

12-1-1960

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### Recommended Citation

Richard W. Ervin and Bruce R. Jacob, *"Sit-In" Demonstrations: Are They Punishable in Florida?*, 15 U. Miami L. Rev. 123 (1960)

Available at: <https://repository.law.miami.edu/umlr/vol15/iss2/2>

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# UNIVERSITY OF MIAMI LAW REVIEW

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VOLUME XV

WINTER, 1960

NUMBER 2

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## **"SIT-IN" DEMONSTRATIONS: ARE THEY PUNISHABLE IN FLORIDA?**

**RICHARD W. ERVIN\* AND BRUCE R. JACOB\*\***

### INTRODUCTION

The recent waves of "sit-in" demonstrations in the South raise many new questions in all fields of law. The First and Fourteenth Amendments to the Federal Constitution, as well as the Declaration of Rights of our Florida Constitution, preserve to all Americans the inviolate rights to speak, pray, assemble and seek a redress of grievances, and such rights may not be lightly or unduly suppressed. They are the "rights of the individual" in our society and stem from our basic concepts of liberty and justice. And yet, there exist also property rights which are nearly as precious to humans as are individual rights. In "sit-in" demonstrations there is a conflict between these two types of rights, and the law must ascertain and preserve a delicate balance between them. In addition, a third interest must be taken into consideration — the desire of the community or state to preserve peace and order.

Peaceful "sit-in" demonstrations are per se lawful, in the same way that peaceful picketing or other forms of remonstrance are lawful and constitutionally protected. However, when free conduct and the exercise of individual rights infringe unnecessarily and unjustifiably upon property rights or when the peace and tranquillity of society in general is threatened, such demonstrations can be punished.

We have chosen to discuss and undertake to determine when and under what circumstances a "sit-in" demonstration in Florida loses constitutional protection and instead becomes criminal. To accomplish our purpose we will examine three general categories of criminal offenses which appear applicable, namely: (1) breach of the peace, (2) trespass, and

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(3) unlawful assembly. Our discussion will consist principally of Florida Statutes, but since many relevant statutes incorporate common law definitions of crimes, the article will deal also with some common law principles.

## I. BREACH OF THE PEACE

### A. *The Common Law Definition*

A breach of the peace is a violation of public order; the offense of disturbing the public peace. The term is generic, and includes riotous and unlawful assemblies.<sup>1</sup> Here are the necessary elements of the common law offense: (1) conduct, actions or words (2) which are voluntary, willful, intentional, unjustifiable and calculated to disturb public order or tranquillity,<sup>2</sup> (3) which arouse and disturb some segment of the public,<sup>3</sup> and (4) which constitute violence or directly and immediately<sup>4</sup> provoke or tend to provoke actual or threatened violence.<sup>5</sup>

Disturbing and arousing the public does not mean causing mere discomfort, annoyance or resentment; rather, the defendant's acts, words or conduct must be such as normally cause alarm, consternation, disquiet and disorder, and which threaten danger or disaster.<sup>6</sup> Actual violence is not a necessary element of the offense; either actual or threatened violence is sufficient to constitute the offense. In cases not involving open disturbances in public places, and the actual annoyance of the public at large, personal violence, either actual or threatened, is required before a crime has been committed.<sup>7</sup> Actual personal violence is never a requirement. There must be at least *threatened personal* violence to constitute non-public breaches of the peace, but if the acts, conduct or words affect a larger segment of the public, the necessity for *personal* violence diminishes in inverse proportion with the increasingly public nature of the environ of the alleged acts, words or conduct.<sup>8</sup> The conduct or act cannot be criminal unless it tends with sufficient *directness* to break the peace. By directness is meant an immediate threat to public safety, peace or order; a mere possibility that the act or conduct may produce or incite violence is not

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1. *Stewart v. State*, 4 Okla. Crim. 564, 568, 109 Pac. 243, 245 (1910).

2. *State v. Mancini*, 91 Vt. 507, 101 Atl. 581 (1917); *People v. Sustek*, 124 N.Y.S.2d 641 (Magis. Ct. 1953).

3. *Stancliff v. United States*, 5 Indian Terr. 486, 82 S.W. 882 (1904); *People v. Perry*, 265 N.Y. 362, 193 N.E. 175 (1934).

