The Law Commission

Working Paper No. 82

Offences against Public Order

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Summary. In this Working Paper the Law Commission considers, as part of its programme of codification of the criminal law of England and Wales, the four common law offences of affray, riot, rout and unlawful assembly. It provisionally proposes the abolition of the obsolete offence of rout. It proposes that the other offences in question be abolished and be replaced by modern statutory offences having broadly similar characteristics to the present common law offences. The purpose of this Working Paper is to obtain the views of the public on the matters considered in the Paper.

I INTRODUCTION

1.1 As part of the Law Commission's continuing programme of codification of the criminal law of England and Wales,[1] we have undertaken, after consultation with the Home Office, a review of the one major group of offences at common law which has not been examined in England and Wales by a law reform agency this century,[2] namely offences against public order. The offences with which we are primarily concerned in this Working Paper are affray, riot, rout and unlawful assembly.[3] We have also extended our review to include a number of old statutory provisions in this field which seem ripe for repeal or restatement in modern terms.[4]

1.2 We are not at this stage intending to undertake a comprehensive examination of the whole of the law relating to public order with a view to putting all public order offences into a single statutory code. Our essential task is to consider whether the common law

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1 Second Programme of Law Reform (1968), Law Com. No. 14, Item XVIII, para. 2.

2 We refer to the recent review of statutory offences in para. 1.4, below.

3 As we explain in paras. 1.9-1.12 below, despite earlier indications to the contrary (see Fifteenth Annual Report: 1979-1980 (1981), Law Com. No. 107, para. 2.14), we are not including within the present review the common law offence of public nuisance in so far as it is used in the field of public order.

4 These are: Tumultuous Petitioning Act 1661; Shipping Offences Act 1793; Seditious Meetings Act 1817, s. 23; Vagrancy Act 1824, s. 4 (part only); Metropolitan Police Act 1839, s. 54(13); City of London Police Act 1839, s. 35(13). See Part VII, below.

offences in this field need be retained or reformed and how, if they are to be retained, they may be restated in statutory terms.

1.3 The proposals for reform in this Working Paper are only provisional. The purpose of this Paper is to seek comment and criticism on these proposals. We shall then prepare our final Report which will have a draft Bill annexed. Where, in this Paper, we have set out the constituent elements of the offences we provisionally propose, we have done so not as a draft of a future Bill but simply to indicate the concepts we have in mind.

Background to our review

1.4 During the last two years or so, the statute law relating to public order has come under scrutiny in a number of official reviews and inquiries brought about by a sequence of disturbances in certain urban areas. The first of these reviews took place in the aftermath of disturbances in the period 1977-1979, culminating in those which occurred in Southall in April 1979. Shortly afterwards the Home Secretary announced that he was instituting a review of the Public Order Act 1936 and related legislation. As a first stage in that review, the Home Office and Scottish Office jointly published a consultative Green Paper[5] in April 1980 which set out the main areas covered by the existing law on public order and indicated possible legislative changes which might be made to meet contemporary circumstances. We have been in close touch with the Home Office with regard to our respective reviews. Events since the publication

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5 Review of the Public Order Act 1936 and related legislation (1980), Cmnd. 7891.

of the Green Paper, in particular the serious disturbances of last summer and the Scarman Inquiry into the earlier disorders at Brixton, have meant an inevitable delay in completion of the Home Office review.[6]

1.5 Before starting our review of the common law offences, we considered how far it was right that different bodies should be considering different aspects of the law relating to public order. In particular, was it right that we should be considering the common law offences without, at the same time, making our own examination of the Public Order Act 1936? We have reached the conclusion that it is not necessary, in order to deal properly with the common law offences, that we should make our own separate examination of the Public Order Act. That Act is largely concerned with such specialised matters as the control of processions and the wearing of uniforms. It is already clear that there is no intention to propose amendments to section 5 of the Act which is a section dealing generally with public order.[7] Many of the other matters in the Home Office review are more suitable for consultation by that Department, being concerned with administration and the day-to-day exercise of powers by the police. Moreover, for reasons which we set out in further detail below,[8] we have reached the conclusion that in this field there is no call for radical restructuring of the law but rather that the common law offences should be put into a statutory form having broadly the same characteristics as the present offences.

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6 See para. 1.7, below. And see Hansard (H.C.), 3 February 1982, vol. 17, col. 450.

7 See the Home Office's Review of the Public Order Act 1936 and related legislation (1980), Cmnd. 7891, paras. 102-103.

8 See Part III.

In reaching this conclusion we have borne in mind the separate existence of the Public Order Act 1936 and the likely changes which may be proposed to that Act.

1.6 Another inquiry into aspects of the law relating to public order was undertaken at the beginning of 1980 by the House of Commons Home Affairs Committee which investigated the operation of the Public Order Act 1936. After taking evidence, including evidence from Home Office officials responsible for conducting the above-mentioned review, the Committee published a Report containing recommendations.[9] The Committee was aware of our proposed review of offences in the field of public order and included in its Report recommendations that we be invited to consider a number of "technical" matters. We refer to these suggestions in paragraphs 1.15-1.16, below.

1.7 The third and most recent inquiry was that undertaken by Lord Scarman, who was appointed by the Home Secretary under the Police Act 1964 "to inquire urgently into the serious disorder in Brixton on 10-12 April 1981 and to report, with the power to make recommendations". So far as reform of the substantive law of public order is concerned, the Scarman Report,[10] published last November, contained only a limited number of recommendations. Specifically, Lord Scarman rejected the necessity for a "new Riot Act",[11] that is, a new

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9 Fifth Report of the Home Affairs Committee, The Law Relating to Public Order (1979-1980), H.C. 756-I.

10 The Brixton Disorders 10-12 April 1981 (1981), Cmnd. 8427.

11 Ibid., paras. 7.31 et seq.

statutory offence penalising on summary trial in a magistrates' court the failure to disperse after a public warning, with a defence of "reasonable excuse" for the defendant's presence. Lord Scarman considered that there would be difficulties in establishing the offence, given that the defendant might not hear the warning in the "din of public disorder" or might arrive on the scene after the warning was given. The meaning of "reasonable excuse" could well give rise to much litigation and the area to be covered by a warning might be difficult to define, especially if the crowd moved on without scattering. Generally, he concluded on this aspect of his inquiry:

> "I am not persuaded that the existing law (which, of course, includes not only the Public Order Act but the common law offences of riot, unlawful assembly, and affray as well as a range of statutory offences, e.g. offences against the person, assaulting a police officer in the execution of his duty and wilful obstruction of the highway) is inadequate either in the powers of arrest which it confers or in the number and nature of the offences available for prosecution. Though I favour a modern restatement of the law relating to public disorder, I see no urgent need for piecemeal reform: and in this Report, I am concerned only with what is urgent." 12

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12 Ibid., para. 7.40.

Matters outside the scope of our review

1.8 There are several aspects of the law relating to public order which we shall not be examining in this Working Paper, the reasons for which call for comment.

(i) Public nuisance

1.9 Contrary to the indication given by our terms of reference for this Working Paper set out in our 15th Annual Report,[13] we are making no proposals in this Paper for reform of the common law offence of public nuisance. Public nuisance is a common law crime covering a miscellany of interferences with rights of the public at large.[14] It was defined by Stephen[15] as follows:

> "...an act not warranted by law or an omission to discharge a legal duty, which act or omission obstructs or causes inconvenience or damage to the public in the exercise of rights common to all His Majesty's subjects."

The offence is triable either way (that is, either in the magistrates' courts or on indictment) with an unlimited maximum penalty on conviction on indictment. But the "major importance of public nuisance today is in the civil remedy which it affords".[16]

1.10 As a crime, public nuisance has been used in a wide variety of situations, some of which are remote from disturbances to public order; for example, carrying on an offensive trade, polluting water, keeping a corpse

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13 See para. 1.1, n. 3, above.

14 See generally Smith and Hogan, Criminal Law (4th ed., 1978), pp. 764-769.

15 A Digest of the Criminal Law (9th ed., 1950), art. 235.

16 Smith and Hogan, op. cit., p. 764.

unburied, and, most recently, making a large number of obscene telephone calls[17] and assisting in effecting the escape of a detainee from Broadmoor.[18] Public nuisance has also been used to penalise obstructions of the highway, occasionally in connection with disturbances to public order. Thus in 1963 there were three reported instances when charges of public nuisance (including incitement) were brought in respect of "sit-down" demonstrations in central London.[19] Use of public nuisance for this purpose is, so far as we are aware, unusual, and these are the most recent reported cases.[20]

1.11 Our earlier decision was that our present work would include an examination of public nuisance only "in so far as it is used in the area of public order".[21] Since starting work on this topic we have considered the law of public nuisance in some detail. It is evident from the definition referred to above that, unlike the other common law offences dealt with in this Working Paper, a disturbance to public order is not an essential element of the offence. On the face of it, therefore, it would be difficult to justify the inclusion of public nuisance in a

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17 R. v. Norbury [1978] Crim. L.R. 435.

18 R. v. Soul (1980) 70 Cr. App. R. 295 (a charge of conspiracy under the Criminal Law Act 1977, s. 1).

19 R. v. Moule [1964] Crim. L.R. 303, R. v. Adler [1964] Crim. L.R. 304 and R. v. Clark(No.2) [1964] 2 Q.B. 315. The conviction in the last-mentioned case was quashed on a misdirection.

20 See also Tynan v. Balmer [1967] 1 Q.B. 91 (D.C.) where the defendant's use of the highway in picketing a factory was held to amount to a nuisance, for which in the circumstances he was held on appeal to have been rightly convicted of wilfully obstructing the police; and Broome v. D.P.P. [1974] A.C. 587 where in similar circumstances the defendant was held rightly convicted of wilfully obstructing the highway under what is now the Highways Act 1980, s. 137.

21 See para. 1.1, n. 3, above.

survey of offences which have that as an important common element. We have noted a few reported instances where, in the context of obstruction to the highway, public nuisance has been used to deal with certain street demonstrations. But while use of public nuisance to deal with highway obstructions constitutes a relatively clearly defined aspect of the offence, the same cannot be said of these isolated cases. We have concluded that there are three possible courses for reviewing the offence -

(a) A review of the offence as a whole within the present terms of reference; this would unduly protract the review and include matters not relevant to consideration of offences relating to disturbances to public order.

(b) A review of the offence in so far as it is used to penalise highway obstructions; this would on the authorities also include many situations remote from the law relating to disturbances to public order.

(c) A separate review of the offence of public nuisance.

1.12 Having regard to the serious difficulties attendant on courses (a) and (b), and to the infrequency of charges of public nuisance to deal with disturbances to public order, we have concluded that course (c) presents the best practicable approach. Accordingly, the present Working Paper does not deal with any aspect of the offence of public nuisance.

(ii) Police powers

1.13 The recent Report of the Royal Commission on Criminal Procedure[22] recommended, inter alia, the codification of many of the powers of the police which at present rest on the common law. Questions regarding the common law police powers in relation to the preservation of public order were outside the Royal Commission's terms of reference.[23] Since publication of that report early last year, the Home Office has raised a number of questions, including the inter-relationship of the Royal Commission's proposals with retention of the common law powers of the police in the field of public order.[24] We should make it clear at the outset that, while we are concerned with making proposals aimed at reform of the common law offences against public order, we are not concerned in this Working Paper to make any suggestions as to the codification of the related police powers.[25] We have not been asked to consider this very difficult issue and we do not consider it would be appropriate for inclusion in the present review.

(iii) A "new Riot Act"

1.14 We do not in this Working Paper discuss the possibility of a new offence of failure to disperse after lawful warning. In response to public calls for the introduction of such an offence, the Home Secretary stated:

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22 (1981) Cmnd. 8092.

23 Ibid., para. 3.23. These powers include arrest for breach of the peace and dispersing an unlawful assembly; see further para. 6.5, below.

24 Report of the Royal Commission on Criminal Procedure: A Consultative Memorandum (1981), paras. 5.1-5.3.

25 A Bill in preparation "Will extend police powers in dealing with suspected offenders": The Times, 22 January 1982.

> "I intend to examine in consultation with my right hon. and learned Friends the Lord Chancellor, the Attorney General, and the Lord Advocate, the value of such proposals in the overall perspective of what new powers generally should be available to the police to maintain order and to deal with disorder."[26]

The need for such a new offence is therefore under consideration by the Home Office. As we have seen,[27] Lord Scarman indicated in his Report that he does not favour an offence of this kind. It is evident from the Home Secretary's statement that the question whether or not there should be such an offence is closely connected with the issue of the adequacy of police powers to preserve public order, which is not a matter within the terms of our review. Furthermore, we do not think that the conclusions which we have reached in relation to the reform of the serious offences considered in this Working Paper would be affected by any proposal to introduce a summary offence of failure to disperse. For these reasons we do not deal further with this possible offence in this Working Paper.

(iv) Recommendations of the Home Affairs Committee

1.15 As we indicated earlier,[28] the House of Commons Home Affairs Committee recommended that we be invited to consider three specific issues in relation to the law of public order. These are -

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26 Hansard (H.C.), 16 July 1981, vol. 8, col. 1404.

27 See para. 1.7, above.

28 See para. 1.6, above.

(a) whether, in regard to the part of section 3 of the Public Order Act 1936 which requires banning orders to apply to "all public processions or any class of public procession," an appropriate definition of "class" can be found;[29]

(b) whether it is necessary and desirable for both the Prevention of Crime Act 1953 and section 4 of the Public Order Act 1936 to contain provisions concerning the possession of offensive weapons at public meetings or in processions;[30] and

(c) whether, if the existing powers regarding the removal of dangerous or offensive articles from demonstrators are seriously inadequate, these powers should be enlarged.[31]

1.16 With regard to all these questions we have had the benefit of discussions with officials from the Home Office immediately concerned with the Department's review of the Public Order Act 1936. Since (a) and (b) both concern issues directly related to the Public Order Act and (c) raises questions going to the scope of police powers,[32] we considered that these were more appropriately

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29 Report, para. 55. In the Report of an Inquiry into the Brixton Disorders 10-12 April 1981 (1981), Cmnd. 8427, para. 7.49, Lord Scarman recommends "an amendment to [the 1936 Act] to enable one specified march to be banned, only if it were considered impracticable to make use of the existing power to ban a class of procession."

30 Ibid., para. 87.

31 Ibid., para. 90.

32 See para. 1.13, above.

matters which fall within the Home Office review. It is because they are under consideration by another body that we have felt it proper not ourselves to consider them.

(v) Riot (Damages) Act 1886

1.17 This Act regulates the provision of compensation out of the police fund to individuals suffering loss or damage to property from "persons riotously and tumultuously assembled together". It is clear[33] that "riotous" bears the same meaning here as it does in the common law offence of riot. The Act, however, is not in other respects concerned with the criminal law and we do not deal with it further in this Working Paper. Some implications which our proposals may have for the Act are referred to below.[34]

Outline of the Working Paper

1.18 It remains for us to outline the structure of this Paper. In Part II we set out a detailed statement and examination of the present law relating to the common law offences.[35] In Part III we set out the general

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33 See para. 2.20, below.

34 See para. 5.54, below.

35 We have avoided so far as possible reference to the historical development of the law since we think that it would be of marginal assistance in the task of seeking ways in which it can be improved and modernised. For more detailed accounts of the history, the reader is referred to the sources from which we have derived much assistance, particularly in the preparation of Part II: see e.g. W. Holdsworth, A History of English Law; D.G.T. Williams, Keeping the Peace (1967); M. Supperstone, Brownlie's Law of Public Order and National Security (2nd ed., 1981).

considerations which have guided us in our approach to reform. Then in Parts IV-VI we consider the defects of and the problems thrown up by the present law and put forward proposals for reform and restatement of the common law offences. In Part VII we consider the statutory provisions falling within our review. Our conclusions and provisional proposals for reform are summarised in Part VIII. In three appendices we set out statistics from the annual Criminal Statistics relating to the principal offences under review (Appendix A), a brief summary of the law relating to riot and other kindred offences in Scotland and in some Commonwealth and foreign jurisdictions (Appendix B), and finally a selection of the texts of the old statutes falling within the terms of the review (Appendix C).

II COMMON LAW OFFENCES: THE PRESENT LAW

A. Introduction

2.1 In this Part of the Working Paper we examine the present law relating to the offences of affray, riot, rout and unlawful assembly. Our principal concern here is to provide an exposition of the law: Parts IV to VI of the Paper deal with the problems arising from the present position and how in our view they should be resolved.

2.2 The offences discussed in this Part are common law offences which are at present untouched by statute. This means that the constituents of the offences have been developed by the courts without any regulation from the legislature[1]; and it means also that they share the characteristics of being triable only on indictment and of having no limit upon the term of imprisonment or size of the fine which may be imposed. The penalties which in recent years have been imposed are discussed in relation to each offence below.[2]

2.3 There are close links between the three offences of riot, rout and unlawful assembly, which are therefore dealt with in turn in the following paragraphs after the offence of affray.

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1 The Riot Act 1714, which declared certain riotous assemblies to be felonies, did not affect the common law offence: see Russell on Crime (12th ed., 1964), Vol.I, p.250, n.47. The Act was repealed by the Criminal Law Act 1967.

2 See paras. 2.19 and 2.39-2.40, below, and Appendix A (statistics).

B. Affray

1. Elements of affray

2.4 The elements of the common law offence of affray are defined by Smith and Hogan[3] in the following way:

> " 1) unlawful fighting or unlawful violence used by one or more persons against another or others; or an unlawful display of force by one or more persons without actual violence;
>
> 2) in a public place or, if on private premises, in the presence of at least one innocent person who was terrified; and
>
> 3) in such a manner that a bystander of reasonably firm character might reasonably be expected to be terrified. "

This definition of the offence is based principally on two recent decisions of the House of Lords: Button v. Director of Public Prosecutions[4] and Taylor v. Director of Public Prosecutions.[5] We consider these cases and the elements of the offence in more detail below.

(a) Unlawful fighting or violence

2.5 To be guilty of an affray the defendant must have engaged in unlawful fighting or violence. In R. v. Sharp and Johnson[6] (at the time the first reported case of affray since 1845)[7] Lord Goddard C.J. made some observations to the effect that affray "is of necessity a joint offence" and that if a man is "only defending himself ... that is not a fight and consequently not an affray."[8] His

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3 Criminal Law (4th ed., 1978), p.757.

4 [1966] A.C. 591.

5 [1973] A.C. 964.

6 [1957] 1 Q.B. 552.

7 There was one reported case in Ireland during this period: R. v. O'Neill (1871) I.R. 6 C.L.1.

8 Ibid., p.561.

observations were not without the support of authority; in many of the older textbooks[9] it was stated in more or less similar terms that affray was "fighting by two or more persons in some public place to the terror of the King's subjects". However, two decisions of the Court of Appeal subsequently cast doubt on the correctness of these observations:[10] in R. v. Scarrow[11] and R. v. Summers[12] it was decided that a person is not to be acquitted of affray simply because his victim acted lawfully, as for instance by retreating or simply warding off the blows aimed at him by the accused.

2.6 In Taylor v. D.P.P.[13] the House of Lords confirmed these decisions and rejected the observations made by Lord Goddard in R. v. Sharp. Their Lordships unanimously decided that one person may be guilty of affray if he makes a violent attack on another, whether that other fights back or merely submits. There need be no reciprocity of violence:

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9 See e.g. Blackstone, Commentaries (1769) vol. IV, p.145.

10 Even before these two decisions Lord Goddard's interpretation of the law had been doubted by Brownlie: see The Law Relating to Public Order (1968), p.57.

11 (1968) 52 Cr. App. R. 591.

12 (1972) 56 Cr. App. R. 604.

13 [1973] A.C. 964. The appellant and a co-accused pleaded not guilty to making an affray. The co-accused was acquitted on the grounds that he was acting in self-defence but the appellant was convicted. The principal ground of appeal was that the judge had been wrong in law to direct the jury that one person found by them to be fighting could be convicted of affray. Both the Court of Appeal and the House of Lords dismissed the appeal.

> " The fact is that affray consists in participating unlawfully in a violent breach of the peace to the terror of the lieges. There is no reason in logic or law to inquire whether other participants in the fight are acting lawfully or unlawfully."[14]

(b) Display of force

2.7 As an alternative to unlawful fighting or violence, it seems that a display of force without actual violence if in such a manner as to cause terror may also constitute an affray. However, all recent reported cases of affray appear to have involved actual fighting or violence. Thus there is no clear modern authority on this form of the offence. Hawkins[15] states that -

> " In some cases there may be an affray where there is no actual violence; as where a man arms himself with dangerous and unusual weapons, in such a manner as will naturally cause a terror to the people, which is said to have been always an offence at common law. "

This statement was apparently accepted by the Court of Criminal Appeal in R. v. Sharp and Johnson.[16] In Taylor v. D.P.P.[17] Lord Hailsham said that the extent to which a display of force without actual violence constitutes the offence of affray even where the element of terror is present was still not wholly clear. Whereas:

> " It seems that the brandishing of a fearful weapon does constitute the offence ... it seems plain enough that mere words, unaccompanied by the brandishing of a weapon or actual violence, are not enough .... I am anxious that nothing in this case should be construed as necessarily implying that anything less than an unlawful participation in a violent breach of the peace

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14 [1973] A.C. 964, 986 per Lord Hailsham.

15 Pleas of the Crown (8th ed., 1824), Vol.I, c.28, p.488.

16 [1957] 1 Q.B. 552, 559.

17 [1973] A.C. 964.

will be enough to satisfy the requirement. "[18]

Lord Hailsham added that "a charge under the Prevention of Crime Act 1953 would now seem preferable."[19] We discuss below whether this aspect of common law affray should survive as part of a statutory restatement of the offence.[20]

(c) In a public or private place

2.8 In Button v. D.P.P.[21] the House of Lords, affirming the Court of Criminal Appeal, held that it was not necessary to prove that the affray occurred in a public place. In so deciding, the House corrected what was evidently an error which had crept into the law from about 1820, namely, that the offence could in fact only be committed in a public place.[22]

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18 Ibid., p.987. The last sentence indicates that in Lord Hailsham's opinion brandishing a weapon is a violent breach of the peace.

19 Ibid. Sect. 1 of the Prevention of Crime Act 1953 penalises the unlawful possession of an offensive weapon in a public place, with a maximum penalty of three months' and a fine not exceeding £1000 on summary conviction or 2 years' and a fine on conviction on indictment.

20 See paras. 4.17-4.20, below.

21 [1966] A.C. 591. The facts were that a darts league held its annual dance in a private hall and only persons with a ticket were admitted. Fighting amongst several youths broke out. The defendants were charged with making an affray. The judge directed the jury that it was an ingredient of the offence that the fighting must take place in a public place which meant "in a place to which at the time of the fighting the general public or at least a substantial portion of the public had access." The defendants were convicted and their appeals dismissed.

22 In 1822 Archbold asserted without authority that the allegation "in a public street or highway" should be charged in the indictment and proved. This was followed in all subsequent cases: see R. v. Hunt and Swanton (1845) 1 Cox C.C. 177; R. v. O'Neill (1871) I.R. 6 C.L. 1; R. v. Sharp and Johnson [1957] 1 Q.B. 552; R. v. Morris (1963) 47 Cr. App. R. 202; R. v. Clark, ibid., 203; R. v. Mapstone [1963] 3 All E.R. 930n.; R. v. Kane [1965] 1 All E.R. 705; R. v. Allan [1965] 1 Q.B. 130.

2.9 Lord Gardiner L.C., delivering the main speech, reviewed the authorities and legal writings of eminent jurists on this offence going back to the 16th century. He demonstrated that up to 1755 all the writers[23] had considered that an affray could take place in a private house as well as a public place. It was Blackstone, writing in 1769,[24] who had used words "which led to subsequent error." But, said Lord Gardiner, "he cannot have been intending to depart from the views expressed by former writers."[25]

(d) Presence of bystanders

2.10 The decision that an affray is capable of commission anywhere does not dispose of the need to distinguish between an affray committed in a public place and an affray committed on private premises. The need to make the distinction relates to the question whether persons must be proved to be present in order to satisfy the ingredient of terror.[26] The House approved in Button[27] the statement by Hawkins[28] that:

> " ... there may be an assault which will not amount to an affray: as to where it happens in a private place out of the hearing or seeing of any except the parties concerned; in which case it cannot be said to be to the terror of the people .... "

2.11 As to whether the presence of one person is enough, it was said by the Court of Criminal Appeal that it did not

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23 Including Lambard, Fitzherbert, Dalton, Coke, Hale, Nelson, Hawkins and Burn.

24 See Commentaries (1769), Vol.IV, p.145.

25 [1966] A.C. 591, 626.

26 See para. 2.12, below.

27 [1966] A.C. 591, 626.

28 Pleas of the Crown (1716), Vol.I, p.134.

matter whether few or many persons are present.[29] In R. v. Mapstone[30] it was held that it was not necessary to prove that any third person was present in the public place. It was sufficient that, were any ordinary person to pass by, he might well be terrified.[31] In Taylor v. D.P.P.[32] Lord Hailsham and Lord Reid briefly discussed this matter but, the question not being in issue in the appeal, left it to be decided when it should arise. Lord Hailsham thought that at least where the events occur in a private place it might have to be proved that a third party was present.[33] If a distinction is to be drawn between public and private places the case law on whether a place is a "public place" may still be relevant.[34] On the state of the present law, Smith and Hogan comment:[35]

> " Obviously, no definite rule can be stated; but while Sharp (on this point) and Mapstone stand, it is thought to be sufficient to prove that D's

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29 [1966] A.C. 591, 609.

30 [1963] 3 All E.R. 930n.

31 See also R. v. Farnill [1982] Crim.L.R. 38 (Leeds Crown Court), in which it was held that where an affray occurs in a public place, it must be proved that there was a reasonable likelihood of a third party coming on the scene.

32 [1973] A.C. 964.

33 Ibid., p.988. But see Lord Hailsham in Kamara v. D.P.P. [1974] A.C. 104, 115-116, para. 2.52, below.

34 See, for example, R. v. Morris (1963) 47 Cr. App. R.202 (a dance hall open to members of public on payment of an admission fee was capable of being a public place); R. v. Clark, ibid., 203 (bar of public house); R. v. Mapstone [1963] 3 All E.R.930n.(public house); R. v. Kane [1965] 1 All E.R. 705 (a club open to public on payment and signing of visitor's book). In the latter case Barry J. said that there was no substantial difference between the meaning of "a public place" as defined by the Prevention of Crime Act 1953, s.1(4) and the meaning of "a public place" at common law: "at common law a public place is a place to which the public can and do have access." It was irrelevant whether admission was by invitation or with the permission of the occupier.

35 Criminal Law (4th ed., 1978), pp.758-759.

> act in a public place was such that it might be expected to terrify any ordinary member of the public who did see it. Where the act is in a private place, it seems that it must be proved that terror was in fact caused to the person present, or persons if more than one is required.[36]"

A statutory offence of affray would require clarification of this issue.[37]

(e) Public terror

2.12 From the earliest days of the offence, terror has been an essential ingredient of the offence. All the early textbooks stress the derivation of the word affray from the French "effrayer" meaning "to put in terror." Lord Hailsham said in Taylor v. D.P.P.[38] that this element must not be weakened: "it is essential to stress that the degree of violence required to constitute the offence of affray must be such as to be calculated to terrify a person of reasonably firm character ... (that is, might reasonably be expected to terrify) not simply such as might terrify a person of the requisite degree of firmness."[39] The concept of "terror" may require attention in any statutory restatement of the law.[40]

(f) A continuing offence

2.13 A single affray may continue for a considerable period of time and over a wide area. Two cases may be

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36 R. v. Summers (1972) 56 Cr. App. R. 604, 613.

37 See paras. 4.24-4.31, below.

38 [1973] A.C. 964, 987. See also R. v. Sharp and Johnson [1957] 1 Q.B. 552.

39 As had been suggested at one time by Smith and Hogan: see Criminal Law (2nd ed., 1969), p.539: "in such a manner that reasonable people might be frightened or intimidated."

40 See para. 4.23, below.

contrasted. In R. v. Woodrow, Cooper and Harrington[41] three defendants were involved at different times and in different incidents in the course of events which took place over a radius of a quarter of a mile between 8.30 p.m. and 12.30 a.m. The count in the indictment which charged them "that in divers streets being public places ... they fought and made an affray" was not bad for duplicity. The Court of Criminal Appeal held that the count was capable of covering the case of a body of persons milling from one street to another over a period of time and on the face of it charged one offence only. In R. v. Jones[42] on the other hand, the single count charging affray showed on its face that there were clearly defined and separate places ("building sites in the county of Salop") some distance apart at which the affray was said to have taken place. The times of fighting did not form a continuous period. It was held that, since there was no continuation of the actus reus between the different places, the single count of affray included more than one activity. The convictions were therefore quashed.[43]

(g) The mental element (mens rea)

2.14 The mental element in affray has received little or no attention in either reported cases or in the textbooks. So far as unlawful fighting or violence is concerned, it is submitted that, by analogy with the mens rea of battery,[44] the mens rea of affray is satisfied by proof that the

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41 (1959) 43 Cr. App. R. 105 (C.C.A.).

42 (1974) 59 Cr. App. R. 120 (C.A.) - the "Shrewsbury flying pickets" case.

43 As to the position in the same case with regard to the charge of unlawful assembly, see para. 2.56, below.

44 R. v. Venna [1976] Q.B. 421: held, that the mental element in the offence of battery "is satisfied by proof that the defendant intentionally or recklessly applied force to the person of another": ibid., p.429.

defendant either intentionally or recklessly fought or used violence against another. Intention generally will only become relevant when self-defence is pleaded.[45] So far as the element of terror is concerned, intention or recklessness would seem to be irrelevant.[46] The defendant does not have to know of the presence of innocent bystanders, nor that the manner of the fighting in which he takes part is such as to cause terror in a bystander.

2. Participation

2.15 Mere presence at an affray is not enough to constitute aiding and abetting: there must be evidence that at the least the defendant encouraged the participants by some means or other.[47] Furthermore, it must be proved that he intended to encourage, and wilfully encouraged the crime.[48] Where presence at an affray is prima facie not accidental, this is evidence, but no more than evidence, of encouragement, even where there is a secret intention to help one side if necessary.[49]

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45 See para. 2.16, below.

46 It is clear that Lord Hailsham in Taylor (see para. 2.12, above) used the expression "calculated to terrify" to mean "might reasonably be expected to terrify" and not in the sense of intended to terrify.

47 R. v. Allan [1965] 1 Q.B. 130, 137 (C.C.A.).

48 See R. v. Clarkson (1971) 55 Cr. App. R. 445 and R. v. Jones and Mirrless (1977) 65 Cr. App. R. 250.

49 R. v. Allan, ibid., following R. v. Coney (1882) 8 Q.B. D. 534. See also R. v. Mapstone [1963] 3 All E.R. 930n., where Paull J. directed the jury that, provided the defendant was present at the fight, the encouragement need not be at the active commencement of or during the fight, but that it had to form part of a deliberate course of action leading to that fight.

3. Defences

2.16 In R. v. Sharp and Johnson the Court of Criminal Appeal held that on a charge of affray the plea of self-defence is available: a person fighting in legitimate self-defence is not fighting unlawfully.[50]

2.17 Section 3(1) of the Criminal Law Act 1967 provides that -

> " A person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. "

Clearly this provision is relevant whenever the use of force is needed to prevent or put an end to an affray.

4. No requirement of consent

2.18 There is no need to obtain the consent of the Director of Public Prosecutions for the institution of proceedings for any of the common law offences against public order, including affray. Nor is a chief officer of police required to report such offences to the Director under the Prosecution of Offences Regulations 1978.[51] It appears, however, that in practice cases of affray and riot are often reported to the Director by chief officers.[52]

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50 [1957] 1 Q.B. 552. See also R. v. Khan and Rakhman [1963] Crim. L.R. 562 and Taylor v. D.P.P. [1973] A.C. 964, 983. As to the defence generally, see Archbold (40th ed., 1979), para. 2648.

51 S.I. 1978 No. 1357, reg. 6(2).

52 The Director of Public Prosecutions has said that it is difficult to classify affray and riot in Regulations without catching the trivial as well as the serious cases, and consequently he is content to leave it to the experience and good sense of Chief Officers of Police to decide which of the cases should be reported.

5. Mode of trial and penalty

2.19 Affray is an offence triable only on indictment, and the maximum penalty is a fine or imprisonment at the discretion of the court. The range of sentences for affray is very wide. According to Thomas "the level of violence used, the scale of the affray and the extent to which it is premeditated or spontaneous appear to be the most important criteria in determining the length of sentence."[53] For premeditated affrays (ranging from pitched street battles between rival gangs to ambushes of individuals for the purpose of revenge) sentences vary from between 3 and 8 years' imprisonment. On the other hand, where the affray develops spontaneously, the sentencing bracket appears to be lower, unless exceptionally grave violence is used. The long sentences imposed for premeditated affrays are an important factor to be borne in mind in considering the maximum sentence for a new statutory offence.[54]

C. Riot

1. Introduction

2.20 Of all the common law offences against public order riot (otherwise known as riotous assembly) is the least used offence (apart from rout, which is never used), but one which has recently aroused the greatest interest and comment. Most of the modern authorities on the definition of riot have stemmed from appeals relating to civil claims for compensation payable out of the police fund under the Riot (Damages) Act 1886, where a "riotous and tumultuous assembly" must be proved to have taken place, rather than

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53 See D.A. Thomas, Principles of Sentencing (2nd ed.,1979), pp. 110-112; and see Appendix A.

54 See para. 4.41, below. The Advisory Council on the Penal System in their Report on Sentences of Imprisonment (1978) recommended a maximum penalty of 3 years' (representing the maximum penalty below which 90% of those convicted of affray between 1974 and 1976 were sentenced: ibid., p.149.

from appeals resulting from convictions for the offence of riot itself.

2.21 While there are few authorities on the offence of riot, it is clear that riot does have a legal meaning distinct from the dictionary meaning of the term. Thus the offence may not be committed even though a layman might readily say of an event: "it was a riot". Equally, certain conduct which comes within the legal meaning of "riot" may nonetheless fall short of meriting the description of a riot in layman's terms. What conduct then does the offence of riot encompass under the present law?

2. Definition

2.22 A definition of riot most frequently relied on in 19th century authorities and still referred to in many textbooks[55] is that of Hawkins:[56]

> " a tumultuous disturbance of the peace by three persons or more, who assemble together of their own authority, with an intent mutually to assist one another against any who shall oppose them in the execution of some enterprise of a private nature, and afterwards actually execute the enterprise, in a violent and turbulent manner, to the terror of the people, whether the act intended were of itself lawful or unlawful. "

Recent decisions have tended to follow the definition given by Phillimore J. in the Divisional Court in Field v. Receiver of Metropolitan Police,[57] where the "necessary

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55 E.g. Russell on Crime (12th ed., 1964), vol.1, p.243; Archbold (40th ed., 1979), para.3582; Stone's Justices' Manual, vol.2, p.3597.

56 Pleas of the Crown, vol.1, c. 65, ss.1-5.

57 [1907] 2 K.B. 853, 860. The judge relied on several authorities including in particular Hawkins and Stephen and referred to R. v. Solely (1705) 11 Mod. 100, 88 E.R. 922; R. v. Langford (1842) Car. and M. 602, 174 E.R. 653; Drake v. Footitt (1881) 7 Q.B.D. 201; R. v. Cunninghame Graham and Burns (1888) 16 Cox C.C. 420.

elements" of riot were stated to be:

> " (1) number of persons, three at least;
>
> (2) common purpose;
>
> (3) execution or inception of the common purpose;
>
> (4) an intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose;
>
> (5) force or violence not merely used in [and about the common purpose] but displayed in such a manner as to alarm at least one person of reasonable firmness and courage. "

As the title of the case suggests, this in fact concerned a claim brought under the Riot (Damages) Act 1886 but the decision nonetheless clearly equates "riotously" in the Act with the common law offence of riot. While this definition is binding on judges at first instance and has been applied in subsequent reported cases,[58] it is important to note that it has never been considered by the Court of Appeal or House of Lords. Indeed, so far as we are aware there is no reported case in either of these courts in which the elements of riot have been in issue. For this reason, the precise terms of the definition in Field, although very well known, should not be given undue weight.

2.23 In R. v. Caird and others[59] (in which the appellant who was convicted of riot did not criticize the trial judge's summing up on the law) the Court of Appeal explained the nature of riot as follows:-

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58 E.g. Ford v. Receiver for the Metropolitan Police District [1921] 2 K.B. 344 and Munday v. Metropolitan Police District Receiver [1949] 1 All E.R. 337: see para. 2.29, below.

59 (1970) 54 Cr. App. R. 499, 504-505 (the Garden House Hotel riot in Cambridge).

" Unlawful assemblies and riotous assemblies take many forms. Without, of course, attempting a full definition, the difference can be stated in broad terms applicable to occasions of the particular type under consideration. The moment when persons in a crowd, however peaceful their original intention, commence to act for some shared common purpose supporting each other and in such a way that reasonable citizens fear a breach of the peace, the assembly becomes unlawful. In particular that applies when those concerned attempt to trespass, or to interrupt or disrupt an occasion where others are peacefully and lawfully enjoying themselves, or show preparedness to use force to achieve the common purpose. The assembly becomes riotous at latest when alarming force or violence begins to be used. The borderline between the two is often not easily drawn with precision."

(a) Three or more persons

2.24 With regard to the first element, it is sufficient to note first, that the minimum number of persons required for there to be a riot in law is the same as for an unlawful assembly;[60] and secondly, that two persons may be convicted of the offence if there is evidence that three or more took part.[61] Whether the requisite number should remain at three in any new offence of riot is an important question for consideration.[62]

(b) Common purpose

2.25 The common purpose may be either lawful or

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60 See para. 2.51, below.

61 See R. v. Scott (1761) 3 Burr. 1262, 1264; 97 E.R. 822, 823, and R. v. Beach and Morris (1909) 2 Cr. App. R. 189 (CCA). Presumably also one person alone might be convicted of riot on this basis.

62 See para. 5.20, below.

unlawful.[63] Smith and Hogan state that "the common purpose must be unlawful or, if it is lawful, the force or violence must be displayed 'needlessly and without any reasonable occasion'".[64] Whether any common purpose may properly be described as "lawful" if its execution entails the use of such force or violence as to alarm others is another matter which will require consideration.[65]

2.26 There is some authority for the view that the common purpose must be a private purpose and not a public purpose.[66] In our view such a suggestion would not be accepted by a court to-day.[67]

2.27 So far as proof of this element against each defendant is concerned, Brownlie notes that, "if the crucial requirement is a breach of the peace alarming to the people

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63 R. v. Cunninghame Graham and Burns (1888) 16 Cox C.C. 420, 427; "it does not matter in the least whether the end which is proposed by the rioters is lawful or unlawful; they must not assert it by riot" (per Charles J.).

64 Criminal Law (4th ed., 1978), p. 755; the qualification upon lawful conduct here is derived from the English draft Code of 1879 (see Appendix B, para.2, below).

65 See para. 5.30, below.

66 R. v. Dowling (1848) 3 Cox C.C. 509, 514 per Erle J.: "If the purpose is a private one, the offence is a riot; but if the purpose is public and general, it is a levying war. The same assembly with the same aims might, by a mere difference in the intent with which such an assembly was convened, be either a riot or a levying war". And see Russell on Crime (12th ed., 1964), Vol.1, p.245.

67 O'Brien v. Friel [1974] N.I.L.R. 29, 43 per Lowry L.C.J.: "it is doubtful whether behaviour alleged to be riotous must be of a private nature on the ground that an enterprise of a public nature will not only amount in certain circumstances to treason but will also cease to constitute a riot".

then what appears to be a common purpose from the general behaviour of the persons involved may suffice. A riot will rarely consist entirely of persons having a common purpose in the sense of motivation".[68]

(c) Execution or inception of the common purpose

2.28 Some examples from the reported cases illustrate the element of execution of the common purpose. In Field v. Receiver of Metropolitan Police,[69] already referred to, a group of youths congregated on a pavement which adjoined a long brick wall. They were shouting and using rough language. Some of the youths were standing with their backs against the wall, and others were running against them or against the wall, with their hands extended. After a quarter of an hour part of the wall collapsed. As soon as this happened, the caretaker of the premises came on to the street and the youths ran off. So far as concerns the existence of the common purpose and its inception or execution, the Divisional Court said that "there was evidence upon which the learned judge could have found their existence, though, as far as we can judge from the notes of the evidence and without seeing the witnesses, we think we should not have found the same way."[70]

2.29 In Ford v. Receiver for the Metropolitan Police District,[71] a crowd assembled during the public celebrations on Peace night 1919 and damaged an empty house by removing the woodwork and floorboards as fuel for a bonfire. Some were armed with crowbars and pickaxes, but the crowd was in very good humour. No evidence was given

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68 M. Supperstone, Brownlie's Law of Public Order and National Security (2nd ed., 1981), p.131.

69 [1907] 2 K.B. 853.

70 Ibid., p. 860.

71 [1921] 2 K.B. 344.

of any threat or violence offered by them to any person although a neighbour stated that he was too afraid of the crowd to ask it to desist from their activity. It was held that all the elements of riot, including the execution of the common purpose, were satisfied. And this element was "clearly satisfied" in Munday v. Metropolitan Police District Receiver[72] where a group of about 40 or 50 persons who were part of a larger crowd, turned away from a football ground because it was full, invaded the garden of a neighbouring house and climbed by ladders on to the garage roof. The plaintiff's gardener was knocked down and, when trying to recover the ladder, he was struck and threatened. Others were frightened and the property was damaged. It will be apparent that, with the possible exception of Field's case, there has been little argument in the reported cases as to whether or not the element of inception and execution of the common purpose has been satisfied.

(d) An intent to help one another by force if necessary against any person who may oppose them in the execution of their common purpose

2.30 This element was presumably derived from Hawkins. It was not a matter which was mentioned in the English draft Code of 1879 nor in Macaulay's Indian Penal Code of 1860.[73] It may be that it signifies nothing more than evidence of the necessary force or violence being used by the rioters.[74] Moreover, the relationship between the necessary intent and the mens rea required for the commission of the offence is uncertain. We have found no judicial comment on this element save that, in Field's case, it was found wanting.

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72 [1949] 1 All E.R. 337, 338.

73 See Appendix B, paras. 2 and 11 where the relevant parts of these codes are set out.

74 Brownlie, op. cit., pp.132-133. But note the comment on this aspect in para. 2.27, above.

(e) Force or violence displayed in such a manner as to alarm at least one person of reasonable firmness and courage

2.31 This element was also found wanting in Field's case. The Divisional Court held that, since there was no reason to suppose that the youths would have resisted if the caretaker had come out earlier and no evidence of anyone being alarmed by the youths, and since their conduct was not such as would be calculated to alarm persons of reasonable firmness and courage, there was no riot.

2.32 Consideration of this element of riot raises a number of questions. It was decided in 1842 that it is sufficient if one person is put in fear.[75] But later cases indicate that the prosecution do not have to prove that a bystander was actually put in fear; it is sufficient if the violence is such that a bystander of reasonable firmness and courage would have been put in fear.[76] But does the prosecution have to prove that there actually was a bystander present who, assuming him to be of reasonable firmness and courage, would have been put in fear? There are so few authorities that this question cannot, we think, be answered with even a reasonable degree of certainty. In Kamara v. D.P.P.[77] Lord Hailsham indicated that what was

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75 R. v. Langford (1842) Car. & M. 602; 174 E.R. 653. In that case five persons were indicted for riot for ejecting an old man from a cottage and then demolishing it. The conviction was upheld because such force was used as was sufficient to terrify the old man. It is clear from the judgment in Field that Phillimore J. derived his fifth element largely from this case.

76 J.W. Dwyer Ltd. v. Metropolitan Police District Receiver [1967] 2 Q.B. 970, 978 per Lyell J. and Devlin v. Armstrong [1971] N.I.L.R. 13, 38 per Lord MacDermott L.C.J. See also R. v. Sharp and Johnson [1957] 1 Q.B. 552, 560 per Lord Goddard C.J.

77 [1974] A.C. 104, 115-116. The relevant passage is set out in para. 2.52, below.

relevant was the presence of members of the public "or the likelihood of it" but this matter was not in issue in the appeal and the above view cannot be taken to be a concluded view on the subject. As we have seen, the same question arises in relation to affray and remains open for final decision.[78]

2.33 Does "force or violence" include threats of violence? In R. v. Sharp and Johnson[79] Lord Goddard said that three men who enter a shop and who "forcibly or by threats" steal goods would be committing the offence of riot. It is clear that if some persons were using actual physical violence and others were assisting their purpose by uttering threats, the latter might be participating in the riot[80] but we know of no case in which riot has been held to have taken place in which the only conduct of the alleged rioters consisted of the uttering of violent threats.

3. Place of commission

2.34 A riot can take place anywhere on public or private property, and even on enclosed premises.[81]

4. Participation

2.35 "Any person who actively encourages or promotes an unlawful assembly or riot, whether by words, by signs or by

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78 See para. 2.11, above.

79 [1957] 1 Q.B. 552.

80 See on this subject para. 2.35, below.

81 See e.g. Pitchers v. Surrey County Council [1923] 2 K.B. 57 (a military camp); J.W. Dwyer Ltd. v. Metropolitan Police District Receiver [1967] 2 Q.B. 970 (robbery in a shop); and see Lord Hailsham in Kamara v. Director of Public Prosecutions [1974] A.C. 104, 116.

actions, or who participates in it, is guilty of an offence which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose".[82] Mere presence on the scene of a riot is not sufficient.[83] If a riot results from an act of incitement, the inciter is liable as a principal, even though he is not actually present when the riot occurs.[84]

5. Alternative verdicts

2.36 It is open to a jury to convict of unlawful assembly or rout, if they acquit on a charge of riot.[85]

6. Defences

2.37 These include self-defence and the use of "such force as is reasonable in the circumstances" in suppressing a riot.[86] At common law police officers may use force to suppress a riot, and if so requested, citizens are obliged to assist the police in this.[87] In addition, a citizen has the right to take reasonable steps to make a person refrain

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82 R. v. Caird and others (1970) 54 Cr. App. R. 499, 505 per Sachs L.J. (C.A.) (the Garden House Hotel riot in Cambridge).

83 R. v. Atkinson (1869) 11 Cox C.C. 330.

84 R. v. Sharpe (1848) 3 Cox C.C. 288. Wilde C.J. said that it was for the jury to determine whether the riot which took place was so connected with the inflammatory language used by the defendant, that they could not reasonably be separated by time or other circumstances; and see Accessories and Abettors Act 1861, s.8.

85 R. v. O'Brien (1911) 6 Cr. App. R. 108; R. v. Caird (1970) 54 Cr. App. R. 499, 503-504.

86 Criminal Law Act 1967, s.3; see para. 2.17, above.

87 See R. v. Fursey (1833) 3 St. Tr. N.S. 543; R. v. Brown (1841) Car. and M. 314, 174 E.R. 522; R. v. Sherlock (1866) L.R. 1 C.C.R. 20.

from breaching or threatening to breach the peace if this is done in his presence.[88]

7. No requirement of consent

2.38 The position here is the same as for affray: there is no requirement of D.P.P. consent to institution of proceedings, although in practice cases of riot are often reported to him by chief officers of police.[89]

8. Mode of trial and penalty

2.39 Riot is an offence triable only on indictment, the maximum penalty for which is a fine and imprisonment at the discretion of the court. Some examples of penalties imposed may be given. For taking part in the riot at the Garden House Hotel, Cambridge, the heaviest penalty imposed was 18 months' imprisonment. The Court of Appeal made a number of observations on the necessity for severe sentences for such offences, in particular when the offenders join in an attempt to overpower police performing protective duties.[90] More lenient sentences were passed on those convicted of riot arising out of the demonstrations in 1968 in Grosvenor Square, London.[91]

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88 Albert v. Lavin [1981] 3 W.L.R. 955 (H.L.); see para. 6.22, below.

89 See para. 2.18, above. As to some of the factors which the D.P.P. takes into account when deciding whether or not to prosecute for riot, see the report of an interview with the D.P.P., The Times, 11 May 1981, p.14.

90 R. v. Caird and others (1970) 54 Cr. App. R. 499, 511. For one example of a severe sentence, see R. v. Los, Daily Telegraph, 21 October 1981, where an 18 year old man received 3 years' imprisonment at Nottingham Crown Court for incitement to riot, after posting leaflets headed "Burn Babylon Burn", urging people to have bigger and better riots and to destroy the system. And see Appendix A.

91 The Times, 10 December 1968 (Central Criminal Court).

2.40 It may at first sight appear paradoxical that, although riot is often perceived as a more serious offence than affray, the range of sentences imposed for those found guilty of riot in the particular instances cited has been lower than for those found guilty of affray. It must, however, be borne in mind that those receiving long sentences for affray are usually men with previous convictions for serious violence. On the other hand, those convicted in the cases referred to above were in many instances of previous good character. In any statutory restatement of the offence of riot, it will be important to bear in mind that the most serious forms of riot could well be incited and carried out by individuals with gravely criminal intention, and that an appropriate maximum penalty will be required.

D. Rout

2.41 Rout is a disturbance of the peace by three or more persons who assemble together with an intention to do something which, if executed, will amount to riot and who actually make a move towards the execution of their common purpose, but do not complete it.[92] Thus it agrees in all particulars with a riot except that it may be complete without the execution of the intended enterprise. Archbold states that indictments for the offence are not now drawn, as the jury can convict of rout on an indictment for riot if the complete riot is not proved.[93]

2.42 The offence of rout is punishable by fine or imprisonment at the discretion of the court.

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92 Redford v. Birley (1822) 1 St. Tr. (N.S.) 1071, 1211, 1214, and see Russell on Crime (12th ed., 1964), Vol. 1, p. 255.

93 (40th ed., 1979), para. 3581, citing R. v. O'Brien (1911) 6 Cr. App. R. 108.

E. Unlawful Assembly

1. Definitions

2.43 Four hundred years ago, Lambard writing in the first edition of his Eirenarcha[94] said:

> " Concerning the proper difference that is between each of these three [i.e. riot, unlawful assembly and rout] all men do not thoroughly agree. "

Since then, judges and commentators have found difficulty in agreeing on the scope, and therefore on a definition, of the common law offence of unlawful assembly. The attempts at a definition can be divided roughly into four groups.

(a) The "incipient riot" theory

2.44 A commonly held view is that an unlawful assembly is a preparation of riot which wants but execution. Indeed this was the opinion which Lambard followed, being in his words the "most colourable and most commonly received at this day". Thus he defined an unlawful assembly quite simply as "a company of three persons (or more) gathered together to do such an unlawful act, although they do it not in deed".[95] And in recent times Lord Hailsham in Kamara v. D.P.P.[96], citing Russell on Crime[97], said that an unlawful assembly is "only an inchoate riot". It was also the approach which the Criminal Law Commissioners commented on in 1840:[98]

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94 (1581), c. 19, p. 175.

95 Ibid.

96 [1974] A.C. 104, 116.

97 (12th ed. 1964), vol. 1, p. 256. Coke also speaks of an unlawful assembly as being when three or more assemble themselves together to commit a riot or rout and do not do it: 3 Institutes, p.176.

98 242 Parl. Papers (Reports 1840), Vol. 20, p. 1.

" It appears to us that the division of the subject matter of these offences into three distinct degrees, as riots, routs and unlawful assemblies, is unnecessary and inconvenient. To constitute a riot, there must be a joint design which must be executed, or at least some act must be done in part execution of it; the character of a rout is complete as soon as some act has been done, moving towards the execution of the joint design; and it is an unlawful assembly where three or more persons meet together for any unlawful purpose, or intending to execute any purpose with force, and with such circumstances as tend to excite alarm, but do no act moving toward its execution. There is, no doubt, an obvious distinction between these three degrees of criminality; but the point of the offence in all is the unlawful assembly ... it seems to be a simpler and more intelligible principle of arrangement to consider the unlawful assembly as the groundwork of the offence and the part execution of the joint design or the motion towards it as aggravations. "

2.45 In opposition to this theory it must be said that Brownlie regards it as "analytically unsound":[99]

" In many circumstances it may be [a sound approach, but] the participants in an assembly may have a mens rea quite inappropriate to an incipient riot and yet there may be a sufficient apprehension of a breach of the peace resulting. Certainly there is some relation between riot and unlawful assembly in terms of a tendency to cause fear to the ordinary citizen. However, the logical restrictions of the 'incipient riot' theory must be avoided. In any case", [referring to Holdsworth,][100] "the theory is historically rather weak. "

(b) Hawkins

2.46 Hawkins, for reasons different from those given by Brownlie, regarded the incipient riot theory as producing too narrow a definition of an unlawful assembly. He added to it the following :

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99 M. Supperstone, Brownlie's Law of Public Order and National Security (2nd ed., 1981), pp. 122-123.

100 A History of English Law, Vol. VIII, pp. 325-326.

" For any meeting whatever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace and raise fears and jealousies among the king's subjects, seems properly to be called an unlawful assembly, as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult together concerning most proper means for the recovery of their interests; for no man can foresee what may be the event of such an assembly. "[101]

The editors of Archbold, until fairly recently following Hawkins' wide definition, defined unlawful assembly as:

" an assembly of three or more persons

(a) for purposes forbidden by law, such as that of committing a crime by open force; or

(b) with intent to carry out any common purpose, lawful or unlawful, in such a manner as to endanger the public peace, or to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace in consequence of it. "[102] (emphasis added)

As Brownlie pointed out in 1968,[103] the first limb of this definition "extends to any assembly to further an unlawful purpose and lacks the element of causing apprehension of a breach of the peace", on which he says the cases since 1830 have placed increasing emphasis.

(c) Smith and Hogan

2.47 The definition of Smith and Hogan[104] is similar to the definitions put forward by the present editors of

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101 Pleas of the Crown (7th ed., 1785), Vol. 1, c.65, s.9.

102 (36th ed., 1966), para. 3571.

103 The Law Relating to Public Order (1968), p.38. The second edition notes the change in definition given in the current edition of Archbold: op. cit., p. 120 and see para. 2.48, below.

104 Criminal Law (4th ed., 1978), p. 750.

Archbold[105], by D.G.T. Williams[106] and by S.A. de Smith:[107]

> "(1) An assembly of three or more persons;
>
> (2) A common purpose (a) to commit a crime of violence or (b) to achieve some other object, whether lawful or not, in such a way as to cause reasonable men to apprehend a breach of the peace."

This definition is distinguishable from that of Hawkins and the one put forward in earlier editions of Archbold, in that the first limb is limited to a common purpose to commit a crime of violence, as opposed to any purpose forbidden by law: for example, an assembly of three or more meeting to discuss a fraud (not being a crime of violence) would not be an unlawful assembly.[108] But in so far as this definition covers an assembly to discuss the commission of a crime of violence in the future, so that there is no present tendency to a breach of the peace, Brownlie would still regard it as too wide in scope.[109]

(d) Brownlie

2.48 Finally, therefore, there is Brownlie's definition:

> "the actus reus requires an assembling of three or more in such a manner as to give persons of ordinary firmness reasonable grounds to fear a breach of the peace."[110]

As to the mens rea, he states that:

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105 (40th ed., 1979), para. 3571.

106 Keeping the Peace (1967), p. 236.

107 Constitutional and Administrative Law (4th ed., 1981), p. 501.

108 It may well be indictable as a conspiracy.

109 Brownlie, op. cit., p. 122.

110 Ibid., p. 123.

> " it must be proved that [the defendant] intended to use or to abet the use of violence; or to do or abet acts which he knows to be likely to cause a breach of the peace. "[111]

Although this definition is clearly narrower than the last two mentioned, for the reasons already stated it is wider than the definition based on the "incipient riot" theory.[112]

2.49 That these differing definitions may be of no mere academic interest is illustrated by the recent case of R. v. Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board,[113] where members of the Court of Appeal displayed a difference of emphasis in their assessment of the authorities upon what constitutes an unlawful assembly. Lord Denning M.R. remarked that -

> " the old authorities, going back to Coke, Blackstone, Stephen and Archbold, all say that an unlawful assembly is an assembly of three or more persons with intent to commit a crime by open force. I think this case comes within that statement and I think it is still the law. "[114]

On the other hand, Lawton L.J. said that -

> " if the obstructors are three or more in number and by conduct show an intention to use violence to achieve their aims or otherwise behave in a tumultuous manner ... those present and forming part of the gathering will be committing the offence of unlawful assembly ... Comments in Coke's Institutes ... and in Blackstone's Commentaries ... which seem to show that an unlawful assembly can occur without the factor of either violence or tumult do not accurately state the modern law. "[115]

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111 Ibid., citing Smith and Hogan, Criminal Law (4th ed., 1978), pp. 752-753.

112 See para. 2.45, above.

113 [1981] 3 W.L.R. 967.

114 Ibid., at p. 976.

115 Ibid., at p. 978.

2.50 Accepting that the authorities give rise to some areas of doubt, we now examine the ingredients of the offence and consider them on the basis of the small number of reported cases.[116]

2. The prohibited conduct (actus reus)

(a) Three or more persons

2.51 This is the same requirement as for rout and riot.[117]

(b) On public or private property

2.52 It is clear that an unlawful assembly may take place anywhere, whether on public or private property.[118] In Kamara v. D.P.P.[119] a group of students entered the premises of the Sierra Leone High Commission in London. They purported to arrest the caretaker, threatened another and locked a number of staff in a room having physically held or pushed a number of them. The police intervened and eventually brought the demonstration to a halt without having to resort to force. Apart from the issue of conspiracy to trespass which was the main point of law argued in the appeal to the House of Lords, the appellants also argued that for unlawful assembly it was necessary to show that fear was engendered in persons beyond the bounds of a building. They had sought to rely on case law in which unlawful assembly was defined by judicial authority

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116 In none of the recent cases have the basic elements of the offence been in issue: see e.g. R. v. Caird (1970) 54 Cr. App. R. 499, 504 (C.A.); R. v. Jones (1974) 59 Cr. App. R. 120, 127 (C.A.); Kamara v. D.P.P. [1974] A.C. 104, 115-116.

117 See paras. 2.24 and 2.41, above.

118 And it may continue even on a moving vehicle: see R. v. Jones (1974) 59 Cr. App. R. 120 (C.A.), para. 2.13, above and para. 2.56, below (the Shrewsbury flying pickets case).

119 [1974] A.C. 104.

in terms of phrases such as "terror and alarm of the neighbourhood".[120] However, Lord Hailsham, agreeing with the Court of Appeal, rejected this argument saying that in the context neighbourhood meant simply "those nearby". Having noted that Hawkins did not use the expression "neighbourhood", he continued:[121]

> " I consider that the public peace is in question when either an affray or a riot or unlawful assembly takes place in the presence of innocent third parties ... in my view [unlawful assembly] is analogous to affray in that (1) it need not be in a public place and (2) that the essential requisite in both is the presence or likely presence of innocent third parties,[122] members of the public not participating in the illegal activities in question. It is their presence, or the likelihood of it, and the danger to their security in each case which constitutes the threat to public peace and the public element necessary to the commission of each offence. "

(c) