City of Chicago* facts as recounted by the Court of Appeals for the Seventh Circuit:

On March 20, 2003, the day after the second war between the United States and Iraq began, a large demonstration was held in Chicago by opponents of the U.S. invasion. The demonstration resulted in some 900 arrests . . . .

. . . .

The organizers of the demonstration wanted it to coincide with the start of the war. They knew war was imminent but did not know exactly when it would start. Under the Chicago ordinances governing demonstrations, a permit is required for a "parade," Chi. Munic. Code § 10–8–330(b), [which includes marches such as the one here] . . . .

The Code requires that the application for the permit specify the date and route of the march, and gives the City five days to act on the application "except that where the purpose of [the demonstration] is a spontaneous response to a current event, or where other good and compelling cause is shown, the [City] shall act within two business days." § 10–8–330(f)(4), (7), (j). But when a march is planned for the unknown date of some triggering event, so that even two days' notice is infeasible, the police, as a matter of uncodified practice, will sometimes waive the requirement of a permit. The City's brief acknowledges the existence of a "standard route for un-permitted marches." Apparently these "un-permitted marches" are sufficiently frequent that the police have adopted a practice of "permitting" them to use a specific corridor of city streets. This waiver of the permit requirement is informal; it seems to consist just in *not* telling the demonstrators that they need a permit.

In discussions with the organizers of the contemplated demonstration, the police made no objections even though they were unable to work out an agree-

ment with the organizers on the route that the march phase of the demonstration would take. The demonstrators didn't want to stay in one place; they wanted to march; but it was unclear where they wanted to march. They were being cagey; and the police, we can assume without having to decide, could have forbidden the march unless the organizers would commit to a specific route that would not cause commuting chaos or other undue disruption of the normal life of the city. But they did not insist on such a commitment. It seems to have been agreed that the march would start in the Federal Plaza on Dearborn Street, but where it would go from there was left open.

....

The demonstration began with a rally at Federal Plaza . . . that turned into a march. The marchers turned east . . . on Adams Street and Jackson Boulevard, which intersect Dearborn Street near the Federal Plaza, and marched all the way to Lake Shore Drive, a multilane commuting thoroughfare, where they turned north. The police tried without conspicuous success to confine the marchers to the northbound lanes of Lake Shore Drive in order to minimize blockage of traffic. As the march proceeded, the police learned from the organizers that the intended route of the march was north on Lake Shore Drive for more than two miles to North Avenue, a major east-west artery, where the marchers would turn west, leaving Lake Shore Drive, and disperse.

But when the marchers arrived, well short of North Avenue, at the intersection of Lake Shore Drive with Oak Street, which runs west and after a few blocks intersects Michigan Avenue, most of them—perhaps as many as 8,000—turned left on Oak Street and marched to its intersection with Michigan Avenue. . . . For all we know, they, or many of them anyway, simply decided that it was too long a walk to North Avenue, so rather than going west on North Avenue and dispersing they decided to go west on Oak Street and disperse.

The police, however, who were out in force because of the size of the march, did not want the march to spill over into Michigan Avenue, a major north-south artery; a crowd on or crossing Michigan Avenue would add to the blockage of north-south traffic that the closure of the northbound lanes of Lake Shore Drive, with impedance of southbound traffic as well, was causing. It was still rush hour, and according to the City some marchers were becoming rowdy. It is undisputed that there had been rowdiness on Lake Shore Drive earlier, with some of the marchers rushing into the southbound lanes of Lake Shore Drive (where they weren't supposed to be) and banging on the hoods and windows of cars. Shouts of "Take Michigan!" had been heard, a possible reference to the opulent stores that line Michigan Avenue.

The police, alarmed, formed a line across Oak Street at the Michigan Avenue intersection, blocking the marchers, and told the organizers to direct their flock either to go east on Oak Street to the inner drive and return to Federal Plaza, or to disperse, and warned them that marchers who tried to enter Michigan Avenue would be arrested. The police claim that they shouted this warning through bullhorns.

....

The marchers began reversing course, marching east on Oak Street and then south on the inner drive. Chicago Avenue is an east-west street five blocks to the south of Oak Street, and thus parallel to it and also intersecting Michigan Avenue after a few blocks. More than a thousand marchers, when

they reached the intersection of Chicago Avenue and the inner drive, turned right (west—for remember that they were marching south on the inner drive) and marched down Chicago Avenue to its intersection with Michigan Avenue, where again the police formed a blocking line.

