NOTES

CONSTITUTIONAL LAW

PROHIBITION OF LAWFUL ASSEMBLY WHEN OPPOSED BY THREAT OF VIOLENCE

Shortly after the war, a company of Jehovah's Witnesses commenced a series of evangelistic meetings in the public park of a small Iowa town. The first meeting was heckled by a few local rowdies, but there was no violence. The second meeting was broken up by twenty or thirty of the rowdies. There was no police protection at either meeting. Jehovah's Witnesses did not incite the attack by either word or act, but were unpopular solely because of their pacifism during the war. Town and county officials became alarmed by this disturbance and by rumors that several hundred ex-servicemen were planning to come from surrounding towns to attack the third meeting. The proposed third meeting was prevented by the sheriff, who, with the cooperation of the town officials, set up a road blockade excluding the Jehovah's Witnesses and everyone else from the town on the day the meeting was scheduled. The evidence showed that the officials did not act from hostility toward the Witnesses, but from a bona fide desire to protect them from danger, and in the belief that a riot was inevitable unless the meeting was prevented.

Jehovah's Witnesses sought an injunction against the town and county officials in the federal district court under the Federal Civil Rights Act,[1] alleging the prevention of the meeting was a violation of their federally-protected rights of free speech, assembly, and worship.[2] They prayed a decree

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1. REV. STAT. § 1979 (1875), 8 U. S. C. § 43 (1940), implemented jurisdictionally by 36 STAT. 1092 (1911), 28 U. S. C. § 41 (14) (1940).

2. It is now settled that public parks and other public places, such as streets, cannot be forbidden to those who wish to propagate their views, religious [Jamison v. Texas, 318 U. S. 413 (1943)] or otherwise [Thornhill v. Alabama, 310 U. S. 88 (1940)], individually [Schneider v. State, 308 U. S. 147 (1939)] or through meetings [Hague v. C.I.O., 307 U. S. 496 (1939)], so long as they do not interfere with the rights of others [Cox v. New Hampshire, 312 U. S. 569 (1941)].

However, an interesting question is raised by Illinois *ex rel.* McCollum v. Board of Education, 333 U. S. 203 (1948). The *McCollum* case involved an arrangement whereby the public schools released school time and made available school facilities to denominations which desired to furnish religious instruction for pupils whose parents wished them to receive it. The arrangement

restraining any interference with future meetings and ordering that such meetings be adequately protected. They also asked declaratory relief covering the same points. The court, after trial, dismissed the petition on the merits, finding such a clear and present danger of mob violence against the plaintiffs on the day their meeting was prevented as to justify the abridgement of their right to freedom of speech, assembly, and worship.[3]

The circuit court of appeals reversed, ordering that a declaratory judgment be entered as prayed, and that jurisdiction be retained to enter an injunction should it become necessary.[4] The court doubted whether the clear and present danger test should have applied at all in the situation, but did not reverse on this ground.[5] It preferred to find that, even

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was held unconstitutional as a state establishment of religion. It can logically be argued that, if tax-supported schools cannot be used by any denomination to propagate religious belief, neither can tax-supported public parks. See Jackson, J., dissenting in Saia v. New York, 68 S. Ct. 1148, 1154 (1948). What is the difference between taxing the Illinois atheist to subsidize religious instruction in the classroom and taxing the Iowa atheist to subsidize it in the parks?

As was pointed out in Everson v. Board of Education, 330 U. S. 1, 17, 18 (1947), not all expenditures of public moneys which happen to benefit religion amount to "establishment." Police and fire protection can validly be extended to churches on the same basis that they are provided for any citizen's property. The state may not actively assist religion, but it need not, indeed may not, discriminate against it. Neutrality is all that is required. When the state permits religion to be taught in the schools, it is giving active assistance to religion. In the *McCollum* case, this fault was compounded by the compulsory features of the plan there used. Although pupils were not required to attend religious instruction unless their parents requested it, they had to attend other activities instead, and were not released from school. Moreover, the school machinery was used to enforce attendance of those who signed up for the religious classes. The benefit which the state confers on a religious sect by allowing it to use the public park does not amount to this sort of active assistance. It is more like the benefit resulting from police and fire protection, since it is extended to all without regard to any religious test. Exactly the same rights, and no more, are extended to the religious preacher in the park as are extended to any other citizen there. And, of course, there are no compulsory features about the use of a public park, comparable to those in the *McCollum* case.

