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I. Introduction

FREEDOM OF ASSEMBLY, guaranteed to all Americans by the First and Fourteenth Amendments to the United States Constitution, is perhaps one of the most sacred and inviolable rights ever possessed by any political segment of mankind; yet, it has limitations. The great Justice Holmes circumscribed First and, consequently, Fourteenth Amendment freedoms with the invisible "clear and present danger" [1] limitation, which distinguishes free speech, religion and assembly from conduct susceptible to criminal sanction. There is, then, a point at which free conduct becomes criminal. We have chosen to discuss and undertake to determine the precise point at which an assemblage of persons engaged in a racial demonstration loses constitutional protection and becomes instead an unlawful assembly, punishable as such under the common law or under state statutes or ordinances which embody the common law.

To accomplish this purpose, we shall first attempt to define the crime of "unlawful assembly"; then we shall discuss breach of the peace because it is so intimately connected with the offense of unlawful assembly. This article will conclude with examples of situations in which racial demonstrations are, or are not, unlawful assemblies; for that purpose we will concern ourselves with three types of racial demonstrations: (1) "sit-in" demonstrations, (2) picketing of eating places, and (3) parades of armed or unarmed demonstrators.

There are so many variations in the statutes of the several states defining unlawful assembly and dealing with breach of the peace that it would be impracticable to treat each of them in this article. Therefore, our discussion will deal with the common law signification of these terms and with court decisions concerning statutes and ordinances which comport with such common law significations.

II. Unlawful Assembly

This article will deal with the common law offense of unlawful assembly as the same is defined in a recent Annotation at 71 A. L. R. 2d 875, 878, in which it is stated that said offense consists of (1) the assembling together of three or more persons (2) with a common design or intent (3) to accomplish a lawful or unlawful purpose by means such as would give rational, firm, and

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[1] 249 U. S. 47, at 52; 63 L. Ed. 470; 39 Sup. Ct. 247 (1918).

courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace.[2]

In line with this definition was Blackstone's statement that an assembly for the purpose of doing an unlawful act without making any motion toward the execution of their purpose could constitute the crime.[3]

Intent, the purpose or design in the minds of those making up the assemblage, is all-important to the commission of the crime; it need not exist, however, at the outset but may be formed either at or after the time of the assembly, and its existence can be inferred from language, acts, conduct and other circumstances involved in the alleged unlawful assembly.[4]

In *Redford v. Birley,*[5] an English decision rendered in 1822, the jury was instructed that a large gathering of persons who drilled with stones, bludgeons and other offensive weapons on a field at Manchester was an unlawful assembly if the participants met "in such a way as to overawe and terrify other persons . . ."

In *State v. Butterworth,*[6] a New Jersey decision, defendants were convicted under a statute adopting the common-law crime of unlawful assembly. During a strike by silk mill workers near Patterson, New Jersey, the strikers attempted to hold a meeting in Turn Hall to protest alleged police oppression against strikers. Police refused to allow the meeting to be held in the Hall. To protest this latest police action, 200 or 300 persons gathered in the public square; a procession of about 30 marched from union headquarters to the square, led by two young women bearing the American flag and followed by the defendants. By the time the procession had reached the city square, about 1,500 or 2,000 persons had gathered. Defendant Butterworth began to address the crowd saying, "Fellow workers," whereupon he was interrupted by police officers, who asked if he had a permit to hold a public meeting. Butterworth, holding up a book in his hand, said, "This is my permit." He was placed under arrest, to which he made no resistance but quietly submitted. There was no evidence that any weapons were displayed at any time. Two police officers testified that the attempted meeting put them in fear that something might happen, but there was no evidence that any other person was put in fear by the proceedings. The convictions of Butterworth and others were under a statute which on appeal was held to be to the same effect as the above quoted common law definition of unlawful assembly.

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[2] See Annotation at 71 A. L. R. 2d 875, 878; State v. Butterworth, 104 N. J. L. 579, 142 A. 57, 59, 58 A. L. R. 744 (1928); Shields v. State, 187 Wis. 448, 204 N. W. 486, 487, 40 A. L. R. 945 (1925).

[3] 71 A. L. R. 2d 877.

[4] Lair v. State, 316 P. 2d 225, at 234 & 235, 71 A. L. R. 2d 856 (Okla., 1957).

[5] 3 Starkie 76, 171 Eng. Reprint 773 (1822); see also 71 A. L. R. 2d 877.

[6] *Supra,* note 2.

On appeal, the convictions were reversed. In reversing, the court, speaking through Justice Kalisch, remarked:

> It is rather startling to the most lively imagination that, if this meeting was of such a turbulent and disorderly character as described in the indictment, unsupported as it is, however, by the proof, that out of 40 policemen only 2 of them, and they without stating any facts reasonably supporting any ground of fear or alarm which would be entertained by a person of a firm and courageous mind, were seized with fear of a threatened outbreak and breach of the public peace . . . . . [The] object of the meeting was to protest publicly against action taken by the police authorities which prevented the strikers from holding their meetings to vent their grievances in a public hall. The object of the meeting, therefore, was per se not an unlawful one, and an indictment for unlawful assembly could not properly be predicated upon the mere fact of holding the meeting in a public place . . .[7]

A Puerto Rican case, *Garcia Dominicci v. District Court*,[8] and a Wisconsin case, *Shields v. State*,[9] will also show what type of assembly is protected by the Constitution. In the former, defendants and other students constituting a throng of 500 gathered together and marched toward the University of Puerto Rico to protest certain acts of the Chancellor of the school. They made noises, including whistling, jeering and uttering boisterous exclamations; and their conduct obstructed traffic. Police tried to change their course to prevent them from approaching the school and to ease traffic conditions; but the demonstrators disregarded police demands, continuing to march upon the University. Later most of the paraders sat in the street and on sidewalks, completely paralyzing traffic for about half an hour.

The defendants were convicted under an unlawful assembly statute requiring violent and tumultuous conduct. The court utilized the *Butterworth* case's definition of unlawful assembly in construing the statute. The convictions were reversed. The decision reads in part:

> The nature of each act depends on the circumstances under which it was executed. Perhaps if this very act had been executed in a peaceful hamlet whose inhabitants were not used to the excitement and noises, its peace and order might be disturbed. But the events took place in the city of Rio Piedras, which is the seat of the University of Puerto Rico, with more than 5,000 students. . . .[10]

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[7] *Id.* at 142 A. 61.

[8] 71 Puerto Rico 122 (1950).

[9] *Supra,* note 2.

[10] *Supra,* note 8, at p. 126.

> . . . [T]he right of the people to assemble for redress of grievances may only be sacrificed when public order is actually threatened and not merely when it is conceivable that it may be slightly affected.[11]

The decision seems to point out the importance of "climate" and circumstances surrounding each alleged crime of unlawful assembly. Latin temperament is excitable and easily aroused; what is commonplace in a university city in Puerto Rico may create riots and be punishable as unlawful assembly in Boston or in a non-university town in Puerto Rico, for that matter. If the students involved had all been members of one race and had conducted their demonstration in a town torn by racial strife, the holding of the court might have been contra.

The Wisconsin decision, *Shields v. State*,[12] concerned a Ku Klux Klan parade, consisting of men and women in regulation regalia of masks and long robes, marching through the streets of a Wisconsin city before a crowd of six or seven thousand people assembled to watch. The parade was conducted in an orderly manner; the participants marched with folded arms and neither said nor did anything to cause any disorder. A question decided by the court was whether this parade could be considered an unlawful assembly. Wisconsin, at that time, evidently had no unlawful assembly statute and the court applied the common-law definition.

The parade was held not to be an unlawful assembly and from the decision, we glean the following relevant comments:

> . . . [T]he conduct of the participants was perfectly orderly; they marched with their arms folded across their breasts; and they behaved in every respect in the most peaceful manner. There was nothing in their conduct to give rise to a reasonable belief that they would, or even intended to, "disturb the peace tumultuously." It might be argued that because of the proclaimed principles of this organization, which are exceedingly offensive to certain classes of American citizens, the presence of its members, clothed in their regalia, might provoke those classes of American citizens who are proscribed by its tenets to a breach of the peace. It cannot be doubted that the public demonstrations of this order *excite resentment* on the part of those classes of our citizens whose Americanism the principles of the order condemn. But experience in our state does not indicate that such resentment, justly entertained, prompts reprisal by acts of violence, or leads to a tumultuous breach of the peace . . .[13] (Emphasis supplied.)