4. *Webber v. Farmers Chevrolet Co.*, 186 S.C. 111, 195 S.E. 139 (1938); *State v. Thompson*, 117 Vt. 70, 84 A.2d 594 (1951); *State v. Steger*, 94 W. Va. 576, 119 S.E. 682 (1923).

5. *Wanzer v. State*, 202 Md. 601, 97 A.2d 914 (1953); *State ex rel. Thompson v. Reichman*, 135 Tenn. 685, 188 S.W. 597 (1916); *Woods v. State*, 152 Tex. Crim. 338, 213 S.W.2d 685 (1948).

6. *People v. Chesnick*, 302 N.Y. 58, 96 N.E.2d 87 (1950); *People v. Ludovici*, 13 N.Y.S.2d 88 (Westchester County Ct. 1939).

7. *Ware v. Loveridge*, 75 Mich. 488, 42 N.W. 997 (1889); *State ex rel. Thompson v. Reichman*, *supra* note 5.

8. *Ibid.*

sufficient to constitute a breach of the peace.<sup>9</sup> Whether or not a given act or state of conduct amounts to a breach of the peace depends upon the circumstances surrounding the act,<sup>10</sup> and what may amount to a punishable offense in one set of circumstances may not be a breach of the peace in another time, place, and situation.

### B. Case Law

Two United States Supreme Court cases in particular have clarified the demarcation line separating First and Fourteenth Amendment freedoms from conduct constituting a breach of the peace; they are *Cantwell v. Connecticut*<sup>11</sup> and *Feiner v. New York*.<sup>12</sup> In the former, the defendant, a member of the Jehovah's Witnesses sect, was convicted of the common law offense of "inciting a breach of the peace." While on a street in a predominantly Catholic neighborhood, he stopped two men who were Catholics. He asked and received permission to play a phonograph record and then proceeded to play the record, which attacked the Catholic religion. Both men were incensed by the playing of the record and were tempted to do violence to Cantwell. They told him to go away, and on being so advised, he left their presence without being argumentative.

The conviction was reversed by the Supreme Court. Cantwell had been on a public street, "where he had a right to be, and where he had a right peacefully to impart his views to others."<sup>13</sup> The court pointed out that the playing of the record had not disturbed nearby residents and that it had not attracted a crowd or impeded traffic; the fact that the hearers had been highly offended and angered was not sufficient to make the actions criminal. The court observed that conduct, words or acts likely to provoke violence can be a breach of the peace, even if no such eventuality be intended and had the following to say with reference to breach of the peace:

[I]n practically all, [breach of the peace cases] the provocative language which was held to amount to a breach of the peace consisted of profane, indecent, or abusive remarks directed to the person of the hearer. Resort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution. . . .<sup>14</sup>

We find in the instant case no assault or threatening of bodily harm, no truculent bearing, no intentional discourtesy, no personal abuse.<sup>15</sup>

9. *State v. Thompson*, *supra* note 4; *State v. Steger*, *supra* note 4.

10. *State v. Stroble*, 169 Kan. 167, 217 P.2d 1073 (1950); *Jennings v. State*, 92 Okla. Crim. 347, 223 P.2d 562 (1950); *State v. Mancini*, *supra* note 2.

11. 310 U.S. 296 (1940).

12. 340 U.S. 315 (1950).

13. 310 U.S. 296, 308 (1940).

14. *Id.* at 309-10.

15. *Id.* at 310.

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

A decision which may have great influence upon future cases regarding racial demonstrations is *Feiner v. New York*.<sup>16</sup> The defendant was arrested under a statute which substantially embodied the common law offense of breach of the peace, with some variations.<sup>17</sup> *Feiner* made a speech at a busy intersection in the city of Syracuse. He spoke from a box located on the sidewalk. A crowd of 75 to 80 (mixed colored and white) persons gathered around him, and some pedestrians had to go into the street in order to pass by. Two policemen observed the meeting. *Feiner* declared in an excited manner that Negroes did not have equal rights and should rise up in arms. One man indicated that if the police did not get the speaker off the stand, he would do it himself. The crowd which consisted of both those who opposed and those who supported the speaker, was restless. There was not yet a disturbance but the arresting officer stepped in to prevent it from resulting in a fight. Having ignored two police requests to stop speaking, *Feiner* was arrested. The United States Supreme Court, in an extremely close decision, upheld the conviction, saying:

[The courts below] . . . found that the officers in making the arrest were motivated solely by a proper concern for the preservation of order and protection of the general welfare, and that there was no evidence which could lend color to a claim that the acts of the police were a cover for suppression of petitioner's views and opinions. Petitioner was thus neither arrested nor convicted for the making or the content of his speech. Rather, it was the reaction which it actually engendered.<sup>18</sup>

This Court respects, as it must, the interest of the community in maintaining peace and order on its streets. (Citations omitted.) We cannot say that the preservation of that interest here encroaches on the constitutional rights of this petitioner.<sup>19</sup>

We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful

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16. See note 12 *supra*.

17. 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. . . ."

18. 340 U.S. 315, 319-20 (1951).

19. *Id.* at 320.

public meetings. 'A State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions.' *Cantwell v. Connecticut*, *supra*, [310 U.S.] at 308. But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace. . . . The findings of the state courts as to the existing situation and the imminence of greater disorder coupled with petitioner's deliberate defiance of the police officers convince us that we should not reverse this conviction in the name of free speech.<sup>20</sup>

In the Colorado Supreme Court case of *Flores v. City & County of Denver*,<sup>21</sup> the following pertinent facts appear. Fifty to seventy people, including the defendants, assembled in front of the Governor's house and chanted in high-pitched voices for a redress of certain grievances. There was no profanity or fighting and police received no complaints from neighbors that they were being disturbed. The chief of police observed the proceedings for ten minutes. Then he requested that the group disperse. The defendants insisted upon the right to demonstrate for fifteen more minutes, to which the chief of police reiterated his demand for immediate dispersal. The defendants refused to comply and were placed under arrest, for, among other things, violation of a "disturbing the peace of others" ordinance. The court held there was no crime committed. They said that the conduct of the defendants was neither violent nor threatening, nor likely to produce violence, or cause consternation and alarm. No one was disturbed, so there could be no "disturbance" of the peace. "[E]ven if the ordinance be construed . . . to include breach of the peace generally . . . there must [at least be] a threat to the peace of the community."<sup>22</sup> The court obviously felt that the conduct of the defendants could not constitute a common law breach of the peace. The court discussed breach of the peace cases involving fighting and wanton activities, then said:

In the situation here presented, we have another element, absent from the cases hereinabove noted. The disturbance of which complaint was made in those cases was wanton and without worthy purpose. In the instant case, the noise involved was incidental to a legitimate right, protected by the Constitution, to appeal to those in authority for redress of grievance by remonstrance, and such right must be balanced against the right of the community to peace and quiet. There exists the undoubted authority of the state reasonably to limit the free exercise of the right of remonstrance, as well as of the free exercise of religion, and even of the right of free speech itself, where they sanction incitement to

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20. *Id.* at 320-21.

21. 122 Colo. 71, 220 P.2d 373 (1950).

22. *Id.* at 77, 220 P.2d at 375.

riot or constitute an immediate threat to public safety, peace or order, but such rights may not be lightly nor unduly suppressed.<sup>23</sup>

In a 1947 New York decision, *People v. Swald*,<sup>24</sup> rendered by the City Court of Utica, Swald, an independent taxicab driver, was told to stop soliciting customers in the Union Station, which was private property of the railroad. He disregarded the warning and came back to solicit customers. A police officer told him to leave. He would not go, however, and was placed under arrest for disorderly conduct, one of the necessary elements of which was language, conduct or behavior intended to provoke a breach of the peace, or whereby a breach of the peace may be occasioned. The court held that no offense was committed, saying:

. . . [D]efendant's actions caused no crowd to collect nor was any loud, offensive, insulting or disturbing language or conduct employed by the defendant.<sup>25</sup>

It is understandable that the refusal of the defendant to leave the premises was annoying, disturbing and perhaps offensive to the complainant as well as interference with the property rights of the New York Central Railroad. It may well be that defendant was a trespasser on the premises and could have been removed by force if necessary. . . .