Whatever be the merits of this distinction, it seems certain that the *McCollum* case does not mean that the United States Supreme Court will alter the status of public parks as a forum for the expression of views on controversial questions, including religion.

3. Sellers v. Johnson, 69 F. Supp. 778 (S. D. Iowa 1946).
4. Sellers v. Johnson, 163 F.2d 877 (C. C. A. 8th 1947), *cert. denied,* 322 U. S. 851 (1948).
5. The relevancy of the clear and present danger test to the situation herein is discussed *infra*, p. 86.

if the test applied, there was no clear and present danger of mob violence, thereby overturning the district court's finding of fact.

It is important to note at the outset that this case involves speaking and assembling[6] for the peaceable transmission of ideas of a controversial nature. Concededly, then, it is the kind of speech and assembly which finds protection in the Constitution. Since that is true, this case is clearly distinguishable from those cases which involve abuse or misuse of the right of free speech and assembly.[7]

The most interesting problem posed by this case is whether otherwise lawful speech and assembly (or indeed lawful activity of any kind) may be prohibited by public officials because of danger that it may be opposed by the lawless.[8] The problem here arose in the setting of the Fourteenth Amendment to the Federal Constitution, in its role of guarantor of freedom of speech and assembly against state encroachment. The history of the problem, however, has been largely a common law one.[9]

One must frequently sympathize with the officials, bent upon preventing violence in the most practical way, and often motivated by the sincere desire to protect the assemblers from the dangerous consequences of their own folly. From

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6. "Assembly," as used in the constitutional sense, is thought of as a vehicle for expression—for speech. Therefore, it has been thought proper to use the two terms more or less interchangeably. Assembly and speech have been held to be "cognate rights." DeJonge v. Oregon, 299 U.S. 353, 364 (1937).

7. For cases involving abuse of the right, see notes 24, 29 *infra*.

8. A separate question arising from this problem of prohibition is the problem of protection. Should it be found, as in this case, that conduct may not be prohibited, then undoubtedly officials owe the duty of protection. This duty is, of course, not an absolute one, but is judged by the standard of reasonableness under the circumstances. Hixon v. Cupp, 5 Okla. 545, 49 Pac. 927 (1897); MECHEM, PUBLIC OFFICES AND OFFICERS §§ 661, 664 (1890). The municipality, as distinguished from its officers, owes no duty of protection at common law, but a frequent type of statute imposes upon it absolute liability for damages to property caused by riots. These statutes have been held not to include liability for personal injury. COOLEY, MUNICIPAL CORPORATIONS § 98 (1914). The problem of protection frequently arises in the form of the nonstriker who attempts to go to work by passing a picket line. It is not infrequent in such cases for the local officials to adopt an expedient neutrality, even where the necessary force is at hand to enforce the lawful rights of the nonstrikers.

9. See, in general, CHAFEE, FREE SPEECH IN THE UNITED STATES 160-161, 422-427 (1941 ed.); Chafee, *Right of Assembly*, 2 ENCYC. SOC. SCI. 275 (1931); DICEY, LAW OF THE CONSTITUTION 256-261, 421-427 (3d ed. 1889).

the officials' point of view, it is foolish to stand by and watch a potential riot develop without taking steps to prevent it, the most obvious step being, of course, to eliminate the cause before the riot starts.

Yet public policy favors the rule that men need not give up their lawful rights simply because the lawless insist on attacking them. Traditionally, officials must enforce the law the lawful way, not the easiest way. The consequences which logically follow prohibiting freedom of rightful action or expression to *A* because *B* threatens violence are so self-evident that they need not be labored.[10] These considerations suggest the desirability of a rule that a peaceable exercise of the right of free speech and assembly should not be prohibited by public officials where it is or may be opposed by the lawless. It cannot be pretended, however, that the cases on the subject are harmonious. One must candidly admit that no rationale, no matter how fine-spun, can reconcile them to one another.

Thus one would think that there would be no problem where there is a mere possibility that the exercise of the right of free speech or assembly might excite hostility, and where this contingency is based merely on a threat, or perhaps only on an official's guess. Here, interference with the right in order to prevent purely speculative harm seems completely unjustified. Yet the cases are in sharp conflict. *West v. Commonwealth*[11] sustained a conviction of breach of the peace for taking part in a peaceful parade of the Ku Klux Klan.

10. If the reader thinks they should be labored, let him look to the following: "If a permit can constitutionally be refused on the grounds relied on by the defendants, a small number of lawless men by passing the word around that they intend to start a riot could prevent any kind of meeting, not only of radicals or Socialists or trade unionists, but also of Negroes, of Jews, of Catholics, of Protestants, of supporters of German refugees, of Republicans in a Democratic community or vice versa. Indeed, on any such theory, a gathering which expressed the sentiment of a majority of law-abiding citizens would be forbidden merely because a small gang of hoodlums threatened to break up the meeting. The only proper remedy for such a situation, small or serious, is the police protection to which citizens are entitled, whether they are singly or in groups." Brief for the Special Committee on the Bill of Rights of the American Bar Association, as *Amicus Curiae*, p. 19, Hague v. C.I.O., 307 U. S. 496 (1939). Such a situation as that envisioned in this quotation is not as fantastic as it sounds, when we recall that the successful tactics of Fascists, Nazis, and Communists have included the use of organized thuggery against all who oppose them. It would be a sorry rule indeed which would commit the forces of the law to the support of such tactics.

11. 208 Ky. 735, 271 S. W. 1079 (1925).

The parade had been prohibited on the ground that the unpopularity of the Klan might lead to violence against them.[12] (It was actually held without incident.) *People v. Burman*[13] sustained a similar conviction of marchers, this time carrying red flags in a Socialist parade. The unpopularity of the red flag had created a hostile disturbance but apparently no actual violence. The force of these cases, however, has been a good deal weakened by *Hague v. C.I.O.*,[14] which held that CIO meetings in the public park of Jersey City could not be prevented merely because numerous civic and veterans' organizations had condemned the CIO in resolutions, and on one occasion had accompanied the condemnation with threats, which were never tested by any actual attempt to meet.[15] This case is so squarely in conflict with the state court decisions mentioned above that they are probably of doubtful validity in the United States today.[16] Attempts have even been made to halt the publication or distribution of newspapers on the ground that the sentiments expressed in them are so unpopular that they may excite the readers to

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12. *Contra*: Shields v. State, 187 Wis. 448, 204 N. W. 486 (1925), holding that the police could not interfere with a peaceful Ku Klux Klan parade because of threats voiced against it. It should be remembered, in discussing the Klan, or other unsavory organizations, that we are here concerned only with the propriety of suppressing its meetings because they are unpopular. No attempt is made herein to consider whether they may be suppressed as being *in themselves* dangerous to the safety or good order of the state. *See, e.g.*, American League of Friends of the New Germany v. Eastmead, 116 N. J. 487, 174 Atl. 156 (Ch. 1934) (Bund meetings, involving anti-Semitic speeches, could not be suppressed on ground they angered Jews, but could be on ground that their purpose was to foment boycotts and assaults against Jews).
13. 154 Mich. 150, 117 N. W. 589 (1908).
14. 307 U. S. 496 (1939).
15. The *Hague* case involved an element not present in the other cases discussed herein. It was found there that the city officials had themselves been responsible for stirring up much of the opposition to the CIO and that Mayor Hague had sponsored and spoken at some of the protest meetings; as the Third Circuit Court of Appeals said, Mayor Hague "troubled the waters in order to fish in them." 101 F.2d 774, 784 (1940). In the instant case, the district court attempted to distinguish the *Hague* case on the ground that the officials here acted in complete good faith. 69 F. Supp. 778, 786 (S. D. Iowa 1946). The distinction seems immaterial. Can the constitutional rights of *A* depend on the mental state of *B*? Of course, if a criminal prosecution against *B* is involved, or a question of punitive damages, *B*'s mental state becomes important.
16. It would also appear to limit, if not to overrule, some contrary language in Gilbert v. Minnesota, 254 U. S. 325, 331 (1920).

violence against somebody (presumably the newsboys, or perhaps the publisher himself). Such attempts have uniformly failed.[17]

However, there may, concededly, be more than mere threats or guesses. The danger may be real, not imaginary. It may be apparent from a background of violence in the recent past, when the attempted exercise of the right of free speech or assembly was opposed, as in the instant case. Or, the danger may appear from a hostile group which has formed and is ready to do business right now. Suppose a woman walks down a street in Ireland wearing an orange lily,[18] followed by a threatening crowd of wearers of the green. May a policeman, without making any attempt to disperse the crowd, prevent disorder by plucking the lily from her dress? The Irish court held that he might.[19] It is submitted that the court was wrong. Suppose the hypothetical case of a