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[11] *Id.* at 127, 128.

[12] *Supra*, note 2.

[13] *Id.* at 204 N. W. 487.

Now let us turn our attention to a case in which convictions for unlawful assembly were upheld. In *People v. Anderson,*[14] a California case, the defendants were all members of a Communist organization known as the Trades Union Unity League. This League called a "demonstration against unemployment," to be held in the Plaza, which was a public square or park in the City of Los Angeles. Large crowds were gathered on all the streets in this vicinity in places blocking the sidewalks and even the roadways. Defendants were all members of the League, and had all come to take part in the demonstration or to speak.

One defendant was raised on the shoulders of other defendants. He began to speak; he shouted, and the crowd shouted back. Police officers started toward him and had to fight their way through the crowd. The speaker shouted, "Don't let the police disperse us, don't let them arrest our speakers, fight against unemployment." The noise was so great that the police could not hear all that was said. When the police reached the defendants, they told them to disperse, that they were disturbing the peace and blocking traffic. The defendant refused to get down and the police proceeded to make arrests, in spite of resistance by all defendants.

Other defendants tried the same tactics at different locations, but not all such groups resisted the police, as did the first assemblage. Convictions of all the defendants were upheld, under an unlawful assembly statute. We quote from the opinion:

> . . . The defendants . . . were all acting in concert and with a common purpose in so assembling, . . . [W]hatever was done by any one of them was in furtherance of their common design, and hence . . . all were equally responsible criminally for the acts of any of them . . .[15]

Next the court stated that one of the purposes of the assembly was to resist by force any attempt to arrest or disperse them and to commit a disturbance of the peace; and that some of the defendants went further than others in executing this unlawful purpose, but that their guilt did not depend on the consummation of the purpose by all, or even by any, of them. The defendants had evidently argued that they had merely been resisting unlawful arrests. Apparently the court considered the gist of the offenses to be that defendants refused to move or quit speaking when warned by police that they were blocking traffic. The court said:

> . . . While a speaker who is not himself obstructing traffic may not always be criminally responsible for such obstruction created by his hearers, yet when he refuses to move on request and insists on holding his meeting at a place where his hearers are blocking traffic, as in this case, he becomes at

[14] 1 P. 2d 65 (Superior Court, Appellate Department, California, 1931).

[15] *Id.* at 67.

least an aider and abettor, and a principal in the offense . . .[16]

III. Breach of the Peace

A breach of the peace is a violation of public order; the offense of disturbing the public peace. The term is generic, and includes riotous and unlawful assemblies.[17] Here are the necessary elements of the common law offense: (1) conduct, actions or words, (2) which are voluntary, willful, intentional, unjustifiable and calculated to disturb public order or tranquillity,[18] (3) which arouse and disturb some segment of the public,[19] and (4) which constitute violence or directly and immediately[20] provoke or tend to provoke actual or threatened violence.[21]

Disturbing and arousing the public does not mean causing mere discomfort, annoyance or resentment; rather, defendant's acts, words or conduct must be such as normally cause alarm, consternation, disquiet and disorder, and which threaten danger or disaster.[22] Actual violence is not a necessary element of the offense; either actual or threatened violence is sufficient to constitute the offense. In cases not involving open disturbances in public places, and the actual annoyance of the public at large, personal violence, either actual or threatened, is required before a crime has been committed.[23] Actual personal violence is never a requirement. There must be at least *threatened personal* violence to constitute non-public breaches of the peace, but if the acts, conduct or words affect a larger segment of the public, the necessity for *personal* violence disappears in inverse proportion with the increasingly public nature of the environ of the alleged acts, words or conduct.[24] The acts, words or conduct cannot be criminal unless they tend with sufficient *directness* to break the peace. By directness is meant an immediate threat to public safety, peace or order; a mere possibility that the act, conduct or

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[16] *Id.* at 68.

