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# THE POLICE ORDER: THE RIGHT TO DISOBEY

Carl Rachlin†

## INTRODUCTION

Now pending before the United States Supreme Court<sup>1</sup> is a case awaiting ruling on the petition for certiorari in which one of the defendants, a judge in a lower criminal court in Mississippi, was asked during his deposition whether a citizen has the right to disobey an unreasonable police order. His answer was that he thought the citizen should obey the officer and later seek redress.<sup>2</sup> Many courts have rendered decisions which throw doubt on the accuracy of this judge's opinion of the law. Such an opinion of the state of the law would not be important, except perhaps to persons convicted, were it not shared by many District Attorneys, police officers, and even high level judges.

During the argument in a case heard recently by the Supreme Court of New Jersey<sup>3</sup> the following exchange took place as reported in the press.<sup>4</sup> The defense attorney was quoted as saying, "a person has a public duty to refuse to obey an illegal police order." Chief Justice Joseph Weintraub's answer was, "You'd have anarchy if you didn't have order." To this the defense attorney replied, "It's a police state otherwise."

This exchange between the Chief Judge and counsel represents a polarization of the opposing views; on one hand, the need for just order, and on the other hand, the maintenance of individual liberty. Unless this polarization is understood, and the problems of law analyzed, society may unwittingly travel a road along which return is difficult and which may be destructive of personal liberty. To oppose a police state, *i.e.* a state in which the direction of the policeman automatically has the force of law, one need not propose anarchy; nor need one be ignorant of the difficulties encountered by the police

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I wish to express my deep gratitude to Stephen Schlakman, a second year student at the Columbia University School of Law without whose able assistance this article could not have been written.

<sup>1</sup> *Pierson v. Ray*, 352 F.2d 213 (5th Cir. 1965).

<sup>2</sup> *Id.* at 217.

<sup>3</sup> *State v. Smith*, No. A-753-64, Super. Ct. N.J., 1965.

<sup>4</sup> Robinson, *Court Debate: What Is an Illegal Disturbance*, Newark Star Ledger, Dec. 22, 1965.

to assert that not every order of the police is sacrosanct. Individual liberty allows for occasions when one may have a right, perhaps even a duty, to disobey an improper order. By living in a democratic society we have before us the responsibility to constantly make decisions of varying importance, many of which affect us, some directly, others tangentially. Correlative with the right to make decisions is the duty to accept responsibility for those decisions. Having made a choice to disobey a police order believing it to be improper, one must accept the responsibility for such act should he be in error.

### *Totalitarian States Require Obedience*

In a Communist or Fascist state, the citizen-subject understands his duties and, whether he likes it or not, obeys the police order. The citizen-subject accordingly has little power and consequentially little responsibility. Rarely is the issue whether the citizen or policeman is wrong or right, but rather whether the citizen did as he was told. While this may be an over-simplification, our knowledge of these societies indicates its general truth. On the other hand, a free society will inquire whether the citizen obeyed or refused to obey the police order and, equally important, whether the police had the right to make such an order.

From the examples stated above, it is submitted that a certain misunderstanding exists in this area of the law. Too often decisions are based upon the special facts of the particular case, not on an adequate understanding of the underlying principles of law and the mutual responsibilities and obligations of police and citizen. Civil Rights cases involving these underlying questions of the relation between police and citizen are often won in behalf of the expansion of civil rights merely because there is unequal treatment on the part of the police (in many areas) toward Negroes and Caucasians.

No less important, and perhaps even more fundamental, is the issue of the right of the police to ask "X" to "move on" because rarely is there an adequate inquiry into underlying relationships. It is not unusual for an appellate court to reverse a conviction based on a refusal to "move on," but again the reversals are not based on an adequate understanding of the underlying principles, but on racial discrimination alone. Unless the fundamental question of the police-citizen relation is examined, the present civil rights legal battles may have to be followed by new battles for personal liberty. Once the "prop" of unequal racial treatment, upon which convictions for refusing to obey an improper order of the police are reversed, is removed, convictions for disobeying police orders come as a matter of course, unanimously affirmed, as discussed later in this article.

Important as it may be that the word of the police in a democracy not have the force of law, it is no less important to understand that there does not exist any broad right to ignore police directions. In a Communist or Fascist state, one merely obeys. In a democracy, one has the opportunity and may have the duty to make a decision concerning the propriety of obeying a police order. But not to be forgotten is the possibility that punishment may follow from making the wrong decision.

#### THE ORDER TO "MOVE ON"

Let us start with the premise that the lot of the policeman is not a happy one. To react quickly to myriad situations, and to judge the merits of problems accurately, many of which come unexpectedly, is part of the duty of the conscientious policeman. Some flexibility in the decision-making power has to be his. Abstractly, of course, one may agree that his will should not be beyond question, particularly when the issue concerns the white middle-class milieu. To allow the police officer to act upon his discretion and yet be restrained in a manner we deem proper is a problem requiring delicate balancing, with proper order and individual freedom on the scales. Whether a man has struck another or stolen his watch are questions reasonably subject to objective analysis. But the right of the police to arrest one for failing to "move on" is not open to such factual analysis, since the issue often arises when one is merely standing, doing nothing. What motivates the policeman's acts about a given possibility of street obstruction, including such factors as his judgment and timidity, his prejudices, and how much of the situation he has really seen, are the unknowns that cause our concern.

Where a police officer orders a person or a group to move on or to disperse, most courts hold that failure to comply is obstruction or resistance . . . Typically opinions treating fact situations of these types offer no . . . statement of broad, guiding principle, but rather conclude without analysis that the conduct is punishable. Courts which have been faced with the problem indicate a split as to whether behavior of this type is punishable either as disorderly conduct or a breach of the peace.<sup>5</sup>

Such lax analysis is indeed harmful to our society, for "our liberties might be seriously threatened if an individual could be punished for refusal to obey an order of a policeman or other officer of the state transcending his lawful authority."<sup>6</sup> Despite these statements no careful delineation of the duties of the police officer nor of his lawful authority has been made and the courts are still lax in their analysis

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<sup>5</sup> Note, 108 U. PA. L. REV. 388, 401 (1960).

<sup>6</sup> *People v. Galpern*, 259 N.Y. 279, 281, 181 N.E. 572, 83 A.L.R. 785 (1932).

even when the decision reverses a conviction. Unfamiliarity with current laws is common among police officers.<sup>7</sup> The attitude commonly taken by the courts is a matter of grave concern. Anarchy is not the inevitable result of the right of the free citizen to question authority,<sup>8</sup> despite a common expectation to that effect.

Important as the problem is, it has not escaped the eye of the United States Supreme Court. But in reversing convictions in recent cases, the Court has avoided clarifying the right of an individual to disobey a police officer's unwarranted order to move on. By basing decisions on narrower grounds, the Court has chosen not to come to grips with the fundamental issue of the rights and limitations of disobeying a police order. Because of an apparent inconsistency in the courts, *i.e.* Civil Rights cases are treated differently from other situations, it is urged that an attempt be made to establish a general rule instead of continuing to decide cases in an *ad hoc* fashion as reactions to particular errors of the police in civil rights situations.

#### *Principles Established by Case Law*

Much of the present thinking in this area derives from *People v. Galpern*,<sup>9</sup> a New York case that attracted little attention when decided. Galpern, a practicing attorney, emerged near midnight on a summer evening from a meeting in New York City and in the age-old fashion stopped to have a quiet chat (or "schmoose" as it is called in New York) with friends on the sidewalk. At this time, the transcript states that he was approached by Officer Falchiere, who said to the "schmoosers," "move on"; in his judgment, this group was obstructing the sidewalk since other similar "schmoosers" were standing nearby. When, after a quiet and orderly dispute, attorney Galpern continued to refuse to move, he was arrested by Officer Falchiere for violation of Section 722(3) of the New York Penal Law.<sup>10</sup> The following express findings were made by the Magistrate:

I find that the defendant used no threatening, abusive, or insulting language. That his behavior was not insulting or threatening, and he

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<sup>7</sup> TOWLER, *THE POLICE ROLE IN RACIAL CONFLICTS* 15 (1964). When this book was written, Mr. Towler was Commanding Officer of the Danville, Virginia Detective Bureau.

