

## II. HISTORY OF MOVE

The police who sought to serve search and arrest warrants at 6221 Osage Avenue, Philadelphia, early on May 13, 1985, faced a remarkable urban scene: A fortified city rowhouse with three rooftop structures, two of which were bunkers. The extensive nature of the fortifications, however, did not become readily apparent until later in the day as the assault on the house progressed.

As of May, 1985, nearly two decades had passed since MOVE's founding. During that time, the group had evolved from a small, non-violent, back-to-nature organization, to an extremist group, well-practiced in the art of urban terrorism. Founded by Vincent Leaphart, who was later known as John Africa, MOVE first appeared in Philadelphia in the mid to late 1960's. Initially, this peaceful group demonstrated for various causes and was philosophically opposed to modern technology. Some witnesses told us that the name "MOVE" was meaningless. One witness, however, said that they began with the concept "movement on vocational education" and adopted their name because they "favored movement, rather than stagnation."

By the early 1970's, MOVE was regularly demonstrating to express their beliefs in the natural law. They sought, for example, to have zoo animals returned to their natural habitat. During their protests, they began to use extreme profanity and to engage in unruly and other behavior which caused them to be arrested.

Their subsequent court appearances were punctuated by both disruptions and contempt citations. These, in turn, resulted in jailings. While members were jailed, the group's membership grew. (Although MOVE members themselves distinguish among members, supporters and sympathizers, this report will use the term "member" to include all those adults closely associated with MOVE.)

MOVE remained a non-violent -- but highly vocal -- radical group until the spring of 1977, when members appeared at their West Philadelphia house wearing fatigues and brandishing weapons. Arrest warrants were subsequently authorized for some members, but not served. A protracted period of negotiations between the City Administration of Mayor Frank L. Rizzo and MOVE followed concerning the service of the warrants, as well as the abatement of the numerous health and other code violations associated with MOVE's back-to-nature life style. By 1978, the MOVE residence was not only a health hazard but also a fortified compound.

Ultimately, on August 8, 1978, after all negotiations failed, the City sought to evict MOVE from their Powelton Village home based on a Common Pleas Court eviction order. This action was preceded by a lengthy and futile attempt to restrict access to the house and to "starve out" the residents in order to avoid violence with the heavily fortified and armed MOVE members. The plan to accomplish the eviction was prepared three months prior to its implementation, and rehearsed and finalized for another six to eight weeks. The intent of the planners was to evict the house's residents without injury, using the least possible force.

The City's plan unfortunately failed. MOVE refused to surrender and retreated to the house's fortified basement by the time the police entered. A gunfight followed. No MOVE lives were lost. However, five police officers and several firemen were wounded -- two severely -- and Police Officer James Ramp was killed before smoke and water forced MOVE's surrender. Subsequently, nine adult MOVE members were convicted of Officer Ramp's murder.

For four or so years after the 1978 eviction and shootout, MOVE was substantially less visible. In the early 1980's, police learned that group members were residing in three West Philadelphia houses, including 6221 Osage Avenue, the home of Louise James, mother of MOVE member Frank James Africa. Various MOVE children and one adult arrived there in 1982. This was one of the two MOVE residences in which outside loudspeakers were installed.

Beginning in 1982, complaints were made about the behavior of the 6221 Osage Avenue occupants who were far more aggressive than the residents of other MOVE houses. Police conducted surveillances over the next 2-1/2 or so years but were ordered by the City Administration to avoid confrontations with MOVE members despite the complaints of many citizens about their activities.

MOVE members did not restrict their disruptive activities to harassment of their Osage Avenue neighbors. Between November of 1982 and January of 1983, they sent threatening letters to ten Philadelphia judges and somewhat less threatening letters to various state and national officials. No charges were brought as a

result of these letters. The judge who had presided at the earlier murder trial of MOVE members, however, was placed under guard because of the violent nature of the threats made.

In the months following, MOVE's behavior became increasingly violent and anti-social. In April of 1983, for example, a former MOVE member was attacked and injured merely because he was earning a living and engaging in a somewhat normal lifestyle.

Life for the neighbors also became increasingly unbearable. MOVE members' poor hygiene and their many animals, who fed off raw meat and garbage left outside by the group, caused insects and rodents to invade the neighborhood. In September of 1983, a neighbor, who sought to rid his house of these vermin by using an exterminator, was assaulted by MOVE members who objected to the killing of insects. No action was taken against the attackers. That same month, the MOVE members erected fences which blocked the rear alley serving all of the houses on the block. If neighbors wished access to their garages from that end of the block, they were required to walk around to the front of 6221, ring the bell under a posted sign, and wait to see if MOVE would allow them to use the alley to reach their homes.

Attempts by neighbors to obtain help to stop these various indignities went unheeded by City agencies. Politicians who were approached counselled restraint until after the mayoral election, assuring residents that the new mayor (W. Wilson Goode) would help them.

Life, however, became worse on Osage Avenue after Goode's election. Beginning on Christmas eve of 1983, the outside loudspeaker was used extensively to spew profanities, threats and harangues. We heard testimony that such harangues -- which could be heard as far away as Upper Darby -- would sometimes begin at noon and last until 2:00 a.m. We also learned that MOVE members would often run across the neighbors' roofs, sometimes knocking down their TV antennas. MOVE members also paraded on these roofs with guns, and slept on their own roof.

In 1984 the house at 6221 Osage Avenue was substantially modified. The windows were barricaded with slats; in March a hatch appeared in the roof. By May, numerous free-standing building materials were on the roof. The harangues and threats also continued. On May 20, 1984, MOVE members stated that they would kill the Mayor and his bodyguards, and "blow up" other politicians, including those in the White House. On May 22, 1984, they threatened to kill any "cop" who came to the house.

After meeting with the residents to discuss their concerns, in late May of 1984 Goode met with, among other people, Edward Dennis, the United States Attorney for the Eastern District of Pennsylvania, in the hope of enlisting federal help. Dennis said, however, that simple loudspeaker threats did not warrant his intervention. He did acknowledge an outstanding federal warrant for John Africa, but refused to act on it without concrete evidence that Africa was in the house.

The situation on Osage Avenue thus continued to deteriorate, with the City Administration taking no action other than the sporadic monitoring of MOVE. In June, considerable dirt was removed from the house, causing speculation that MOVE was digging tunnels. That same month, a MOVE member threatened to kill a police officer at a court hearing in an unrelated matter. MOVE began hanging raw meat on the house fences for a variety of animals to eat, and continued to build up rooftop materials. At a July, 1984 meeting with neighborhood residents, Goode reiterated a May statement that there was no legal basis for the City to act with respect to the problems they faced. The only positive results of the July meeting were the City's commitment to fix a blocked street drain and to provide mental health treatment for children affected by the neighborhood's atmosphere.

Goode's July 1984 disavowal of any legal basis to act was in conflict with his knowledge of the facts. In June, the entire legal situation with respect to Osage Avenue was reviewed by the District Attorney's Office at the Mayor's request. The memorandum which was prepared in response to the Mayor's request stated, without qualification, that probable cause existed to obtain a search warrant for explosives and weapons in the house and arrest warrants for some of its residents. It further noted the existence of open bench warrants for various occupants. That memo was forwarded to the Mayor on June 22, 1984 by then District Attorney Edward G. Rendell. In his cover letter, the District Attorney stated "it is imperative to do something as quickly as

possible, before the situation grows even worse and before MOVE members receive a higher profile from increased media attention.

Given the material which he received from Rendell, we are troubled by Goode's public statements in July of 1984 to the residents, on May 14, 1985 in a television address to the City, and in later sworn testimony before the MOVE Commission, that until May of 1985 there was no legal basis to proceed against MOVE. In his testimony before us, the Mayor, for the first time, explained what he meant by his pronouncement that no legal basis existed:

Q. Now, moving ahead in time to after May 13, 1985, you on numerous occasions spoke to the citizens of Philadelphia and informed them that there was no legal basis to proceed against MOVE in 1984; is that correct?

A. That is correct.

Q. Would you explain, since the ordinary lay person would interpret that to mean that there were not any facts to support any type of arrests in this case, would you explain what you meant by that statement?

A. What I meant by that statement was that we did not have warrants signed by a Judge that we could go into the house and, in fact, make arrests as I understood the facts to be at that time.

Q. And there was a decision made by yourself and other members of the government that that step of going to a Judge and seeking arrest warrants based on facts which make out crimes should not be done; is that correct?

A. I would point out that the answer to your question is yes....

The Mayor's decision not to seek viable criminal warrants, and to misleadingly state in July that no legal basis existed for thus proceeding despite his knowledge to the contrary, was

apparently the product of his desire to wait out the August 8, 1984 anniversary of the Powelton Village eviction and murder. The rationale of that decision, however, was never satisfactorily explained to us.

Information in the City's possession with respect to the possibility of an August 8, 1984 confrontation was obtained from Louise James. Ms. James approached authorities in February 1984, after she was attacked by her son Frank at the direction of John Africa, her brother. Although uncertain whether her information was credible, the police were instructed to prepare a responsive plan in the event that her information was correct. This 1984 plan was developed under the supervision of Sergeant Herb Kirk, a firearms supervisor at the Police Academy. Kirk met with various City departments, including the Fire, Water and Health Departments, and solicited the help of Lieutenant Frank Powell, Officer William Klein and other Bomb Disposal Unit members. The plan's overall goal was to remove 6221's occupants on August 8, 1984, with little or no injury to anyone in the event that MOVE initiated a confrontation.

The situation in July and August of 1984 was substantially different than it would be in May of 1985. In 1984, the MOVE compound's rooftop trap door was surrounded only by a three- to four-foot high square pile of unsecured wooden pallets. According to the 1984 plan, the police would first clear the rooftop area and expose the trap door by using "squirts" (Fire Department hoses mounted on trucks). Next, an assault team, including Kirk,



Powell and Klein, would scale the roof and place an entry device (explosive charge) on the roof just over the party wall. The device's purpose was to blow a small hole, about eight inches in diameter. They would use a water charge to accomplish this: a Tupperware container of water, wrapped in "det" (detonation) cord which, when exploded, would propel the water through the roof, thus making a small hole with minimal risks.

In order to be sure that device would accomplish precisely what was intended -- no less and no more -- there was extensive testing at the Fire Academy. Kirk told us that, after obtaining information about the roof's construction,

... we experimented with various amounts of explosives and water to see how long it would take to get through this roof top. After four or five days of experimentation, we developed a charge which when detonated would blow right through the roof top and through the second floor ceiling and make an entry hole about eight to ten inches in diameter... Once we had developed the charge so that it would open the hole up in this roof top everytime, we placed Officer Kline [sic] in a bomb protective suit and we placed this charge about 15 feet from him and detonated it. We wanted to see what the blast effect was ... Officer Kline [sic] volunteered to get into the suit and take this shock. When we were experimenting with the roof top, we had placed underneath the roof top cardboard dummies to see what effect the downward force of the water explosive would do to this cardboard dummy, whether it would tear it apart or cut it or anything ... the only damage to these cardboard dummies was that they would get a little dust debris....

After breaching the roof, the Kirk plan called for the insertion of a high volume of tear gas which would drive out the occupants even if they had tear gas masks. After the evacuation,

officers wearing breathing apparatus would enter to search for any injured people. Also included in the plan was a helicopter, primarily for aerial observation to be certain that no MOVE members were on other roofs. Finally, it was intended that the MOVE children would be taken into protective custody prior to any confrontation. No steps (such as obtaining the necessary court orders) were taken, however, to accomplish this latter goal in advance of the anticipated August 8, 1984 confrontation.

If the original plan was not successful, there was also an alternative plan developed to breach 6221 Osage Avenue using shape charges on an adjoining east or west wall and there to insert tear gas. The entire plan, including this alternative approach, was reduced to writing -- one copy only. According to it, each officer participant had an assigned weapon; weapon "freelancing" was not permitted.

On August 8, 1984, the City administration was prepared if MOVE created a confrontation with neighbors and police. Hundreds of police, in fact, were in position near the house, although not visible to MOVE. The day passed quietly, however. Relieved, the City did not, either immediately or subsequently, consider proceeding with the legal options previously outlined by the District Attorney.

As a result of the City's inaction, the situation on Osage Avenue worsened. MOVE's fortifications were dramatically increased in the months following. With the cold weather's arrival, however, many of MOVE's offensive activities stopped. Although the back

alley-driveway remained blocked, the loudspeaker threats abated and the odors and health hazards were less offensive. Complaints were made by the neighbors about lumber piled in front of their houses, however, and substantial construction activity by MOVE was apparent. More dirt was taken out of the house, large trees were taken in, and three separate rooftop structures were built - two of them bunkers. The lack of official action in response to this activity was apparently based on a hope or belief that the entire matter would somehow run its course and fade away. Mayor Goode himself told us that, between August of 1984 and May of 1985, he felt that the City could wait and perhaps mediate the problem. He attempted to explain the failure of the City to respond:

Q. What did you really think was going to happen between 1984 and 1985, except thinking that things were going to get worse?