[17] Stewart v. State, 4 Okl. Cr. 564, 109 P. 243, 245 (1910).

[18] State v. Mancini, 91 Vt. 507, 101 A. 581 (1917); People v. Sustek, et al., 124 N. Y. S. 2d 641 (1953).

[19] Stancliff v. United States, 5 Ind. T. 486, 82 S. W. 882 (1904); People v. Perry, et al., 265 N. Y. 362, 193 N. E. 175 (1934).

[20] State v. Steger, 94 W. Va. 576, 119 S. E. 682, 34 A. L. R. 570 (1923); State v. Thompson, 117 Vt. 70, 84 A. 2d 594 (1951); Webber v. Farmers Chevrolet Co., et al., 186 S. C. 111, 195 S. E. 139 (1938).

[21] Woods v. State, 152 Cr. 338, 213 S. W. 2d 685 (Tex., 1948); Wanzer v. State, 202 Md. 601, 97 A. 2d 914 (1953); State ex rel. Thompson, Atty. Gen. v. Reichman, 135 Tenn. 685, 188 S. W. 597 (1916).

[22] People v. Ludovici, 13 N. Y. S. 2d 88 (1939); People v. Chesnick, 302 N. Y. 58, 96 N. E. 2d 87 (1950).

[23] Ware v. Loveridge, 75 Mich. 488, 42 N. W. 997 (1889); State ex rel. Thompson, Atty. Gen. v. Reichman, *supra*, note 21.

[24] *Ibid.*

words may produce or incite violence is not sufficient to constitute a breach of the peace.[25] Whether or not a given act or state of conduct amounts to a breach of the peace depends upon the circumstances surrounding the act,[26] what may amount to a punishable offense in one set of circumstances may not be a breach of the peace in another time, place, and situation.

A. The Cantwell and Feiner Cases

Two United States Supreme Court cases in particular have clarified the demarcation line separating First Amendment freedoms from conduct constituting a breach of the peace; they are *Cantwell v. Connecticut*[27] and *Feiner v. New York*.[28] In the former, the defendant, a member of the Jehovah's Witnesses sect, was convicted of the common law offense of "inciting a breach of the peace." While on a street in a predominantly Catholic neighborhood, he stopped two men who were Catholics. He asked and received permission to play a phonograph record and then proceeded to play the record, which attacked the Catholic religion. Both men were incensed by the playing of the record and were tempted to do violence to Cantwell. They told him to go away, and on being so advised, he left their presence without being argumentative.

The conviction was reversed by the Supreme Court. Cantwell had been on a public street, "where he had a right to be, and where he had a right peacefully to impart his views to others."[29] The court pointed out that the playing of the record had not disturbed nearby residents and that it had not attracted a crowd or impeded traffic; the fact that the hearers had been highly offended and angered was not sufficient to make the actions criminal. The court observed that conduct, words or acts likely to provoke violence can be a breach of the peace, even if no such eventuality be intended and had the following to say with reference to breach of the peace:

> . . . [I]n practically all [breach of the peace cases], the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution . . .[30] (Parentheses supplied.)

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[25] State v. Thompson, *supra,* note 20; State v. Steger, *supra,* note 20.

[26] Jennings v. State, 92 O. Cr. 347, 223 P. 2d 562 (Okla., 1950); State v. Stroble, 169 Kan. 167, 217 P. 2d 1073 (1950); State v. Mancini, *supra,* note 18.

[27] 310 U. S. 296, 84 L. Ed. 1213, 60 Sup. Ct. 900, 128 A. L. R. 1352 (1939).

[28] 340 U. S. 315, 95 L. Ed. 267, 71 Sup. Ct. 303 (1950).

[29] *Supra,* note 27 at 310 U. S. 308.

[30] *Id.* at 309, 310.

> We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse . . .[31]

The court opined that Cantwell could not be said to have committed a breach of the peace in the absence of a statute narrowly drawn to define and punish conduct as constituting a clear and present danger.