The marchers chose Chicago Avenue rather than one of the other streets that connect the inner drive to Michigan Avenue and points west because the police had set up lines of mounted officers at each intersection with the inner drive between Oak and Chicago, making it impossible to move west on those streets. What happened on Chicago Avenue is disputed. The police say they were directing the marchers to continue south but lacked enough man- and horse-power to block all the intersections. But there is evidence that no police orders were given at the intersection of Chicago Avenue with the inner drive, although two mounted officers were on either side of Chicago Avenue at the intersection—yet their presence, not blocking the avenue, might have made the marchers think it a permitted route west for them. There is also evidence that some of the marchers thought the police were directing them onto Chicago Avenue rather than to continue south on the inner drive. In any event more than a thousand people ended up streaming west on Chicago.

Rather than telling them to turn back and return to Federal Plaza via the inner drive, the police formed a second blocking line (the first being at the intersection of Chicago Avenue with Michigan Avenue), behind the marchers, at the intersection of Chicago Avenue with a north-south street called Mies Van Der Rohe Way. Marchers proceeding down Chicago Avenue to its intersection with Michigan Avenue thus became penned . . . because there is no north-south street between Mies Van Der Rohe Way and Michigan Avenue, and they could not escape north on Mies Van Der Rohe Way itself because the police line behind the marchers was west of the intersection between that street and Chicago Avenue.

The police then began culling the trapped herd, arresting marchers along with people who weren't part of the march but were just trying to get home and to do so needed to cross Michigan Avenue. The police seem to have considered the marchers' presence on Chicago Avenue illegal because they'd been ordered when they had been on Oak Street to return to Federal Plaza via the inner drive, or disperse, yet instead they were trying to reach (and perhaps "take") Michigan Avenue by a parallel route to Oak.<sup>31</sup>

Again, here are some relevant features of the facts: first, the city's ordinances and uncodified practices accommodate the demonstrators' interests in connection with occasional demonstrations. In particular, notice requirements, such as they were, were applied in ways that allowed interactions between the demonstration's organizers and police officials. Second, although this particular march ended badly—mostly because of bad communications caused perhaps by the fact that the relevant practices were not codified and that the "standard" route of march was not well designed to deal with the dispersal of marchers at

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31. *Vodak v. City of Chicago*, 639 F.3d 738, 740–44 (7th Cir. 2011) (second and third alterations in original).

the demonstration's conclusion—most of what city officials did—even the arrests—seems to have been done in good faith.

### C. *The Holdings*

The court in *Long Beach* upheld the “relatively precise” specification of the costs that demonstrators could be assessed, as well as an insurance-bond requirement, for the same reasons of limited discretion.<sup>32</sup> It held unconstitutional a regulation that triggered special requirements for large assemblies, defined as having more than seventy-five participants, that might “require the provision of city public services.”<sup>33</sup> The services the city enumerated dealt with “street blockages,” “erecting barriers,” “construction,” “traffic,” “crowd control,” and “litter abatement.”<sup>34</sup> Litter abatement was not a strong enough interest; traffic control and the like might be a permissible basis for regulating, but the terms were too imprecise.<sup>35</sup>

Most important for present purposes, the court invalidated a twenty-four-hour notice requirement for what the city called “spontaneous” events.<sup>36</sup> Such a requirement might be permissible in some circumstances, but it was not narrowly tailored. “The regulation requires . . . notice irrespective of whether there is any possibility that the event will interfere with traffic flow[,]” and “alternative means of expression are limited for people who cannot comply, or who could comply [with the requirement] only with difficulty.”<sup>37</sup> Further, when a demonstration was occasioned by an event “coming into public knowledge within five (5) days” of the demonstration, apparently organizers would have to apply for a permit even if their activity posed no threat to traffic or other public interest.<sup>38</sup> Finally, the court held unconstitutional the city council’s “unbridled discretion” to waive the fees for excess costs.<sup>39</sup>

Judge Richard Posner, in *Vodak v. City of Chicago*, wrote that,

The underlying problem is the basic idiocy of a permit system that does not allow a permit for a march to be granted if the date of the march can't be fixed in advance, but does allow the police to waive the permit requirement just by not prohibiting the demonstration.<sup>40</sup>

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32. *Long Beach*, 522 F.3d at 1027, 1030.

33. *Id.* at 1032.

34. *Id.*

35. *Id.* at 1034.

36. Other events were subject to notice periods of three to ten days. *Id.* at 1025.

37. *Id.* at 1036–37.

