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PUBLIC SPEECH AND PUBLIC ORDER IN BRITAIN AND THE UNITED STATES

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I. General Introduction

This paper will not attempt a general comparison of free speech in Britain and the United States. It concentrates on one aspect of the free speech problem. That aspect is speech that does or may lead to a breach of the peace by the audience.[1]

We may start this specific inquiry with some observations so general as to belong in a preface and not in a conclusion. Peaceful, democratic societies like Britain and the United States esteem freedom of speech. They also esteem the peacefulness of their citizens. The freedom should not be trampled by the police; the citizens should not be trampled by rioters. Our problem is rooted in political philosophy, and many thoughtful men have reflected on how freedom and order are opposed or complementary.[2] A more modest but perhaps useful task is to examine and compare what is actually done about one kind of freedom and one kind of order in two similar societies, leaving the reader to decide whether what is done ought to be done. Unfortunately, our only data are decided cases. They are few, and soap box speeches are many. Cases gather on the fringe of everyday behavior. What happens in a nation's courtrooms may not be a perfect guide to what happens in its streets.

The frame of comparison should include the following facts. In the United States, the Supreme Court can effectively nullify a state or federal statute that conflicts with the United States Constitution.[3] No court in Britain can refuse to enforce an Act of Parliament.[4] For the most part, Parliament has not legislated on speech that leads to disorder.[5] The British legal rules we shall investigate are mainly

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1. The speech itself, because of loudness, etc., may disturb the peace. *Cf.* Kovacs v. Cooper, 336 U.S. 77 (1949). The audience may illegally obstruct a highway. Homer v. Cadman, 16 Cox Crim. Cas. 51 (Q.B. 1886). This paper does not deal with those questions.

2. Some references are collected in Note, *Freedom of Speech and Assembly: The Problem of the Hostile Audience,* 49 Colum. L. Rev. 1118 (1949).

3. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

4. Lee v. Bude & Torrington Junction Ry., L.R. 6 C.P. 576, 582 (1871).

5. The most recent statute is the Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, c. 6. Section 5 of that Act provides: "Any person who in any public place or at any public meeting uses threatening, abusive or insulting words or behavior with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence." Section

common law rules.

In the United States, a litigant can invoke the constitutional guarantees of free speech against federal or state governments.[6] He may also be able to rely on a state constitution, but to avoid burying our comparison in citations, this paper will focus on the federal constitutional questions. In Britain, the speaker has no written guarantee good even against police or judicial, let alone legislative, interference. Therefore, in British cases the constitutional questions are not separated from the substantive law of the wrong (*e.g.*, unlawful assembly, trespass). They are subsumed under the question of coverage.[7] This is an important difference in judicial approach from that of the American courts.

When during or after a speech the audience breaks the peace, or when officials apprehend that it will do so, there are several ways the state can apply force in the interest of order. It can prevent the meeting from being held at all, or from being held at a particularly dangerous time and place. While permitting the meeting, it can restrain the crowd or stop the speaker if the crowd gets unruly. It can estreat a bond the speaker has given to secure the peace. It can punish the speaker and/or the audience for what happened or what might have happened.

Of these methods, most American cases concern prohibition under a licensing scheme and punishment. The United Kingdom cases involve the bond or recognizance, police intervention during the meeting, and punishment. The license cases are confined to American courts probably because license requirements are based on a statute, which could not be challenged in England.[8] Recognizances are used

5 is almost identical to N.Y. Penal Law § 722(1), *infra* note 38. The Public Order Act, 1936, *supra*, was aimed at fascist demonstrations. See generally Comment, *Public Order and the Right of Assembly in England and the United States*, 47 YALE L.J. 404 (1938). Section 5 cannot be made much clearer by exposition. In the twenty-two years since enactment, it appears to have been invoked in only one reported case, Wilson v. Skeock, [1949] W.N. 203 (K.B.) (§ 5 not applicable to "abusive language between neighbors").

6. U.S. CONST. amend. I. The freedoms of speech and assembly are cognate. Thomas v. Collins, 323 U.S. 516, 530 (1945); DeJonge v. Oregon, 299 U.S. 353, 364 (1937). Speech to a crowd involves both freedoms. Therefore, in this paper they are treated together and usually denominated compendiously as "free speech," etc. U.S. CONST. amend. XIV, § 1 imposes similar limitations on the states. Gitlow v. New York, 268 U.S. 652 (1925).

7. *Cf.* DICEY, LAW OF THE CONSTITUTION 239, 246 (9th ed. 1939).

8. Apparently the only case holding the parent statute invalid is M'Ara v. Magistrates of Edinburgh, [1913] Sess. Cas. 1059 (Scot. 1st Div.) (statute in desuetude under Scots law). A more common line of attack is that the local licensing by-law is ultra vires the parent Act. See generally Kruse v. Johnson, [1898] 2 Q.B. 91. This problem of delegated legislation is no different in the free speech area from elsewhere, and turns mostly on construction of the parent statute. Since Parliament would never authorize the unreasonable, some cases hold by-laws ultra vires because unreasonable. Two indicia of unreasonableness resemble arguments in American license cases. See Munro v. Watson, 57 L.T.R. (n.s.) 366 (Q.B. 1887) (excessive discretion); Johnson

in this area only in Britain. Most American state courts have jurisdiction to bind over to keep the peace, under rules similar to those in England.[9] But no American case has been found in which a person had to give a penal bond because the court feared he would make a speech that would lead to a breach of the peace.

The rest of this paper is planned as follows. First the United States rules will be set forth and discussed. Next the United Kingdom rules. Each country's cases will be divided into classes used by that country's own courts. Comparison will come last, for it will have more meaning after each rule has been seen in its national context.

II. United States

A. Introduction

A few American cases concern on-the-spot intervention or injunctions against speech.[10] A great many concern licenses or criminal convictions. These last two sanctions are so different that courts find it easy to apply a prior restraint-subsequent punishment distinction to the facts of each case. The distinction is well criticized as oversimple.[11] It originally related to government licensing of the press, not of speaking.[12] Descriptively, the words "prior" or "previous" add nothing to the notion of restraint. They may do nothing more than express the ultimate conclusion of unconstitutionality. The Court speaks of valid restraints, but not of valid prior restraints. Still, more or less following the courts' own practice, we shall examine separately the cases on licensing, injunction, intervention, and punishment.

B. Before the Speech

1. *License.*—Under the recent decisions, a licensing scheme can be an unconstitutional restraint of speech for any one of three reasons:[13]

v. Mayor of Croyden, 16 Q.B.D. 708 (1886) (discrimination).

9. See generally People v. Blaylock, 357 Ill. 23, 191 N.E. 206, 93 A.L.R. 300 (1934); State v. Read, 164 La. 315, 113 So. 860, 54 A.L.R. 383 (1927).

10. Injunctions against the speaker are to be distinguished from injunctions against those who would interfere with the speaker. The latter are common, but are outside the scope of this paper. On injunctions against interference with the exercise of a civil right, see Hague v. CIO, 307 U.S. 496 (1939); Annot., 175 A.L.R. 438, 467-72 (1948).

11. See Freund, *The Supreme Court and Civil Liberties*, 4 Vand. L. Rev. 533, 537-39 (1951).

12. *Cf.* The King v. Dean of St. Asaph, 3 T.R. 428n., 100 Eng. Rep. 657n. (K.B. 1784) per Lord Mansfield, C.J.: "The liberty of the press consists in printing without any previous license, subject to the consequence of law." 3 T.R. at 433n. 4 Blackstone, Commentaries *151-52.

13. Davis v. Massachusetts, 167 U.S. 43 (1897), upholding a licensing ordinance that set no standards to guide the officials, is almost certainly no longer law. See Niemotko v. Maryland, 340 U.S. 268 (1951); Hague v. C.I.O, *supra* note 10. See generally Chafee, Free Speech in the United States 409-33 (1941).

First, discriminatory administration.[14] This is separate from the question of excessive discretion in the licensing official.[15] *Second,* too much official discretion in deciding whether or not to grant the permit.[16] *Third,* grounds for refusing a permit which do not justify the restraint on speech. If the standard is wrong, it matters not that it be narrowly drawn or fairly administered. Time, place, and manner are valid licensing standards.[17] Whether they are the only valid standards is not clear. Specifically, it has not been decided that all licensing standards relating to anticipated disorder are void. *Hague v. CIO*[18] held invalid a standard of anticipated riot not limited to riots for which the speaker (applicant) could be held responsible. Indeed, in that case, the riot was to be by opponents, due to their general antagonism to the applicant, rather than to any particular thing applicant was expected to say. In *Kunz v. New York,*[19] the licensing ordinance was stricken down because it stated no standards for refusal.[20] The Court did not suggest that an ordinance denying a permit to one who "ridicules and denounces other religious beliefs," a standard used in the ordinance but for another purpose, would be invalid. Even if it were invalid, a standard of anticipated incitement or provocation of breach of the peace might still be valid.[21]

If a breach of the peace norm is to be upheld, it will not be by simple extension of the reasoning that upholds standards of time and place. First, licensing considerations of time and place look to other legitimate uses of public streets and parks. The license acts as a traffic light. So to analyze a standard based on the preservation of order would be to obscure its chief merit. Second, denying a permit on grounds of time and place need not prevent the meeting entirely. Thus on its face, such an ordinance interferes with speech less than does one basing permits on the speech's contents. This could also be true of a breach of the peace standard if the licensing authority believed the applicant would cause a disturbance at one time and place but not at another. It seems likely that the Court would uphold a licensing standard that included (1) reference to the public interest in public order, (2) requirement of anticipated advocacy or provocation of disorder, and serious danger that dis-

14. Niemotko v. Maryland, *supra* note 13; Hague v. CIO *supra* note 10.
15. *Cf.* Fowler v. Rhode Island, 345 U.S. 67 (1953) (prohibition against meetings in a park held invalid because discriminatory against one religion; no official discretion as to individual meetings).
16. Kunz v. New York, 340 U.S. 290 (1951); Niemotko v. Maryland, *supra* note 13; Hague v. CIO, *supra* note 10.
17. Poulos v. New Hampshire, 345 U.S. 395 (1953); Cox v. New Hampshire, 312 U.S. 569 (1941).
18. *Supra* note 10.
19. *Supra* note 16.
20. 340 U.S. 290, 293, 295 (1951).
21. *Cf.* Freund, *supra* note 11, at 544 n. 53.

order would ensue, with adequate proof needed for each, and (3) limitation of denial to a particular time and place.[22]

2. *Injunction.*—Injunctions against speech that is expected to cause disorder would be more like the British practice of binding over than are licensing schemes. Like recognizances, injunctions come from a court, are directed at a particular person, are based on a present fact situation, and can restrain certain objectionable speech without stopping speech altogether. Yet apposite cases are scarce. In *Thomas v. Collins,*[23] the charge was contempt for defying a temporary restraining order, but the issue was the validity of the license requirement which the order buttressed.[24] *Near v. Minnesota*[25] involved an injunction against a particular publication, but for historical reasons cases on restraint of the press are doubtful precedents for the spoken word.[26]

Apparently the only case on enjoining speech that is expected to cause a breach of the peace is *Kasper v. Brittain.*[27] There, John Kasper was enjoined from illegally obstructing school integration in Clinton, Tennessee. He violated the injunction by a characteristic speech, was convicted of contempt, and appealed. The Court of Appeals affirmed, holding that the first amendment did not prevent a federal court from enjoining the "advocacy of immediate action to accomplish an illegal result. . . ."[28] It is not clear whether the court would have upheld the injunction absent mob violence, but the decision does imply that one who is expected to incite violence can be enjoined from so speaking. This would combine the solicitation of illegality with the threat of disorder, and the court in *Kasper v. Brittain* relied on both.[29]

Cases on enjoining picketing point the same way. Picketing is protected speech within the first and fourteenth amendments.[30] Yet picketing that solicits an illegal agreement can be enjoined.[31] Where picketing is enmeshed in contemporary violence, a court may enjoin all picketing, including that which is itself peaceful.[32] These last two rules together contain both factors the court relied on in *Kasper v. Brittain.*[33] The picketing cases do not, however, advance

22. Extrajudicially, even Mr. Justice Douglas agrees that a properly drawn license standard looking to riot would be valid. DOUGLAS, THE RIGHT OF THE PEOPLE 59 (1958).
23. 323 U.S. 516 (1944).
24. 323 U.S. 516, 538-41 (1944).
25. 283 U.S. 697 (1931).
26. *Cf.* 283 U.S. 697, 708, 713-14 (1931).
27. 245 F.2d 92 (6th Cir.), *cert. denied,* 355 U.S. 834 (1957).
28. 245 F.2d at 96.
29. *Id.* at 95-96.
30. Thornhill v. Alabama, 310 U.S. 88 (1940).
31. Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).
32. Milk Wagon Drivers Union v. Meadowmoor Dairies, 312 U.S. 287 (1941).
33. *Supra* note 27; see text accompanying note 29 *supra.*

our analysis, because picketing now appears constitutionally more susceptible to injunction than is ordinary speech.[34] The only safe inference is that the picketing cases are not inconsistent with the view that ordinary speech inciting a breach of the peace may be enjoined.

C. During the Speech: Intervention and Dispersal

Surprisingly few cases in state or federal courts concern the propriety of police intervention against a speaker to prevent a breach of the peace by his audience.[35] Where nothing in the speaker's manner or words or in the circumstances is likely to lead to breach of the peace, police suppression of the speaker is unconstitutional.[36] Presumably if the speaker is doing something for which he could constitutionally be punished, like soliciting the commission of crimes, the police may intervene to stop him. By arresting him for what he has already done, the police would necessarily stop his speech. But more difficult constitutional problems arise where the police stop the speech not because anything unlawful has yet happened, but because they expect that if the speaker continues, something unlawful (a breach of the peace by the audience) will happen. Apparently the only American case, at any level, whose facts squarely pose this problem, is *Feiner v. New York*.[37] There, the defendant was speaking at a street meeting to an audience of Negroes and whites. He called certain public officials "bums," and urged Negroes to rise up and fight for equal rights. The trial court found, over conflicting testimony, that he had said they should rise up "in arms." The crowd of about seventy-five persons milled and murmured, but there was no disorder or breach of the peace. Two policemen had been present for about twenty minutes. After one auditor told a policeman that he would shut Feiner up if the police would not, the officer asked Feiner to stop speaking. After two such requests went unheeded, the policeman arrested him. Feiner was convicted of disorderly conduct under New York Penal Law, section 722(2).[38] Three courts affirmed that conviction over defendant's free speech

34. See International Bhd. of Teamsters v. Vogt, Inc., 354 U.S. 284 (1957).

35. Dispersal because the speaker or his audience is blocking traffic on a street is not here considered.

36. Pope v. State, 192 Misc. 587, 79 N.Y.S.2d 466 (Ct. Cl. 1948) (carrying protest sign at meeting).

37. 340 U.S. 315 (1951).

38. N.Y. Penal Law § 722: "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."

objections. It is necessary to examine the case in some detail in order to ascertain how the police intervention fitted into the offense.

The police intervention problem would have best been isolated if Feiner had either been prosecuted under section 722(3) of the Penal Law[39] or else had sued the arresting officer for trespass[40] or for deprivation of constitutionally secured rights under the Civil Rights Act.[41] Even under section 722(2), Feiner's disobeying the policeman could by itself have constituted the offense.[42] But the prosecution did not rely merely on that, and the defense never tried so to narrow the issues.[43]

In his opinion, the trial judge listed disobedience of the police request as one of the facts supporting the charge.[44] On appeal, the County Court considered it at least relevant, and perhaps as independently sufficient, provided the request was justified (to which the likelihood of disorder would be relevant).[45] On further appeal, the New York Court of Appeals inferred from all the facts Feiner's intent to provoke a breach of the peace, which, together with his abusive language, violated section 722(2).[46] Disobeying the police would appear relevant only to the speaker's intent to cause disorder. Alternatively, the Court of Appeals held that disobeying a policeman's request made "within the scope of his lawful authority," was itself disorderly conduct.[47] When considering the constitutionality of the conviction, the Court of Appeals combined these alternative grounds, holding that the United States Constitution permitted conviction where (1) the speaker intended to provoke a breach of the peace, (2) police at the scene believed in good faith that there was a clear and present danger of disorder, and (3) the speaker ignored the policeman's request to stop speaking.[48] Even this reasoning does not require that the speaker have yet said anything that would

39. Note 38 *supra*, subsection 3.

40. As in the British cases, pp. 641-45 *infra*.

41. Civil Rights Act of 1871 § 1, REV. STAT. § 1979 (1875), 42 U.S.C. § 1983 (1952). As in Hague v. CIO, *supra* note 10, and Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

42. *Cf.* People v. Garvey, 6 Misc. 2d 266, 79 N.Y.S.2d 456 (N.Y.C. Magis. Ct. 1948).

43. *But see* Feiner v. New York, *supra* note 37, at 325 (dissenting opinion of Black, J.).

44. "I think that all those facts that have been testified to here are sufficient to sustain the charge of disorderly conduct." Record, p. 140, Feiner v. New York, *supra* note 37. Perhaps the main reason, in the judge's mind, was that those who "advocate change by violence and . . . pit . . . race against race . . . should be denied the right of freedom of speech." Record, p. 137.

45. Record, p. 146. The Trial Court and County Court opinions are not reported.

46. 300 N.Y. 391, 398-99, 91 N.E.2d 316, 319 (1950).

47. 300 N.Y. at 399, 91 N.E.2d at 319, citing People v. Galpern, 259 N.Y. 279, 181 N.E. 572, 83 A.L.R. 785 (1932) (conviction under § 722 (3) affirmed on ground that an unwarranted request to move on is still within the policeman's lawful authority; no constitutional question raised).

48. 300 N.Y. at 402, 91 N.E.2d at 321.

incite or provoke a breach of the peace.[49] Nor does it require that the court agree with the officer's estimate of the danger.

In the United States Supreme Court, petitioner argued that the police intervention was irrelevant to guilt under section 722(2),[50] but was itself an unconstitutional interference with freedom of speech.[51] Respondent did not make clear exactly how the police intervention related to the charge.[52] Petitioner contended that intervention, like punishment, must meet the clear and present danger test.[53] The Court apparently accepted this argument.[54] Petitioner further pressed for a judicial assessment of the danger.[55] But the Court held the constitutional requirement satisfied if the police in good faith apprehended a clear and present danger of disorder.[56] The police then had a "proper discretionary power" to preserve the peace as they saw fit.[57] At the end of its opinion, the majority bases affirmance on the fact that Feiner was inciting to riot.[58] Assuming that the majority is laying down this rule for police intervention, rather than for punishment afterwards,[59] it appears that a speaker who incites to riot may be stopped by police who apprehend in good faith that disorder is imminent. It is irrelevant that they could have preserved the peace without interrupting the speech. If a speaker was not speaking intemperately, or perhaps merely if he was not inciting to riot, a future Court might still allow the police to intervene only if there were no other practicable way for them to preserve the peace.[60]

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49. It is hard to find in the Record any support for the various courts' findings that Feiner intended to cause a breach of the peace. The clearest threat of disorder came from an antagonist. This is, however, beside our point.

50. Brief for Petitioner, pp. 24-27, 39-41, 45, Feiner v. New York, *supra* note 37.

51. Brief for Petitioner, pp. 26, 37, 53.

52. See Brief for Respondent, pp. 61-65.

53. Brief for Petitioner, pp. 26, 37, 53.

54. See 340 U.S. at 319.

55. Brief for Petitioner, p. 51. This could be done by the trial court. The argument is to be distinguished from that for a redetermination of facts by the Supreme Court despite lower court findings.

56. 340 U.S. at 319.

57. *Id.* at 319n., quoting the N.Y. Court of Appeals.

58. *Id.* at 321. Actual incitement, as opposed to an intent to incite, had not been found by any of the lower courts.

59. The very failure to separate intervention from punishment may suggest that the majority regarded the rules as being the same. Surely this would only be true where the speaker was inciting to disorder, and even there a policeman's belief that there was a clear and present danger might not by itself satisfy the constitutional test for punishment.

60. It must be admitted that nothing in the majority opinion suggests such a rule. The majority's view of Feiner's language merely leaves the question open. But such a result would accord with the British caes, pp. 641-45 *infra*. It would not be inconsistent with the view of Frankfurter, J., concurring in Feiner v. New York, *supra* note 37, that "it is not a constitutional principle that, in acting to preserve order, the police must proceed against the crowd, *whatever its size and temper*, and not against the speaker." 340 U.S. at 289. (Emphasis added).

In *Feiner v. New York,* Mr. Justice Black dissented in an opinion, and Mr. Justice Douglas dissented in an opinion in which Mr. Justice Minton joined.[61] The dissenters isolated the intervention question more clearly than did the majority. They stated that the first duty of the police was to control the crowd. Only if the Court[62] is satisfied that there was a clear and present danger of disorder that the police could not otherwise prevent, would the police be justified in stopping the speaker. However, the dissenters proceeded from the view that Feiner was not inciting to riot. While conceding other of the majority's facts for the sake of argument, they never conceded that one. Consequently, the dissents are not necessarily inconsistent with the decision. Rather they are directed at the situation which, it is believed, a properly narrow reading of the majority opinion leaves open.

In *Sellers v. Johnson,*[63] a police blockade against would-be assemblers was enjoined on the ground that the police must first try to restrain the violent opponents of a lawful meeting. In that case, cited by a dissenter[64] but not by the majority in *Feiner v. New York,* the police action was designed to meet a particular situation, and the police had access to almost as many facts as if the meeting had begun. Thus the blockade differed from dispersal only in the formal respect that the meeting had not yet met. The court treated the problem like one of police intervention during the meeting, and held that until the police have exhausted all available means of dealing with the mob, there is no clear and present danger of disorder justifying suppression of speech.[65] This probably means that the court must be satisfied there was no other practicable way to preserve the peace.[66] This would appear to be the constitutional standard for police intervention where the speaker is not inciting to riot, or at least where he does not intend to provoke a breach of the peace.[67]

D. After the Speech: Punishment

Generally, federal or state punishments for speech or its effects

61. 340 U.S. at 321, 329.

62. That is, the Supreme Court. But apart from the dissenters' view on redetermining facts found below, the danger and necessity would at least have to be proved to the trial court. The policeman's good faith belief would not be enough.

63. *Supra* note 41.

64. 340 U.S. at 326 n.8 (Black, J.).

65. 163 F.2d 877, 882-83 (8th Cir. 1947). *But see* 61 HARV. L. REV. 537 (1948).

66. See also American League of Friends of the New Germany v. Eastmead, 116 N.J. Eq. 487, 174 Atl. 156 (Ch. 1934); Brief of the Committee on the Bill of Rights, American Bar Association, as Amicus Curiae, Hague v. CIO, 307 U.S. 496 (1939), summarized *id.* at 678.

67. If the dividing line between Feiner v. New York, *supra* note 37, and Sellers v. Johnson, *supra* note 41, is incitement, then all intervention before the speech begins will have to meet the stricter *(Sellers v. Johnson)* test.

must meet the clear and present danger test.[68] This "test" labels a judicial reasoning process that begins by recognizing that federal and state governments can, despite the first and fourteenth amendments, punish for speech where the government is protecting an important interest against serious threat. The importance of the interest, and the gravity, likelihood, and imminence of the threat posed by the punished speech are weighed against the constitutional mandate.[69] This technique is used where disorder is the danger.[70] If the meeting in question is not broken up by police, the court trying the speaker will know whether the speech was in fact followed by disorder. But this appears relevant only to the likelihood of disorder. In *Terminiello v. Chicago*,[71] the Court reversed the speaker's conviction although there was in fact a breach of the peace. In *Feiner v. New York*,[72] the Court upheld his conviction although there was in fact no breach of the peace.

1. *Fighting Words.*—"Fighting words," because their threat to the peace so far outweighs their value in communicating ideas, are constitutionally punishable.[73] Fighting words are words "likely to cause an average addressee to fight."[74] Hence they must be insulting to the person to whom they are addressed.[75] The better view is that the doctrine applies to such words addressed to a group as well as to an individual.[76] Fighting words might be viewed as incitements to breach of the peace, albeit against the speaker. But the danger of violence is here generalized or abstracted. Only the standard of guilt need meet the clear and present danger test. The speaker's intent and the addressee's actual reaction are irrelevant. This is because "fighting words" are deemed to be outside the protection of the Constitution.[77] Apart from fighting words, speech likely to lead to

68. *E.g.*, Feiner v. New York, *supra* note 37; Schenck v. United States, 249 U.S. 47 (1919).

69. Whitney v. California, 274 U.S. 357, 374-78 (1926) (Brandeis and Holmes, JJ., concurring); *cf.* FREUND, ON UNDERSTANDING THE SUPREME COURT 27-28 (1949); HAND, THE BILL OF RIGHTS 58-61 (1958). This approach can be used on other free speech problems as well as on punishment. See Niemotko v. Maryland, 340 U.S. 268, 273-89 (1951) (Frankfurter, J., concurring).

70. Cantwell v. Connecticut, 310 U.S. 296 (1940).

71. 337 U.S. 1 (1949).

72. *Supra* note 37.

73. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

74. *Id.* at 571.

75. Chaplinsky v. New Hampshire, *supra* note 73; Cantwell v. Connecticut, *supra* note 70 (dictum).

76. See City of Chicago v. Terminiello, 400 Ill. 23, 79 N.E.2d 39 (1948), *rev'd on other grounds*, 337 U.S. 1 (1949). See also opinion of Ill. Appellate Court (unreported), Record, p. 26; Brief in Opposition to Certiorari, p. 12; Brief for Respondent, p. 15; Reply Brief for Petitioner, p. 15; Terminiello v. Chicago, 337 U.S. 1 (1949).

77. See Chaplinsky v. New Hampshire, *supra* note 73. It might not matter if the addressee were paralyzed and deaf. In Chaplinsky v. New Hampshire, *supra*, he was a policeman, who could be expected to have more than average self-restraint.

violence is only punishable if the facts of the particular case meet the clear and present danger test.

2. *Incitement to Break the Peace.*—Incitement to riot or breach of the peace is a common law misdemeanor. Where riot or breach of the peace is itself illegal, the speaker may be viewed as soliciting the commission of a crime. Apart from constitutional questions, one is guilty of inciting a breach of the peace when he urges his audience to violence, intending that violence ensue.[78] This common law crime is often codified, but the rules usually remain the same.[79] It includes non-speech communication, like carrying a red flag.[80]

Most of the decisions came before the fourteenth amendment was held[81] to limit the states' power to punish speech. While the authority is not conclusive, it appears that the state or federal governments[82] can constitutionally punish a speaker for inciting to breach of the peace. That is, if the standard of guilt includes intent to cause breach of the peace, inflammatory language, and the likelihood that disorder will follow, the standard is constitutional.[83] It may be part of a general rule that incitements to crime are punishable, at least if the crime is serious enough.[84] The better approach here seems to be that prompted by the clear and present danger test, rather than that simply thrusting incitement to crime outside the first and fourteenth amendments, along with obscenity and fighting words.[85]

Incitement to audience conduct less serious than breach of the

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The Court has similarly analyzed obscenity and libel as being without constitutional protection. Roth v. United States, 354 U.S. 476 (1957) (obscenity); Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel).

78. State v. Schleifer, 99 Conn. 432, 121 Atl. 805 (1923); Commonwealth v. Sciullo, Appeal of Albert, 169 Pa. Super. 318, 82 A.2d 695 (1951); Commonwealth v. Merrick, 65 Pa. Super. 482 (1917).

79. See, *e.g.*, State v. Quinlan, 86 N.J.L. 120, 91 Atl. 111 (Sup. Ct. 1914).

80. Commonwealth v. Karvonen, 219 Mass. 30, 106 N.E. 556 (1914); People v. Burman, 154 Mich. 150, 117 N.W. 589, 25 L.R.A. (n.s.) 251 (1908); *cf.* Stromberg v. California, 283 U.S. 359 (1931).

81. Gitlow v. New York, 268 U.S. 652 (1925). Stromberg v. California, *supra* note 80, of course, centered on the constitutional question, but the anticipated evil there was not simply disorder but also overthrow of the government. In Commonwealth v. Sciullo, Appeal of Albert, *supra* note 78, the constitutional argument was rejected without much discussion.

82. Usually it is the state. No distinction has been drawn between the federal government and the states as to magnitude of interest in preserving the peace. *But cf.* Roth v. United States, *supra* note 77, at 497-99 (separate opinion of Harlan, J.).

83. City of Chicago v. Terminiello, *supra* note 76. This is not the *ratio decidendi* of any Supreme Court case. But it is consistent with dicta in Terminiello v. Chicago, *supra* note 71, at 13-14, 25-28, 32-37 (dissenting opinion of Jackson, J.); Cantwell v. Connecticut, *supra* note 70, at 308; Stromberg v. California, *supra* note 80, at 368-69; and Schenck v. United States, *supra* note 68, at 52, 57. No contrary authority has been found.

84. See Fox v. Washington, 236 U.S. 273 (1915); 18 U.S.C. § 2(a) (1948) (one who counsels commission of crime is guilty as principal); HAND, *op. cit. supra* note 69, at 58.

85. *But see* Kasper v. Brittain, 245 F.2d 92 (6th Cir.), *cert. denied*, 355 U.S. 834 (1957).

peace is not punishable. In *Terminiello v. Chicago*,[86] the Court, reasoning from clear and present danger, reversed a general verdict conviction under an ordinance that had been construed to cover speech that "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance."[87] It is virtually certain that Terminiello could have been properly convicted under an ordinance requiring responsibility (incitement and causal connection) for a more serious evil (breach of the peace).

3. *Danger of Breach of the Peace, But No Incitement.*—Incitement to disorder involves a specific intent that disorder ensue. The speaker, to be an inciter, must have some "enthusiasm for the result."[88] A notion of accidental incitement seems self-contradictory. Usually one only incites his supporters. He makes his audience part of his plan. It is conceivable that a speaker would deliberately antagonize his audience with the intent that they break the peace in trying to attack him. But usually, when the threat of disorder comes from the speaker's antagonists, it is hard to fix him with an intent to cause disorder or with inciting it.[89] In such a case, the speaker probably cannot be punished.[90]

Incitement also involves the use of language which, in the circumstances, might be expected to lead to the particular behavior. This could be assimilated to the question of intent, by saying a man is taken to intend the natural consequences of his acts or words, as is done in British cases on unlawful assembly. However, it seems more related to the common sense requirement that the punished conduct must have a causal relation to the apprehended evil. The causal relation should be fairly strong, both because the Constitution protects speech and because the court is not merely explaining an event but is attributing criminal responsibility for it.

Our tentative conclusion that speech short of incitement to breach of the peace is not punishable where breach of the peace is the only evil apprehended, is supported by reference to the decisions concerning punishment of seditious and like speech. Apparently the only

86. *Supra* note 71.
87. 337 U.S. at 3.
88. Quotation from Gitlow v. New York, *supra* note 81, at 673 (dissent of Holmes and Brandeis, JJ.).
89. Compare Beatty v. Gillbanks, 9 Q.B.D. 308 (1882).
90. See Cantwell v. Connecticut, *supra* note 70, at 308-10, where the Court relied on lack of provocative intent, but also on excessive official discretion, vagueness, and absence of legislated state policy, to reverse a breach of the peace conviction. The speaker and his audience might still be guilty of unlawful assembly because of their frightening non-speech behavior. Probably all who behaved so as to put firm observers in fear of violence could be punished despite free speech objections. See generally State v. Butterworth, 104 N.J.L. 579, 142 Atl. 57 (Ct. Err. & App. 1928). In the United States there have been few unlawful assembly cases with constitutional overtones, and not one has gotten to the Supreme Court. It is more significant in England; see pp. 645-47, 649 *infra*.

kind of speech that is constitutionally punishable for its relation to violent overthrow of the government is speech advocating or inciting such action.[91] Violent overthrow of the government is, for purposes of the clear and present danger test, a more serious evil than breach of the peace.[92] The evil is more remote in time in sedition than in breach of the peace cases. But this interval between speech and action is irrelevant if it does not provide occasion for a spoken antidote.[93] Thus in the communist conspiracy cases, the time gap does not make the seditious speech less punishable, the ultimate state interest is threatened, and yet incitement seems required. If incitement is necessary in order constitutionally to punish the more punishable speech, surely nothing short of incitement would suffice for the less punishable (because less dangerous) speech.

III. United Kingdom

A. Introduction

Even more than the American cases, the British cases should be discussed in the three groups of before, during, and after the speech. In Britain, there is no constitutional protection of speech to unify the cases. They fall naturally into groups, according to the various bases of state powers and subjects' remedies.

B. Before the Speech: Binding Over

Justices of the Peace may order a person to enter into recognizances to keep the peace or to be of good behavior. This power may come from the Justices of the Peace Act, 1361,[94] which created their office. The recognizance is a contract of record, normally with the Crown as obligee. The obligation is conditional upon specified conduct, *e.g.*, disturbing the peace, by the obligor during a stated period.[95] If the obligation is for money, the obligor may be ordered to find sureties for his performance.[96]

Binding over is much used in Britain, though not in the United

91. See Dennis v. United States, 341 U.S. 494 (1951); *cf.* Yates v. United States, 354 U.S. 298 (1957).

92. Dennis v. United States, *supra* note 91, at 509.

93. Yates v. United States, *supra* note 91; see Abrams v. United States, 250 U.S. 616, 630-31 (1919) (dissent of Holmes, J.).