A decision which may have great influence upon future cases regarding racial demonstrations is *Feiner v. New York*.[32] Defendant was arrested under a statute which substantially embodied the common law offense of breach of the peace, with some variations.[33] Feiner, the defendant, made a speech at a busy intersection in the City of Syracuse. He spoke from a box located between the sidewalk and the street. A crowd of 75 to 80 (mixed colored and white) persons gathered around him, and some pedestrians had to go into the street in order to pass by. Two policemen observed the meeting. Feiner indicated in an excited manner that Negroes did not have equal rights and should rise up in arms. One man indicated that if the police did not get the speaker off the stand, he would do it himself. The crowd, which consisted of both those who opposed and those who supported the speaker, was restless. There was not yet a disturbance but the arresting officer stepped in to prevent it from resulting in a fight. Having ignored two police requests to stop speaking, Feiner was arrested. The United States Supreme Court, in an extremely close decision upheld the conviction, saying:

> . . . The courts below . . . found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.[34]

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[31] *Id.* at 310.

[32] *Supra,* note 28.

[33] Section 722 of the Penal Law of New York:
"Any person who with intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned, commits any of the following acts shall be deemed to have committed the offense of disorderly conduct:
"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 offensive to others;
"3. Congregates with others on a public street and refuses to move on when ordered by the police; . . . ."

[34] *Supra,* note 28 at 340 U. S. 319, 320.

> . . . This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. [giving citations]. We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner.[35]
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> We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. "A State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." Cantwell v. Connecticut, supra, (310 U. S. at 308 . . .) . . . But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace . . . The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.[36]

B. Refusal to Leave Private Property as a Breach of the Peace

Under the common law, if A, while lawfully on the private property of B, is asked by B to leave, and A refuses to so do, B may have the right to forcibly remove A or to obtain police aid in removing A; but if A sits quietly and engages in no offensive conduct other than quiet refusal to leave, the courts find difficulty in construing such conduct of A to be a breach of the peace.

In a 1947 New York decision, *People v. Swald*,[37] rendered by the City Court of Utica, Swald, an independent taxicab driver, was told to stop soliciting customers in the Union Station, which was private property of the railroad. He disregarded the warning and came back to solicit customers. A police officer told him to leave. He would not go, however, and was placed under arrest for disorderly conduct, one of the necessary elements of which was language, conduct or behavior intended to provoke a breach of the peace, or whereby a breach of the peace may be occasioned. The court held that no offense was committed, saying:

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[35] *Id.* at 320.

[36] *Id.* at 320, 321.

[37] 73 N. Y. S. 2d 399 (1947).

> . . . [D]efendant's actions caused no crowd to collect nor was any loud, offensive, insulting or disturbing language or conduct employed by the defendant.[38]
> It is understandable that the refusal of the defendant to leave the premises was annoying, disturbing and perhaps offensive to the complainant as well as interference with the property rights of the New York Central Railroad. It may well be that defendant was a trespasser on the premises and could have been removed by force if necessary . . .
> It has not been shown in this case that the defendant had any intention of breaching the peace. The record discloses no loud or angry talk, no boisterous or profane language, no physical violence or threat to do so . . .[39]

Thus, annoying, disturbing or offensive conduct does not necessarily in and of itself provoke a breach of the peace. Violence, either actual or threatened, is necessary.

C. Picketing as a Breach of the Peace

Peaceful picketing is not per se unlawful nor a breach of the peace; however, if carried on for an unlawful purpose, or if accompanied by threats, force, violence, coercion or intimidation, it enjoys no immunity.[40] Also, pickets may not violate traffic regulations; a person could not, for instance, take "his stand in the middle of a crowded street . . . and maintain his position to the stoppage of all traffic; a group . . . could not insist upon a constitutional right to form a cordon across the street and to allow no pedestrian to pass who did not accept a tendered leaflet . . . ."[41]

In *People v. Kieran*,[42] a New York County Court case, defendants who were members of a religious sect walked along the sidewalk in single file, at intervals of ten feet, bearing placards with such words as "Religion is a snare and a racket." No violence occurred and none was threatened though curious people followed the marchers. The defendants were arrested under New York statute for the crime of "disorderly conduct," which contains many of the elements of, but is broader in scope than, the common-law offense of breach of the peace. They were found not guilty. Here is what the court said:

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[38] *Id.* at 400.