<sup>8</sup> WEBSTERS THIRD NEW INTERNATIONAL DICTIONARY (1961) defines anarchy as, "absence or denial of any authority, established order, or ruling power."

<sup>9</sup> 259 N.Y. 279, 181 N.E. 572, 83 A.L.R. 785 (1932).

<sup>10</sup> N.Y. PENAL LAW § 722(3). The statute provides: "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: . . . (3) Congregates with others on a public street and refuses to move when ordered by the police." In New York, disorderly conduct (§ 722) is not a crime but an offense, although the penalties can be severe.

had no intent to provoke a breach of the peace. But I do find that he obstructed the sidewalk with a number of other unknown men, and refused to move on when ordered by the police officer, and that the officer, in my opinion, was acting within his rights in placing the defendant under arrest. I find defendant guilty.<sup>11</sup>

Without a dissent,<sup>12</sup> the affirming opinion of the New York Court of Appeals, written by Judge Irving Lehman, a jurist of sound reputation, points out that policemen "are called upon to determine both the occasion for and the nature of such directions. Reasonable discretion must, in such matters, be left to them and only when they exceed that discretion do they transcend their authority and depart from their duty."<sup>13</sup> Upon finding that the defendant's conduct fell within the statutory definition of disorderly conduct, and that the police officer's interference was authorized, the opinion goes on to say:

A refusal to obey such an order can be justified only where the circumstances show conclusively that the police officer's direction was purely arbitrary and was not calculated in any way to promote the public order. That is not the case here. The courts *cannot weigh opposing considerations as to the wisdom of the police officer's directions when a police officer is called upon to decide whether the time has come in which some directions are called for.*<sup>14</sup>

Whether the decision would have been the same if Justice Cardozo had taken part and whether, in light of some of the recent civil rights decisions referred to below, the opposite conclusion would have been reached, is pure speculation; the impact of the opinion's thinking is with us. Although factual situations are of major importance to the ultimate decisions, specific factual findings nevertheless are not made in *Galpern*. The Lehman opinion stated as a fact that Galpern's group consisted of six or seven persons.<sup>15</sup> But the magistrate made no findings of fact concerning the number of persons in the group;<sup>16</sup> the record merely contains some contradictory evidence. Officer Falchiere first testified that the group consisted of six people<sup>17</sup> but later testified that it consisted of seven.<sup>18</sup> Yet both the defendant and witness Kitzes testified that none besides themselves constituted this group at the time the officer approached the defendant.<sup>19</sup>

<sup>11</sup> Record, p. 30. It does seem strange that the court expressly said Galpern had no intent to commit a breach of the peace, and made no reference to the possible occasioning of such a breach, yet still found Galpern guilty.

<sup>12</sup> Justice Cardozo heard the argument but did not take part in the decision.

<sup>13</sup> *People v. Galpern*, 259 N.Y. 279, 281-82, 181 N.E. 572, 83 A.L.R. 785, 786 (1932).

<sup>14</sup> *Id.* at 284-85, 181 N.E. at 574, 83 A.L.R. at 788. [Emphasis added.]

<sup>15</sup> *Id.* at 284, 181 N.E. at 573, 83 A.L.R. at 787.

<sup>16</sup> *Id.* at 281, 181 N.E. at 572, 83 A.L.R. at 786.

<sup>17</sup> Record, p. 13.

<sup>18</sup> Record, p. 24.

<sup>19</sup> Record, p. 18 (*Galpern*), p. 28 (*Kitzes*).

In a later case, *People v. Carcel*,<sup>20</sup> the same court stated that under Section 722<sup>21</sup> (under which Galpern was convicted) there must be no fewer than three persons to constitute a group. From *Carcel* we can see the importance of a determination of this disputed factual issue. Yet in *Galpern* the magistrate chose not to make a specific finding on this factual issue, and the Court of Appeals apparently merely accepted the testimony of Officer Falchiere. No findings were made as to the size of the sidewalk, or as to the number of other persons on the sidewalk. The importance of these facts to a finding of obstruction is obvious, yet the court did not see fit to enlighten itself. But these criticisms, in the light of what *Galpern* stands for, are perhaps picayune, and do not advance our analysis. No objective evidence existed that the sidewalk's use for pedestrian passage was unreasonably obstructed, nor is there any evidence of any complaint to the police officer, nor is there any evidence that any pedestrian had difficulty using the sidewalk. Except for some general allusions by Officer Falchiere, no evidence was submitted upon which to base a finding that the street was unreasonably obstructed.

Despite the failure to produce any evidence of obstruction, the testimony of Officer Falchiere was sufficient to neutralize the testimony of Galpern, his brother, and Kitzes and to cause Galpern's conviction. Admittedly the trier of facts should have broad leeway as to the credibility of witnesses. Nevertheless, when so little evidence of guilt existed and especially when the judge recognized that Galpern had no intent to commit a breach of the peace, should one not ask whether in fact the order of the officer has not achieved the force of law irrebuttable except for the rare circumstances where the officer is shown to be arbitrary? From the quotation of Judge Lehman quoted above,<sup>22</sup> a presumption in favor of the police testimony is rebuttable (it is not put in the terms of a presumption) although just barely so. To see any wrongful conduct in *Galpern* is very difficult, unless the refusal to obey the order in and of itself was wrongful.

Subsequent New York Court of Appeals cases are not of much help as to whether such a presumption exists *de facto* if not actually *de jure*. A *per curiam* opinion, in which the only material fact stated was the reference to the defendant's conviction under subsection three of Section 722,<sup>23</sup> was issued by the court in *People v. Gaskin*<sup>24</sup> to dismiss the information for failure to establish guilt beyond a

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<sup>20</sup> 3 N.Y.2d 327, 144 N.E.2d 81, 165 N.Y.S.2d 113 (1957).

<sup>21</sup> N.Y. PENAL LAW § 722.

<sup>22</sup> See text accompanying note 13 *supra*.

<sup>23</sup> N.Y. PENAL LAW § 722(3).

<sup>24</sup> 306 N.Y. 837, 118 N.E.2d 903 (1954).

reasonable doubt. Since we may presume that the arresting officer testified at the trial, even this skimpy appellate report demonstrates at least some dissatisfaction with the *Galpern* presumption.

A year later the same court dismissed, again with a *per curiam* opinion, the information in *People v. Auslander*.<sup>25</sup> The factual circumstances of the case were that the defendant, a sixteen-year-old schoolboy, while talking with some friends outside a pizza palace where he had ordered and was waiting for two pizza pies, was told by a police officer (as was the entire group) to move on. Except for defendant, who insisted upon his right to wait for his pizza, all others in the group moved on. He was told by the police that unless he moved to the inside of the "palace" he would be arrested. Expressing his feelings with exuberance the defendant refused to move from his spot. To no one's surprise he was arrested after he further defended his right not to be ordered to move (something that Galpern, who was very gentlemanly, did not do). In reversing by merely citing the *Gaskin* case, the Court did not take the trouble to discuss the basis for its decision, much less discuss the fundamental issue of whether the policeman had the right under these circumstances to order one to move.

No less important in the long run is the policy upon which the *Galpern* decision is premised. Dormant in the *Galpern* decision lies a view expressed by Justice Black in his concurring opinion in *Cox v. Louisiana*:<sup>26</sup> "A state statute [that is sufficiently definite] . . . regulating conduct . . . as distinguished from speech, would in my judgment be constitutional. . . ."<sup>27</sup> Because this view is stated so broadly and draws such a sharp distinction between the protections afforded speech and those afforded conduct, it is open to serious question. It is quite simple to argue (although not in this paper at this time) that the communication of ideas which freedom of speech seeks to foster, can often be accomplished far more dramatically through peaceful, reasonable conduct rather than through a dull sermon. To separate the rights that attach to conduct from the rights that attach to speech is to draw an unreal distinction between equally important and only slightly different means of expression. And so, by his stand in *Cox*, the venerable Justice Black is led to a position in which people who stand absolutely silent in a public library can be arrested for breach of the peace since their protest against segregation was action not speech.<sup>28</sup>

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<sup>25</sup> 308 N.Y. 977, 127 N.E.2d 339 (1955).

<sup>26</sup> 379 U.S. 536 (1965).

<sup>27</sup> *Id.* at 577.

<sup>28</sup> See *Brown v. Louisiana*, 86 Sup. Ct. 719, 736 (1966) (dissenting opinion).



*The Significance of the Galpern Decision*

Although *Galpern* is a questionable decision, it has exerted a powerful influence on the law in this area. The evidentiary presumption, bordering on irrebuttability, that the policeman's testimony is conclusive not only of the facts but also of his authority to issue the order, subject only to the exceptional case where it can be affirmatively demonstrated that the order was purely arbitrary, has been one of its important progeny. Instead of the burden remaining with the prosecution to prove *all* the details of the alleged wrong-doing, the burden appears to shift to the defendant to explain and defend why he did not move on.<sup>29</sup>

Understanding the danger referred to above, Judge Cates of the Alabama Court of Appeals, in the course of his concurring opinion in *Shelton v. City of Birmingham*,<sup>30</sup> wrote:

I consider the burden was on the city to show, to the required degree, the need to regulate and also the reasonableness of the means of regulation . . . I do not think there should be any legal (or factual) presumption merely from the action of the police in temporarily closing the street (or a part of it) to the public.<sup>31</sup>

And in *Middlebrooks v. City of Birmingham*,<sup>32</sup> he clarified his position by stating:

Until directed otherwise by a higher holding, I continue to stick by what I said in *Shelton* and consider that the prosecution must show administrative or jurisdictional facts sufficient to support a policeman's order to move on . . . This requirement I consider to be not only one of due process, but of necessity for the sake of guidance of the policemen.<sup>33</sup>

Few judges have seen the issue as sharply as has Judge Cates, even under circumstances whereby the citizen might win his case. Not only are the views of Judge Cates not shared by most courts, they are not accepted by his own court. At the time Officer Cashett arrested Shelton, the latter had disobeyed three orders to move from a street previously closed for public use by the police during a racial demonstration. By contending that Shelton was urging the crowd on

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<sup>29</sup> But see CAL. EVID. CODE § 664 effective Jan. 1, 1967. The section states: "Official duty regularly performed. It is presumed that official duty has been regularly performed. *This presumption does not apply on an issue as to the lawfulness of an arrest if it is found or otherwise established that the arrest was made without a warrant.*" [Emphasis added.]

<sup>30</sup> 42 Ala. App. 371, 165 So. 2d 912 (1964). Conviction based on § 1231 of Birmingham General City Code which reads: "It shall be unlawful for any person to refuse or fail to comply with any lawful order, signal or direction of a police officer."

<sup>31</sup> *Id.* at 373, 165 So. 2d at 913 (concurring opinion).

<sup>32</sup> 42 Ala. App. 525, 170 So. 2d 424 (1964).

<sup>33</sup> *Id.* at 527, 170 So. 2d at 426, n.3.

the sidewalk to upset the barrier and go into the closed street when he refused the police order, the prosecution persuaded the court of Shelton's guilt. The defendant had claimed he was beckoning to his nephew and that he moved when directed to move, only to be called back and arrested. While not developed in the decision in Shelton, a careful reading of *Middlebrook* indicates that there was a split of opinion in *Shelton* as to the sufficiency of a policeman's order in itself to establish a prima facie case. Apparently, the majority of two believed that the mere showing of the order and defendant's refusal to obey it was itself sufficient to support a conviction in the absence of an affirmative defense that the order was arbitrary. On the other hand, Judge Cates believes that additionally the state must make some showing of the reasonableness of the order before a conviction can be obtained.

That an officer is prima facie correct in giving his order to move on is perhaps better illustrated in *Tinsley v. City of Richmond*.<sup>34</sup> Although the defendant was in no way a part of a labor demonstration in front of Thalheimer's Department Store, she was arrested while waiting on the sidewalk nearby for a friend. She was charged with failing to move on when ordered to do so by a policeman. Conviction was obtained under Richmond's very broad ordinance<sup>35</sup> and a unanimous Virginia Supreme Court affirmed, emphasizing *Galpern* as a precedent. Review was declined by the United State Supreme Court.<sup>36</sup>

What opportunity is left to rebut the presumption of guilt disappears, for practical purposes, under this rigid Richmond ordinance. Either one moves upon direction by the police or one is guilty. It is difficult to see anything else in *Tinsley*. It is an unredeeming case. What can be said for an ordinance which equates loitering with standing on the street? No distinction is drawn regardless of the number of parties or the size of the group. What can be said of the Virginia Supreme Court which does not see the anti-libertarian nature of the ordinance? Whatever its intent, by declining review in a case as bold as *Tinsley*, the United States Supreme Court has encouraged the idea that the order of a policeman to move on *must* be obeyed. Although in *Galpern* there was at least a finding of obstruction on the street, *Galpern*, without the obstruction, has become the supporting "prop" for *Tinsley*.

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<sup>34</sup> 202 Va. 707, 119 S.E.2d 488 (1961).

<sup>35</sup> RICHMOND, VA., CITY CODE § 24-17 (1957) says: "Any person loitering or standing on the street, sidewalk or curb, shall move on or separate when required to do so by any member of the Police Bureau and shall cease to occupy such position on the street, sidewalk, or curb."

<sup>36</sup> 368 U.S. 18 (1961).

Further support for this view of *Galpern* came in *Drews v. State*.<sup>37</sup> Because they chose not to leave a privately owned amusement park that regularly excluded Negroes, a Negro woman and three white friends were convicted on the charge of disorderly conduct.<sup>38</sup> Upon receipt of a police order to leave, they chose to remain. Since the police order was not purely arbitrary the Maryland high court affirmed the conviction.<sup>39</sup> Although the United States Supreme Court sent the case back for reconsideration,<sup>40</sup> the Maryland court reinstated its former verdict.<sup>41</sup> The United States Supreme Court, despite the passage of the Civil Rights Act of 1964, then dismissed the appeal for want of jurisdiction, over the strong protest of Chief Justice Warren and Justice Douglas.<sup>42</sup> By declining review and thus making no decision on the merits, the Supreme Court has further encouraged the doctrine extrapolated from *Galpern*, namely that one must move when told.

### *The Application to Picketing*

This doctrine from *Galpern*, that one must move when told by the police, has been applied against pickets told by police to picket elsewhere. In *Scott v. District of Columbia*,<sup>43</sup> even though the prosecution did not prove an actual or impending breach of the peace, the demonstrators were convicted under the applicable statute<sup>44</sup> for refusing to move from the Northwest gate of the White House to what is considered the normal White House picketing area. Their convictions were affirmed. One year later another court affirmed a dis-

<sup>37</sup> 224 Md. 186, 167 A.2d 341, *vacated*, 378 U.S. 547, 236 Md. 349, 204 A.2d 64 (1964).

<sup>38</sup> MD. CODE ANN. art. 27, § 123 (1957) makes culpable ". . . acting in a disorderly manner to the disturbance of the public peace."

<sup>39</sup> *Drews v. State*, 224 Md. 186, 167 A.2d 341 (1961).

<sup>40</sup> 378 U.S. 547 (1964).

<sup>41</sup> 236 Md. 349, 204 A.2d 64 (1964).

<sup>42</sup> 381 U.S. 421 (1965). The dissenting opinion, at 430-31, states the case as follows: "Juretha Joyner, a Negro, went with some friends to celebrate 'All Nations Day' at Gwynn Oak Park. Despite the facts that she behaved with complete order and dignity, and that her right to be at the park is protected by federal law, she was asked to leave, solely because of her race. She refused and, upon being handcuffed, displayed some reluctance (though no active resistance to being pulled through an actively hostile mob. For this she was convicted of 'acting in a disorderly manner, to the disturbance of the public peace.' Today the Court declines to review her conviction, and the convictions of her three companions. I cannot join."

<sup>43</sup> 184 A.2d 849 (D.C. Mun. App. 1962).

<sup>44</sup> D.C. CODE § 22-1121(2) (1961) which says: "Whoever, with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby . . . congregates with others on a public street and refuses to move on when ordered by the police shall be fined not more than \$250 or imprisoned not more than ninety days, or both." As can be seen, the language in this ordinance practically tracks the language in the *Galpern* statute. This is true of many of the state statutes.

orderly conduct conviction where the evidence indicated that three defendants (out of forty picketers) refused to obey the policemen's order to move the picket line so as to occupy only one-half of the sidewalk.<sup>45</sup>

### *Civil Rights Cases Distinguished*

Not surprisingly, however, when a First Amendment freedom, in a civil rights context, is denied by the application of the *Galpern* evidentiary (almost irrebuttable) presumption, the United States Supreme Court has not been so willing to permit the power of the police to order one to move on regardless of the circumstances. In *Edwards v. South Carolina*,<sup>46</sup> the defendants, 187 Negroes, while peacefully demonstrating against racial discrimination, marched through the State House grounds, normally open to the public, in a manner previously approved by the police officials. No disorder or blocking of traffic occurred, although a group gathered to watch the protest. When ordered by the police to disperse, the demonstrators, not moving, were arrested for breach of the peace; they refused to "break it up."<sup>47</sup> Despite the dissent's view that the dispersal "request" was "reasonable" under the circumstances,<sup>48</sup> and despite a failure by the majority to find that the order was arbitrary (although they doubted its reasonableness), the Supreme Court's opinion concluded:

. . . [I]t is clear to us that in arresting, convicting, and punishing the petitioners under the circumstances disclosed by this record, South Carolina infringed the petitioners' constitutionally protected rights of free speech, free assembly, and freedom to petition for redress of their grievances.<sup>49</sup>

The Court reversed the convictions, deciding that the interpretation of "breach of the peace" by the courts of South Carolina was unconstitutionally broad.<sup>50</sup> One would think that the decision might throw light on the *Galpern* doctrine, but at no time did the Court

<sup>45</sup> *City of Chicago v. Williams*, 45 Ill. App. 2d 327, 195 N.E.2d 425 (1963).

<sup>46</sup> 372 U.S. 229 (1963).

<sup>47</sup> The Court did not quote the applicable statute.

<sup>48</sup> *Edwards v. South Carolina*, 372 U.S. 229, 241 (1963) (dissenting opinion).

<sup>49</sup> *Id.* at 235.

<sup>50</sup> The courts of South Carolina had defined "breach of the peace" as follows: "In general terms, a breach of the peace is a violation of public order, a disturbance of the public tranquility, by an act or conduct inciting to violence . . . . If what is done is unjustifiable and unlawful, tending with sufficient directness to break the peace, no more is required." *Edwards v. South Carolina*, 372 U.S. 229, 234 (1963). Compare the definition recently set down in California: "The public peace is disturbed when the acts complained of disturb public peace or tranquility enjoyed by members of a community where good order reigns among its members or where acts are likely to produce violence or where acts cause consternation and alarm in the community." *People v. Green*, 234 Cal. App. 2d 871, 873, 44 Cal. Rptr. 438, 439 (1965).

refer either to *Galpern* or any of its progeny, nor did it discuss the power of the police to order one to "move on."

By questioning the propriety of an order and holding the interpretation of "breach of the peace" unconstitutionally vague, the United States Supreme Court, not long after *Edwards*, reversed convictions in *Cox v. Louisiana*.<sup>51</sup> A CORE protest on the sidewalk across the street from the courthouse in Baton Rouge, where it had been directed to demonstrate by the chief of police, was led by the Reverend B. Elton Cox. As in many such buildings throughout the United States, the courthouse is the home for not only all the local hangers-on and domino players but also houses other public offices in addition to the court. Shortly prior to this demonstration, several Negro students had been picketing to increase Negro employment for the Christmas holidays. When Cox told his students, who were demonstrating against the arrests of the day before, that it was time to eat, the sheriff, with rare intuition (*Garner v. Louisiana*<sup>52</sup> had been decided a few days before), deemed such a direction inflammatory, and ordered the demonstrators to disperse. When they did not, he directed the police to use teargas to disperse the students and Mr. Cox. The defendant's conviction for breach of the peace<sup>53</sup> (affirmed by the lower courts) was unanimously reversed. Again, none of the opinions referred to the sheriff's order as purely arbitrary, nor did they discuss questions raised by *Galpern*.

In *Shuttlesworth v. Birmingham*,<sup>54</sup> the *Galpern* evidentiary presumption was ignored even though there were facts similar to those in *Galpern*. The Supreme Court relied upon the susceptibility of the applicable Birmingham ordinance being unconstitutionally applied to an event occurring immediately after a civil rights demonstration. The Reverend Fred Shuttlesworth, one of the leaders of the Southern Christian Leadership Conference and a man well known to readers of the reports of the United States Supreme Court, was standing on the sidewalk in front of a department store talking with friends upon conclusion of the demonstration. The group refused to move on when so directed by a Birmingham police officer. After a second order all had moved except Mr. Shuttlesworth; at this juncture the officer arrested him. In reversing the almost inevitable conviction,<sup>55</sup> the

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<sup>51</sup> 379 U.S. 536 (1965).

<sup>52</sup> 368 U.S. 157 (1961).

<sup>53</sup> Defendant convicted under LA. REV. STAT. tit. 14, § 103.1 (Supp. 1962), which defines the crime as congregating with others, "with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned," and refusal to move on after being so ordered by a law enforcement officer. Once again, compare this statute with the New York statute in *Galpern*, *supra* note 9.

<sup>54</sup> 42 Ala. App. 296, 161 So. 2d 796, *rev'd*, 382 U.S. 87 (1965).

<sup>55</sup> "There was no showing, however, of any connection between this [selective

Court's majority found the applicable ordinances so broad that they evoked constitutional doubts. Of these ordinances, section 1142 of the Birmingham Code<sup>56</sup> was being constitutionally interpreted by the higher Alabama court, but the opinion<sup>57</sup> had not been handed down when the trial court decided the *Shuttlesworth* case; and under Birmingham Code section 1231,<sup>58</sup> no evidence of guilt existed if the section was interpreted as the Alabama Court of Appeals had interpreted it.<sup>59</sup> Once more the Court ignored the opportunity to shed light on the power of the police.

Perhaps the Court had the police problem in mind when it said *Shuttlesworth* was not a civil rights case, but one can hardly take this seriously, despite the Court's statement. In addition to his national leadership of a civil rights organization, Shuttlesworth was not a stranger to the United States Supreme Court as a civil rights defendant, nor was he merely standing on the sidewalk, as attorney Galpern had been, for only moments before there had been a picketing demonstration.

Thus far one sees that *Galpern* seemingly created a strong evidentiary presumption in favor of police testimony which is applied unless there has been a denial of a First Amendment right in a civil rights setting. Under circumstances such as *Shuttlesworth*, the Court will look at the statute or ordinance, but not in a case like *Tinsley* where seemingly the facts and ordinance create at least as much of a deprivation of one's civil liberties.

#### CONDUCT WHICH MAY BREACH THE PEACE

Closely related in spirit to the above, but exhibiting another aspect of *Galpern*, is the view that conduct, otherwise lawful, becomes unlawful when it *may* result in a breach of the peace from an undescribed source. In *Galpern*, Officer Falchiere had the authority, as the New York Court of Appeals decided, to order Galpern to move on, regardless of the fact that he was doing no more than standing and conversing on a public sidewalk. Recall that no evidence showed that the use of the sidewalk by any other person was hampered at

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buying] campaign and the presence of the petitioner and his companions outside the department store . . . ." *Shuttlesworth v. City of Birmingham*, *supra* note 54, at 90 n.3.

<sup>56</sup> BIRMINGHAM, ALA., GENERAL CITY CODE § 1142 (1944) states: "It shall be unlawful for any person or any number of persons to so stand, loiter or walk upon any street or sidewalk in the city as to obstruct free passage over, on or along said street or sidewalk. It shall also be unlawful for any person to stand or loiter upon any street or sidewalk of the city after being requested by any police officer to move on."

<sup>57</sup> *Middlebrooks v. City of Birmingham*, 42 Ala. App. 525, 170 So. 2d 424 (1964).

<sup>58</sup> BIRMINGHAM, ALA., GENERAL CITY CODE § 1231 (1944).

<sup>59</sup> *Phifer v. City of Birmingham*, 42 Ala. 282, 160 So. 2d 898 (1963).

the time. Neither did any evidence show from where such a breach might come, nor whether that source had anything to do with Galpern, if it was to come from a specific source. Such reasoning is perhaps most dramatically exemplified by *Thomas v. Mississippi*.<sup>60</sup> In this case the defendant, the first freedom-rider tried in a Mississippi court of record,<sup>61</sup> entered the Continental Trailways bus terminal at Jackson, Mississippi where the police sign immediately outside the waiting room carefully designated the room for whites only "by order of the police." Although he neither said nor did anything inflammatory, the police testified that the crowd in the station was hostile. A police officer twice ordered Thomas to leave. He refused and was thereafter arrested for breach of the peace.<sup>62</sup> Mississippi's Supreme Court unanimously held that the defendant's right to travel unhampered in interstate commerce was not sufficient to outweigh the State's interest in the preservation of order.<sup>63</sup> One cannot help asking whether the "order" that the court talked about preserving was social order and not the one requiring peace on the streets.

As a result of the *Thomas* ruling, the highest Mississippi court came into direct conflict with the highest Arkansas court. Previously the highest Arkansas court had decided *Briggs v. State*,<sup>64</sup> like *Thomas*, a civil rights case, but one not so prominent. In *Briggs* there was a consolidation of three criminal prosecutions against thirteen defendants. While all involved lunch-counter sit-ins, there were three different factual situations. In the first, the defendants refused to leave when so ordered by the police officers; no such order being given by the restaurant management. In the second, the defendants left when requested to do so by the management. In the third, upon a similar request by management, the defendants refused to leave the premises. All of the defendants were convicted of breaching the

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<sup>60</sup> 248 Miss. 850, 160 So. 2d 657, *rev'd*, 380 U.S. 524, — Miss. —, 170 So. 2d 258 (1965).

<sup>61</sup> Under Mississippi law, as in other states, the first appeal from an order of a magistrate or justice of the peace is a trial *de novo* in a court of record.

<sup>62</sup> Defendant was convicted under MISS. CODE § 2087.5 (1942), which says: "Whoever with intent to provoke a breach of the peace or under circumstances such that a breach of the peace may be occasioned thereby: (1) crowds or congregates with others in or upon . . . any other place of business engaged in selling or servicing members of the public . . . and who fails or refuses to disperse and move on . . . when ordered by any law enforcement officer . . ." Again see the similarity to the New York statute and particularly the words "or under circumstances such that a breach may be occasioned thereby."

<sup>63</sup> *Thomas v. State*, 248 Miss. 850, 160 So. 2d 657 (1964). At the actual trial the police testimony was quite vague as to the actual hostility of the crowd since a large number of those who were in the station at that time were either police or reporters and photographers. Furthermore, one of the police captains stated the police had the situation under control. Despite this the Jackson jury convicted and the Mississippi Supreme Court affirmed.

<sup>64</sup> 236 Ark. 596, 367 S.W.2d 750 (1965).

peace<sup>65</sup> and, in addition, those involved in the third situation were convicted under an Arkansas statute that made it a misdemeanor for failure to leave a business establishment when requested to do so by the management.<sup>66</sup> In reversing the convictions for breach of the peace, the Arkansas court very perceptively stated:

The point that we wish to make completely clear is that the mere fact that the exercise of a lawful right may result in a disturbance or a breach of the peace does not make the exercise of that right a violation of the law so long as the right is exercised in a peaceful manner and without force or violence or threats of same.<sup>67</sup>

Although the court did not talk in terms of police power versus individual right, its recognition that the defendant must evince a wrongful intent before he may be found guilty of a crime is significant, simple though it sounds.

When the United States Supreme Court reversed *Thomas*<sup>68</sup> and *Callendar v. Florida*,<sup>69</sup> the Court relied upon *Boynnton v. Virginia*<sup>70</sup> which had been decided five years earlier. During a stopover, Boynton (a Negro) was refused service in the white section of a restaurant located on the premises of the Richmond, Virginia bus terminal. After refusing to move to the colored section, Boynton was arrested for unlawfully being on the restaurant's premises. Holding that the restaurant was subject to and had violated the Interstate Commerce Act, the United States Supreme Court reversed.<sup>71</sup>

Clearly the Supreme Court's disposition of *Thomas* rested on quite narrow grounds, contrasted with the broader grounds used by the Arkansas court in *Briggs*. Such narrow grounds, of course, have no connection with *Galpern*; rather they rest on a civil rights base in an interstate commerce framework. This is particularly surprising in view of *Wright v. Georgia*,<sup>72</sup> decided two years before *Thomas*. By reversing *Thomas* and *Callendar* without argument, merely on the petitions for certiorari, the Court deprived all concerned of an analysis of the police authority although the issue was clearly present in those cases. Subsequent to the arrests in these two cases, the Interstate Commerce Commission had made its regulations concerning

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<sup>65</sup> ARK. STATS., § 41-1432 (Act 226 of 1959, § 1) makes creating disturbances or breaches of the peace prohibited offenses.

<sup>66</sup> ARK. STATS., § 41-1433 (Act. 14 of 1959, § 1).

<sup>67</sup> 236 Ark. 596, 601, 367 S.W.2d 750, 754 (1963).

<sup>68</sup> *Thomas v. Mississippi*, 380 U.S. 524, 176 So. 2d 258 (1965).

<sup>69</sup> 380 U.S. 519 (1965).

<sup>70</sup> 364 U.S. 454 (1960).

<sup>71</sup> *Id.* at 463.

<sup>72</sup> 217 Ga. 453, 122 S.E.2d 737, *rev'd*, 373 U.S. 284, 219 Ga. 125, 131 S.E.2d 851 (1963).



bus travel far more stringent. No guidance was needed from the Supreme Court on travel, but it is required on the use of police power so clearly abused in *Thomas* and *Callendar*.

In *Wright v. Georgia*,<sup>73</sup> six Negroes were convicted of disturbing the peace for disobeying a police order to leave a public park owned by the city and customarily used only by Whites. Wright and the others had been playing basketball in an otherwise empty park. In reversing the conviction,<sup>74</sup> a unanimous Court said, "the possibility of disorder by others cannot justify exclusion of persons from a place if they otherwise have a constitutional right (founded upon the equal protection clause) to be present."<sup>75</sup> Although limited by the decision to cases coming under the equal protection clause,<sup>76</sup> *Wright* could easily and justifiably have been applied to *Thomas*, or any other case involving the right of an individual to be free of police harassment.

To rely on *Boynton*, as the Court did in *Thomas*, and play the game in the interstate commerce ball park, is to avoid deciding the case on the important constitutional ground, and is clearly to miss the point. No one can seriously believe that interstate commerce was more than an accidental issue in *Boynton*, having nothing to do with the real point, *i.e.*, the illegal conduct of the police. Two ways, both important, were open to the Court in *Thomas*, namely: (a) the equal protection-due process route, since Negroes were being deprived by the police of a facility available to whites; or (b) the negation of the *Galpern*-civil liberties route, since a citizen has a right to stand peacefully in a public place free from interference without fear of harm or arrest. Let us note, in any event, that the decision in *Wright*, valuable as it is, although applying as it does only to the equal protection clause, falls far short of the decision of the Arkansas court in *Briggs*, which applied its protection to all "lawful" rights.

#### THE SPEECH-ACTION DISTINCTION

Another aspect of *Galpern* not favoring individual liberty is the distinction between speech and action toward which Justice Black

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<sup>73</sup> *Ibid.*

<sup>74</sup> The conviction was under GA. CODE ANN., § 26-5301 (1953) which says: "Unlawful assemblies—Any two or more persons who shall assemble for the purpose of disturbing the public peace or committing an unlawful act, and shall not disperse upon being commanded to do so by a . . . police officer, shall be guilty of a misdemeanor." Presumably Negro boys playing basketball on a court reserved for Whites, may disturb someone's peace, but except for this mental disturbance, the act of the Negro boys, playing basketball, could not seriously result in a conviction for a crime requiring intent to commit one, as well as a refusal to disperse on police order.

<sup>75</sup> 373 U.S. at 293.

<sup>76</sup> U.S. CONST. amend. XIV.

has been leading. This distinction is that peaceful action and speech are different, and only the latter falls within the rights of the First Amendment which are generally more zealously protected by the Supreme Court than other constitutional rights. It is sad to realize that this distinction, enunciated by Justice Black who is considered an absolutist on the First Amendment, has become persuasive to a possible majority of the Court. While the issue was not made explicit in *Galpern*, the refusal to obey a police order, unless one has a very good reason (*e.g.*, a clear free speech problem) is implicit in Judge Lehman's opinion.<sup>77</sup> Justice Black's doctrine of distinction in his concurrence-dissent in *Cox*<sup>78</sup> has dramatically come to the fore in *Brown v. Louisiana*.<sup>79</sup>

In *Brown*, five Negroes led by Henry Brown entered the reading room of their local public library branch during its normal business hours. The Branch Assistant was the only one present in the library when they entered. The library system was segregated, with Negroes normally not permitted in its branches; Negroes were relegated to the "Blue Bookmobile." Brown asked the Branch Assistant for a book. After looking in the card catalogue and not finding it, she informed Brown that she would order it. At this point Brown quietly sat down with his four associates grouped around him. As Justice Fortas said, the drama started. After unsuccessfully asking all five to leave, the Branch Assistant called in the Regional Librarian who was nearby; the request was repeated, once more unsuccessfully. Not long after the Negroes entered the library, the sheriff, who had seen the group enter, and his deputies arrived. When the sheriff's unexplained request to leave was also refused, Brown and the others were arrested for breach of the peace on the charge of refusing to leave a public building upon request of the person in charge. They were found guilty of the charge.<sup>80</sup> Affirmances in the Louisiana courts followed and certiorari was granted by the United States Supreme Court.

In a 5-4 decision the United States Supreme Court reversed.<sup>81</sup> Uniting in a dissent by Justice Black, the minority of four appears to find the speech-conduct distinction crucial in deciding the case. At the beginning of his dissent Justice Black sets the tone of what is to follow:

I do not believe that any provision of the United States Constitution forbids any one of the 50 states of the Union, including Louisiana, to

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<sup>77</sup> *People v. Galpern*, 259 N.Y. 279, 181 N.E. 572, 83 A.L.R. 785 (1932).

<sup>78</sup> *Cox v. Louisiana*, 379 U.S. 559, 575 (1964) (concurring and dissenting opinion).

<sup>79</sup> *Brown v. Louisiana*, 86 Sup. Ct. 719 (1966).

<sup>80</sup> For the applicable statute, see *supra* note 53.

<sup>81</sup> *Brown v. Louisiana*, 86 Sup. Ct. 719 (1966).

make it unlawful to stage "sit-ins" or "stand-ups" in public libraries for the purpose of advertising objections to the State's public policies.<sup>82</sup>

Not only does the minority accept this distinction, but the opinion goes on to give it the status of constitutional doctrine. Quite incredibly, Mr. Justice Black says,

The prevailing opinion and to some extent the two separate concurring opinions treat this case as though Louisiana was here attempting to enforce a policy of denying Louisiana citizens the right to use the State's libraries on account of race. . . . [T]here simply was no racial discrimination practiced in this case.<sup>83</sup>

This is said despite a record replete with evidence of discrimination: counsel for Louisiana acknowledged that library cards were stamped "Negro," and further that the building closed after this incident.<sup>84</sup>

In his concurring opinion, Justice White also appears to accept the speech-conduct distinction, although he is not willing to decide the case by rigidly applying it to these facts. "In my view," he states, "the behavior of these petitioners and their use of the library building, even though it was for the purpose of a demonstration, did not depart significantly from what normal library use would contemplate."<sup>85</sup> Justice White stands for reversal but indicates that given a different version of this peaceful incident he would accept the doctrine that peaceful action and speech are different and the former is necessarily less protected than speech. Had a regulation been in effect for the purpose of restricting Negro use of the library, but as a result limiting white use also, Justice White might have voted for affirming the conviction on the ground that it applies to all. Can we not ask whether there is certain conduct beyond the power of the statute or the authority of the police to regulate? Is not peaceful public behavior such conduct?<sup>86</sup> This third progeny of *Galpern*, the speech-action dichotomy, appears to have been accepted, at least as highly persuasive, by a majority of the present Supreme Court.

While his opinion in *Brown* strongly favors reversing the con-

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<sup>82</sup> *Id.* at 729.

<sup>83</sup> *Id.* at 733.

<sup>84</sup> *Id.* at 722.

<sup>85</sup> *Id.* at 729.

<sup>86</sup> *Id.* at 723-24. As Justice Fortas said in his opinion: "We are here dealing with an aspect of a basic constitutional right—the right under the First and Fourteenth Amendments guaranteeing freedom of speech and of assembly, and freedom to petition the Government for a redress of grievances . . . . As this Court has repeatedly stated, these rights are not confined to verbal expressions. They embrace appropriate types of actions which certainly include the right in a peaceful and orderly manner to protest by silent and reproachful presence. In a place where the protestant has every right to be, the unconstitutional segregation of public facilities."

viction, Justice Fortas chose not to consider the constitutional issue concerning the right of the police to ask persons behaving quietly in a public place to leave during normal business hours. It is not clear whether a different issue would be created by a specific, narrowly drawn regulation concerning the length of time one or a number of persons may remain in a small library, but *Edwards* so suggests. Since the statute in *Brown* lacks any specific limitations, and is applicable to all alike, it gives to the police a sweeping power to remove or arrest those not wanted. From his opening sentence it is clear that Justice Fortas is thinking of civil rights and segregation of library facilities and not of the more general problem, the right of a citizen to be free and quiet in a public place. His opinion says that there was no evidence that a breach of the peace might be "occasioned" by the defendants' actions. He further states:

. . . [E]ven if the accused action were within the scope of the statutory instrument, we would be required to assess the constitutional impact of its application, and we would have to hold that the statute cannot constitutionally be applied to punish petitioners' actions in the circumstances of this case."<sup>87</sup>

The opinion, therefore, constitutes a strong affirmation of the right to conduct a peaceful demonstration to end segregation, free from official intervention.

Since apparently there was trouble fashioning a majority to reverse the convictions of *Brown* and the others, it is probably unfair to point to the omission of discussion of the law in the context of a non-demonstration case, such as *Galpern* or *Tinsley*. At times Justice Fortas comes close to a consideration of the *Galpern* doctrine: "Without reference to the statute . . . petitioners' presence in the library was unquestionably lawful. It was a public facility, open to the public."<sup>88</sup> But then he retreats from *Galpern* and goes back to the racial aspect: "Negroes could not be denied access since white persons were welcome."<sup>89</sup> Had the case been decided on the right of a citizen to be in a public place peacefully without fear of arrest, instead of on the segregation problem, then the meager issue that Justice Black makes concerning segregation in the library falls of its own weight; it is irrelevant because all citizens may be there. If the Court in *Brown* was as close to affirmation of the convictions as it apparently was, even though no disturbance was shown, the future for civil liberties cases based on peaceful demonstrations is bleak.

In order to uphold his absolute defense of freedom of speech

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<sup>87</sup> *Id.* at 724.

<sup>88</sup> *Id.* at 722.

<sup>89</sup> *Ibid.*

and at the same time distinguish cases that bother him, Mr. Justice Black seems to have developed the thought that under the First Amendment speech and conduct are distinguishable. While this is not the place to analyze why Mr. Justice Black has chosen to differentiate between speech and conduct, it is less than reassuring that under his current view the police, almost at whim, have the right to remove persons peacefully occupying a building during business hours. Justice Black bases his dissent on the right of Louisiana to end demonstrations in the library. But it is difficult to visualize a different opinion had Brown not been demonstrating but merely standing or sitting in the library doing nothing, a common course of conduct in libraries. In either situation the defendant, although behaving peacefully, has refused to obey the order of the one in charge.

Under such circumstances the power of the police becomes unlimited. If there is a limitation on such power to end demonstrations, where is it? How could conduct be more peaceful and thus worthy of protection? Not even Judge Lehman in *Galpern* desired unlimited police power; nor can Justice Black. But if *Brown* is a case which four Justices see as warranting an affirmance of a conviction, whence would come the situation in which these four respected Justices who dissented in *Brown* would vote to reverse?

Justice Brennan would throw out the statute as being too broad in its scope. Since this statute is like that of New York and other states, presumably others besides Louisiana might be affected, unless the interpretation of their courts limited their statute to constitutional scope. But if they all gather within their nets peaceful conduct which should be protected under the Constitution, one then cannot ignore Justice Brennan's position despite its effect on other similar laws. Statutory versions and enlargements of common-law breach of the peace have become so overly broad that hard examinations of these must take place. Under common law breach of the peace, the issue rested upon the conduct of the person charged. Our more sophisticated moderns have added the conception of a crime for failure to obey a police order.

Justice Brennan gently reminds us<sup>90</sup> that Justice Black dissented in *Feiner v. New York*,<sup>91</sup> a case in which Feiner, while making a public speech, called on Negroes to revolt. Feiner refused to discontinue his violent speech. After being arrested, charged, and con-

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<sup>90</sup> *Id.* at 728. ". . . [A]s my Brother Black observed in *Feiner v. New York*, 340 U.S. 315, 327 . . . 'courtesy and explanation of commands are basic elements . . . in a democratic society.'" No such explanation was made by the sheriff in *Brown*.

<sup>91</sup> 340 U.S. 315 (1954).

victed, his conviction was upheld by the United States Supreme Court. To reconcile Justice Black's dissent in *Feiner* with his dissent in *Brown* is impossible. *Feiner* aroused people to the possibility of violence, *Brown* did not.

While Mr. Justice Black apparently adheres to his absolute position in constitutionally protecting speech, he has now so narrowed the concept of speech that one wonders how much is left. For example, would giving out leaflets at a meeting be speech or action? While the leaflet may contain words exhorting the reader to accept an idea, the distribution, it could be urged, is action separate and apart from the content of the leaflet; thus the physical act of distribution is action or conduct, not speech, and hence is not worthy of the same protection. Under these circumstances would Justice Black and his strong minority say such acts are subject to the order of police to move on and affirm an arrest made thereon?

Not much imagination is required to understand the full impact of Justice Black's dissent in *Brown*, for he did say: "It is high time to challenge the assumption . . . that groups that think they have been mistreated have a constitutional right to use the public streets, buildings . . . whenever they want, without regard to whom it may disturb."<sup>92</sup> He also said, "I think the evidence . . . established every element in the offense charged against petitioners."<sup>93</sup> If *Brown's* peaceful conduct established every element of the offense, then the ordinary citizen, not protected by any semblance of First Amendment activity (as in *Tinsley*) has no protection from a refusal to obey a police order to move on, regardless of the basis for the order.

#### STATUTORY PROVISIONS AS GUIDELINES: THEIR SHORTCOMINGS

Not so much an off-shoot of *Galpern*, but rather a pretext for upholding arrests, is the language of the statute under which *Galpern* was convicted. As seen in some of the statutes and ordinances discussed above, other communities refer to "an intent to provoke a breach of the peace, or whereby a breach of the peace may be occasioned . . ."

"Intent to commit a breach of the peace" is relatively specific and seems to require some affirmative action to upset the tranquility of the community. On the other hand, the phrase "or whereby a breach of the peace may be occasioned" is not only distinct from the "intent" phrase but would appear to express some kind of inactive wrong-doing, as discussed in such cases as *Thomas*.

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<sup>92</sup> *Brown v. Louisiana*, 76 Sup. Ct. 719, 734 (1966).

<sup>93</sup> *Ibid.*

It is no wonder that the phrase has been seized upon in making so many arrests in civil rights activities. One need only be present and be disliked in order to be guilty. When briefs are submitted in support of upholding such arrests, the New York statute referred to in *Galpern* is cited in support of such a proposition. An innocent party, not liked by others in the vicinity, is ordered to move on; his arrest results when he fails to comply. *Galpern* is the prop with which courts uphold convictions. After all, why not? The statutes are similar and *Galpern* represents the view of the New York Court of Appeals, a view which seems to come close to the conception that one must move on when ordered by the police. The upshot of such broad statutes, coupled with *Galpern*-style interpretations, is that a breach of the peace may be occasioned by one's presence alone in the particular area of concern to the police.

Whether this constitutes an improper delegation of judicial power to the police, by making them the repository of the responsibility to decide whether "A" is guilty of a crime because the police officer thinks "B" may commit some improper act towards "A," may well be argued some future day in the courts. But more important is our present difficulty which results from allowing convictions to stand against persons who have committed no discernible wrong-doing beyond standing where a police officer thought they had no business to be, as in *Galpern* and *Tinsley*.

If convictions, such as in *Galpern* and *Tinsley*, and the all-encompassing statutory phrasing associated with such convictions, are allowed to stand regardless of the defendant's intent to breach the peace, then the net effect is that the police officer decides who is guilty. It is not one's conduct that determines guilt or innocence, rather it is the policeman's subjective judgment. Such statutory phrasing does not advise one when he is in danger of committing a crime; it merely tells him he had better move when told to do so, or risk arrest. Since the phrase in the statute "occasioned thereby" does not advise one what constitutes the wrong-doing, and since "intent" is not a necessary element of the crime, all that is left of the element of the crime is the failure to move on when told.

In *Galpern* the trial judge acknowledged that the defendant had no intent to commit a breach of peace and the record does not disclose the defendant being properly advised what breach of the peace would have been occasioned by his presence on the sidewalk. *Tinsley* is even more difficult to understand. Seemingly no objective standard existed. Does the situation settle down, then, to laws where one is practically automatically guilty if he fails to move on as ordered, regardless of the circumstances, and regardless of the officer being nervous or authoritarian?

Nor are the civil rights cases discussed above of any analytic help. Where there is an overriding reason, such as civil rights, then the Supreme Court seems to reverse the conviction on the basis, generally, that there has been a denial of equal protection of the law. Let there be no such important consideration and although our citizen may be even more peaceful than a singing civil rights demonstrator, he is nevertheless guilty.

Of the cases discussed above each could have been decided on the ground that no wrongful intent or wrongful act was exhibited by the defendant; accordingly no right lay in the police to force him to move on. Had such a test of wrongful intent been applied, then probably the civil rights cases and the *Galpern* case would have had the same result, because in many such cases the proof would show that the defendant had no intent to commit a breach of the peace, nor would any have been occasioned by anything the defendant did. A generally different result has occurred in these cases because different standards are applied under different circumstances to the same or similar conduct. Tinsley and Galpern were convicted. The others were not. Our courts have properly recognized the need to protect the Browns, but not the Tinsleys. While it is important to protect those who exercise First Amendment rights in a dramatic fashion before the glare of publicity, that good is diminished if police are allowed to arrest and convict peaceful citizens who assert a right not to move because the order was improper. Certainty in the law is not encouraged by such variable factors, nor is the conception enhanced that the law ought to be equitable.

At some time a free society must defend not only the headline case but also the simple right to stand peacefully in a public place, unless there exists a substantial interest of the state to forbid such conduct. Privacy has been defended as to acts in our homes and in our bedrooms.<sup>94</sup> Cannot one say that the citizen who commits no wrongful act should have at least a similar right to be free of the duty of explaining one's peaceful presence in a public place? It is the duty of the courts to define and protect the public conduct so that only under very limited circumstances may one be ordered from the street when his conduct is beyond reproach. Until the courts determine the rights and limits of the policeman in a particular instance to direct citizens to move on, and until consideration is given to what the citizen was actually doing, not what the police officer thought the presence of the citizen would do, ordinary persons who become rightfully stubborn at a police order will continue to have no protection.

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<sup>94</sup> *Griswold v. Connecticut*, 151 Conn. 544, 200 A.2d 479, 381 U.S. 479 (1965).



One must either exhibit an intent to commit a breach of the peace, or his conduct, not his mere presence, must be such as to cause a reasonable person to believe that a breach was about to be committed. Under such a test not only would the civil rights cases have been decided the same way, but *Galpern* and *Tinsley* probably would have been reversed, as they should have been.

A policeman's lot is not a happy one, but arresting the Galperns of this world cannot make it happier. Patrolling the streets of a large city is difficult and often dangerous. The crowds are large, sometimes rude and unruly, and decisions must be made, but the harmless "schmooser" like Galpern is not the one who should be arrested. Respect for the law is not engendered in this fashion; rather the unfortunate gulf between much of the citizenry and the police is widened and the "we-they" attitude encouraged.

In sum, the first off-shoot of *Galpern* is that a police officer's order is prima facie correct. This remains the law unless an important issue such as a First Amendment freedom has been denied, or the applicable statute was or could actually have been unconstitutionally applied in the factual situation. Limited Supreme Court holdings have left *Galpern's* second off-shoot, the view that conduct otherwise lawful becomes unlawful when it may result in a breach of peace, largely intact. Finally, the third off-shoot, the distinction between speech and conduct, may well have won over a majority of the present Supreme Court. Yet in light of *Galpern's* questionable validity today, the admitted unfamiliarity of police officers with current laws,<sup>95</sup> and general policy considerations, it is time to bury *Galpern*, and all its progeny forever.

The reasonableness of the evidentiary presumption in favor of the policeman's testimony is open to serious doubt. We have seen Arkansas Judge Cates' strong stand against this presumption. Indeed, we have seen that this evidentiary presumption renders the defendant presumptively guilty (rather than presumptively innocent) in a disorderly conduct or breach of the peace case. As discussed above, fairness and equity require that the defendant's guilt be established beyond a reasonable doubt by the state without employing this presumption. Fairness and equity require that judges wrestle with the problems inherent in balancing the individual's right and society's interests without resorting to the escape of this evidentiary presumption. Ending the use of such an evidentiary presumption would serve to clarify a nebulous area of the law, thereby offering guidance to police officers in the performance of their duties,<sup>96</sup> and to individuals in their daily conduct.

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<sup>95</sup> TOWLER, *THE ROLE IN RACIAL CONFLICTS* 15 (1964).

<sup>96</sup> *Middlebrooks v. City of Birmingham*, 42 Ala. App. 25, 170 So. 2d 424 (1964).

The reasonableness of the principle that otherwise lawful conduct is punishable if it may result in a breach of the peace is equally open to serious doubt. The exercise of one's lawful rights should not be limited by the hypothetical consequences of the exercise. The State has a duty to allow the individual to exercise all his lawful rights, not merely his rights under the equal protection clause or his rights specifically derived from the Constitution. Unless there is a clear showing that the exercise of these rights will cause a harm that clearly outweighs the harm caused by their abridgment, the state should have no right to abridge them. The rule of the *Briggs* case is that merely because exercise of a lawful right may result in a disturbance is not alone sufficient to breach the peace. This rule is just, equitable, and necessary in a society that is keenly protective of individual rights.

The fact that *Brown* nearly resulted in an affirmance of the convictions demonstrates the unreasonableness of the speech-conduct distinction. What possible justifiable basis in law can there be for holding the conduct of the Negroes involved in sitting in a public library punishable by law?

The statute was deliberately and purposely applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest the unconstitutional segregation of a public facility. Interference with this right, so exercised, by state action is intolerable under our Constitution.<sup>97</sup>

*Brown* graphically demonstrates that the speech-conduct distinction, which summarily concludes that conduct is worthy of fewer protections than speech, is a dangerous doctrine. Men who peacefully seek through reasonable means to bring to the public's attention a denial of rights may find the law, from which they seek support, attacking them with brutal force. While there may be conduct that is not worthy of First Amendment protection, drawing such a line between speech and action is artificial and can only lead to a denial of the communication of ideas.

Many similar cases require the prosecution to prove that the police order was warranted and made necessary by the conduct of the defendant without obtaining the benefit of such an evidentiary presumption. Merely because an exercise of a lawful right might lead to a breach of the peace is insufficient in these cases to prove the order warranted.

An arrest following refusal to obey an unwarranted police order should properly be characterized as unlawful. Traditionally the remedy, although of doubtful effect, for an unlawful arrest has been

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<sup>97</sup> *Brown v. Louisiana*, 76 Sup. Ct. 719, 724 (1966) (Opinion of Justice Fortas).

a civil suit for damages against the individual officer; sometimes criminal penalties are also attached. A far more effective and appropriate remedy was recommended in 1954 by the California Bar Association Committee on Criminal Law and Procedure.<sup>98</sup> The Committee called for the establishment of

. . . [A] new kind of civil action, or better a summary type of proceeding, for a substantial money judgment in favor of the wronged individual . . . and against the political subdivision whose enforcement officers violated the person's rights. After not many outlays of public funds the taxpayers and administrative heads will insist upon curbing unlawful police action.<sup>99</sup>

Much has been done to protect the individual's right to counsel<sup>100</sup> and his protection from unlawful searches and seizures<sup>101</sup> in recent years. While the present civil rights struggle may have obscured the problem presented by *Galpern*, the 5-4 decision in *Brown* indicates the tenuousness of relying upon the racial nature of a case to obtain reversal. Furtherance of individual liberty, now in danger because Justice Black seems to hold a possible majority for his conduct-speech distinction, must be stressed under newer banners to meet the newer attacks upon it. Hopefully the discussion herein raises questions for consideration and will produce modern solutions.

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<sup>98</sup> Wilson, *Police Arrest Privileges in a Free Society: A Plea for Modernization*, 51 J. CRIM. L., C. & P.S. 395 (1960) at 400-01.

<sup>99</sup> *Ibid.* See also Foote, *Tort Remedies for Police Violations of Individual Rights*, 39 MINN. L. REV. 493 (1955) and Wilson, *supra* note 98, at 400.

<sup>100</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>101</sup> *Mapp v. Ohio*, 367 U.S. 643 (1961).