94. 34 Edw. 3, c. 1. Or conservators of the peace may have had such power even before the statute. Or binding over to good behavior may be statutory whereas binding over to keep the peace is at common law. See generally Lansbury v. Riley, [1914] 3 K.B. 229 (1913); 4 Blackstone, Commentaries *256; Putnam, Proceedings Before the Justices of the Peace in the Fourteenth and Fifteenth Centuries, intro. at XXX (Ames Foundation 1938); Allen, The Queen's Peace 61-66 (1953). For our purposes, there is no difference between the two kinds of recognizances or between the two possible historical bases.

95. A sample recognizance may be seen in Short & Mellor, The Practice on the Crown Side of the Queen's Bench Division 672 (1890).

96. Magistrates' Courts Act, 1952, 15 & 16 Geo. 6 and 1 Eliz. 2, c. 55, § 91(1).

States, to restrain the rowdy and the rabble-rouser. We must consider how it works and what questions it presents when brought to a court of record.

An order to enter into a recognizance to keep the peace or to be of good behavior may follow a criminal conviction[97] or a proceeding directed only at the binding over[98] or even an acquittal of the crime charged.[99] Since 1879, it has been necessary for the prospective obligor to be before the court, and the procedure has been that for a normal criminal trial.[100]

From the magistrate's order, there was no appeal properly so called.[101] The only ways to obtain review were by the prerogative writ of certiorari[102] and by appeal by way of case stated.[103] Both certiorari and case stated brought the order before a division of the High Court of Justice, but on both the scope of review was narrow. Apparently the court could quash the order only if, on the facts, a reasonable magistrate could not have apprehended a breach of the peace connected with the person bound over.[104] Since 1956, there has been a right of appeal from recognizance orders.[105] It is likely that the scope of review is now broader.

The important constitutional cases concern binding over, rather than the later proceeding to estreat (forfeit) the recognizance. In

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97. The King v. Sandbach, *ex parte* Williams, [1935] 2 K.B. 192.

98. Lansbury v. Riley, *supra* note 94; Wise v. Dunning, [1902] 1 K.B. 167 (1901).

99. Reg. v. Sharp, [1957] 1 Q.B. 552 (C.C.A.); *Ex Parte* Davis, 35 J.P. 551 (Q.B. 1871).

100. Summary Jurisdiction Act, 1879, 42 & 43 Vict., c. 49, § 25 (now Magistrates' Courts Act, 1952, *supra* note 96, § 91 (1)).

101. Rex v. London Sessions, *ex parte* Beaumont, [1951] 1 K.B. 557 (1950); The King v. London Quarter Sessions Appeals Committee, [1948] 1 K.B. 670 (1947).

102. As in The King v. Sandbach, *ex parte* Williams, *supra* note 97; The Queen v. Justices of Londonderry, 28 L.R. Ir. 440 (Q.B. 1891); *Ex parte* Davis, *supra* note 99.

103. As in Lansbury v. Riley, *supra* note 94; Wise v. Dunning, *supra* note 98. See Magistrates' Courts Act, 1952, *supra* note 96, § 87 (formerly Summary Jurisdiction Act, 1857, 20 & 21 Vict., c. 43 § 2, as amended by Summary Jurisdiction Act, 1879, *supra* note 100, § 33).

104. On certiorari, review was limited to whether the magistrate had jurisdiction, *i.e.*, whether there was any evidence to support the order. The Queen v. Justices of Londonderry, *supra* note 102, at 446, 461; cf. *id.* at 451-54. *But see id.* at 450 (W. O'Brien, J., concurring *dubitante*). On case stated, review was limited to jurisdiction and questions of law. Summary Jurisdiction Act, 1879, *supra* note 100, § 33(1) (now Magistrates' Courts Act, 1952, *supra* note 96, § 87 (1)). The rubric of questions of fact, not reviewable on case stated, was stretched wide by the courts. See Newman v. Baker, 8 C.B. (n.s.) 200, 141 Eng. Rep. 1142 (C.P. 1860); Reg. v. Yeomans, 1 L.T.R. (n.s.) 369 (Q.B. 1860); cf. Bracegirdle v. Oxley [1947] K.B. 349, 353 (1946). Restricted review is a concomitant of broad discretion below. Binding over is largely a matter of the magistrate's discretion. See The King v. Sandbach, *ex parte* Williams, *supra* note 97; ALLEN, *op. cit. supra* note 94, at 62.

105. Magistrates' Courts (Appeals from Binding Over Orders) Act, 1956, 4 & 5 Eliz. 2, c. 44, § 1. The appeal is to Quarter Sessions, few of whose cases are reported.

this later action, the procedure is the same as in a criminal trial.[106] But whether the recognizance is forfeited depends entirely on what was the condition of the recognizance.[107] The act of violation need not itself be a crime.[108] Thus a person may have to pay money or go to jail for doing two successive acts, neither of which was criminal.

More important for our purposes than the magistral procedure is the question of what facts justify binding a speaker over. If he violates the law, as where he himself disturbs the peace, he may be bound over.[109] If he incites his audience to riot or to break the peace, he may be bound over not to do so again.[110] At the other extreme, even before 1956, a reviewing court would quash the magistrate's order if there was no evidence of speaker misconduct or audience hostility.[111]

More difficult is the question of binding over a speaker whose audience is ripe for riot, though the speaker has done no wrong. Usually the anticipated violence would be by those hostile to the speaker, directed against the speaker, and designed to stop the speech.[112] In *Beatty v. Gillbanks*,[113] Salvation Army paraders were convicted of unlawful assembly and bound over to keep the peace, solely because they had been attacked by the antagonistic "Skeleton Army" and a repetition of such attacks was likely. On appeal, the conviction was set aside and the recognizance order quashed on the ground that the Salvationists could not be liable for their lawful act merely because they knew it would cause others to act unlawfully. In *Wise v. Dunning*,[114] however, a speaker was bound over although only his opponents threatened violence, and that against the speaker himself. The speaker, a self-styled "Protestant Crusader," had given anti-Catholic harangues in a Catholic section of Liverpool, followed

106. R. v. McGarry, 30 Crim. App. R. 187 (1945). Defendant may answer. R. v. Pine, 24 Crim. App. R. 10 (1932). In accord with the general rule for misdemeanor trials, defendant has no right to a jury. R. v. David, 27 Crim. App. R. 50 (1939).

107. See R. v. McGarry, *supra* note 106.

108. *Cf.* R. v. David, *supra* note 106; Magistrates' Courts Act, 1952, *supra* note 96, § 96(1).

109. See The King v. Sandbach, *ex parte* Williams, *supra* note 97.

110. Lansbury v. Riley, *supra* note 98; see Haylock v. Sparke, 1 El. & Bl. 471, 486-88, 118 Eng. Rep. 512 (Q.B. 1853).

111. The Queen v. Justices of Londonderry, *supra* note 102. This may still be the only ground for quashing the order in Scotland and Northern Ireland, where the Magistrates' Courts (Appeals from Binding Over Orders) Act, 1956, *supra* note 105, does not apply. The following discussion will be in terms of the pre-1956 law unless otherwise stated.

112. Some of these cases, notably Beatty v. Gillbanks, *supra* note 89, involved parades. Parades are probably further from "speech" than is the wearing of an emblem, as in Humphries v. Connor, 17 Ir. R.C.L. 1 (Q.B. 1864). Both are assimilated to cases of speech in the narrow sense by British courts and writers. This may be due to the lack of a preferred status for speech in the British constitution.

113. *Supra* note 89.

114. *Supra* note 98.

on several occasions by opposition riots. Holding that disorder by others was the "natural consequence" of such language, the divisional court affirmed the magistrate's order.[115] Thus *Beatty v. Gillbanks* and *Wise v. Dunning* apparently conflict on whether a person can be bound over merely because his lawful act is expected to provoke another to do an unlawful act. The cases may be distinguished in various ways, all of which express the feeling that the "Crusader" was more responsible for his opponents' breaches of the peace than were the Salvation Army paraders. For example: The paraders were more peaceful, more normal. A listener might not unreasonably want to assault a geyser of bile like the "Crusader."[116] The crowd's antagonism in *Beatty v. Gillbanks* was aimed more at the Salvationists themselves and less at what they were doing or saying.