[39] *Id.* at 401.

[40] Thornhill v. Alabama, 310 U. S. 88, 84 L. Ed. 1093, 60 Sup. Ct. 736 (1940); Carlson v. California, 310 U. S. 106, 84 L. Ed. 1104, 60 Sup. Ct. 746, *reh. den.* 310 U. S. 657, 84 L. Ed. 1420, 60 Sup. Ct. 1072 (1940); Moore v. City Dry Cleaners and Laundry, 41 So. 2d 865 (Fla., 1949).

[41] Nichols v. Commonwealth of Massachusetts, 308 U. S. 147, 160, 84 L. Ed. 155, 60 Sup. Ct. 146 (1941).

[42] 26 N. Y. S. 2d 291 (1940).

> . . . [I]n the instant case is presented the question whether the acts of the defendants passed beyond lawful exercise of constitutional rights and into the range of "disorderly conduct . . . ." [43]
>
> . . . They . . . [defendants] . . . exercising their individual freedom of thought, are convinced that "truth" is in the Bible alone and not in organized religion . . . I think that the Constitution and bill of rights are intended to and do guarantee to them the right to do that very thing. . . .[44] We may well say that these defendants, in the manner in which they exercised their rights, were guilty of lack of manners and of bad taste, but those errors are not to be corrected by convictions for disorderly conduct . . . No violence occurred and none was threatened . . . .[45]

Several other decisions deserve our attention. Another New York case, *People v. Barkal*,[46] decided in 1942 in the City Magistrate's Court of New York City, involved arrests for disorderly conduct of persons who had failed to move their picket line of march around a Coney Island lunch room and sidewalk counter restaurant, when ordered to do so by police. The picketing was being conducted around an oval march pattern extending the length of the building, with the strikers circling around to the center of the twenty-five foot wide sidewalk, while remaining 6 to 8 feet from the building at all times. Police had demanded that picketing be confined to an area on the sidewalk 5 feet from the curb. The defendants refused to so restrict their activities.

No offense was committed, the court held. "Picketing is not a game nor a sport. It is engaged in by people seeking to improve their working conditions and their standards of living."[47] Picketing is freedom of speech, and, said the court, its use in cases of conflicting economic, social and political interests may cause temporary inconvenience. This incidental inconvenience, however, is not justification for the limitation of the constitutional right to picket.[48] The opinion then reads:

> It follows, therefore, that the defendants as strikers had a right, under all the circumstances, to picket in or about the center of the sidewalk, in order to convey the information they desired to disseminate to the public in the immediate vicinity. The order of the Police Department limiting the picketing to five feet from the curb was arbitrary, unreason-

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[43] *Id.* at 306.

[44] *Id.* at 308.

[45] *Id.* at 308, 309.

[46] 36 N. Y. S. 2d 1011 (1942).

[47] *Id.* at 1014.

[48] *Id.* at 1015.

able and capricious. It constituted a flagrant invasion and deprivation of the constitutional rights of the pickets.[49]

In the Colorado Supreme Court case of *Flores, et al. by City & County of Denver*,[50] the following pertinent facts appear: Fifty to seventy people, including the defendants, assembled in front of the Governor's house and chanted in high-pitched voices for a redress of certain grievances. There was no profanity or fighting and police received no complaints from neighbors that they were being disturbed. The chief of police observed the proceedings for ten minutes. Then he requested that the group disperse. The defendants insisted upon the right to demonstrate for fifteen more minutes, to which the chief of police reiterated his demand for immediate dispersal. The defendants refused to comply and were placed under arrest, for, among other things, violation of a "disturbing the peace of others" ordinance. The court held there was no crime committed. It said that the conduct of the defendants was neither violent nor threatening, nor likely to produce violence, or cause consternation and alarm. No one was disturbed, so there could be no "disturbance" of the peace. "Even if the ordinance be construed to include breach of the peace generally, there must be at least a threat to the peace of the community." [51] The court obviously felt that the conduct of the defendants could not constitute a common law beach of the peace. The court discussed breach of the peace cases involving fighting and unlawful activities, then said:

> In the situation here presented, we have another element, absent from the cases hereinabove noted. The disturbance of which complaint was made in those cases was wanton and without worthy purpose. In the instant case, the noise involved was incidental to a legitimate right, protected by the Constitution, to appeal to those in authority for redress of grievance by remonstrance, and such right must be balanced against the right of the community to peace and quiet. There exists the undoubted authority of the state reasonably to limit the free exercise of the right of remonstrance, as well as of the free exercise of religion, and even of the right of free speech itself, where they sanction incitement to riot or constitute an immediate threat to public safety, peace or order, but such rights may not be lightly nor unduly suppressed . . . .[52]

People v. Nixson (1928, New York Court of Appeals) [53]

[49] *Ibid.*

[50] 122 Colo. 71, 220 P. 2d 373 (1950).

[51] *Id.* at 220 P. 2d 375.

[52] *Id.* at 376.

[53] 248 N. Y. 182, 161 N. E. 463 (1928).

involved several appeals from disorderly conduct convictions resulting from a picketing demonstration; some convictions were upheld while others were reversed, the reason seeming to be that the former group, prior to being arrested, were admonished by police to discontinue marching in large groups, and failed to heed the warning. Those whose convictions were reversed, although engaging in identical conduct, had not been so admonished. All defendants had picketed or marched in mass formation on a sidewalk, thereby obstructing it and causing some pedestrians to use the roadway. They had been parading four abreast and occupied approximately 6 feet of a 12 foot sidewalk.

The court, among other things, mentioned that the mere fact that persons congregating or walking in the streets cause inconvenience to others or cause pedestrians to stand aside or step into the roadway does not necessarily tend to a breach of the peace. The court went on to say that the social or economic position of defendants should have no bearing on the question of whether conduct is innocent or wrongful. As to those defendants who were not forewarned by the police, the court said:

> . . . In the absence of evidence that the defendants caused substantial annoyance to others, or persisted in their conduct after protest from others or warning from a police officer, we find the evidence insufficient to sustain the conviction . . . .[54]

However:

> . . . In the other four cases the circumstances are different. There the evidence, though meager and unsatisfactory, yet seems to us sufficient to support a finding that the defendants acted recklessly of the rights and convenience of others, and that their conduct tended to a breach of the peace.
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> In all these four cases there is evidence that before the defendants were arrested they were warned by police officers that they must not persist in marching up and down the street in large groups. Police officers are guardians of the public order. Their duty is not merely to arrest offenders, but to protect persons from threatened wrong and to prevent disorder. In the performance of their duties they may give reasonable directions. Present at the point where the defendants were congregating they might early sense the possibility of disorder.
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> Even a protest from pedestrians who were annoyed by the defendants' conduct might be a significant element in determining whether persistence in such conduct was wrongful. Enough has been shown in these cases to justify the officers in warning the defendants. Refusal to heed the warning so given, persistence in parading the street in groups thereafter, is, perhaps, so significant of a contumacious disregard of the

[54] *Id.* at 161 N. E. 466.

rights of others that it supports the finding of guilt of the defendants. In these cases the judgments must be affirmed.[55]

IV. When do Racial Demonstrations Become Unlawful Assemblies?

We already have seen that the common law offense of unlawful assembly is not committed unless the defendants can be shown to have intent to accomplish a lawful or unlawful purpose by means which would cause persons in the neighborhood to fear *a breach of the peace.*[56] They must, of course, act in concert with intent to effectuate a common purpose or design, before such act becomes criminal.[57] The right to demonstrate for the purpose of seeking a redress of grievances is not to be lightly or unduly suppressed.[58] However, there can be no doubt that if such demonstration takes on the characteristics or elements of the common law crime of unlawful assembly, the demonstrators will be guilty of that offense.

