PUBLIC ORDER AND THE RIGHT OF ASSEMBLY IN ENGLAND AND THE UNITED STATES: A COMPARATIVE STUDY

Without the right of assembly, guaranties of free speech are empty gestures; for if no public forum is available, the right to speak freely is of little value. Nevertheless the right of assembly is subjected to varied restrictions both in England and America. Some have evolved from judicial interpretation of "the" common law; others are crystallized in statutes. These restrictions have generally been made in the name of public order. They seek to avoid disturbance by punishing conduct which, it is thought, if allowed to continue, might endanger the public peace.

The purpose is worthy. Its execution is fraught with danger to civil liberty. Since there can be no objective standard for determining whether any particular conduct, if unchecked, will cause a breach of the peace, the initial judgment will be made by a policeman. Even if the charges he prefers are dismissed, the decision will have come too late; speech will have been prevented.

Because such restrictions in the name of public order provide the law-enforcement agencies with broad discretion, they offer convenient legal weapons for curbing the activities of unpopular minorities — minorities whose
politics, in the past at least, have usually been to the left of those of the ruling party. But the recent growth of Fascist and Nazi groups in England and the United States has brought forth legislation, or demands for legislation, to restrain these groups on the right. In England, they style themselves, British Union of Fascists, or “Blackshirts.” Under the leadership of Sir Oswald Mosley, England had witnessed the rise of uniformed troops, dedicated to the eradication of Jews and Communists and the establishment of a Fascist dictatorship for Britain.\(^1\) Grave danger to public order from the activities of Mosley’s Blackshirts was long brewing; it culminated in the fall of 1936 with serious violence in the Jewish quarter of London. Jews were verbally abused and threatened; occasionally injured. Their shop windows were broken and stores raided. Counter-attacks and marches were organized; streets were barricaded.\(^2\) The East End of London was rapidly developing into an armed camp.\(^3\) Liberals and other anti-Fascists demanded that the police take action.\(^4\) The Government maintained that existing laws were insufficient to cope with the situation.\(^5\) Therefore, in opening Parliament in November, the King announced that his ministers had concluded “that the existing law requires amendment in order to deal more effectively with persons or organizations who provoke or cause disturbances of the public peace,” but that such an amendment would not interfere “with legitimate freedom of speech or assembly.”\(^6\)

The result was the Public Order Act of 1936.\(^7\) Allegedly designed to strike at Mosley and his men,\(^8\) the principal provisions of the Act not only prohibit the wearing of political uniforms and the organization of quasi-

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1. See, generally, Mosley, Fascism in Britain (pamph. 1933); Drennan, B. U. F. (1934); Rudlin, Growth of Fascism in Great Britain (1935).
2. See the vivid description by Mr. Herbert Morrison, reported in 309 H. C. Deb. (5th Ser. 1936) 1595-1603; The Times, Oct. 12, 1936, p. 14, col. c; p. 11, col. c.
3. Initially, the Government attempted to deal with the situation by prohibiting a Fascist march through the East End of London. See id., Oct. 5, 1936, p. 9, col. a; p. 12, col. e.
5. See speech of Sir John Simon, then Home Sec’y, reported in The Times, Oct. 8, 1936, p. 7, col. d.
7. 1 Edw. 8 & 1 Geo. 6, c. 6, hereafter cited as “the Act.” Section 10 (3) provides that the Act shall take effect on Jan. 1, 1937. It applies to Scotland with certain modifications not discussed herein [§ 8], but does not apply to Northern Ireland. § 10 (2).
8. Although the Government never frankly conceded this, numerous Members of Parliament intimated they “would like a crack at the Fascists.” See Remarks of Mr. Maxton, reported in 318 H. C. Deb. (5th ser. 1936) 1763-4. See also id. at 1693; 317 H. C. Deb. (5th ser. 1936) 1388, 1440, 1456.
military organizations, but also enjoin both public parades under certain conditions and "insulting" words or behavior. The Act can thus be employed to restrict the activities of political minorities of the left as well as those of the right.

In the United States undoubtedly there is as yet no organization comparable in size or in influence to the British Union of Fascists at the time that the Public Order Act was passed. There are, however, sundry Nazi and Fascist groups whose present tactics demonstrate potentialities for future activities not unlike those of Mosley's Blackshirts. Indeed the Nazi-Americans, it is said, not only wear uniforms, but also conduct drills with firearms. Although there is at present no single piece of legislation in the United States similar to the Public Order Act, there are numerous statutes and ordinances which have been, and are being, applied to restrict the activities of leftist groups. It may be expected that they will be employed against Nazi organizations in the future. In addition, new legislation may be enacted to cope with the novel techniques employed by these groups.

The enactment of the Public Order Act and the possibility of similar legislation in the United States suggest a comparative study of the restrictions on the right of assembly in England and the United States.

**Street Meetings**

*England.* No one knows whether it is lawful in England to hold a meeting, however orderly, on the public streets. It is settled that obstructions of the highway are unlawful under the Highways Act, 1835, and that every street meeting constitutes at least a technical obstruction. It would seem, therefore, that "the only right which a subject possesses in the highway is the

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12. The inhabitants of Southbury, Conn., have already taken action against Nazi-Americans by passing a zoning ordinance "restricting as 'farming and residence district', the area which includes the . . . site" proposed by the German-American Bund for the establishment of a camp. See N. Y. Times, Dec. 15, 1937, p. 26, col. 2.


14. 5 & 6 Will. 4, c. 30, § 72.

right to pass and repass;" any other use constitutes a "trespass." And while the law "usually . . . is not rigidly enforced," there is no modern reported decision clearly holding that it is either prima facie lawful or unlawful to hold a meeting in the streets. It thus lies in the arbitrary power of the police to disperse a street meeting on no other ground than that the meeting constitutes an obstruction of the streets, and the charge is made that this device is frequently employed as a weapon against unpopular political minorities.

Although this offense serves as a vehicle for dispersion, others are frequently resorted to. Under various Parliamentary grants of power to regulate the use of the streets, local governmental subdivisions have passed numerous bye-laws prohibiting the holding of meetings or the playing of musical instruments in the streets, without first securing a permit from the proper authorities. Attacked on the ground that they are unreasonable and therefore ultra vires, and occasionally on the further ground that they are fatally indefinite, these ordinances have been upheld in the majority of cases.

The legitimate purpose of these laws, if any, is the prevention of undue interference with street traffic and the suppression of unseemly noises. Other weapons for curbing street meetings have as their ostensible purpose the preservation of public order, and can thus be employed only in a more limited sphere. The most ancient of such devices is that of unlawful assembly. Contrary to the opinion of most commentators, the common law definition

17. Ibid.
18. The courts have indicated some reluctance to declare a meeting on a public street unlawful per se. In a private prosecution under the Public Meeting Act, 1903 (8 Edw. 7, c. 65) for disturbing a meeting held on a public street where the trial court had dismissed the complaint on the ground that a meeting on a highway was ipso facto unlawful, the appellate court reversed, saying: The court had ". . . no right to assume that, simply because the meeting was held on a highway it could not be a lawful meeting. Burden v. Rigler [1911] 1 K. B. 337, 340 (meeting of Tariff Reform League). In Aldred v. Miller, [1924] Sess. Cas. 117 (Ct. of Justiciary) (lecturer), Lord Sands said at 121: "When meetings in such places [i.e., the highways] are customary, they are not interfered with. On the other hand, . . . if they cause an obstruction, they are an offence."
21. Cases sustaining the ordinances: Kruse v. Johnson [1899] 2 Q. B. 83 (church revival meeting); Reg. ex rel. Gay v. Powell, 51 L. T. (N.S.) 92 (Q. B. 1884) (music by Salvation Army); Slee v. Meadows, 75 J. P. 246 (K. B. 1911) (Salvation Army lecture). Contra: Johnson v. Mayor of Croyden, 16 Q. B. D. 703 (1889); Munro v. Watson, 57 L. T. (N.S.) 366 (Q. B. 1887) (Salvation Army singer). In the last case Mathew, J., said: "Permission to the mayor to license such music as he may see fit is an additional objection to the bye-law." Id. at 367.
of this misdemeanor has undergone a decided expansion within the last three centuries.\(^2\) Probably originating in the Star Chamber,\(^3\) this offense was defined early in the seventeenth century by the chronicler of that body as the assemblage of two or more persons together “to do some unlawful thing” “in terrorem populi,”\(^4\) which disperses, or is dispersed, before the “unlawful thing” has been accomplished.\(^5\)

But approximately a century after this definition was written, Hawkins, with neither unanimous nor compelling supporting authority,\(^6\) asserted in a definition frequently quoted judicially, that the ancient definition was “much too narrow.”\(^7\) He maintained that an unlawful purpose in the assembly was not a necessary element of the offense.\(^8\) “For any meeting whatsoever of great numbers of people with such circumstances of terror as cannot but endanger publick peace, and raise fears and jealousies among the king’s subjects” constitutes an unlawful assembly.\(^9\)

Doubt was cast on this doctrine by the famous case of Beatty v. Gillbanks decided in 1882. It was there held that an assembly is not unlawful merely because the opponents of those holding the meeting propose to attack it,

\(^{22}\) See Jarrett & Mund, The Right of Assembly (1931) 9 N. Y. U. L. Q. Rev. 1, 6; 5 Holdsworth, History of English Law (2d ed. 1937) 198-9; but see Comment (1935) 23 Calif. L. Rev. 180, 183. Dicey hinted at this expansion when he said: “... the rules defining the right of public meeting are the result of judicial legislation, and ... the law which has been created may be further developed by the judges.” Dicey, op. cit. supra note 13, at 501. Also significant is the fact that it was not until the sixth edition of his treatise (publ. 1902) that the chapter on “The Right of Public Meeting” contained sections discussing limitations on that right as originally defined in the first edition (publ. 1885).

\(^{23}\) 5 Holdsworth, op. cit. supra note 22, at 198.

\(^{24}\) Hudson, Treatise of the Court of Star Chamber (1635) printed in 2 Collectanea Juridica (1791), at 82-85. In Lambard, Eirenarchia (1619) at 175, the definition is similar. But later on he casts doubt on the necessity for proving “an unlawful thing,” saying at 177: “... the lawfulness or unlawfulness of the thing it selfe that is done or intended, doth not always excuse or accuse the parties to [a Riot, Rout, or Unlawful] Assembly ... The manner of the doing of a lawfull thing may make it unlawfull.” But in Dalton, The Country Justice (1715) an “unlawful act” is said to be a necessary element of the crime of unlawful assembly. Id. at 320.

\(^{25}\) Hudson, op. cit. supra note 24, at 82. He defines riot as an assemblage of two or more “to do an unlawful thing and do it ... in terrorem populi.” Id., 82-85.

\(^{26}\) See cases cited infra note 28.

\(^{27}\) 1 HAWK., P. C. (1st ed. 1715) at *297.

\(^{28}\) Howard v. Bell, Hob. 91 (Star Chamber, 1619). Contra, however, is Holt, C. J., a century later in Queen v. Solely, 11 Mod. 100 (K. B. 1707), at 101: “Surely it [i.e., the indictment] ought to be laid, that the assembly came together to do an unlawful act.”

\(^{29}\) 1 HAWK., P. C., *297. Hawkins then cites as a hypothetical example a case “where great numbers, complaining of a common grievance, meet together, armed in a warlike manner in order to consult together concerning the most proper means for the recovery of their interests.” Yet in 1820 in Rex v. Hunt, 1 St. Tr. (N.s.) 171 it was held that the element of being “armed in a warlike manner” was not an essential element of the offense.
thus endangering the public peace. But within the next decade all doubts on this score should have been dispelled, for in Regina v. Graham, Charles, J., relied specifically on the Hawkins definition in his charge to the jury. He further stated: “An unlawful assembly is an assembly of persons with the intention of carrying out any common purpose, . . . lawful or unlawful,” so as to give courageous bystanders “ground to apprehend a breach of the peace in consequence of it.”

The charge of unlawful assembly as a device for curbing street meetings appears to have given way in popularity to the statutory offense under the Metropolitan Police Act, 1839, and other local acts, of using “threatening, abusive or insulting words or behaviour . . . whereby a breach of the peace may be occasioned.” The police may have found this offense more advantageous than that of unlawful assembly, since proof of a common purpose in an assemblage of at least three persons is not an essential of the offense; the proof need only look to the conduct of a single defendant. Furthermore, the judges have brought their interpretation of these statutes into line with the expanded doctrine of unlawful assembly. Thus, in Wise v. Dunning the court held that even though a person did not “incite” others to commit a breach of the peace—an unlawful act—his conduct is proscribed if its “natural consequence” would have been to have caused others to breach the peace, had he been permitted to continue.

The offense was reenacted as Section Five of the Public Order Act, but with substantial additions. First, the offense is extended to all England and Scotland; second, the penalty is increased from a fine of forty shilling to imprisonment on summary conviction for a term not exceeding three months and/or to a fine not exceeding fifty pounds.

30. See Beatty v. Gillbanks, 9 Q. B. D. 303 (1882) (Salvation Army meeting attacked by “Skeleton Army”); Dicey, op. cit. supra note 13 at 270-2. In the Beatty case, Field, J., said at 314: “There is no authority for . . . a proposition” “that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act.” See also Queen v. Justices of Londonderry, 28 L. R. Ir. 440, 450, 461-2. (Q. B. 1891) (Salvation Army parade).


33. “Besides actual breaches of the peace, anything that tends to provoke or excite others to break it, is an offence . . . .” 4 Bl. Commr. *150; and see Lansbury v. Riley [1914] 3 K. B. 229 (defendant was supporter of Women’s Social & Political Union whose object was to secure votes for women by having its members commit “crimes against property . . . to coerce men . . . to put political pressure” on the government).

34. Wise v. Dunning [1902] 1 K. B. 167, 171, 176. Although the defendant was not prosecuted under the Liverpool local act which enjoined the use of “insulting words” etc., the court considered the act relevant in arriving at its decision.

35. Subsection 7 (2). Another change is the substitution of the words, “is likely to be” for “may be.” For another change, see page 420, infra.
Although the facts in *Wise v. Dunning* may have justified a conviction, the doctrine of the case is fraught with danger for civil liberties. For it is obvious that many remarks may be highly "insulting" and yet worthy of a public hearing; and if ideas of this sort are not to be suppressed, speech for which scant justification can be found must be permitted. Nevertheless, this section of the Act, like the old section, may readily be construed as making unlawful the expression of any opinion, true or false, if it is "insulting" and if it is likely to cause a breach of the peace.

Recent cases arising under this section of the Public Order Act may serve as illustrations. Thus, a young Communist was sentenced to one month at hard labor because he remarked that the Queen and Princess Elizabeth "are what you pay for" and complained because the Government had initially suppressed the facts concerning the former King and Mrs. Simpson. Another example is the case of a Fascist sentenced to two months at hard labor who asserted that "England will never be England again" until all Jews are expelled. Less flagrant, perhaps, is a case arising under the old section, where the court convicted persons distributing leaflets discussing the evils of National Socialism to German visitors at an Anglo-German football match. Significant is the fact that in none of these cases had an actual breach of the peace occurred.

The recent decision in the case of *Duncan v. Jones* provides the police with even wider powers to disperse street meetings than those afforded by Section Five of the Public Order Act. Just as the defendant in that case was about to address a street gathering near the entrance of an unemployed training centre, a policeman told her the meeting could not be held there, but that she could speak at a point some 175 yards distant. A disturbance had taken place in the training centre after the defendant had held such a meeting at the same point a year previous. But when the defendant disregarded the policeman's warning and commenced to speak at the proscribed...

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36. The syllabus summarizes the facts as follows: "The appellant, a Protestant lecturer, had held meetings in public places in ... Liverpool ... In addressing those meetings, he used gestures and language which were highly insulting ... to Catholic inhabitants ... [This] conduct had ... caused breaches of the peace to be committed by his opponents and supporters, and he threatened ... to hold similar meetings ..." Religious feeling has always run high in Liverpool.


38. See The Times, June 7, 1937, p. 11, col. b. But these words were those which the defendant repeated in court. The report does not give the words spoken by the accused at the scene of the arrest.


40. See Barrister, supra note 32, at 846. Also recounted in the article is the case of a boy who was arrested under the old section for selling copies of *The Daily Worker*. There was no conviction, however. For accounts of other cases, see The Times, Oct. 8, 1936, p. 11, col. a; id., Oct. 9, 1936, p. 16, col. d; id., Oct. 10, 1936, p. 7, col. b, p. 9, col. b; id., Oct. 16, p. 11, col. b.

location, she was arrested, and convicted in magistrate's court of the charge of violating Acts of Parliament making it an offense "wilfully" to obstruct any "peace officer when in the execution of his duty." Upon appeal to a Divisional Court, her conviction was affirmed, the Court disposing of the issue with disarming brevity. Lord Hewart, C. J., thought that the facts indicated "clearly a causal connection" between the first meeting, "and the disturbance which occurred after it." Humphries, J., in a fifteen line opinion, stated: Having "reasonably apprehended a breach of the peace, . . . it became his [the police inspector's] duty to prevent anything which in his view would cause that breach of the peace."  

The decision expands the broad doctrine of Wise v. Dunning in two ways. First, it shifts the issue at trial from the objective fact, what would have been the "consequence" of the projected conduct of the defendant, to the inquiry — right or wrong, was the policeman reasonable in his opinion concerning that consequence? It has been observed that as a result of this decision, the police will no longer disperse street meetings by invoking the offenses of assembling unlawfully or of using insulting words or behaviour. Instead, they will simply order those participating in a meeting to disperse, and if they refuse, arrest them for obstructing the police in the execution of their duty. Second, this decision makes it possible to impose something akin to a "previous restraint" upon speech. Unlike the offenses of unlawful assembly, "insulting words or behaviour," and even of obstructing the streets in many cases, which require as elements thereof at least the commencement of speech or other overt acts on the part of the offenders, this new doctrine may prevent a person from making any utterance whatsoever. Thus Duncan v. Jones serves to make more impenetrable the legal barrier closing the streets in England to those who wish to hold street meetings.  

It is no doubt a legitimate purpose to attempt to prevent a breach of the peace, rather than to punish the offender after its occurrence. But the operation of the law of street meetings in England suggests that the price


44. See Jennings, supra note 16, at 20.


46. Where permits are required for street meetings, similar results may also be reached by a refusal to grant a permit.

47. See Wade, Police Powers & Public Meetings (1937) 6 Camb. L. J. 175, 179.
to be paid for the accomplishment of this end may come too high, for it is clear that these attempts to preserve public order have resulted in entrusting the police with very broad discretion to arrest. And at the trial discussion is centered around “natural consequence” and “cause” and the “reasonable apprehensions” of a policeman; obviously, what the judge will think constitutes, for example, a “natural consequence” of a speech will in part be conditioned upon his political beliefs. Indeed, in many cases judges exercise virtually complete control, for defendants charged with the offense of using “insulting words or behaviour” or “obstructing the police” are not afforded a jury trial. Instead, they are brought before a magistrate sitting without a jury.48 Such magistrates, it is charged, usually exhibit a decided propensity to agree with the police,49 become impatient with defendants who do not plead guilty,50 and with the unskilled manner in which those defendants who cannot afford counsel conduct their own defense.51

United States. Americans may point with pride to the fact that our Constitution knows “of such a thing as . . . [a] specific right of public meeting.”52 For the Constitution guarantees against Congressional aggression “the right of the people peaceably to assemble.”53 And state constitutions impose similar prohibitions upon state legislatures.54 Unfortunately, however, these constitutional provisions do not guarantee a place for the people peaceably to assemble, and restrictions on street meetings in this country are consequently as extensive as in England.


49. See Solicitor, “Police” Courts (1937) 14 New Statesman & Nation 244. It is also said that policemen when serving as witnesses are awed by the presence of their superior officers who conduct the prosecution, and are apt too readily to agree with the prosecution’s theory of the case. See Police Advocacy (1937) 101 J. P. Rev. 714. The writer calls for the removal of the popular “impression that ‘police’ courts are the courts of the police.” And see The Times, Oct. 6, 1936, p. 4, col. f, where a magistrate is reported as having said at a hearing arising out of Fascist disturbances: “I am entirely behind the police in any remedy they may ask for.”


51. Magistrates’ Practice & Procedure (1937) 101 J. P. Rev. 548. And even if the accused is not convicted, his arrest will have effectively prevented the exercise of his right of free speech.

52. See Dicey, op. cit. supra note 13, at 267.


54. These constitutional prohibitions are reprinted in Jarrett & Mund, supra note 22, 36-38. The Supreme Court has held that the word “liberty” as used in U. S. Const. Amendt. XIV, includes the right of assembly. DeJonge v. Oregon, 299 U. S. 353, 364 (1937), (1937) 46 Yale L. J. 862. See also United States v. Cruikshank, 92 U. S. 542, 552 (1875).
Perhaps the most frequently employed devices in the United States for
preventing or dispersing street meetings are municipal ordinances. These
fall into two well-defined classes: ordinances prohibiting obstruction in the
streets, and ordinances prohibiting meetings in public places without a permit
from some authorized municipal authority. The first class is almost invari-
ably upheld both against constitutional objections, and against attacks based
on the ground that the ordinances are unreasonable and therefore *ultra vires*. They are sustained by a doctrine similar to that invoked in England: "Streets . . . are for the use of all the public to pass and repass thereon," Occasionally a dissenting judge is heard to protest against the inadequacy of the evidence and to urge that the obstruction is only technical and that there was no substantial hindrance to traffic — but in vain.

The second type of ordinance, that requiring permits for street meetings,
has generally been upheld against attacks founded on various constitutional
provisions, as well as the *ultra vires* contention. The courts have usually

55. Wilson v. Eureka City, 173 U. S. 32 (1899); *Ex parte* Garrison, 18 Cal. App. (2d) 495, 64 P. (2d) 1007 (1937) (ordinance requiring crowd to disperse upon com-
mand of policeman “whenever the free passage of any street or sidewalk shall be
obstructed, except on occasion of public meeting” *held* constitutional); Tacoma v. Roe, 68 P. (2d) 1028 (Wash. 1937).

56. Chariton v. Simmons, 87 Iowa 226, 54 N. W. 146 (1893); State v. Sugerman,
126 Minn. 477, 148 N. W. 466 (1914); People v. Pierce, 85 App. Div. 125, 83 N. Y.
Supp. 79 (3d Dep't 1903) (political speaker).


58. See Parker, P. J., dissenting in People v. Pierce, 85 App. Div. 125, 129-30,
83 N. Y. Supp. 79, 82-3 (3d Dep't 1903). The leading case in Massachusetts on this
question is typical of both the traditionally reactionary and highly conceptual approach
of the judiciary of that state to questions involving civil liberties. (See also notes 61
and 157 infra). Although the City of Lynn had granted the defendant a permit to
hold a meeting, defendant’s conviction of the common law offense of obstructing a high-
way was affirmed. The court held that a city had no power to grant a permit for a
meeting on the highway even though the meeting did not occasion inconvenience or

59. Cases upholding the ordinances: Commonwealth v. Davis, 162 Mass. 510, 39
N. E. 113 (1895) (gospel preacher); Fitts v. Atlanta, 121 Ga. 567, 49 S. E. 793 (1905)
(Socialist speaker); Bloomington v. Richardson, 38 Ill. App. 60 (1890) (ordinance
sustained but *held* inapplicable since Salvation Army street meeting was not a “public
meeting”); Love v. Phelan, 128 Mich. 545, 87 N. W. 785 (1901) (gospel preacher);
Burkitt v. Beggans, 103 N. J. Eq. 7, 142 Atl. 181 (1928) (injunction against police
interference with street meetings denied); People *ex rel* Doyle v. Atwell, 232 N. Y.
96, 133 N. E. 364 (1921) (Socialist); Duquesne City v. Fincek, 269 Pa. 112, 112 Atl.
130 (1920) (meeting to discuss the cause of organized labor); People v. Smith, 263
N. Y. 255, 188 N. E. 745 (1934) (ordinance requiring permit to expound atheism on
public streets held constitutional). [With this last case, compare People v. Smith, 259
N. Y. 48, 180 N. E. 891 (1932) (ordinance requiring permit for holding religious
meetings on streets held inapplicable to atheist speaker since atheism is not a religion).]
*Contra*: State v. Coleman, 96 Conn. 190, 113 Atl. 385 (1921) (ordinance held uncon-
cursory dismissed arguments based on guaranties of free speech and the right of assembly, on the ground that the legislature has as much right "to forbid public speaking in a highway" as has "the owner of a private house to forbid it in his house." Claims that the ordinance prescribes no standard for the guidance of the licensing authority have likewise usually been unsuccessful. And of no avail was the invocation of the equal protection clause against one ordinance which applied only to meetings "for political purposes."

This type of ordinance has the disadvantage of giving the police an opportunity for discriminating against political minorities — discriminations it seems almost impossible to prove satisfactorily in court. Therefore, the frequent and pious assurances of the judges that relief will be granted if and when discrimination can be shown, seem a doubtful safeguard.

Unlawful assembly is another charge employed throughout the United States against participants in street meetings. There has been a marked increase in recent years of the relatively few cases which formerly reached appellate courts. Thus, the course of popularity of this offense in the United States would appear precisely opposite to that in England. Riot, an offense which involves all the elements of unlawful assembly plus an actual

stitutional because granted absolute and uncontrolled discretion to chief of police); Anderson v. Tedford, 80 Fla. 376, 85 So. 673 (1920) (ordinance held unreasonable in absence of specific charter provision).


Very recently one such ordinance was used to prohibit the C.I.O. from holding an open-air meeting, apparently on the ground that the meeting would "lead to" violent opposition from certain veterans' organizations. See N. Y. Times, Dec. 31, 1937, p. 7, col. 5. But cf. Field, J. in Beatty v. Gillbanks, 9 Q. B. D. 308, 314, (1882), quoted note 30 supra.

61. Cases sustaining ordinances against this attack: People ex. rel. Doyle v. Atwell, Burkitt v. Beggans. Contra: State v. Coleman, all cited supra note 59. Here again the courts have drawn upon Holmes' argument—or rather, assertion—in Commonwealth v. Davis, 162 Mass. 510, 512, 39 N. E. 113 (1895), that a prohibition against the use of the streets "is not made invalid by the fact that it may be removed in a particular case by a license from a city officer."


63. See, e.g., Cardozo, J., concurring in People ex rel. Doyle v. Atwell, 232 N. Y. 96, 103, 133 N. E. 364, 367 (1921); but see State v. Coleman, 96 Conn. 190, 196–7, 113 Atl. 385, 387 (1921). Compare Stephen, J., in Reg. ex rel. Gay v. Powell, 51 L. T. (n.s.) 92 (Q. B. 1884), at 94: " . . . if I thought that, merely because these people did not like the Salvation Army and their meetings, they tried to strain that bye-law to prevent their doing what they prima facie have a right to do, my view of the case would be altogether different."

breach of the peace, has also recently gained in popularity in the United States.

Since common law crimes have been abolished in most states, the precise definition of the offense of unlawful assembly is generally a matter of statutory interpretation. The statutes vary considerably among the states, and the different stages of the development of unlawful assembly in England find counterparts in the United States. Thus Missouri's statute, seemingly embodying the original definition of unlawful assembly, defines the offense as an assemblage with intent to commit an "unlawful act" either "with force or violence . . . against the peace," or in terrorcm populi. In New Jersey, common law crimes are perpetuated by statute. When the now leading *Butterworth* case arose some ten years ago, the court looked to "the" common law for its guide. But even though the court relied on the definitions of Hawkins and of the *Graham* case, it held that a meeting of strikers in a public square to protest against the refusal of the police to permit them to hold a street meeting did not constitute an unlawful assembly because there was no proof that the meeting inspired "in the minds of firm and courageous persons a well-founded fear of threatening danger to the public peace;" this, despite the testimony of one policeman "that the crowd put him in fear." This acceptance of the Hawkins definition is the prevailing rule in this country.


66. See *Riot & Incitement to Riot* (1935) 3 I. A. BULL. (No. 12) 1, 10-12. The American riot cases involving economic and political disputes are collected in *id.* at 1, n. 6, 10, n. 7-13. On riot in England, see Field v. Receiver of Met. Police [1907] 2 K. B. 853; *Kenny, op. cit.* supra note 48, at 331-334. The penalty for statutory riot is more severe than for those offenses previously discussed.

67. Mo. STAT. ANN. (Vernon, 1932) §4221, In re Ceder, 226 Mo. App. 479, 44 S. W. (2d) 179 (1931) (conviction of defendant who had advocated adherence to the Communist party reversed on grounds of no common interest and no intent to commit unlawful act).

68. N. J. COMP. STAT. (1911) tit. 52, §215, providing that unlawful assembly and "all other offenses of an indictable nature at common law and not provided for" by statute "shall be misdemeanors," has been held to leave intact the common law definition of unlawful assembly. State v. Butterworth, 104 N. J. L. 579, 581, 142 Atl. 57, 58 (1928), rev'd 104 N. J. L. 43, 139 Atl. 161 (1927).


70. *Id.*, at 583, 142 Atl. at 59. And see pp. 408-409, supra.

71. State v. Butterworth, 104 N. J. L. 579, 588, 142 Atl. 57, 61 (1928); but see Koss v. State, 217 Wis. 325, 258 N. W. 860 (1935) (members of assembly to protest against reception to German ambassador convicted of unlawful assembly under statute [Wis. STAT. (1935) §347.02] embodying the Hawkins definition).

On the other hand, the New York statute concerning unlawful assemblies goes even further than current English doctrine. In New York, three or more assembled persons who "threaten any act" simply "tending towards a breach of the peace," are guilty of the offense.\textsuperscript{73} And in the famous case of \textit{People v. Most}, which involved a meeting of sympathizers with those convicted following the Haymarket riots, the court upheld the conviction of the defendants though there was no evidence that the meeting had caused fear to reasonably courageous men.\textsuperscript{74} Because of the breadth of the statute, the Court was able to hold that the threats necessary to the commission of the crime may relate "to acts . . . to be performed at some future time, when affairs" shall be "ripe" for their performance.\textsuperscript{75} This statement—a repudiation of the clear and present danger doctrine which would seem to inhere in the Hawkins definition\textsuperscript{76}—appears to afford a convenient weapon for the conviction of vague but vehement "revolutionaries."

The offenses classified generally as breach of the peace and disorderly conduct\textsuperscript{77}—the term employed in the United States—are likewise frequently employed as weapons against political minorities and labor unions in industrial disputes.\textsuperscript{78} These offenses differ from unlawful assembly chiefly in the fact that unlawful assembly requires the concurrence of at least three persons in the prohibited conduct. Anciently, breach of the peace had consisted of "any injurious Force or Violence moved against the Person of

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\textsuperscript{73} N. Y. Penal Law § 2092: "Whenever three or more persons: 1. Assemble with intent to commit any unlawful act by force; or 2. Assemble with intent to carry out any purpose in such a manner as to disturb the public peace; or 3. Being assembled attempt or threaten any act tending towards a breach of the peace, or an injury to person or property, or any unlawful act, such assembly is unlawful, and every person participating therein, by his presence, aid, or instigation, is guilty of a misdemeanor. But this section shall not be construed as to prevent the peaceable assembling of persons for lawful purposes of protest [sic!] or petition."
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\textsuperscript{74} People v. Most, 128 N. Y. 108, 27 N. E. 970 (1891).
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\textsuperscript{76} See p. 408, supra. For other recent cases involving unlawful assembly, see Notes (1929) 58 A. L. R. 751; (1934) 93 A. L. R. 737. The California cases are discussed in Comment (1935) 23 Calif. L. Rev. 180.
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\textsuperscript{78} See Note (1927) 48 A. L. R. 83.
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another, his Goods, Lands, or other Possessions, whether it be by threaten-
ing words, or by furious gesture, or force of the body, or any other force
used in terrorem." Modern statutes and ordinances in the United States,
however, have expanded this definition along two lines; first, by prohibiting
not only conduct that reasonably would be expected to result in physical
violence, but also conduct which, by the stretch of a policeman's imagination,
might possibly result in disorder if allowed to continue; and, secondly, by
couching the restrictions in language so broad as to permit of a construc-
tion interdicting almost any provocative words uttered in public on public ques-
tions.81

Portions of the New York Penal Code section on disorderly conduct, now
increasingly invoked, are similar to Section Five of the Public Order
Act. Relevant subsections provide that:

"any person who with intent to provoke a breach of the peace, or whereby
a breach of the peace may be occasioned . . . 1. Uses offensive, disorderly,
threatening, abusive or insulting language, conduct or behavior; 2. Acts
in such a manner as to annoy, disturb, interfere with, obstruct, or be of-
fensive to others; 3. Congregates with others on a public street and refuses
to move on when ordered by the police; 4. By his actions causes a crowd
to collect, except when lawfully addressing such a crowd;" "shall be deemed
to have committed the offense of disorderly conduct".

As in England, offenders are tried by a magistrate sitting without a jury.83

While these clauses have been used most significantly by the police in
the arbitrary regulation or prohibition of picketing, they have also been
employed to curb political minorities. In cases arising under these provi-
sions the New York courts do not insist upon a finding by the trial court that

80. Compare the similar development in England (see pp. 408-11, supra).
81. "A disturbance of the peace may be created by any act or conduct of a person
... which throws into confusion things settled, or which causes excitement, unrest,
disquietude, or fear among persons of ordinary, normal temperament." Ponchatoula v.
It would be difficult to conceive of any speech on a public question which would
not fall within this definition. Compare Remarks of Mr. Kingsley Griffith, M. P.:
"You are not entitled to legislate against an expression of opinion just because it is
provocative . . . Liberty only arises when people are saying something which is very
provocative." Reported in 318 H. C. Dn. (5th ser. 1936) 1411. And see Holmes, J.,
82. N. Y. PENAL LAW, § 722.
83. See People v. Sadowsky, 149 Misc. 583, 267 N. Y. Supp. 762 (Spec. Sess.,
1933). Section 723 fixes the punishment at "imprisonment . . . for . . . six months, or by
a fine not exceeding fifty dollars, or by both," or "by placing on probation for a term
not to exceed two years." Compare §7(2) of the Public Order Act. See p. 409, supra.
84. See Picketing as Disorderly Conduct in New York (1935) 4 I. J. A. BUL-
(No. 6) 1, 11, 12.
the defendant's conduct might have occasioned a breach of the peace.85 Concealedly, such a finding would be a mere formality, since the Court of Appeals has in effect adopted the doctrine of Duncan v. Jones by holding that the arresting officer's judgment as to the likelihood of such a breach must be accepted unless "purely arbitrary and . . . not calculated in any way to promote the public order."86

Although there is apparently no exact counterpart in this country to the English legislation prohibiting the wilful obstruction of a policeman in the execution of his duty, somewhat similar statutes and ordinances are to be found.87 Noteworthy is Subsection Three of the New York statute quoted above, which penalizes a refusal to move on when requested by the police. One dissimilarity, however, is the fact that the New York statute requires as a condition precedent to conviction a finding by the court that the refusal to move on might have occasioned a breach of the peace. Nevertheless, the New York statute may have a more sweeping effect than the doctrine of Duncan v. Jones, for it has been held that "failure . . . to obey directions of a police officer, not exceeding his authority, may [of itself] . . . lead to a breach of the peace."88

Here again, we find a recurring judicial justification for such legislation; namely, that "it is . . . most salutary that the police . . . should have reasonable . . . discretion" in this matter.89

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85. The courts have tended, however, to insist upon such a finding in some cases arising under §722(2), but not in situations where civil liberties were involved. See People v. Perry, 265 N. Y. 362, 193 N. E. 175 (1934); People v. Schroedel, 147 Misc. 296, 263 N.Y. Supp. 658 (Spec. Sess. 1933): ("§ 722(2) . . . is upon its face . . . so broad . . . that Appellate Courts should limit its application.").