38. *Id.* at 1016 (quoting LONG BEACH MUN. CODE § 5.60.030(A)(5) (2014)).

39. *Id.* at 1035, 1040.

40. *Vodak v. City of Chicago*, 639 F.3d 738, 746 (7th Cir. 2011) (first citing Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543, 548–52 (2009); then citing Vince Blasi, *Prior Restraints on Demonstrations*, 68 MICH. L. REV. 1481, 1524–27, 1526 n.170 (1970)).

He observed as well that the city could have required a permit “provided it does not use the requirement to stifle demonstrations by imposing unreasonable conditions, such as having to apply for a permit 45 days in advance.”<sup>41</sup> The city could have required the organizers to provide “a clear idea of the intended march route” so that the city could “prepare in advance reasonable measures” for ensuring that the march as conducted conformed to the march as planned.<sup>42</sup>

As I have suggested, these holdings are less illuminating of the law in action than are the facts of the cases. The holdings deal with matters mostly at the periphery of the problems posed by occasional demonstrations, while the facts—and the things that the cities and the demonstrators took more or less for granted—illustrate mostly sensible solutions to those problems.

### III. VARIANT THREE: THE TRULY SPONTANEOUS DEMONSTRATION

Something occurs that outrages a community or political group: an important figure in the community is assassinated (the Martin Luther King Jr. case), someone is killed in circumstances that suggest to the community failures of public policy (many Black Lives Matter cases), or a policy is unexpectedly implemented (the *Travel Ban Case*). Social media messages fly back and forth, and the messages discuss doing something within the next few hours.<sup>43</sup> Perhaps someone calls for a community meeting in a local church or community center; perhaps someone calls for a demonstration in a public park. What regulations of these completely spontaneous demonstrations are consistent with the First Amendment?

Several features of such demonstrations stand out. First, identifying the events’ “organizers” is likely to be substantially more difficult—or at least more ambiguous—than in the paradigm case or in Variants One and Two. We might be able to identify the person who first suggested that the demonstration be held, but that person might not be the real impetus behind what actually took place. Indeed, when messages go viral, there might not be *any* individual distinctively responsible for the event.

Second, it is impossible in practice to have a formal notice requirement for truly spontaneous demonstrations. Somebody might let city officials know what is happening on social media, but—precisely because no individual really organizes the event—we cannot pin responsibility for providing notice (even “notice as soon as reasonably possible”) on anyone. I think that the sensible conclusion here, perhaps required by the First Amendment, is that participants

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41. *Id.* at 749 (first citing *Church of Am. Knights of Ku Klux Klan v. City of Gary*, 334 F.3d 676, 682–83 (7th Cir. 2004); then citing *Douglas v. Brownell*, 88 F.3d 1511, 1523–24 (8th Cir. 1996); then citing *NAACP v. City of Richmond*, 743 F.2d 1346, 1355–57 (9th Cir. 1984); then citing *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 162–63 (1969) (Harlan, J., concurring)).

42. *Id.* at 750.

43. In the past, the messages would have been conveyed over a telephone network or tree.



in the demonstration cannot be punished for demonstrating without a permit nor can “organizers,” if they can be identified.

Third, the risks of things getting out of hand might well be greater for spontaneous demonstration than for planned ones—not because spontaneous demonstrations are necessarily likely to be more disruptive than planned ones but rather because traffic officers and police officials cannot know or even hazard good guesses about what sorts of disruptions will occur. Marchers *might* stop at red lights to let cars go by, but they might not.<sup>44</sup> Demonstrators *might* disperse peacefully after a rally concludes, but they might not. Pop psychology suggests that people engaging “in the moment” with an event that provokes emotions strong enough to lead to a spontaneous demonstration might be more prone to violence than participants in a march planned two weeks in advance.<sup>45</sup>

In principle, the First Amendment should not stand in the way of enforcing ordinary traffic, trespass, or other similar laws (where violence occurs) against those who violate those laws “while” they are participating in a demonstration or march.<sup>46</sup> Prudent officials will quite often find it sensible to forgo insisting on the strict letter of the law, though. In the circumstances of a spontaneous demonstration, it will often be foolish to cite marchers for failing to observe red lights along their route of march. If police or prosecutors can identify—either on the spot or after the event (by viewing surveillance camera footage, for example)—people who engage in violence, the First Amendment should be no barrier to arrest and prosecution. Interventions against assault and trespass as they occur seem to me likely to get out of hand, and police officials would do well to train officers to take particular care if they decide to intervene.<sup>47</sup>