While the different degrees of fault can thus reconcile the two decisions, the better view is that they were addressed to two different questions: *Beatty v. Gillbanks* to unlawful assembly, and *Wise v. Dunning* to whether a reviewing court would quash a magistrate's recognizance order. In both cases, the speaker or paraders had been bound over. Only in *Beatty v. Gillbanks* had they been tried for unlawful assembly as well. This need have made no difference. The court could have set aside the conviction without quashing the recognizance order, on the ground either that one could be bound over without being convicted, or that the scope of review of binding over orders was narrower, even when review was on appeal from a conviction rather than on certiorari or case stated. However, the recognizance question was not considered separately from that of unlawful assembly. It appears that the case was argued and decided on the assumption that if the conviction were reversed, the binding over order would fall with it.[117] The reason for this may be that the only reason the (trial) Court of Petty Sessions gave for binding the defendants over was that they were guilty of unlawful assembly.[118] Therefore, *Beatty v. Gillbanks* is just authority on unlawful assembly and not on recognizances as such.

Both *Beatty v. Gillbanks* and *Wise v. Dunning* appear to turn on whether the violence was the "natural consequence" of the speaker's admittedly lawful acts.[119] It will be seen that the concept of "natural

115. Two of the Justices distinguished (without reasons) Beatty v. Gillbanks, *supra* note 89. [1902] 1 K.B. at 174, 179.

116. Compare Terminiello v. Chicago, *supra* note 71; Chaplinsky v. New Hampshire, *supra* note 73; Cantwell v. Connecticut, *supra* note 70.

117. See Beatty v. Gillbanks, *supra* note 89, at 312-13 (arguments of counsel) and at 313-15 (opinion of Field, J.).

118. See *id.* at 308 (statement of proceedings below). While that summary is inconclusive on the point, it appears that the recognizances were taken only after conviction, by way of suspended sentence.

119. See Wise v. Dunning, *supra* note 98, at 175-76; Beatty v. Gillbanks, *supra* note 89.

consequence" is important in unlawful assembly as showing the requisite intent. But that concept must be used, if at all, in a different sense when a court is reviewing a binding over order.[120] There, it indicates only that the speech is causally related to the disorder. *Wise v. Dunning* is thus just an instance of the rule that, on certiorari or case stated, a reviewing court will quash the binding over order only if the magistrate had no grounds to anticipate a breach of the peace.[121] This is reasonable, for binding over does not stigmatize or penalize as much as does a criminal conviction, and it is a discretionary matter with the magistrate. Thus it is not surprising that, in the public meeting area as in others, a person who cannot be convicted can nevertheless be bound over. If such a rule seems to put one's freedom of speech and meeting too much into the hands of hostile troglodytes, still in practice the magistrates have not pushed their wide discretion to its limit. *Wise v. Dunning,* where the provocation was extreme, appears the only case in which a lawful party has been bound over in what we would consider a free speech situation.

All of this is from an appellate court's point of view. The pre-1956 cases gave the Justice of the Peace wide latitude but no guide. Now that there is a right of appeal, Quarter Sessions may start to quash orders binding over a person who could not be blamed for the anticipated disturbance. It is too early to tell. Such a development would make a reality out of the popular conception of *Beatty v. Gillbanks,* and elevate its glossators from error to prescience.

C. During the Speech: Intervention and Dispersal

The question here is under what circumstances an officer with a duty to preserve the peace can disperse a lawful meeting merely because it is likely to lead to a breach of the peace.[122] Three Irish cases in the latter half of the nineteenth century[123] made the rule rather clear, but an important problem will be to determine how that rule has been affected by a more recent English decision.[124] All three Irish cases were actions of assault brought against the officer by the party with whom he interfered in order to preserve the peace. The first two were decided on plaintiff's demurrer to a defense of neces-

120. In Wise v. Dunning, *supra* note 98, the court spoke of "natural consequence" perhaps to show that, even under the rule in Beatty v. Gillbanks, *supra* note 89, they would decide their case the same way.

121. See p. 629 *supra.*

122. This is the only aspect of a constable's power to disperse meetings that raises any difficult problems. If the meeting is an unlawful assembly, he can of course disperse it and arrest anyone involved. If the meeting is lawful, but a breach of the peace is already in progress, the officer's powers will be, if anything, broader than where the disturbance is imminent but the peace is still unbroken.

123. Humphries v. Connor, *supra* note 112; O'Kelly v. Harvey, 14 L.R. Ir. 105 (C.A. 1883); Coyne v. Tweedy, [1898] 2 Ir. R. 167 (Q.B. & C.A. 1896).

124. Duncan v. Jones, [1936] 1 K.B. 218 (1935).

sity, and the third concerned the reasonableness and sufficiency of a jury verdict that the technical assault was necessary to preserve the peace.

In *Humphries v. Connor*,[125] the defendant constable pleaded that it was necessary for him to remove plaintiff's orange lily in order to prevent a breach of the peace by a crowd threatening to attack plaintiff.[126] In overruling plaintiff's demurrer to this defense, the court held a constable had a duty to preserve the peace unbroken, and that although wearing the lily was lawful, still if the constable's purpose in removing it was to preserve the peace, and this interference with plaintiff's person was necessary to preserve the peace, then the constable was not liable.[127] Apparently it was not essential to the defense that the officer have first asked plaintiff to remove the lily.[128] It is not clear whether the provocative character of the lily or the plaintiff's intent in wearing it was relevant.[129]

On similar pleadings, the Irish Court of Appeal in *O'Kelly v. Harvey*[130] held that a Justice of the Peace was not liable in assault for dispersing plaintiff's meeting because the defendant "believed and had just grounds for believing that the peace could only be preserved" by dispersing it.[131] This is the same holding as in *Humphries v. Connor*, which, unlike the instant case, involved neither speech nor a meeting. The rule was carried over into a "public meeting" case without comment by the court, probably because in England only ordinary law, and not a higher law, governs speech and assembly.[132] *O'Kelly v. Harvey* makes it clear that the defense of necessity is good although plaintiff's conduct be lawful and neither provocative nor intended to cause disorder.[133]

125. *Supra* note 112.

126. While the necessity of removing the lily to protect plaintiff from physical injury was argued, the court decided the case solely on the defense of necessity to preserve the peace. *Id.* at 8.

127. Provided, of course, he did not use unnecessary force. This fact was separately averred in the plea, but logically can be included in the general point that this particular assault was necessary to preserve the peace.

128. See 17 Ir. R.C.L. at 8. This, too, might be subsumed under the general question of the necessity of the assault.

129. The facts, admitted by demurrer, were that wearing the lily was "calculated and tended to provoke animosity among different classes of the Queen's subjects." *Id.* at 1-2. O'Brien, J., did not discuss plaintiff's intent. Hayes, J., seems to have thought she intended to provoke a breach of the peace. *Id.* at 8. Fitzgerald, J., concurring *dubitante*, thought the defense should be good only if plaintiff intended to provoke a breach of the peace. *Id.* at 8-9. But a finding that plaintiff intended to cause disorder might have been inconsistent with the finding that she was behaving lawfully.

130. *Supra* note 123.

131. *Id.* at 109-10.

132. *Cf.* DICEY, LAW OF THE CONSTITUTION 239, 270-71 (9th ed. 1939).

133. As to lawfulness and intent, see 14 L.R. Ir. at 109-110. That the court regarded plaintiff's conduct as not in itself provocative appears from the holding that the assembly was not unlawful, despite the court's view that an assembly that is likely to provoke breach of the peace is an unlawful assembly. See *id.* at 109-10 (distinguishing and disapproving Beatty v. Gill-

Coyne v. Tweedy[134] extended this defense of necessity to a peace officer[135] who could and should have acted earlier, against another party, to prevent the breach of the peace.[136] There, Officer *D* stood by while Priest *A* and followers broke down the door of the church wherein rival Priest *P* and followers were ensconced. When the two clerics and their adherents confronted each other and violence seemed imminent, Officer *D* forcibly removed *P* from the sacristy. *P* sued *D* for assault. The jury found that *D*'s action was reasonable and necessary to preserve the peace. On *P*'s motion for a new trial, the divisional court and Court of Appeal held that even if *D* erred in letting *A* break down the door, without which the ominous confrontation would not have occurred, still he had a good defense under *O'Kelly v. Harvey*.[137] The courts reasoned that the defense depended on the officer's duty to preserve the peace and the necessity for his action when he acted. The fact that if he had done his duty earlier he would not have had to act later was not held to alter either his duty or the necessity for action later. Apparently the officer would have lost his defense against *P* only if he himself had broken down the door or had actively encouraged *A* to do it.[138]

Under these three cases, the standard for dispersal of a public meeting is as follows. An official with the duty of preserving the peace may disperse a lawful meeting (or interrupt a speaker) if he reasonably apprehends that it is the only way to avert a breach of the peace, even by the meeting's antagonists. Apparently any notion of clear and present danger of disorder is relevant only to the reasonableness of the officer's belief that disorder would otherwise follow. The officer is not liable if his apprehension was "reasonable" on the facts before him at the time. It is not necessary that the court agree with his appraisal of those facts. Apparently the officer is not liable even if his interference with the plaintiff turned out not to be sufficient to preserve the peace, so long as he reasonably believed it to be necessary and sufficient.[139] But if the trial court in the assault action

banks, *supra* note 89).