A. First of all, there were a lot of reports at that time that they were talking about moving their location out of the City ... there was information coming from Gerald Ford Africa that, in fact, they may decide to go to Richmond. We had numerous reports in that time frame as to what they likely would do. And, therefore, I didn't have any strong reason to believe that this would necessarily end at some point in the future in a violent confrontation....

Q. So your hope was that they may leave, and when they did not, and the situation got worse, there was a realization that the City had to respond if there was a legal basis to do so?

A. That is correct, sir.

The City's refusal to act after August, 1984, was, at best, extraordinarily unfortunate. As spring approached, MOVE became more volatile and disruptive than ever before. Neighbors were attacked and harangued over the loudspeaker at all hours. What was a bad situation by the end of February was far worse by the end of April as virtually every form of MOVE's anti-social behavior continued unabated. MOVE's ability both to terrorize and to intimidate was further enhanced by the three ominous structures on their roof giving them clear tactical superiority over what had once been a quiet, middle-class neighborhood.

That the situation on Osage Avenue had reached such a point by April of 1985 was, without doubt, the product of the nonconfrontation policy which had been followed by the City to that date, despite the clear legal basis for proceeding criminally outlined earlier. The policy, which extended to all operating departments, was to avoid any confrontations with MOVE members at or near their residence, absent prior approval. Goode told us that he approved the policy of not sending civilian inspectors and similar individuals to the house because of the possibility of injury to them and out of a desire to protect them. He said that he understood the policy to mean that

inspectors from the Department of L & I, or from the Gas Works or from the Electric Company, non-law enforcement persons, would not go to the door without some type of clearance from the Police Commissioner or the Managing Director to do so. It need not be approved by me, but it needed to be some type of understanding they would not just walk to the door.

Former Managing Director Leo Brooks, former Police Commissioner Sambor and other officials, however, all testified that they understood the nonconfrontation policy to extend to the police. Brooks added that it was the Mayor who had the final word on the policy.

The plain effect of the nonconfrontation policy was to place the residents of 6221 Osage Avenue above the law. That policy continued although assaults and other very substantial problems were related to the Mayor at a March 9, 1984 meeting. As a consequence, MOVE was not sanctioned either for their refusal to pay utility bills, or for their violations of the Health and City Codes, or for their violations of the Criminal Code. For example although their use of the loudspeaker constituted a clear basis for disorderly conduct charges, none was brought. Neither were there attempts to force the removal of the loudspeaker. Although physical assaults were witnessed, no assault charges were brought. On one occasion, police saw Frank James Africa attack Alfonzo Leaphart with an ax outside of 6221 Osage Avenue. Frank James, the weapon wielder, returned to the house and was not arrested. Leaphart, however, a non-MOVE member who had come into the area to confront his brother, John Africa, was taken into custody to "keep the peace." Although not eventually charged, the police extracted from Leaphart a promise not to return to the house. Similarly, the State Parole Board was discouraged from serving Frank James Africa and Larry Howard with outstanding fugitive warrants at the house.

We have considered, as we are bound to do, whether the Mayor's failure to act, especially once a basis to act was spelled out in June of 1984, merits the lodging of any criminal charges against him. We have concluded that it does not. In reaching that result, we are aware that omission may be the basis for criminal liability if a duty to perform the omitted act is imposed by law (18 Pa.C.S.A. §301(b)(2)). We have also been instructed that the Home Rule Charter imposes upon the Mayor responsibility for law enforcement (Article IV, Chapter I, §4-100).

Bearing these points in mind, the failure to act between June or August of 1984 and May of 1985, and the possibly imprudent actions of the City from the end of April, 1985 to May 12, 1985 (which are more fully discussed later), initially appear to support charges of reckless endangerment, set forth at 18 Pa.C.S.A. §2705, which provides:

Recklessly Endangering Another Person.

A person commits a misdemeanor of the second degree if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.

In order to convict someone of this crime, however, it must be proved beyond a reasonable doubt that the individual acted "recklessly," as that term is statutorily defined. (Compare the MOVE Commission's more informal use of this and other terms.) This requires proof that the individual acted with a conscious disregard of a substantial and unjustifiable risk. Specifically, under 18 Pa.C.S.A. §302(b)(3) of the Crimes Code:

A person acts recklessly with respect to a material element of an offense when

he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

(emphasis added).