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17. New Yorker Staats-Zeitung v. Nolan, 89 N. J. Eq. 387, 105 Atl. 72 (Ch. 1918) (German language paper in World War I); Dearborn Publishing Co. v. Fitzgerald, 271 Fed. 479 (N. D. Ohio 1921); People v. Downer, 6 N. Y. S.2d 566 (1938) (both anti-Semitic papers). *See* Near v. Minnesota, 283 U. S. 697, 721, 722 (1931) (anti-Semitic and muckraking paper).

18. The right to wear or carry an emblem which has an ulterior significance [*cf.* the red flags in People v. Burman, 154 Mich. 150, 117 N. W. 589 (1908)] is closely connected with the right of free speech. See CHAFEE, FREE SPEECH IN THE UNITED STATES 159-163 (1941 ed.).

19. Humphries v. Connor, 17 Ir. C. L. R. 1 (1864); *accord,* O'Kelley v. Harvey, 15 Cox C. C. 435 (1883). *But cf.* The Queen v. The Justices of Londonderry, L. R. 28 Ir. 440 (1891). A point worth noting about *O'Kelley v. Harvey, supra,* is the unusual theory on which it was decided. Most of the cases considered in this note have involved deciding whether a peaceable assembly could become unlawful if opposed [*E.g.,* West v. Commonwealth, 208 Ky. 735, 271 S. W. 1079 (1925); People v. Burman, 154 Mich. 150, 117 N. W. 589 (1908)]. If unlawful, there is no doubt of the privilege of a policeman to use such force as is reasonably necessary to break it up. RESTATEMENT, TORTS §141 (1934). But in *O'Kelley v. Harvey,* which was an action against a public officer for assault in dispersing a meeting of Irish land reformers, the court conceded the meeting was lawful, but held that the officer was nevertheless privileged to disperse it, where necessary to preserve the peace. 15 Cox C. C. 435, 447 (1883). The case is, so far as we can find, unique in tort law. It is, of course, well recognized that public officers or private individuals are privileged to invade interests in *property* where necessary to protect greater interests during public emergencies. A common illustration is the razing of a building in the path of a fire. RESTATEMENT, TORTS § 196 (1934); HARPER, TORTS § 58 (1933). The writers on torts do not seem to recoguize any analogous privilege to invade interests in *personality* during the public emergencies. *O'Kelley v. Harvey,* however, recognized such a privilege. While, as indicated, the *O'Kelley* case probably was wrongly decided, yet if one adopts, as

policeman coming upon a 250-pound footpad robbing a 125-pound citizen of his wallet. May the policeman, to avoid the very real danger of a serious breach of the peace, command the citizen to deliver his wallet peacefully to the footpad, using force, if necessary, to procure obedience? It is difficult to distinguish this situation from the orange lily situation. The right of free expression may well be as dear to its possessor as the contents of his wallet. Even where the danger is real, the police should not be allowed to prohibit the exercise of lawful rights.

Such was the opinion of the English court which decided the famous case of *Beatty v. Gillbanks.*[20] There, there was no question as to the reality of the danger. A series of Salvation Army parades had been attacked by hoodlums. The final such incident had culminated in a full-scale riot, involving 1,000 persons, during which the police were temporarily overpowered and order was restored only with the aid of reinforcements. An order was obtained from two justices of the peace, forbidding further assemblages to the disturbance of the peace. Three days later the Army attempted to parade again, disregarding the order. A similar mob, several hundred strong, again assembled to dispute its passage. After the Army ignored a command to disperse, the police took its leaders into custody. They were adjudged guilty of unlawful assembly, but the convictions were reversed by the Queen's Bench Division, Justice Field saying, "What has happened here is that an unlawful organization has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition."[21]

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some courts have, the idea that peaceable assembly may be dispersed, it would seem more logical to follow this theory of an emergency privilege than to try to torture lawful conduct into the mold of crime.

20. 9 Q. B. D. 308 (1882).