89. Benson v. Norfolk, 163 Va. 1037, 1040, 177 S. E. 222, 224 (1934). Compare Mathew, dissenting in Kruse v. Johnson [1898] 2 Q. B. 83 (cited supra note 21) at 109: " . . . it was said that confidence might be reposed in the discretion of a policeman, and that he would not be likely to interfere unreasonably. This seems to me too generous a view of the qualifications of the ordinary constable."

90. Section 9(1) of the Public Order Act defines "meeting" as any "meeting held for the purpose of the discussion of matters of public interest or for the purpose
seem politic for these groups to heed the derisive advice of the police, "Hire a Hall." This suggestion, however, assumes financial capacity to rent a hall and general availability of meeting halls to unpopular organizations. Both assumptions are frequently not demonstrable.

While for many purposes it is doubtless preferable to hold a street meeting, there would seem to be distinct advantages to holding meetings indoors. Not only is the audience apt to be more attentive and quiet, but also, because indoor meetings—unlike street meetings—are prima facie lawful in England, sanctions exist for controlling members of the audience hostile to the sponsors. Thus, the Public Meeting Act of 1908 made it an offense for any person at a lawful public meeting to act, or to incite others to act, in a disorderly manner for the purpose of preventing the transaction of the business for which the meeting was called. But the Act became a dead letter, apparently because it did not grant the police power to arrest offenders without a warrant. Section Six of the Public Order Act was passed to remedy this defect. It amends the Public Meeting Act by providing that "if any constable reasonably suspects any person of committing any offence" under that Act, "he may if requested to do so by the Chairman of the meeting, require that person to declare to him immediately his name and address . . . " If the person requested refuses, he is guilty of an offense and the constable may arrest him without a warrant.

Though the act places greater sanctions in the hands of the sponsors of indoor meetings, it authorizes police action only at the request of the chair-
man of a meeting, and it is not concerned with a situation where the sponsors
do not desire police aid or even police presence. But a recent decision of
the King's Bench Division subjects this type of meeting to severe restrictions.
It had long been thought that the police could not enter public meetings held
on private premises against the will of the promoters unless they had reason
to believe that a breach of the peace was being committed. But in 1935 in
the case of *Thomas v. Sawkins*, this exception was extended to all cases
where the police have reasonable grounds for believing that a breach of the
peace will be committed. The case involved police presence at a Com-
munist meeting held in a hired hall to protest against the Incitement to
Disaffection Bill. In defense to an action for technical assault, the police
justified their conduct on the ground that they "anticipated that the meeting
would become an unlawful assembly or a riot or that breaches of the peace
would take place, and that seditious speeches were likely to be made." Follow-
ring another brief opinion by Lord Hewart, C. J., Amory, J., employing
a non-sequitur, argued: If "a constable hears an affray in a house he may
break in to suppress it . . . If he can do that, . . . he has a right to break
in to prevent an affray which he has reasonable cause to suspect may take
place on private premises." By authorizing the police to enter meetings held on private premises when
they have a reasonable suspicion that a breach of the peace "may" occur,
this decision may be said to bring the repressive doctrine of *Duncan v. Jones*
indoors. The law of that case may now be employed increasingly to restrict
indoor meetings in advance of unlawful conduct on the part of those par-
ticipating in the meeting. And since Section Five of the Public Order Act
makes it possible to commit the old offense of using "insulting words" at a
public meeting even when held on private premises, the decision in *Thomas
v. Sawkins* can also be said to have brought that offense indoors; or at
least to have assisted in the process.

95. See Report of Dep'tal Comm. on Duties of Police with Regard to Preservation
Of Order at Public Meetings (Cmd. 4673, 1909); Police & Public Meetings on Private
Premises (1935) 79 Sol. J. 445, 446; Remarks of Sir John Simon, reported in 318
H. C. Deb. (5th ser. 1936) 679; Goodhart, *Thomas v. Sawkins: A Constitutional Inno-
vation* (1936) 6 Camb. L. J. 22.
96. [1935] 2 K. B. 249, (1935) 49 Harv. L. Rev. 156 (approving the decision),
(1936) 4 I. J. A. Bull. (No. 8) 6, (1936) 6 Camb. L. J. 96. See also Davies v.
Griffiths [1937] 2 All. Eng. 671 (K. B. 1937) (defendants convicted of obstructing
police officer seeking to enter meeting where it was thought appeal would be made
for volunteers to war in Spain). For the case in the lower court, see (1937) 101 J. P.
Rev. 171.
97. The bill later was enacted into law as the Incitement to Disaffection Act,
1934, 24 & 25 Geo. 5, c. 56.
100. For definition, see note 90, supra.
101. Although no appeal lies from a decision of the Divisional Court in criminal cases
[Judicature Act § 31(1), 15 & 16 Geo. 5 (1925) c. 49], the doctrine of *Thomas v. Saw-


United States. The greatest obstacle facing minority groups in holding indoor meetings in the United States is the difficulty of securing a meeting-hall. Municipal authorities employ numerous techniques to thwart indoor meetings of this sort. Most direct and blunt is Mayor Hague's ordinance which, in effect, forbids the owner of a meeting hall to rent it for Communist meetings unless police permission is first secured. It is exceptional to require permits for meetings held in private halls; a more common technique stems from laws requiring licenses for theaters and public halls. These are presumably operative to safeguard buildings against fire and similar hazards. Nevertheless owners who do not cooperate with the police by refusing to rent their halls to objectionable radicals sometimes find their licenses revoked because of the "structural . . . condition" of the building. A final source of discrimination arises in connection with the administration of statutes authorizing municipalities to issue permits for the use of school buildings to permit "discussion of matters of . . . public interest." A recent survey has disclosed frequent and confessed discriminations against political minorities seeking such permits.  

kiss (a criminal prosecution) may nevertheless be overruled. Thus the decision in Rex v. Denyer [1926] 2 K. B. 238 (Ct. Cr. App.), a criminal prosecution, did not preclude a different result in the civil action of Hardie & Lane v. Chilton [1928] 2 K. B. 306 (C. A.). The conflict that raged, in the books at least, [see 20 Cr. App. R. 185, 186 (1928)] was finally put to rest when the rule of the Hardie case was adopted by the House of Lords. Thorne v. Motor Trade Ass'n [1937] A. C. 797 (H. L.). The possibility thus remains of overturning Thomas v. Sawkins by the institution of a civil action for assault.

102. The ordinance is discussed in (1937) 5 I. J. A. Bull. 84. In Hudson County Com. of Communist Party v. Hague, the plaintiffs secured an injunction against the police "from utilizing the ordinance so as to prevent owners from renting halls for the holding of Communist meetings." Ibid. Nevertheless, the C.I.O. very recently charged that it has "been unable to hire a meeting hall in Mayor Hague's stronghold because of intimidation of the owners by city officials." See N. Y. Times, Dec. 31, 1937, p. 7, col. 5.

103. See Jarrett & Mund, supra note 22, at 29.


105. See Jarrett & Mund, supra note 22, at 29.

106. CAL. SCHOOL CODE (Deering, 1932) § 6.740. Some statutes authorize the school board in its discretion to require the group applying for the use of the building "pay the actual expense incurred for janitor service, light, and heat." See Mich. CORP. LAWS (1929) § 7431. Such a provision would seem to invite discrimination against unpopular minorities.

107. SCHOOL BUILDINGS AS PUBLIC FORUMS (Am. Civ. Lib. Union Pamph., 1934); see Comment (1935) 23 CALIF. L. REV. 180, 192; and see case reported in (1935) 4 I. J. A. BULL. (No. 2) 1 (application for mandamus by Youth Congress to compel Detroit Bd. of Educ. to issue permit for use of school, granted); cf. Coughlin v. Chicago Park Dist., 364 Ill. 90, 4 N. E. (2d) 1 (1936) (application for writ of mandamus to compel park commissioners to grant Nat. Union for Social Justice permit to use Soldier's Field, denied).

That the remedy of mandamus may frequently be ineffectual, see Barron v. Belonay, 229 Mich. 201, 200 N. W. 944 (1924). There certiorari to review the action of the lower
But once a group is successful in securing a hall there appears to be little difficulty in maintaining order at the meeting. Contrary to the situation in England, disturbances caused by persons antagonistic to the sponsors of such meetings (other than the police) do not appear to be widespread, and the offense of disturbing a public assemblage, which is a statutory crime in some American jurisdictions, apparently has been rarely invoked in modern times against disturbers of political assemblages.

In localities where permits are not required for meetings held in private halls, it seems clear that the police have no right to be present at a meeting held on private premises unless there is reasonable ground for belief that a breach of the peace is being committed. Nevertheless, the police on occasions do enter such meetings without any authority. Although there is some indication that an injunction can be secured against such conduct, the remedy, even if granted, would usually come too late.

court in issuing mandamus compelling school board to grant permit was denied, as presenting a moot question, because the date for which the application was made had passed. Sharpe, J., dissenting (two judges concurring) said: "... it would be difficult ... to secure a construction of the statute in a proceeding when the time for which the application had been made had not expired. Id. at 20, 200 N. W. at 945.


109. The large majority of the appellate cases concerning this offense arise out of the disturbance of religious assemblages, particularly in the South. Cf. Note (1921) 12 A. L. R. 650.


110. See note 103, supra.

111. See, Right of Police to Attend Public Meetings (1936) 4 I. J. A. Bull. (No. 8) 6, 8. For a case contra to Thomas v. Sawkins [1935] 1 K. B. 249 (discussed supra page 420, see Gallagher v. Porter, Case No. 305052 (Los Ang. Mun. Ct. 1933), reported in (1933) 2 I. J. A. Bull. (No. 3) 2. There the court refused to admit evidence as to the doctrines of the Communist Party which were offered to show that the meeting would have resulted in violations of such laws as the Criminal Syndicalism Act.

112. See Commonwealth v. Cooper, 95 Pa. Super. 382, 384 (1929) (defendant convicted of disorderly conduct for actions in protesting against unlawful police conduct); Commonwealth v. Gabrow, 97 Pa. Super. 459 (1929) ("protest against unwarranted ... actions of policemen cannot justify ... disorderly conduct" Id. at 463).

PRIVATE ARMIES

England. The Public Order Act imposes further restrictions on the conduct of persons engaging in public assembly. These restrictions do not impinge directly upon free speech, but rather are designed to curb the cruder forms of emotional appeal, largely indigenous to Fascists.

A uniform bolsters the ego of the wearer and stirs the emotions of the bystander. Section One of the Public Order Act was passed to deprive Sir Oswald Mosley's Blackshirts of this emotional advantage. It provides that:

“any person who in any public place or at any public meeting wears uniform signifying his association with any political organisation or with the promotion of any political object shall be guilty of an offence.”

Section Two (1) of the Act has for its purpose the abolition of associations, whose members are

“organised or trained or equipped for the purpose of enabling them to be employed in usurping the functions of the police or of the armed forces of the Crown; or ... for the purpose of enabling them to be employed for the use or display of physical force in promoting any political object, or in such manner as to arouse reasonable apprehension that they are organised and either trained or equipped for that purpose . . . .”

Worthy of note perhaps as precedent for both of these sections of the Act, is the unrepealed Unlawful Drilling Act of 1819, which outlaws un-

114. For definition of “public meeting”, see note 90, supra. The section contains a provision authorizing the chief of police with the consent of a Secretary of State, to permit the wearing of such uniforms “on any ceremonial, anniversary, or other special occasion” provided that he is satisfied that such a wearing “will not be likely to involve risk of public disorder.”

Subsection (2) requires the consent of the Attorney-General before further proceedings may be taken against any person charged under subsection (1).

115. The Subsection contains a proviso that in a prosecution thereunder “it shall be a defence . . . to prove that” the person charged did not consent to the organization, etc., “of members . . . of the association.” Subsection (2) provides that no prosecution under the section “shall be instituted . . . without the consent of the Attorney-General;” (3) grants wide powers to the courts to dissolve the association and to dispose of its property; (4) modifies common law rules of evidence at trials under the section; (5) grants the High Court power to grant search warrants, etc., if “satisfied . . . that there is reasonable ground for suspecting that an offense under this section has been committed.”

Subsection (6) is noted elsewhere. See note 94, supra. As to the effect of this provision, see 318 H. C. Dea. (5th ser. 1936) 1689.

116. 60 Geo. 3 & 1 Geo. 4, c. 1. For prosecutions under this statute, see Gogarty v. the Queen, 3 Cox C. C. 306 (Q. B. 1849) and Reg. v. Hunt, 3 Cox C. C. 215 (N. P. 1848).

See also the Statute of Northampton, 1328, (2 Edw. 3) still in effect, which prohibits riding or going armed in public. For a prosecution under this statute, see Sir John Knight's case, 3 Mod. 117 (K. B. 1686). In another report of the same case in Comb. 38, the court says that the crime had almost fallen into desuetude. Yet Rex v.
authorized assemblies, meeting "for the purpose of training" in "the use of arms, or for . . . practising military exercise." In addition the Unlawful Oaths Act of 1797,118 and Unlawful Societies Act of 1799,119 are both still operative. These acts were designed to outlaw every society, and to punish the members, if an oath was required binding them

"to engage in any mutinous or seditious purpose, or to disturb the publick peace, . . . or to obey the . . . commands of any . . . body of men not lawfully constituted," or not to reveal "or give evidence against any . . . person, or . . . any unlawful combination or confederacy."121

Significant is the fact that these statutes were later employed for a time in suppressing labor organizations.122

It will be observed that the term, "uniform," was left undefined in the Public Order Act, presumably advertently, in order to give the courts greater discretion in meeting new developments of political minorities in the field of wearing apparel designed to avoid the provisions of Section One. Counsel has advised the Blackshirts "that while the wearing of the Blackshirt uniform is illegal, the wearing of an ordinary shirt of black colour with tie under an ordinary suit is legal." In the first six months of its operation there were at least seven prosecutions under this section, mostly against Mosley's men, but including an unsuccessful one against the Social Credit Party or "Greenshirts."125

Meade, 19 T. L. R. 540 (N. P. 1903) reports a modern prosecution under the statute. See also King v. Smith [1914] 2 Ir. R. 190.

Section 4 (1) of the Public Order Act, 1937, makes it an offense for "any person . . . while present at any public meeting or . . . procession" to have "with him any offensive weapon, otherwise than in pursuance of lawful authority."

117. Section One.
118. 37 Geo. 3, c. 123.
119. 39 Geo. 3, c. 79.
120. See Baker, op. cit. supra note 7, at 110.
121. Unlawful Oaths Act, § 1.
122. See, e.g., Rex. v. Marks, 3 East 157 (K. B. 1802) (prosecution under Unlawful Oaths Act of a labor association held to be a conspiracy to raise wages, though not to engender mutiny or sedition). Rex. v. Lovelass, 6 C. & P. 596 (N. P. 1834), a prosecution under the Unlawful Oaths Act against the "General Society of Labourers." Efforts to secure a remission of sentence were unavailing and the prisoners were sentenced to seven years in New South Wales. Id. at 601.

In Luby v. Warwickshire Miners' Asso., [1912] 2 Ch. 371, although the court refused to hold the acts obsolete since they had "received comparatively recent . . . application," it nevertheless held trade unions impliedly exempt. Id., 379-81.

123. Mr. MacQuisten, M. P., considered § 1 "a complete inversion of one of the fundamental principles of our criminal law" because it contained "no definition . . . of 'uniform.'" See 318 H. C. Deb. (5th Ser. 1936) 98.

125. See Remarks of the Solicitor-General, reported in 319 H. C. Deb. (5th ser. 1937) 1293. Unofficial reports of these and other cases can be found in (1937) 101 J. P. Rev. 90; The Times, Jan. 28, 1937, p. 16, col. d; id., Jan. 30, 1937, p. 7, col. f; id., June 3, 1937, p. 24, col. g.
Despite the fact that Sections One and Two passed both Houses of Parliament with scarcely a dissenting voice, the desirability of this legislation is debatable. Thus, it may be argued that since existing legislation and the English common law crimes of assault, riot, unlawful assembly, and criminal libel\(^\text{126}\) are more than adequate to curb violence, disorder, and abusive speech on the part of the Blackshirts, these sections are unnecessary and may serve as a dangerous tool in the hands of repressive majorities to come. The employment formerly of the Unlawful Societies Act as a weapon against labor lends strength to this argument.

On the other hand, liberals of the traditional school would insist that these sections do not violate their concept of the rights of free speech and assembly, since no one is inhibited from peaceably assembling in civilian dress for the purpose of voicing his views on public questions. Undaunted by predictions as to the use to which the sections will be put at some future time, these liberals may find cause for rejoicing in the reports that the Blackshirts in white shirts have declined in number and popularity.\(^\text{127}\)

**United States.** The rise of Nazi-Americans presents regulatory problems not unlike those occasioned by the Blackshirts in England.\(^\text{128}\) Existing legislation in many states seems adequate to curb the use of firearms by these minorities on the right. Thus, many jurisdictions have statutes prohibiting unauthorized bodies of men from associating "themselves together as a military company with arms."\(^\text{129}\) And a federal statute prohibits the transportation in interstate commerce of unregistered firearms.\(^\text{130}\) Both types of statutes have


A successful civil libel suit was recently brought against the Fascist magazine, *Action*. "The decision did not affect financially Sir Oswald Mosley . . . but it was a staggering blow to the movement [*i.e., B. U. F.], which has shrunken to a membership of a few hundred." See *N. Y. Times*, Oct. 16, 1937, p. 1, col. 4, p. 2, cols. 4-5. Since it is probable that the magazine is judgment proof, part or all of the exceptionally large verdict (£20,000) must therefore be paid by the non-Fascist publisher. *Cf. id.* at p. 2, col. 5. This suggests that "there is a real danger" in "the award of damages out of all proportion to the actual proven injury" for "it may end in suppressing the publication of all but the most respectable bourgeois views." *A London Diary* (1937) 14 *New Statesman & Nation* 634.

\(^{127}\) See supra note 126.

\(^{128}\) See p. 406, supra.


been sustained against charges that they violate constitutional guaranties of the right of the people to bear arms,131 and a state statute against a contention that it transcended the 14th Amendment.132

But apparently the only statutes specifically prohibiting the wearing of uniforms are the federal law prohibiting unauthorized wearing of the official uniforms of the armed forces of the United States,133 and the state statutes prohibiting unauthorized use of the uniforms of certain private lawful societies.134 There is, however, some legislation not altogether dissimilar to that of Section One of the Public Order Act. Thus, laws designed to curb the activities of the Ku Klux Klan prohibit persons "disguised by having their faces . . . concealed" from assembling in public places.135 Such statutes and ordinances have withstood constitutional attack.136 Although obviously not identical with Section One of the Act, the favorable judicial climate of opinion in which these laws were discussed, gives some hint as to the judicial treatment that prospective anti-Nazi legislation will receive.137

Most analogous, however, are the so-called red flag laws.138 Their wording varies considerably from state to state. In at least two jurisdictions, the statutes are couched in language sufficiently broad to permit a construction prohibiting the wearing of uniforms as well as display of flags for the purpose of indicating "sympathy with or support of . . . forms of government, hostile . . . or antagonistic to . . . [that] of the United States."139 More typical, however, are the statutes which limit the prohibition specifically to the carry-


132. Presser v. Illinois, 116 U. S. 252 (1886) (defendant was member of Lehr & Wehr Verein, an organization for "improving the mental and bodily conditions of its members" [Id., at 254]).


134. See e.g., IND. STAT. ANN. (Burns, 1933) § 10-504.

135. N. Y. PENAL LAW, § 710; see also WASH. REV. STAT. ANN. (Remington, 1932) § 2553; ILL. ANN. STAT. (Smith-Hurd, 1934) c. 38, § 160.


137. Cf. American League of Friends of New Germany of Hudson County v. Eastmead, 116 N. J. Eq. 487, 174 Atl. 156 (1934), in which the court denied an injunction sought by Nazis against police interference with their meetings on the ground that equity would not aid organizations advocating boycott of Jews, etc. A later application, however, was successful. See (1935) 3 I. J. A. BULL. (No. 8) 3.

138. See CHAFEES, FREEDOM OF SPEECH (1920) 180-187.

139. W. VA. CODE ANN. (Michie, 1937) § 5913 (prohibits display of "any other . . . emblem, device, or sign of any nature whatever," etc.); for a similarly worded law, see WASH. REV. STAT. ANN. (Remington, 1932) § 2563-7.
ing in a parade or the display in a public place of red — and in some states black — flags as symbols indicating opposition to the American form of government. But the Supreme Court has declared that insofar as such a statute operates to prohibit the display of a flag as a sign of peaceful opposition to existing government, it is an unconstitutional restriction on the right of freedom of expression guaranteed by the Fourteenth Amendment.

It may be argued that, like flags, Nazi uniforms are merely symbolic of a particular political creed, and that the state cannot constitutionally prohibit their use unless emblematic of forceful opposition to existing government. On the other hand, it may be urged that, unlike a red flag, a uniform per se symbolizes force and is a token of military activity. Thus the arguments may run. A guess may be hazarded that the ultimate judicial decision will be conditioned by the popular belief as to the size of the threat which the particular uniform-wearing organization constitutes to the existing American form of government.

**Street Parades**

*England.* It would have been poor technique indeed for Mosley to have equipped his men with uniforms without displaying the uniforms on parade, and the Blackshirts frequently indulged in this common form of display. But the parades often ended in pitched battles. Section Three of the Public Order Act is a frontal attack on this technique.

Prior to the passage of the Act, miscellaneous statutes granted power to the police in various parts of England to control the route to be taken by processions. Section Three (1) of the Act is largely a codification of these


141. Stromberg v. California, 283 U. S. 359, 369 (1931) (McReynolds & Butler, JJ., dissent). 142. "Uniformed men in military formation suggest, and are meant to suggest, the idea of force . . . to be used either now or in the future." Remarks of Mr. Bernays, reported in 318 I. C. Dan. (5th ser. 1936) 1388.

143. See note 150, infra and note 2, supra.

144. See Remarks of Sir John Simon, reported in 317 H. C. Den. (5th ser. 1935) 1359. In the London Metropolitan area, the statute is the Metropolitan Police Act, 1839, 2 & 3 Vict., c. 47, § 52.
statutes so as to have them apply uniformly throughout England and Scotland.\textsuperscript{145} It provides that

“If the chief officer of police . . . has reasonable ground for apprehending that the procession may occasion serious public disorder, he may give directions imposing . . . such conditions as appear to him necessary for the preservation of public order . . . ”\textsuperscript{146}

Section Three (2), however, grants powers entirely novel.\textsuperscript{147} It provides that outside of the Metropolitan Police District if

“the chief officer of police is of opinion that by reason of particular circumstances existing in any . . . district . . . the powers conferred on him by . . . [subsection one] will not be sufficient to enable him to prevent serious public disorder being occasioned by the holding of public processions in” his district, “he shall apply to the council of the . . . district for an order prohibiting for such period not exceeding three months . . . the holding of all public processions . . . , and . . . the council may, with the consent of a Secretary of State,” make the order.

Subsection (3) applies solely to the Metropolitan police district, and provides that within this area the police are to apply directly to the Secretary of State for consent to invoke the powers set forth in Subsection (2).

It will be observed that under Subsections (2) and (3), unlike Subsection (1), the chief of police need not have “reasonable ground” for apprehending a breach of the peace in order to apply for an order, but need only be of the “opinion” that a breach will be occasioned. This difference was created, apparently, in order to prevent an appeal to the courts for an injunction on the ground that the police officer does not have “reasonable ground” for his application.\textsuperscript{148} The necessity of securing the consent of the Secretary of State is some protection against arbitrary police action, since the Secretary’s conduct is subject to criticism in Parliament when that body is in session. Yet students have strongly questioned the potency of this check upon executive action.\textsuperscript{149}

Subsection (3) was first invoked in June, 1937, when the Home Secretary approved an order banning a Mosley procession through the Jewish quarter

\textsuperscript{145} See Remarks of Sir John Simon, cited \textit{supra} note 144; Remarks of Mr. Dingle Foot, 318 H. C. Deb. (5th ser. 1936) 1728.

\textsuperscript{146} The subsection contains the further proviso: “that no conditions restricting the display of flags, banners, or emblems shall be imposed under this subsection except such as are reasonably necessary to prevent risk of a breach of the peace.”

\textsuperscript{147} See Remarks of Mr. Dingle Foot, cited \textit{supra} note 145.

\textsuperscript{148} “In subsection (1) the Chief Constable forms his opinion and, having formed it, he acts upon it immediately and there is no one to say him nay . . . But it is a very different position in subsection (2) . . . After all, his opinion merely sets a train of events in motion . . . We do not want the organizers of processions to be able to get an injunction of some kind preventing action.” Remarks of the Marquess of Dufferin & Ava, reported in 103 H. L. Deb. (5th ser. 1936) 879-880

\textsuperscript{149} See, \textit{e.g.}, MUIR, \textit{HOW BRITAIN IS GOVERNED} (2d ed. 1930) 76-80.
in the East End of London. Following this action, the Secretary stated that he does not consider "a mere threat of opposition to a proposed political demonstration as a sufficient ground for prohibiting that demonstration." The "circumstances," he said, must be "exceptional." All of which is not a very enlightening standard.