Liability for excess policing and cleanup costs plays a significant role in the paradigm case and Variant Two. Again, in principle, it might play a role in Variant Three, as well. Perhaps cities could require that the organizers of truly spontaneous events pay these costs. Sometimes there will be readily identifiable organizers, but often there will not—or the designation of “organizer” will be

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44. In *Robinson v. Coopwood*, demonstrators who had not complied with a twenty-four-hour notice requirement apparently did stop at traffic lights:

Being aware of the terms of the ordinance, the leaders of the march crossed streets at green traffic lights only, although some followers may have failed to heed the traffic signals. For the most part, the marchers proceeded across streets in the marked pedestrian lanes. Also, they kept, for the most part, as nearly as possible, to the right-hand side of the streets, and attempted to avoid obstructing traffic.

292 F. Supp. 926, 930 (N.D. Miss. 1968).

45. Tabatha Abu El-Haj, *Defining Peaceably: Policing the Line Between Constitutionally Protected Protest and Unlawful Assembly*, 80 MO. L. REV. 961, 984 (2015) (“The tendency to disorder is greatest when crowds take to the streets spontaneously in response to current events . . . .”); Christopher W. Bloomer, *Rethinking Assembly Ordinances: Three Considerations Cities Should Make to Avoid Another Ferguson or Baltimore-Type Riot*, 44 OHIO N.U. L. REV. 1, 9–11 (2018) (discussing how quickly formed assemblies typically “skimp on cognitive reflection, and, as a result, end up with poor decision-making processes” that often result in violent behavior).

46. I use the quotation marks in the text because violating traffic laws or committing an assault need not be understood as part of the First Amendment activity itself.

47. Again, arrests on the spot might be quite imprudent.

quite contestable. We might expect organizers of occasional demonstrations to ask participants to donate money to pay for the costs that will later be assessed. That seems to me unlikely to occur in connection with truly spontaneous demonstrations. Participants in “flash mobs” are unlikely to have the kind of ongoing solidarity that participants in a Variant Two demonstration do. And on a more mundane level, simply distributing containers to collect funds from participants is likely to be logistically difficult.

The bottom line, then, seems to be this: first, the First Amendment bars cities from imposing any notice requirement for a truly spontaneous demonstration, meaning that participants cannot be punished for participating in an unlawful assembly. Second, participants who commit ordinary traffic offenses, assaults, or trespasses can be punished for doing so, though often it will be unwise for city officials to attempt to do so. Third, assessing costs, while perhaps constitutionally permissible, will be almost impossible in practice.

Fourth, and probably most important, the absence of reported recent cases dealing with attempts to regulate truly spontaneous demonstrations suggests that public officials have figured out that such demonstrations—and perhaps all demonstrations—do not present the cities with problems serious enough to devote much effort to.<sup>48</sup> Better to let the demonstrations occur and run their course and then get on with the city’s work—so public officials appear to have thought.

#### CONCLUSION

First Amendment law and the way public officials appear to have internalized it has produced practices in connection with spontaneous demonstrations that give wide scope to political and social protest. Both components are important. I have no doubt that the stated doctrine could be manipulated by hostile public officials to license them to suppress spontaneous demonstrations more often than they do. Further, it might well be true that the degree of internalization varies systematically—roughly, more internalization in large to medium-sized cities compared to smaller towns and suburbs, and more internalization in connection with occasional demonstrations compared to truly spontaneous ones.

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48. As I understand it, there have been post-event arrests for violence and the like and some arrests for unlawful assembly, primarily of those caught in acts of violence where prosecutors are concerned that establishing the defendants’ violent activities beyond a reasonable doubt might be difficult. *See, e.g.*, Keith L. Alexander, *Prosecutors No Longer Pursuing 188 Inauguration Protest Cases*, WASH. POST (Mar. 24, 2019), [https://www.washingtonpost.com/local/public-safety/prosecutors-no-longer-pursuing-188-inauguration-protest-cases/2019/03/24/cf990576-4ca7-11e9-93d0-64dbcf38ba41\\_story.html](https://www.washingtonpost.com/local/public-safety/prosecutors-no-longer-pursuing-188-inauguration-protest-cases/2019/03/24/cf990576-4ca7-11e9-93d0-64dbcf38ba41_story.html) (describing prosecutors dropping cases against 188 protestors at President Trump’s inauguration because they were unable to prove the defendants engaged in vandalism).