It has not been shown in this case that the defendant had any intention of breaching the peace. The record discloses no loud or angry talk, no boisterous or profane language, no physical violence or threat to do so.<sup>26</sup>

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

### C. "Sit-in" Demonstrations in Florida

The Florida Breach of the Peace and Disorderly Conduct Statute, Florida Statutes 877.03,<sup>27</sup> seems to embody the common law crime offense of breach of the peace, and therefore, the cases discussed above are applicable in this State. In light of these cases, we feel that a peaceful "sit-in" demonstration cannot constitute a breach of the peace no matter how much antagonism and resentment it might engender except in the following situations:

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23. *Id.* at 77-78, 220 P.2d at 376.

24. 73 N.Y.S.2d 399 (Utica City Ct. 1947).

25. *Id.* at 400.

26. *Id.* at 401.

27. FLA. STAT. § 877.03 (1959). "*Breach of the peace; disorderly conduct.*—Whoever commits such acts as are of a nature to corrupt the public morals, or outrage the sense of public decency, or affect the peace and quiet of persons who may witness them, or engages in brawling or fighting, or engages in such conduct as to constitute a breach of the peace or disorderly conduct, shall be guilty of a misdemeanor, and subject to punishment as provided by law."

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

(2) Bystanders gathering to watch the "sit-in" demonstrators become agitated to such extent as to create a clear and present danger of a riot or breach of the peace and the demonstrators, although previously innocent of wrongdoing, refuse to disperse upon demand of the authorities. It is true that if the bystanders become abusive, profane, or violent, or if their conduct tends to provoke violence, then they have committed crimes. It is also true that the duty of police officers is to protect the demonstrators in the exercise of their constitutional right to seek a redress of grievances, but this does not mean that demonstrators may insist upon exercising that right when to do so creates imminent danger of a riot or a breach of the peace. The mere fact that the demonstration causes resentment among bystanders, of course, cannot make the "sit-in" illegal. Nevertheless, if the demonstrators refuse to desist from conduct which, although lawful under ordinary circumstances, tends to create an imminent danger of a riot or a breach of the peace, then we think that the *Feiner*<sup>28</sup> decision would justify their arrest.

## II. CRIMINAL TRESPASS

### A. *Restaurants as Private Property;*

#### *Common Law Rights of Owners*

In the case of *Marsh v. Alabama*,<sup>29</sup> decided by the United States Supreme Court in 1946, the defendant was convicted for violation of an Alabama statute after she attempted to distribute Jehovah's Witnesses literature in a company-owned town, contrary to the wishes of the town's management. The company had leased stores and business places in the business block to merchants, and the federal government used one of the places for a post office. The streets and sidewalks of the town were owned by the company. In the stores there was posted a notice which read: "This is Private Property, and Without Written Permission, No Street, or House Vendor, Agent or Solicitation of Any Kind Will Be Permitted."<sup>30</sup>

The defendant came onto the sidewalk, stood near the post office, and began to distribute the literature. She was warned to desist and was asked to leave the sidewalk but did neither. An arrest and conviction followed for the commission of the statutory crime of "entering or remaining

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28. See text accompanying note 12 *supra*.

29. 326 U.S. 501 (1946).

30. *Id.* at 503.

on the premises of another after having been warned not to do so."<sup>31</sup> The defendant contended that to construe the statute as applicable to her activities would abridge her right to freedom of press and religion contrary to the First and Fourteenth Amendments to the Constitution.

On appeal to the Supreme Court, the conviction was reversed, the Court, through Mr. Justice Black saying:

. . . [I]t is the state's contention that the mere fact that all the property interests in the town are held by a single company is enough to give that company power, enforceable by a state statute, to abridge these freedoms.<sup>32</sup>

We do not agree that the corporation's property interests settle the question. The State urges in effect that the corporation's right to control the inhabitants of Chickasaw is coextensive with the right of a homeowner to regulate the conduct of his guests. We cannot accept that contention. Ownership does not always mean absolute dominion. The more an owner, for his advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.<sup>33</sup>

When we balance the Constitutional rights of owners of property against those of the people to enjoy freedom of press and religion, as we must here, we remain mindful of the fact that the latter occupy a preferred position.<sup>34</sup>

Thus, to the extent that a private property owner allows the public on his premises, his property rights become correspondingly less absolute. However, the *Marsh v. Alabama* rule has not been applied to privately owned restaurants. Two recent federal cases and a Delaware decision hold that, under the common law, an owner of a private restaurant may select his clientele as he sees fit. All three, *Williams v. Howard Johnson's Restaurant*,<sup>35</sup> *Slack v. Atlantic White Tower System, Inc.*,<sup>36</sup> and the *Wilmington Parking Authority & Eagle Coffee Shop, Inc. v. Burton*,<sup>37</sup> involved Negroes who complained that their constitutional rights were violated by restaurateurs who refused to serve them. The court made the following remarks in the *Slack* case:

In the absence of statute, the rule is well established that an operator of a restaurant has the right to select the clientele he will serve, and to make such selection based on color, if he so desires. He is not an innkeeper charged with a duty to serve everyone who applies.<sup>38</sup>

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31. *Id.* at 503-04; ALA. CODE tit. 14, § 426 (1940).

32. 326 U.S. 501, 505 (1946).

33. *Id.* at 505-06.

34. *Id.* at 505-06.

35. 268 F.2d 845 (4th Cir. 1959).

36. 181 F. Supp. 124 (D. Md. 1960).

37. 157 A.2d 894 (Del. 1960).

38. See note 36 *supra* at 128.

### B. *The Common Law Crime of Criminal Trespass*

At common law, no trespass to property was a crime unless it was accompanied by or tended to create a breach of the peace, even though the act was committed forcibly, willfully, or maliciously. Something more than what amounts to a mere civil trespass was necessary; the peace had to be actually broken or the act complained of had to tend directly and manifestly to it, as when the acts were done in the presence of the owner, to his terror or against his will. When a civil trespass was shown to be attended by circumstances constituting a breach of the peace there was, of course, no problem; the intruder was guilty of criminal trespass.<sup>39</sup>

In the recent "sit-in" demonstrations, the conduct of the participants has been deliberately non-violent; in fact the theory underlying the use of such tactics seems to be based upon Ghandi's conception of passive resistance.

Unless a demonstrator has previously been admonished by a restaurant owner to remain off the restaurant premises, he is an implied invitee and lawfully on the premises when he enters an eating place. As appears from the above discussion of common law breach of the peace, particularly from the *Swald* case,<sup>40</sup> if A, while lawfully on the private property of B, is asked by B to leave, and A refuses to do so, B may have the right to forcibly remove A or to obtain police aid in ejecting A; but if A sits quietly and engages in no offensive conduct other than quiet refusal to leave, the courts find difficulty in holding that such conduct of A constitutes a breach of the peace, which is an essential element of common law criminal trespass. (However, as hereinafter pointed out, A's refusal to leave after being so requested would constitute a statutory criminal trespass). The element of violence, either actual or threatened, is indispensable to the commission of the crime of breach of the peace.

### C. *Refusal to Leave as Statutory Criminal Trespass*

Statutes, of course, can make civil trespass criminal. The case of *Marsh v. Alabama*,<sup>41</sup> involved such a statute. Florida Statute Section 821.01,<sup>42</sup> provides another example. It is possible that under certain circumstances Section 821.01 will be applicable to "sit-in" demonstrations. If a demonstrator *willfully enters* into a *private building* (restaurant) which is *occupied by*

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39. 87 C.J.S. *Trespass* § 140 at p. 1101 (1954).

40. See note 24 *supra*.

41. See note 29 *supra*.

42. FLA. STAT. § 821.01 (1959). "*Trespass after warning*.—Whoever wilfully enters into the enclosed land and premises of another, or into any private residence, house, building or labor camp of another, which is occupied by the owner or his employees, being forbidden so to enter, or not being previously forbidden, is warned to depart therefrom and refuses to do so, or having departed re-enters without the previous consent of the owner, or having departed remains about in the vicinity, using profane or indecent language, shall be punished by imprisonment not exceeding six months, or by a fine not exceeding one hundred dollars."

*the owner or his employees, being forbidden so to enter, or not being previously forbidden, is warned to depart therefrom and refuses to do so, or having departed re-enters without the previous consent of the owner, then he may have violated this criminal statute.*

#### D. *The Florida Undesirable Guest Ejection Statute*

Florida has a law, Section 509.141, Florida Statutes, the pertinent parts of which are set out below,<sup>43</sup> which allows restaurant owners, among others, to eject undesirable guests. Being a criminal statute, it must be strictly construed, and if a restaurant owner wishes to prosecute "sit-in" demonstrators, he must follow the provisions of the statute step by step.

*The manager, assistant manager, or other person in charge or authority must orally notify the guest or guests that the restaurant no longer desires to entertain him, her or them and must request that such guest or guests immediately depart from the restaurant.* In such case, the sitters will be guilty of a misdemeanor if, *after being so requested to depart, they remain or attempt to remain.*

What is meant by "other person in charge or authority?" Can this phrase include waitresses? The answer is probably *yes* if the waitress is acting on instructions from the management in such way that she can be said to be "in charge or in authority." The manager or other person in charge or authority must notify the guest that he is no longer welcome and must request him to leave the restaurant immediately if the statute is to be operative. Merely refusing to serve the guest and/or closing a counter or restaurant in the midst of a "sit-in" demonstration would probably not be sufficient to constitute the demand to leave required by Section 509.141.

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43. FLA. STAT. § 509.141 (1959). "*Ejection of undesirable guests; procedure, etc.*—  
 (1) The manager, assistant manager . . . or other person in charge or in authority in any . . . restaurant [or other similar establishment] . . . shall have the right to remove, cause to be removed, or eject from such . . . restaurant . . . any guest of said . . . restaurant . . . who, while in said . . . restaurant . . . is intoxicated, immoral, profane, lewd, brawling, or who shall indulge in any language or conduct either such as to disturb the peace and comfort of other guests of such . . . restaurant . . . or such as to injure the reputation or dignity or standing of such . . . restaurant . . . or who, in the opinion of the management, is a person whom it would be detrimental to such . . . restaurant . . . for it any longer to entertain.  
 (2) The manager, assistant manager . . . or other person in charge or in authority in such . . . restaurant . . . shall first orally notify such guest that the . . . restaurant . . . no longer desires to entertain him or her and request that such guest immediately depart from the . . . restaurant . . .  
 (3) And any guest who shall remain or attempt to remain in such . . . restaurant . . . after being requested, as aforesaid, to depart therefrom, shall be guilty of a misdemeanor, and shall be deemed to be illegally upon such . . . restaurant . . . premises.  
 (4) In case any such guest, or former guest, of such . . . restaurant . . . or any other person, shall be illegally upon any . . . restaurant . . . premises, the management, of such . . . restaurant . . . forthwith and forceably, if necessary, to immediately eject constable, deputy sheriff, sheriff or other law enforcement officer of this state, and it shall be the duty of each member of the aforesaid classes of officers, upon request of such . . . restaurant . . . forthwith and forceably, if necessary, to immediately eject from such . . . restaurant . . . any such guest, or former guest, or other person, illegally upon such . . . restaurant . . . premises, as aforesaid."

### III. UNLAWFUL ASSEMBLY

#### A. Common Law Definition

The common law offense of unlawful assembly has recently been defined as consisting of (1) the assembling together of three or more persons (2) with a common design or intent (3) to accomplish a lawful or unlawful purpose by means such as would give rational, firm, and courageous persons in the neighborhood of the assembly a well-grounded fear of a breach of the peace.<sup>44</sup> In line with this definition was Blackstone's statement that an assembly for the purpose of doing an unlawful act without making any motion toward the execution of their purpose could constitute the crime.<sup>45</sup> Intent, the purpose or design in the minds of those making up the assemblage, is all-important to the commission of the crime; it need not exist, however, at the outset but may be formed either at or after the time of the assembly, and its existence can be inferred from language, acts, conduct, and other circumstances involved in the alleged unlawful assembly.<sup>46</sup>

#### B. Case Law

In *State v. Butterworth*,<sup>47</sup> defendants were convicted under a statute adopting the common law crime of unlawful assembly. During a strike by silk mill workers near Paterson, New Jersey, the strikers attempted to hold a meeting in Turn Hall to protest alleged police oppression against strikers. The police refused to allow the meeting to be held in the Hall. To protest this latest police action, 200 or 300 persons gathered in the public square; a procession of about 30 marched from union headquarters to the square, led by two young women bearing the American flag and followed by the defendants. By the time the procession had reached the city square, about 1,500 or 2,000 persons had gathered. Defendant Butterworth began to address the crowd saying, "Fellow workers," whereupon he was interrupted by police officers, who asked if he had a permit to hold a public meeting. Butterworth, holding up a book in his hand, said, "This is my permit." He was placed under arrest, to which he made no resistance but quietly submitted. There was no evidence that any weapons were displayed at any time. Two police officers testified that the attempted meeting put them in fear that something might happen, but there was no evidence that any other person was put in fear by the proceedings. The convictions of Butterworth and others were under a statute which, on appeal, was held to be to the same effect as the above quoted common law definition of unlawful assembly.