21. 9 Q. B. D. 308, 314 (1882). *But cf.* Star Opera Co. v. Hylan, 178 N. Y. S. 179, 108 N. E. 838 (1919) (production of opera in German prohibited immediately after World War I, where it led to serious riots in New York City). The most likely ground on which the *Opera* case can be distinguished from the *Beatty* (Salvation Army) case is that the *Beatty* case involved a more fundamental right (the right to propagate religious ideas) than did the *Opera* case. In other words, that even in areas where the state may not interfere with the right to disseminate ideas, it

The *Beatty* case has led us to the threshold of the most difficult situation of all. Suppose that there is a real danger of violence so savage that the police obviously will not be able to cope with it. Should they not be able to postpone the assembly temporarily until they can furnish adequate protection?[22] Should the right to assemble include, under such cir-

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may interfere with other, presumably less vital, rights—in this case the rights to produce and listen to opera. Such a distinction would overlook the fact that a composer-dramatist like Wagner may well exercise, under the guise of entertainment, a more profound influence on the thinking of his time than a whole raft of preachers and soapbox orators. See G. BERNARD SHAW, THE PERFECT WAGNERITE (1898).

But there is a more fundamental objection to any distinction here between the right to propagandize and the right to pursue any other lawful course of conduct. In many situations it is at least arguable that the right to propagandize is so essential to the free trade in ideas, upon which a healthy, dynamic society depends, that compared to other rights it ought to occupy a preferred position as against state regulation. *See* United States v. Carolene Products Co., 304 U. S. 144, 152 n.4 (1938).

However, it is the writer's opinion that no such preference should exist here. The right to engage in lawful conduct and to be protected therein against the lawless is the fundamental reason for the existence of organized government. The protection of the right, therefore, is equally vital to government regardless of the benefits which its exercise may or may not confer, for if the right is not protected, government has failed in its basic function. While this note concerns itself only with the specific rights covered by the First Amendment, it is earnestly felt that rights not coming within this category should be afforded no less degree of protection than those that do. In other words, the right to preach a sermon, to produce an opera, to continue operating a strikebound factory, or to wear a long beard in a town where long beards are unpopular [See CHAFEE, FREEDOM OF SPEECH IN THE UNITED STATES 151-152 (1941 ed.)] seem equally fundamental when it comes to vindicating them against the lawless. The basic question here is not the social utility of the particular right at stake, but the manner in which society is to meet a challenge which goes to the very purpose for which it exists.

22. The British Parliament apparently thought so. The Public Order Act, 1936, 1 Edw. VIII & 1 Geo. VI, c. 6, provided (§ 3) that to prevent "serious public disorder" the police could prescribe the route to be taken by processions, and could restrict the display of flags, banners, and emblems. In cases where such measures were not deemed sufficient, they might, with the approval of the borough or district council and the Secretary of State, entirely prohibit for three months all processions or any class of procession, to prevent such disorder. [During the war, the act was temporarily replaced by an order in council, which broadened the provisions by including not only processions but all meetings, and by removing the three month limit. Defense (General) Regulations, 1939, § 39 E (S. R. & O., 1939, No. 927, as amended by S. R. & O., 1939, No. 1681). Revoked by S. D. & O., 1945, No. 504.]

The act does not differentiate between processions disorderly in themselves and those which by their unpopularity occasion disorder in others. The debates on the bill, however, show that

cumstances, the right to commit virtual suicide? At the risk of seeming dogmatic, the answer is yes, it should. True, not many people will be likely to avail themselves of this right. Nor will the situation often arise. But where it does, the right of a man to follow his own lawful desires should be absolute, no matter what the consequences to him personally may be. The arguments which have been advanced above to support the proposition of an absolute right of peaceable speech and assembly are just as valid in emergencies as they are at any other time.[23]

It should be apparent from the foregoing that where speech or assembly is merely unpopular, the "clear and present danger" test[24] is thought to be irrelevant. It has always been applied to what, for lack of a better label, we may denominate "wrongful" speech, that is, speech which is directed toward the accomplishment of some substantive harm.[25] Un-

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it was devised to meet the tactics of the British Fascists, who marched into Jewish and working-class districts with the deliberate intent of provoking fights with Jews and Communists. Marching in uniformed military formations, shouting slogans like "Down with the Yids," they used every trick they knew to provoke attacks by inspiring hatred and terror in the inhabitants. They succeeded in starting serious riots in the East End of London. See the remarks of Mr. Bernays (Parliamentary Debates, 317 House of Commons, col. 1392) and of Mr. Morrison (13 *id.*, col. 174, 175).