Vince Blasi, who wrote one of the most important articles giving flesh to First Amendment principles about permit requirements,<sup>49</sup> has urged that First Amendment doctrine be shaped by what he calls the “pathological perspective.”<sup>50</sup> Taking that perspective, we would figure out how regulation of speech could lead to significant restrictions on the distribution of ideas and then craft doctrine that would effectively constrain public officials who were trying their best to suppress speech.

The practices associated with spontaneous demonstrations might help us think about the merits and costs of taking the pathological perspective. Doctrine as widely but not universally internalized seems to have produced results that work reasonably well in the nation’s large population centers but perhaps not so well in smaller ones.<sup>51</sup> “Improving” the doctrine to deal with what Seth Kreimer calls “village tyrants” might increase the social costs of traffic disruptions and the like in our cities.<sup>52</sup>

Our thinking about these problems might be sharpened by suggesting some drafting possibilities for each of the Variants. Variant One, the symbolically important date, is probably the easiest to deal with. Cities should begin by setting out a list of symbolically important dates based on the city’s experience. Applications for permits on such dates should be granted either on a first-come-first-served policy or by random selection from applications received within some specified window that closes well before the date (say, thirty days). The window-closing date might well be quite a bit earlier than that used for “ordinary” applications; that is, cities might require applications for “ordinary” demonstrations to be submitted only a week before the event, while the window-closing date might be earlier. The reason for the difference combines the fact that demonstrators should know well in advance that they want to demonstrate on the symbolically important date with the fact that competing applications for demonstrations on that date are more likely than with ordinary demonstrations. Other provisions, though, might simply mirror those used for “ordinary” demonstrations: crowd-size estimates, route specifications, bond or insurance requirements, and the like.<sup>53</sup>

Precise details for Variants Two and Three will vary, most notably depending on the jurisdiction’s size and its “ordinary” budget for policing and other

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49. Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449 (1985).

50. *Id.* at 449.

51. For a valuable contribution to thinking about the extent to which First Amendment doctrine should be responsive to concerns about localized bad actors, see Seth F. Kreimer, *Good Enough for Government Work: Two Cheers for Content Neutrality*, 16 U. PA. J. CONST. L. 1261 (2014).

52. *Id.* at 1304–05.

53. I have not dealt in detail with bond and insurance requirements, which raise questions about the extent to which the First Amendment constrains the imposition of financial requirements on groups that might lack the resources to satisfy such requirements. My personal view, not defended here, is that the First Amendment allows the imposition of the full excess costs of policing and cleanup on groups that can afford to pay such costs and also requires adjustment of those costs downward, sometimes to zero, in light of a demonstrating group’s ability to pay.

public services associated with demonstrations. For the occasional demonstration, cities might require permit applications be submitted as soon as reasonably possible and perhaps no later than twenty-four hours before the event. Cities can ask the organizers to estimate the crowd size they anticipate and the route they would like to follow.<sup>54</sup> Such regulations would give cities a reasonable opportunity to determine how they should redeploy public services, including the police, to deal with the demonstration.<sup>55</sup>

No similar system seems available for the truly spontaneous demonstration. There, the regulations probably should request—not require—notification as soon as is reasonably possible and should expressly acknowledge that those who participate peacefully in a truly spontaneous demonstration cannot be found guilty of unlawful assembly.<sup>56</sup>

These drafting guidelines respond to the distinctive First Amendment characteristics of the demonstrations discussed in this Essay. In Blasi's term, implementing them might significantly reduce the risk that city officials will have a pathological response to occasional and spontaneous demonstrations.

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54. The regulations probably should state specifically that the city need not automatically accept the proposed route and that if it does not, the city will engage in good-faith negotiations to identify a route that provides the demonstrators with reasonable alternative access to the audience it hopes to reach.

55. As a substitute for bond and insurance requirements used in connection with ordinary demonstrations, the regulations might also require that the city notify the applicant of the estimated costs of policing and the like, cross-referencing the payment obligations imposed with respect to ordinary demonstrations, including adjustments based on ability to pay.

56. Whether a demonstration is truly spontaneous is a matter of fact and probably can be accurately assessed only after the event. That implies that, formally speaking, whether a demonstration was truly spontaneous should be a defense to a charge of unlawful assembly. In my view, cities should be quite cautious in attempting to invoke the law prohibiting unlawful assemblies against events that participants might plausibly understand to be demonstrations (where plausibility is a weaker standard than reasonableness). The reason for such caution is that intervening creates a risk that events that otherwise might end peacefully will spiral out of control into violence.