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44. *State v. Butterworth*, 104 N.J.L. 579, 583, 142 Atl. 57, 59 (Errors and Appeals 1928); *Shields v. State*, 187 Wis. 448, 204 N.W. 486, 487 (1925); See Annot., 71 A.L.R.2d 875, 878 (1960).

45. Annot., 71 A.L.R.2d 875 (1960).

46. *Lair v. State*, 316 P.2d 225, 234, 235 (Okla. 1957).

47. 104 N.J.L. 579, 142 Atl. 57 (Errors and Appeals 1928).

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

It is rather startling to the most lively imagination that, if this meeting was of such a turbulent and disorderly character as described in the indictment, unsupported as it is, however, by the proof, that out of forty policemen only two of them, and they without stating any facts reasonably supporting any ground of fear or alarm which would be entertained by a person of a firm and courageous mind, were seized with fear of a threatened outbreak and breach of the public peace.

[T]he object of the meeting was to protest publicly against action taken by the police authorities which prevented the strikers from holding their meetings to vent their grievances in a public hall. The object of the meeting, therefore, was *per se* not an unlawful one, and an indictment for unlawful assembly could not properly be predicated upon the mere fact of holding the meeting in a public place.<sup>48</sup>

A Puerto Rican case, *Garcia Dominicci v. District Court*,<sup>49</sup> will also show the reader what type of assembly is protected by the Constitution. Defendants and other students constituting a throng of 500 gathered together and marched toward the University of Puerto Rico to protest certain acts of the Chancellor of the school. They made noises, including whistling, jeering and uttering boisterous exclamations; and their conduct obstructed traffic. Police tried to change their course to prevent them from approaching the school and to ease traffic conditions; but the demonstrators disregarded police demands, continuing to march upon the University. Later most of the paraders sat in the street and on sidewalks, completely paralyzing traffic for about half an hour.

The defendants were convicted under an unlawful assembly statute prohibiting violent and tumultuous conduct. The court utilized the *Butterworth*<sup>50</sup> case's definition of unlawful assembly in construing the statute. The convictions were reversed. The decision reads in part:

The nature of each act depends on the circumstances under which it was executed. Perhaps if this very act had been executed in a peaceful hamlet whose inhabitants were not used to the excitement and noises, its peace and order might be disturbed. But the events took place in the city of Rio Piedras which is the seat of the University of Puerto Rico, with more than 5,000 students.<sup>51</sup>

[T]he right of the people to assemble for redress of grievances may only be sacrificed when public order is actually threatened and not merely when it is conceivable that it may be slightly affected.<sup>52</sup>

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48. *Id.* at 587-88, 142 Atl. at 61.

49. 71 P.R.R. 122 (1950).

50. See note 44 *supra*.

51. 71 P.R.R. 122, 126 (1950).

52. *Id.* at 127-28.

The decision seems to point out the importance of "climate" and circumstances surrounding each alleged crime of unlawful assembly. What is commonplace in a university city in Puerto Rico may create riots and be punishable as unlawful assembly in Boston or in a non-university town in Puerto Rico, for that matter.

Now let us turn our attention to cases in which convictions for the crime of unlawful assembly were sustained. In *People v. Anderson*,<sup>53</sup> the defendants were all members of a Communist organization known as the Trades Union Unity League. This League called a "demonstration against unemployment," to be held in the Plaza, which was a public square or park in the City of Los Angeles. Large crowds were gathered on all the streets in the vicinity, blocking the sidewalks and even the roadways in places. The defendants were all members of the League, and had all come to take part in the demonstration or to speak.

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

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

The defendants . . . were all acting in concert and with a common purpose in so assembling . . . [So] that whatever was done by any one of them was in furtherance of their common design, and hence . . . all were equally responsible criminally for the acts of any of them.<sup>54</sup>

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

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53. 117 Cal. App. 763, 1 P.2d 64 (1931).

54. *Id.* at 770, 1 P.2d at 67.