United States. It has previously been noted that American courts have generally sustained ordinances requiring a permit as a condition precedent to the holding of a street meeting. Quite different has been the treatment accorded ordinances requiring permits for street parades. Most of the cases arose in the last quarter of the nineteenth century and involved parades by the Salvation Army. In some instances municipalities had exempted from the operation of the ordinances funerals, fire companies, the national guard, and occasionally also the police and the Grand Army of the Republic; and, in one case, any "political party having a regular state organization." These exemptions clearly revealed the true purpose of the ordinances. With the customary exception of Massachusetts, ordinances containing such exemptions have been condemned as unreasonable and as a denial of the equal protection of the laws. But even where the obnoxious exemptions were not present, the majority of appellate courts have declared such or-

150. See The Times, June 22, 1937, p. 16, col. f. The Blackshirts were, however, permitted to parade in other parts of London. Nevertheless, police attempts to protect them from counter-demonstrations have often failed. See N. Y. Times, Oct. 4, 1937, p. 1, col. 2; id., Oct. 11, 1937, p. 1, cols. 4-5. The Home Office is now said to be convinced that such demonstrations "were principally the work of undesirable aliens." See N. Y. Times, Dec. 17, 1937, p. 18, col. 3.

151. See The Times, June 29, 1937, p. 21, col. b.

152. Ibid.

153. See p. 413, supra.


156. See ordinance discussed in State ex rel. Garrabad v. Deming, 84 Wis. 585, 54 N. W. 1104 (1893) (Salvation Army parade—ordinance held to violate equal protection clause).

157. See Commonwealth v. Plaisted, 148 Mass. 375, 19 N. E. 224 (1889) (Salvation Army parade—police "rule" upheld under grant of authority to regulate "itinerant musicians" though rule excepted funeral or military parades and processions by a political, a "civic, or charitable organization for which a police escort is provided.") And see supra, notes 58 and 61.

158. See cases cited supra notes 154, 155 and 156.
dinances unreasonable because they delegate uncontrolled discretion to the licensing official.\footnote{159}

This apparent difference between the judicial treatment accorded ordinances regulating street meetings and parades invites speculation. One ingenious though unconvincing rationalization has been suggested for the distinction.\footnote{160} It is argued that a procession is "prima facie lawful," for, since "A, B, and C have each separately the right to pass and repass on the highway, there is nothing illegal in their doing so in concert."\footnote{161} The test of legality of any particular procession, therefore, is whether it "is a reasonable user of the highway, and not merely whether it causes an obstruction."\footnote{162}

The distinction in the United States may perhaps be explained on the ground that the parade cases have generally involved Salvation Army processions,\footnote{163} while the meeting cases have frequently involved Socialists or Communists.\footnote{164} Another possible explanation is that the possibility for discrimination is more apparent to the judges in the ordinances requiring permits for parades. Thus, even where the ordinance applies to all parades, regardless of the sponsoring organization, the argument recurs in the opinions that parades by lodges, fraternal societies, veterans' associations, and the like, have always been permitted; and that, therefore, it is unreasonable to grant arbitrary power to deny the privilege of parading to any organization.\footnote{165} But when the judges approach ordinances regulating street meetings, their sense of fair play is not necessarily stimulated. For generally, accepted organiza-


160. See Goodhart, \textit{Public Meetings \& Processions} (1937) 6 \textit{CAMBR. L. J.} 161. Although Professor Goodhart’s rationalization was concerned only with English law, it would seem equally applicable to the United States. Lowdens v. Keaveney [1903] 2 Ir. R. 82 seems to be the only reported British case definitely making the point that a procession, as distinguished from a meeting, on the streets may be \textit{prima facie} lawful. See \textit{id.}, at 89, 90. The distinction is made more frequently in the United States. See cases cited \textit{infra} note 166.


162. \textit{Id.}, at 171.

163. See cases cited \textit{supra} notes 154, 156, and 159.

164. See cases cited \textit{supra} notes 59, and 62; and see Bloomington v. Richardson, 38 Ill. App. 66 (1890), where the court held an ordinance requiring a permit to hold a "public meeting" in the streets inapplicable to a meeting of the Salvation Army on the ground that it was not a "public meeting."

165. See People ex. rel. Cartmill v. Rochester, 44 Hun 166, 169-70 (5th Dep't N. Y., 1887); \textit{In re} Gribben, 5 Okla. 379, 392, 47 Pac. 1074, 107 (1897) (Salvation Army parade—ordinance prohibiting "noise upon streets . . . by means of drums or musical instruments or otherwise" \textit{[Id.], at 380-1, 47 Pac. at 1075] held unreasonable).
tions, with the exception of the Salvation Army, do not desire to hold street meetings; they can usually afford to hire a hall.\footnote{166}

**CONCLUSION**

Few generalized comparisons of the right of public assembly in England and America are worth making other than those that by this time should be obvious. The legal techniques for controlling street meetings are similar in both countries, but regulation of private armies and Fascist organizations is far more extensive in England than in America.

It may be true that control of private armies has curbed Fascism in Great Britain without impinging on free speech. But statesmen may find that any ultimately successful policy must be based upon an examination into the fundamental causes of British fascism. Highly speculative though this examination may be, it would seem prerequisite to any permanent solution of the problems presented by Mosley's rise. "Down with the Jews," may be the cry—however misdirected—of a people in distress; a cry not to be permanently eliminated by repressive laws conceived in fear.

To those who wish to preserve free speech, more pressing problems are presented by the limitations on the right of public assembly, for the cumulative effect of these restrictions is serious. Repression of this sort is sought to be justified by the plea that it is necessary to maintain the public order. Some restrictions are necessary to curtail conduct which actually interferes with the public safety, but these measures are frequently used where the threat of disturbance is remote. In the long run the public order may best be served by risking a little disorder. To let off steam may scorch the ceiling; it does not blow off the roof.

Several proposals for reform recur. It is sometimes urged that all discretion be taken away from the law-enforcing agencies.\footnote{167} The suggestion

\footnote{166. This rationale is, perhaps, illustrated by two cases, both arising in Michigan. The first, decided in 1886, involved an unlicensed parade by the Salvation Army. The ordinance was held unreasonable. Matter of Frazee, 63 Mich. 396, 30 N. W. 72 (1886), cited supra note 159. Fifteen years later, the same court had before it an ordinance prohibiting public addresses in the streets without a license. The accused was described as a "gospel preacher." The court upheld the ordinance, stating, without further rationalization, that there was an obvious distinction between a "stationary assemblage" and a "moving procession." Love v. Phelan, 128 Mich. 545, 549, 87 N. W. 785, 787 (1901) (The court relied on a statement in the Frazee case, supra, at 407, 30 N. W. 76). See also People ex rel. Cartmill v. Rochester, 44 Hun 166, 169 (5th Dep't N. Y., 1887) (procession in street "not necessarily a nuisance."); Shields v. State, 187 Wis. 448, 204 N. W. 486, 40 A. L. R. 945 (1925) (K. K. K. masked parade—defendant policeman convicted of assault since parade not unlawful per se). Pennsylvania courts, however, apparently make no distinction between street parades and meetings. See cases cited supra note 155.}

\footnote{167. See, e.g., Jennings, supra note 16, at 7; Comment (1935) 23 CALIF. L. REV. 180, 192.}
is futile. Every statute, every ordinance must look to men for its interpretation. But this study has indicated that the wording of statutes does have some significance. It might therefore be helpful to attempt to tighten up those statutes seeking to maintain the public order.\textsuperscript{108} Within broad limits a standard of conduct can be described which should be extremely difficult to twist or distort. But a word can have only that meaning which a man imports to it.

There is of course some hope that the law-enforcing agencies might be induced to use their discretion more wisely. The American policeman might at least be taught to follow the example of his English contemporary by discarding some of his more brutal tactics. And judges might be educated to be frankly suspicious of police administration in civil liberties cases. But these vague hopes are hardly likely to be achieved.

The abuse of discretion by the police has led to another recurring proposal. In the words of an Englishman, "the most important single problem of civil liberty in England today is to secure the control by democracy of the police."\textsuperscript{169} If by "democracy" is meant the majority, this suggestion is illusory. The majority has never desired civil liberties save for itself. Thus the guaranties of civil liberty contained in our Constitution have never withstood major attacks. The Alien and Sedition Act of 1798, the hysteria of the Reconstruction Days, the World War, and the post-war legislation have all taken their toll, unabashed by constitutional restrictions and unhindered by court action. True, there are the recent victories of some of the Scottsboro boys, and of Herndon, De Jonge and Miss Stromberg, but they stand in the very shadow of such cases as those of Gitlow, Abrams, Debs and Miss Whitney.\textsuperscript{170} There is no reason to doubt that the repressive activities of the police in England and the United States have the support of the majority.

Nevertheless, there remains the hope that at least the more flagrant abuses can be curbed by a minority dedicated to the task of reminding a democracy of its pledge as articulated in the Bill of Rights.

\textsuperscript{168} In "preventing breaches of the peace or bringing to an end an actual disturbance . . . the police are better served by the common law—with all its elasticity and adaptibility—than they would be by any rigid statutory code." \textit{The Police and the Law} (1936) 9 POLICE J. 11, 19.

\textsuperscript{169} Bing, \textit{Civil Liberty} (1937) 19 LABOUR MONTHLY 296.

\textsuperscript{170} (1936) 46 YALE L. J. 862.