In view of this legislative history, and of the fact that the rest of the act is aimed at various other kinds of typically Fascist political hooliganism, it could well be argued that § 3 of the act was meant to apply only to deliberately provocative processions, and not to peaceful but unpopular groups. For a discussion of provocative, as opposed to merely unpopular, conduct, see p. 87 *infra.*

23. Of course, there comes a time when hostile violence may become so explosive as to threaten not the assemblers alone, but the very structure of society itself. But this is a situation for martial law. Until martial law is validly declared, the ordinary constitutional guarantees should remain in full force. The subject of martial law is too large to be considered within the scope of this note. Yet, it should be noted that even where martial law has been validly proclaimed, it does not (at least in peacetime) confer unlimited discretion on the executive to prohibit lawful activity, where the power is at hand to protect it from lawlessness. Strutwear Knitting Co. v. Olson, 13 F. Supp. 384 (D. Minn. 1936) (statutory three-judge court).

24. "The question in every case [in determining whether speech can be made unlawful] is whether the words used are used in such circumstances and are of such nature as to create a clear and present danger that they will bring about the substantive evils that . . . [the state] has the right to prevent." Schenck v. United States, 249 U. S. 47, 52 (1919).

25. Schenck v. United States, 249 U. S. 47 (1919) (publication of leaflets designed to obstruct enlistment and cause insubordination in the armed forces in wartime); Herndon v. Lowry, 301 U. S.

der the test, even such "wrongful" speech is not unlawful if it does not threaten to bring about the harm immediately. But where there is a "clear and present danger" that it will bring the harm about, it may be prohibited. The thesis of this note, however, has been that "rightful" speech or assembly, that is, speech or assembly which is objectionable only because the lawless intend to prevent it, can never be prohibited so long as the First and Fourteenth Amendments to the Constitution are in effect.

A qualification of this proposition occurs, however, where the hostility to the assemblers is caused by their use of offensive or provoking language. If this is the case, the language may be punished. But, in view of the present state of the law in the United States, probably neither the meeting nor the offensive language could be prevented.[26] Of course, the delicate question here is where unpopular but legitimate speech ends and incitement to breach of the peace begins. Difficult though it be to draw the line, in general the distinction is made between the bona fide effort to change men's minds (even where that involves vigorous and tactless expression of views on controversial subjects) and the use of vulgar or abusive language in a deliberate attempt to stir up trouble. In *Cantwell v. Connecticut*,[27] for example, a conviction for incitement to breach of the peace was reversed where a Jehovah's Witness had played a phonograph record attacking the Roman Catholic Church in the presence of a pair of Catholic pedestrians. That was a sincere, if tactless, effort to change men's thinking. But *Wise v. Dunning*[28] upheld the decision of a lower court binding a Protestant minister over to keep the peace[29] where his attacks on the Roman Catholic

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242 (1937) (soliciting memberships in the Communist Party, which advocates "ultimate resort to violence at some indefinite time in the future against organized government").

26. The general rule is that not even defamatory or obscene speech can be subjected to previous restrait (4 BL. COMM. 151, 152), *e.g.*, by an equity decree [Near v. Minnesota, 283 U. S. 697, (1931)]. If it cannot be prevented by a court of equity, *a fortiori* it probably could not be physically prevented by police officers.

27. 310 U. S. 396 (1940).

28. [1902] 1 K. B. 167.

29. See also Respublica v. Cobbett, 3 Yeates 93 (Pa. 1800), holding that a libeler could be bound over to keep the peace. Do not such cases apply a previous restraint? Apparently not in such a form as to conflict with the policy of Anglo-American law. Blackstone enumerates the offenses of libel and provoking a breach of the peace among those by which a bond might be for-

Church were accompanied by gratuitous insults, such as making sport of a rosary and crucifix. And the Illinois Supreme Court upheld a conviction for disorderly conduct where defendant, addressing an anti-Semitic meeting, stated that he supposed some of the "slimy scum outside" (referring to a mob picketing the hall) had gotten in.[30]

The instant case, judged by all the criteria herein, was correctly decided. There was the threat of future violence, given substance by a history of past violence. But the assemblers were lawful and peaceable in their conduct, and did not provoke the violence by abusive language. A dozen trained officers and a hundred special deputies were used to prevent the meeting; they could have been used to protect it. But even had it been impossible to protect the meeting at all, the officials should not have been allowed to prevent it. The very purpose of maintaining peace and order is to permit the