Unlike the MOVE Commission, we will use terms such as "reckless" and "negligent" not as they are used in common speech, but only as they are set forth in the Crimes Code. Following that approach and analysis, we have concluded that the available evidence does not support a conclusion that Goode's actions were "reckless" as that term is statutorily defined.

We have already noted the Mayor's testimony that he did not act between August 1984 and May 1985 because there was "talk" that MOVE would relocate from Philadelphia, obviating the need for any City action at all. Although MOVE's continued fortification of its house in the winter of 1984-1985 makes this reliance on such talk questionable, the initial inaction nonetheless could be considered defensible (i.e., not reckless) because the extreme likelihood that any confrontation would be violent (as evidenced by the 1978 incident) made its complete avoidance at least an objective worthy of consideration. Moreover, as is more fully discussed subsequently, when Goode finally decided to take action he did instruct then Police Commissioner Sambor to prepare a plan that would safeguard the lives of all involved, and he also instructed the Human Services Commissioner, Irene Pernsley, to

take the necessary steps to remove the children. These actions were not undertaken, however, despite the Mayor's orders.

As is more fully discussed subsequently, Goode did not wait to execute the plan when he learned that the children had not been picked up. He explained that this was because he "was given and approved a plan that indicated ... that [the police] could safely remove the persons ... without causing harm to them." And, indeed, the plan as originally formulated utilized only non-lethal tactics (principally water and tear gas), and even the hatch charges that were intended to be used had been tested and found to be safe. For all of these reasons, we conclude that neither Goode's initial inaction, nor his approval of the plan as formulated, were reckless, and, thus, that he could not, for these reasons, be prosecuted for reckless endangerment.

We have also considered whether the Mayor's decision to proceed with the plan on May 13, 1985 was reckless because, even though the police would only fire at "sure targets," (1) suppressive fire might be necessary, and (2) there was no guarantee that the children would be in the basement and protected from all police gunfire. The available evidence, however, does not support a conclusion that Goode was aware of these factors or that he consciously disregarded them. Hence, we have concluded that no charges are warranted under these theories.

Finally, we have considered the Mayor's failure to act well before May 13, 1985. There is no doubt in our mind, whatsoever, that the Mayor's refusal to act sooner was, at a minimum, extremely



unfortunate. Further, the situation which resulted from that inaction is highly ironic in that the evidence before us demonstrates that the charges brought in 1985 were virtually the same charges which could have been brought in 1984 before 6221's extensive fortification. This was acknowledged by Goode himself in his testimony before us:

Q. The same condition which existed in 1984 again existed in 1985 with the exception of one more individual with charges that could be made against him; is that correct?

A. I would concur that essentially the same charges that were put forth in 1985 were there in 1984, could have been done in 1984.

Given this, we have sought to determine what caused the City to act in May 1985 in the face of its prior extensive and deliberate refusals to do so. A number of facts appear to us to have solidified or, perhaps, compelled the Mayor's resolve. The Mayor admitted that Councilman Lucien Blackwell came to him and expressed his concern about the situation. The neighbors became far more vocal, forceful and visible than previously. In April and May they met various politicians, sought out the media, and held a press conference. As MOVE's work on its fortifications continued, the media editorialized in favor of City action on behalf of the neighbors who deserved peace and protection. These neighbors also approached the governor for help, and it was perceived by some Philadelphians as "not looking good" for Philadelphia politicians that state help had been sought. Finally, and perhaps most importantly, the neighbors threatened to take matters into their own hands.

Such actions by the neighbors were precisely MOVE's goals. During a May 1984 negotiation session with Benjamin Swans, Jr., of the Crisis Intervention Network, MOVE members said that they believed "that through the alienation of the residents, that it would bring the city to the point of confrontation or compromise as it related to the release of the persons arrested ... in the 1978 shootout."

MOVE's strategy unfortunately succeeded. In the face of all of these occurrences and pressures, in May, 1985 the City finally responded, using the same legal remedies that had been available in 1984. By that time, however, three rooftop structures including a huge bunker had been constructed, making a tactical plan almost impossible and, most importantly, extremely dangerous for the officers who would attempt to carry it out.