134. *Supra* note 123.

135. Defendant was a district inspector of constabulary. His duty to preserve the peace was held to be the same as that of a constable (as in Humphries v. Connor, *supra* note 112) or a Justice of the Peace (as in O'Kelly v. Harvey, *supra* note 123). Coyne v. Tweedy, *supra* note 123, at 171 (Q.B.).

136. Strangely enough, the case is not mentioned in DICEY, *op. cit. supra* note 132, JENNINGS, LAW AND THE CONSTITUTION (4th ed. 1952), KEIR & LAWSON, CASES ON CONSTITUTIONAL LAW (4th ed. 1954), or WADE & PHILLIPS, CONSTITUTIONAL LAW (5th ed. 1955).

137. *Supra* note 123.

138. See [1898] 2 Ir. R. at 178, 182, 189 (Q.B.), and *id.* at 196, 202, 204 (C.A.). This may depend on a distinction between acting where there is a duty not to act and not acting where there is a duty to act. Compare Sellers v. Johnson, 163 F.2d 877 (8th Cir. 1947), *cert. denied*, 332 U.S. 851 (1948).

139. The question of sufficiency of the intervention is not expressly treated in the cases. But the courts' use of the term "necessary" impliedly includes "sufficient," or at least the joint sufficiency of all the officer's acts.

following dispersal may be seen as entertaining an appeal from the officer's on-the-spot judgment, comparable to a court reviewing a magistrate's recognizance order, then the standard for binding over seems even looser. Evidence sufficient to ground a constable's reasonable belief would probably confer jurisdiction to bind over.[140] And, unlike dispersal, binding over need not have been thought the only way to preserve the peace.

Closer court scrutiny of dispersal than of binding over has, as we have seen, a procedural basis. It is defensible on the ground that a magistrate can be trusted with a wider discretion than can a policeman. But it has defects. A magistrate has more calm, more time, and more evidence when deciding to take recognizances than does a policeman when dispersing a meeting under the claws of a mob. A binding over order imprints more stigma than does the breaking up of a meeting, and imposes a continuing hardship, whereas dispersal is entirely past and usually involves only a nominal trespass. And a decision against the state in the case of dispersal, but not of binding over, will make a private person pay damages. Therefore, one would expect a reviewing court to be more reluctant to second-guess dispersal than binding over. Before 1956, the law was the other way around. Now that an appeal lies from binding over orders, however, stricter standards for recognizances may develop.

It is important to consider how *Duncan v. Jones*[141] has affected these dispersal rules. There, the defendant was about to begin speaking at a street meeting opposite an unemployed training center when a police inspector told her she would have to move the meeting to another street. When defendant disregarded the request and began to speak, the inspector arrested her. She was convicted, under the Prevention of Crimes Acts,[142] of wilfully obstructing the officer in the execution of his duty. On appeal to the King's Bench, the only issue was whether instructing the defendant not to hold her meeting as planned was within the scope of the officer's "duty." All three Justices held that as he reasonably apprehended a breach of the peace,[143] his duty to preserve the peace included requesting defendant not to speak.[144] On this point, that the officer's apprehension must be

140. Such evidence would probably also reduce any of the magistrate's mistakes to "errors of fact," and thus immunize his order from review by case stated as well as by certiorari. See note 104 *supra*.

141. *Supra* note 124.

142. Prevention of Crimes Amendment Act, 1885, 48 & 49 Vict., c. 75, § 2, amending Prevention of Crimes Act, 1871, 34 & 35 Vict., c. 112, § 12.

143. The trial court had so found. [1936] 1 K.B. 218, 220. Apparently the main fact grounding the officer's fears was that, a year before, a speech by defendant at the same spot had been followed by a disturbance inside the center. The manager of the center thought defendant had "caused" this disturbance, and Lord Hewart, C.J., agreed. *Id.* at 220, 223.

144. *Contra*, E.C.S. Wade, *Police Powers and Public Meetings*, 6 CAMB. L.J. 175, 178 (1937), contending that the case did not involve any apprehended

"reasonable" in the eyes of the court, the case is consistent with the three Irish cases. Like those cases, *Duncan v. Jones* turned on the scope of a peace officer's duty to interfere with someone who had done nothing unlawful.[145] But whereas the Irish cases[146] held it was the officer's duty to disperse the meeting only if he reasonably believed that disorder was likely and that dispersing the lawful meeting was the only way to avert it, the court in *Duncan v. Jones* defined his duty to include any act calculated to preserve the peace.[147] Mr. Justice Humphreys put it most strongly: "Here it is found as a fact that the respondent reasonably apprehended a breach of the peace. It then . . . became his duty to prevent anything which in his view would cause that breach of the peace."[148] Probably the causal relation between the lawful meeting and the apprehended disturbance must appear reasonable to the court. But the important point is that neither the officer nor the court need believe that dispersing the meeting was the only way to preserve the peace. True, it appears that the apprehended disturbance would not have been by the defendant's opponents, as in the Irish cases.[149] The rule in *Duncan v. Jones* is susceptible to future limitation on that ground, but it formed no part of the reasoning of the court.

D. After the Speech: Punishment

1. *Incitement to Riot.*—Riot is an indictable common law misdemeanor whose crux is a crowd using force in a common purpose.[150] Inciting another to commit a crime is itself a misdemeanor, even though the principal crime is never committed.[151] If the other person commits the misdemeanor urged, as where the crowd riots, then the inciter is guilty of the principal offense.[152]

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breach of the peace.

145. "Neither was it alleged that the appellant nor any of the persons present at the meeting had either committed, incited or provoked any breach of the peace." Duncan v. Jones, *supra* note 124, at 219. Note the past perfect tense.

146. *Supra* note 123.

147. None of the three Justices mentions the concept of necessity. Nor do they or counsel cite any of the Irish dispersal cases. *Duncan v. Jones* seems to have been argued and decided with reference solely to *Beatty v. Gillbanks*, *supra* note 89, which Lord Hewart, C.J., distinguished as concerning unlawful assembly and not the scope of an officer's duty.

148. [1936] 1 K.B. at 223.

149. This is stressed, in a supple argument about causation, by KEIR & LAWSON, *op. cit. supra* note 136, at 402-03, criticized by H.W.R. Wade, Book Review, [1954] CAMB. L.J. 263, 268. A narrower holding in *Duncan v. Jones*, based on the fact (if it was a fact) that the disorder would have been by defendant's supporters and that she was "not unwilling" that it should ensue, would indeed have been more satisfactory. Counsel may have argued the case that way. See [1936] 1 K.B. at 220, 221.

150. See Field v. Receiver of Metropolitan Police, [1907] 2 K.B. 853.

151. Reg. v. Gregory, 10 Cox Crim. Cas. 459 (C.C.A. 1867); R. v. Higgins, 2 East 5, 102 Eng. Rep. 269 (K.B. 1801).

152. Reg. v. Sharpe, 3 Cox Crim. Cas. 288 (Central Crim. Ct. 1848). Compare 18 U.S.C. § 2(a) (1948).

2. *Unlawful Assembly.*—Before the eighteenth century, an unlawful assembly was just an incipient riot.[153] The assemblers had to intend to do an illegal act,[154] probably one involving violence.[155]

Added later was a definition that looked not to the intent of the assemblers but to their behavior.[156] If the gathering is such as to make a normally courageous onlooker fear a breach of the peace, it is, without more, an unlawful assembly.[157] It appears that the fear-inspiring conduct must be that of the defendant assemblers themselves. Thus where the defendants' meeting attracts a hostile crowd, and only that crowd inspires fear, the meeting is not an unlawful assembly unless the defendants intended to cause a breach of the peace.[158] This appears to be the best explanation of *Beatty v. Gillbanks.*[159] There the defendant paraders were admittedly peaceful, but the antagonistic mob was not. Hence defendants could not be guilty of unlawful assembly under the post-1700 extension of the crime, because their own behavior would not inspire fear. The case was argued and decided with a view to the older branch of unlawful assembly, which required evil intent. Thus the case turned on whether an intent to cause a breach of the peace could be imputed to the defendants because they knew their peaceful parade would provoke their opponents to riot. Reasoning that one is taken to intend the natural consequences of his acts, the court asked whether opposition violence was the natural consequence of defendants' acts, and held it was not.[160] This is still good law, if the case is properly seen as concerning only the intent of persons whose overt acts are admittedly lawful. One will not be taken to intend to cause a breach of the peace merely because he expects one to ensue. He must have

153. COKE, THIRD INSTITUTE *176: "An unlawful assembly is when three or more assemble themselves together to commit a riot or rout, and do it not." See generally 8 HOLDSWORTH, HISTORY OF ENGLISH LAW 324-27 (1926).

154. Reg. v. Ellis, 2 Salk. 596, 91 Eng. Rep. 504 (Nisi Prius 1708).

155. LAMBARD, EIRENARCHA 175 (1614): "An unlawful Assembly, is of the company of three or more persons, disorderly coming together, forcibly to commit an unlawful act . . . ." See 5 HOLDSWORTH *op. cit. supra* note 153, at 198; 8 *Id.* at 325.

156. HAWKINS, PLEAS OF THE CROWN, Bk. I, ch. 65, § 9 (1st ed. 1716), criticizing the older definitions as too narrow. *Cf.* Jarrett & Mund, *The Right of Assembly,* 9 N.Y.U.L.Q. REV. 1, 5-6 (1931) (same conclusion as to two heads of unlawful assembly, but different chronology). It should be noted that the new definition supplemented, but did not supplant, the old. After Hawkins, there were two alternative ways for an assembly to be unlawful.

157. Reg. v. Cunninghame Graham, 16 Cox Crim. Cas. 420, 427-28 (Central Crim. Ct. 1888); Reg. v. Vincent, 9 Car. & P. 91, 109, 173 Eng. Rep. 754 (Nisi Prius (1839)); Reg. v. Soley, 2 Salk. 594, 595, 91 Eng. Rep. 503 (Q.B. 1708) (dictum).

158. See Reg. v. Clarkson, 17 Cox Crim. Cas. 483, 490 (Cr. Cas. Res. 1892); KENNY, OUTLINES OF CRIMINAL LAW 329-30 (16th ed. 1952).

159. 9 Q.B.D. 308 (1882).

160. *Id.* at 314 (opinion of Field, J.). Similar reasoning was used, under a breach of the peace statute, in Beaty v. Glenister, 51 L.T.R. (n.s.) 304 (Q.B. 1884).

more connection with the violence than simply being its victim.[161]

Unlawful assembly chiefly concerns meetings rather than speech. To constitute the offense, three or more persons must participate, that is, share the intent or behave so as to cause fear of disorder.[162] Therefore, the offense is not committed when a single speaker, intending to cause a breach of the peace, speaks to a peaceful audience. Only if the audience becomes menacing or partakes of the speaker's intent, can the speaker be convicted of unlawful assembly.[163]

IV. Comparison

A. Before the Speech

The restraining techniques of the two countries are so different that comparison may distort what it tries to draw together. In England before 1956, a magistrate's binding over order would be upheld if there were any evidence to support the magistrate's apprehension of a breach of the peace.[164] Such wide discretion even in a judicial officer would be stricken down in the United States unless perhaps the binding over followed conviction, replaced a penalty that the magistrate had jurisdiction to impose, and was conditioned on repetition of the same crime. In such a case it might survive constitutional challenge on the analogy to increased penalties for second offenders. But the statute would have to limit the binding over powers in speech cases to such a situation. After 1956, the right of appeal in England from a binding over order may narrow the magistrates' discretion.[165] If so, they may be able in the future to take recognizances only from inciters and provocateurs among those who do not themselves break the law. This practice might be held constitutional in the United States, at least if the condition were a punishable act.

In the United States, only time and place and perhaps anticipated responsibility for disorder are constitutional standards for licensing schemes.[166] No English recognizance has been found based on considerations of time and place. An American licensing standard of riot or disorder would have to be so narrowly drawn, in both criteria and discretion, as to be incomparable with English binding over practice, whose hallmark is its flexibility. And even such a license law,

161. Dicta in Wise v. Dunning, [1902] 1 K.B. 167 (1901), support inferring such an intent from very provocative language. But that case concerned binding over, not unlawful assembly. See discussion, text at note 114 *supra*.

162. Stephen, A Digest of the Criminal Law 75 (9th ed. 1950); 4 Blackstone, *op. cit. supra* note 94, *146; *cf.* Rex v. Sudbury, 1 Ld. Raym. 484, 91 Eng. Rep. 1222 (K.B. 1701).

163. This proposition seems to follow from the accepted principles, but no case or treatise authority has been found for or against it.

164. See pp. 637-41 & note 104 *supra*.

165. See pp. 638-39 *supra*.

166. See pp. 627-28 *supra*.

unlike binding over, would necessarily stop the good as well as the bad speech of those who were denied licenses.[167]

In the United States, injunctions are a restraining technique similar in impact to binding over.[168] It appears that one who, on sufficient evidence, is expected to incite breach of the peace or any other crime may be enjoined from doing so.[169] In England he could be bound over.[170] But it is not clear that an American injunction, unlike an English recognizance, can constitutionally reach any other speaker.

B. During the Speech

In Britain, a peace officer has common law power to disperse a lawful meeting only if he reasonably apprehends that that is the only way to prevent a breach of the peace.[171] If our analysis of the American cases is correct, such is the rule in the United States where the speaker does not intend to cause a breach of the peace.[172]

In Britain, under the Prevention of Crimes Acts, it is a crime for the speaker to disobey the officer who, reasonably believing that a breach of the peace will occur, stops the speaker or disperses the meeting.[173] Such intervention need not be the only practicable way for the officer to preserve the peace.[174] Thus the officer has wider dispersal powers under statute than at common law. In the United States, the officer has this same wide power where the speaker intended to cause a breach of the peace.[175]

In the two countries, the narrow dispersal powers are the same, as are the broader ones. It is not surprising that in the United States, where the question is of constitutional limits, the extent of the restraining power should depend on the blameworthiness of the speaker. Nor is it surprising that in Britain, where the limits on a power are not set by an extrinsic higher law, the extent of the power should depend on its source.

C. After the Speech

On punishment of speech that leads to disorder, the United States constitutional limitations and the limits of coverage of the British

167. Under a licensing scheme, the applicant may either make the whole speech or none of it. The recognizance is conditioned on certain kinds of behavior, including speech. No instance has been found of a person's being bound over not to speak publicly at all. Further, if one starts to speak without the necessary license, he thereby breaks the law and can be arrested at once; whereas, even if one speaks so as to violate the condition of his recognizance, he does not thereby break the law and presumably cannot be arrested. His contractual obligation to the Crown just becomes absolute.

168. See pp. 629-30 *supra.*

169. See p. 629 *supra.*

170. See text accompanying note 110 *supra.*

171. See pp. 642-44 *supra.*

172. See pp. 630-33 *supra.*

173. See p. 644 *supra.*

174. See p. 645 *supra.*

175. See pp. 630-33 *supra.*

common law offenses coincide almost perfectly. Despite a shortage of direct authority, it appears that in the United States the speaker can only be punished if he intended that disorder ensue and used language which in the circumstances would be expected to produce that disorder.[176] This may be condensed into a requirement that the speaker have advocated or incited a breach of the peace.

In Britain, incitement is not unnaturally required for conviction of inciting to riot.[177] Unlawful assembly also, according to our historical analysis of the cases, involves an intent that disorder ensue, if the speaker himself is behaving peaceably.[178] Where the speaker is urging his supporters to break the peace, his intent will be apparent and will be shared by at least the necessary two members of his audience.[179] Where only the speaker's opponents are disorderly, the speaker can be held criminally responsible only if his behavior in the circumstances imputes to him an intent to provoke his opponents to break the peace.[180] While it is difficult to predict what a court will do when it seeks to find intent in this way, it may be that in an extreme case an English court would convict for unlawful assembly on facts that an American court would hold constitutionally insufficient to justify punishment.

176. See pp. 636-37 *supra*. Explosively insulting speech is, however, punishable regardless of the speaker's intent, under the doctrine of fighting words. See p. 634 *supra*. One could perhaps explain incitement cases by a similar objective theory.

Some parts of New York Penal Law § 722, set forth in note 38 *supra*, do not appear to meet the standard stated in the text. No case has been found in which § 722 was challenged as unconstitutional on its face. *But cf.* Feiner v. New York, 340 U.S. 315 (1951). See also note 5 *supra*.

177. See p. 645 *supra*.

178. See pp. 646-47 *supra*.

179. See p. 647 *supra*.

180. See pp. 646-47 *supra*. Such an intent would probably identify the speaker with his audience enough to satisfy the three-person requirement.