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feited. 4 BL. COMM. 150. Yet on the very next page he enunciates the now famous rule against "previous restraint." 4 BL. COMM. 151, 152. Logically, it would seem that there is no more restraint in an injunction than in a recognizance to keep the peace. For that matter, it has been pointed out by more than one writer that an equity decree, violation of which would lead to punishment for contempt, is no more a previous restraint than a criminal libel statute, violation of which would lead to punishment after a jury trial. Pound, *Equitable Relief Against Defamation*, 29 HARV. L. REV. 640, 651 (1916); WALSH, EQUITY 264 (1930). Probably the real distinction is that an action on a recognizance and an indictment for violating a statute both furnish the safeguard of a jury trial, whereas punishment for violating an equity decree stems from a single person, the chancellor. And note that "Control of the matter by a judge in a court of law is equally odious—witness *Fox's Libel Act* [32 Geo. 3, C. 60 (1792)]." Moscovitz, *Civil Liberties and Injunctive Protection*, 39 ILL. L. REV. 144, 148 (1944).

30. City of Chicago v. Terminiello, 79 N. E.2d 39 (Ill. 1948); *accord*, Chaplinsky v. New Hampshire, 315 U. S. 568 (1942). In the *Terminiello* case, the affirmance of the conviction seems to rest upon rather insecure ground. The picketing mob assaulted persons coming to the meeting, threw rocks through windows, and were only restrained from completely breaking up the meeting by seventy of Chicago's finest. Query whether a person thus savagely attacked should be convicted of crime for venting his anger through name-calling. Nothing the defendant said could possibly have added to the tumult, since the mob which he reviled could not even hear him. The affirmance rested on two other grounds:

(1) That the anti-Semitic speech of defendant, including vicious slanders against the Jewish race, tended to incite his own followers against the Jews. Here, it seems, the "clear and present danger" test should apply. (See note 24 *supra*.) The court did not discuss the test, nor do the facts seem to fulfill its requirements.

(2) That the holding of the meeting at all in the face of such strong opposition was punishable. This theory has already been extensively discussed herein, and will not be labored further.

unimpaired pursuit of lawful conduct. To prevent lawful conduct under the guise of preserving peace and order is altogether anomalous. It is to be hoped that the rule of this case will be followed and extended.

CRIMINAL LAW

CONSTITUTIONALITY OF CRIMINAL STATUTES CONTAINING NO REQUIREMENT OF *MENS REA*

A state embezzlement statute which dispenses with *mens rea*[1] as a constituent of the crime is repugnant to the due process clause of the Fourteenth Amendment to the Federal Constitution, according to a recent decision of the Supreme Court of New Mexico. *State v. Prince*, 189 P.2d 993 (N. M. 1948).

Defendant was charged in an information based upon a New Mexico statute which reads: "Any person being in the possession of the property of another, who shall convert such property to his own use, or dispose of such property in any way not authorized by the owner thereof, or by law, shall be guilty of embezzlement. . . ."[2] This statute expressly repealed a prior embezzlement statute which had included *mens rea* as a requisite of the crime.[3]

The trial court sustained a motion to quash the information as unconstitutional and void, notwithstanding the fact that the information did allege *mens rea*.[4] Upon review by writ of error, the New Mexico Supreme Court agreed with the trial court that the statute upon which the information was based was invalid. It was held that the statute constituted a denial of due process in that to make an "innocent" act a crime is "inconsistent with law," and that the statute

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1. As used throughout this note, the term *mens rea* is defined as meaning the intentional or reckless doing of an act forbidden by the criminal law, with knowledge of, or reckless disregard for, the facts which make the act forbidden. Screws v. United States, 325 U. S. 91, 96 (1945); Ellis v. United States, 206 U. S. 246, 257 (1907); HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 138-168, esp. 148-49 (1947).
2. N. M. STAT. ANN. § 41-4519 (1941).
3. N. M. STAT. ANN. § 1543 (1915).
4. Courts frequently read the requirement of *mens rea* into statutes which have omitted it. Cases cited notes 34, 35, and 36 *infra*. When a statute is so construed, it is uniformly held that if the indictment or information alleges *mens rea*, the charge is sufficient. Baender v. Barnett, 255 U. S. 224 (1921).