A. "Sit-in" Demonstrations

The recent wave of restaurant "sit-ins" in the South raises new and important questions. The concern of the law in such instances must be not only with individual constitutional rights, but also with the property rights of the restaurant owner. Peaceful "sit-in" demonstrations are lawful and cannot constitute a breach of the peace or unlawful assembly no matter how much antagonism and resentment they cause except in the following types of situations:

(1) The demonstrators, to the disturbance of some segment of the public, engage in some form of violence, profanity, indecency, abusiveness or discourtesy, which under the common law would constitute or create in others a reasonable fear of a breach of the peace, provided that the other elements of the common law crime of unlawful assembly are also present;

(2) Bystanders gathering to watch the "sit-in" demonstrators become agitated to such extent as to create a clear and present danger of a riot or breach of the peace and the demonstrators, although previously innocent of wrong-doing, refuse to disperse upon demand of authorities. It is true that if the bystanders become abusive, profane, violent, or if their conduct tends to provoke violence, then they have committed crimes. It is also true that the duty of police officers is to protect the demonstrators in the exercise of their constitutional right to seek a redress of griev-

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[55] *Ibid.*

[56] *Supra,* note 2.

[57] *Supra,* notes 2 & 4.

[58] *Supra,* note 50, at 220 P. 2d 376.

ances, but this does not mean that demonstrators may insist upon exercising that right when to do so creates imminent danger of a riot or a breach of the peace. The mere fact that the demonstration causes resentment among bystanders, of course, cannot make the "sit-in" illegal. Nevertheless, if the demonstrators refuse to desist from conduct which, although lawful under ordinary circumstances, tends to create an imminent danger of a riot or a breach of the peace, then we think that the *Feiner*[59] decision would justify their arrest.

B. Picketing

Peaceful picketing which does not unduly block traffic is constitutionally protected unless and until it becomes violent or otherwise constitutes a breach of the peace. The illustration above concerning bystanders at "sit-ins" is equally applicable to picketing. The cases involving picketing already mentioned are, of course, equally applicable whether the demonstration is by laborers seeking higher wages and better working conditions or by Negroes striking for greater voice in social, economic and political affairs. The *Nixson*[60] case, above discussed, although a much older case, seems to apply to the field of picketing the legal principles enunciated in the *Feiner* decision.

C. Parades

A parade is merely an assemblage in motion. The rules applying to "sit-in" and picketing demonstrations, apply to parades as well. In addition, the old English case of *Redford v. Birley,*[61] in which common law principles were applied, points out that a group of men drilling or marching with sticks, guns, clubs or other offensive weapons, may be guilty of unlawful assembly if the participants meet in such a way as to "overawe and terrify" other persons.

V. Conclusion

It should be pointed out that the circumstances surrounding any act are of prime importance in determining whether the crime of unlawful assembly has been committed.[62] Conduct constituting the crime in a city beset by race disturbances might not be punishable if committed in some other setting. Probably the law enforcement officials of a tradition-steeped southern community or of a crowded northern city are faced with potential race riots and disorders of much greater magnitude and of more explosive potential than are sheriffs and police officers in localities where

[59] *Supra,* note 28.

[60] *Supra,* note 53.

[61] *Supra,* note 5.

[62] *Supra,* note 8.

race problems are negligible; accordingly officials in the first mentioned areas may justifiably sense danger from racial demonstrations and take action to disperse them sooner than if they were in localities of the latter type; and, although doubtless many will disagree, we think that law enforcement officers in the first-mentioned types of localities would be justified in making arrests under circumstances where arrests might not be justified in areas of the last-mentioned type.

Racial demonstrations for the purpose of promoting or opposing the full exercise of "civil rights" of individuals will no doubt raise many complex and novel legal questions in the near and continuing future. As for the criminal law aspect of such demonstrations, the best and most worthwhile observation that can be made at this point is that there will be disorder and chaos indefinitely unless demonstrators are arrested, if at all, only on an impartial and strictly legal basis; that is to say, the law must be the paramount consideration of police and judges.