While a speaker who is not himself obstructing traffic may not always be criminally responsible for such obstruction created by his hearers, yet when he refuses to move on request and insists on holding his meeting at a place where his hearers are blocking traffic, as in this case, he becomes at least an aider and abettor, and a principal in the offense.<sup>55</sup>

*Koss v. State*<sup>56</sup> involved a situation in which approximately 200 persons assembled in downtown Milwaukee to protest the arrival of German ambassador Luther, holding signs such as "Luther agent of the bloody Hitler." Police went among the assembled persons and commanded them to disperse because they were blocking traffic. Defendants urged the assembled persons not to move, and many of the latter, by locking arms, closed in around the defendants and prevented police from dispersing the assembly.

Defendants were convicted and the convictions upheld under a Wisconsin unlawful assembly and riot statute, which was interpreted as follows by the court: (1) an assembly originally for the purpose of doing an unlawful act is punishable, as is (2) an assembly peaceable and lawful at the outset, the members of which later make an attempt or motion to do an act in either a tumultuous, violent, or unlawful manner, to the terror or disturbance of others.<sup>57</sup>

In the *Koss* case, the following instruction was held to be valid:

. . . '[T]he mere peaceable assembling of a large number of people upon a public highway with no unlawful purpose is not itself unlawful,' that 'if such assembly becomes of such a nature, or such a number, that it in fact results in unreasonably obstructing the use of the highway for public travel, or results in a trespass of private property, it becomes unlawful.'<sup>58</sup>

The court held that the defendants were guilty because they unlawfully blockaded public travel and unlawfully refused to disperse when commanded to do so by police officers.

### C. *The Florida Law of Unlawful Assembly*

Florida's unlawful assembly statute, Section 870.02, Florida Statutes,<sup>59</sup> includes assemblages of three or more persons "to commit a breach of the peace, or to do any other unlawful act." The common law definition has thus been broadened in this State. If it can be proved that three or more "sit-in" demonstrators assembled with the intent or design, or after having

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55. *Id.* at 772, 1 P.2d at 68.

56. 217 Wis. 325, 258 N.W. 860 (1935).

57. *Id.* at 326, 258 N.W. at 862.

58. *Id.* at 327, 258 N.W. at 864.

59. FLA. STAT. § 870.02 (1959). *Unlawful assemblies*.—"If three or more persons meet together to commit a breach of the peace, or to do any other unlawful act, each of them shall be punished by imprisonment not exceeding six months, or by fine not exceeding five hundred dollars."

been assembled formed the requisite common intent, to commit a breach of the peace, as that crime has been delineated in Section II of this article, then such demonstrators are guilty of the crime of unlawful assembly.

In Florida, in addition, if three or more "sitters" assemble with common intent to do *any* unlawful act, they can be said to have violated Section 870.02. Therefore, if three or more demonstrators intend to commit the crime of criminal trespass, which includes intended violations of the Florida trespass and undesirable guest ejection statutes, then such persons are guilty of unlawful assembly, as that crime has been defined by the Legislature of this State.

#### CONCLUSION

It appears to be a basic concept, well established by court decisions, that demonstrations for the purpose of seeking an improved social, economic and political status in our society are not to be lightly or unduly suppressed.<sup>60</sup> At some point, however, individual rights and liberties, including the right to seek a redress of grievances, must yield to property rights and to the necessity for peace and order in the community. A "sit-in" demonstration is no exception to this rule.

If "sitters" enter a restaurant as implied invitees and are not thereafter requested to leave by the owner or his agent, their mere presence does not make them guilty of criminal trespass; if we assume that they have assembled for the purpose of peacefully, non-violently demonstrating for improved status in society, and if we assume that they have done nothing that could be considered a breach of the peace or which could tend to create a breach of the peace, they have not been guilty of any crime. Under certain circumstances, however, discussed above, the demonstrators may be guilty of breach of the peace, criminal trespass, unlawful assembly, or a combination of them, under Florida law.

The mere fact that bystanders may resent a "sit-in" demonstration does not make it illegal; in fact, if such resentment leads the bystanders to commit a breach of the peace, they become guilty of a criminal offense.

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60. *Flores v. City & County of Denver*, 122 Colo. 71, 220 P.2d 373 (1950); *State v. Butterworth*, 104 N.J.L. 579, 142 Atl. 57 (Errors and Appeals 1928); *Garcia Dominicci v. District Court*, 71 P.R.R. 122 (1950).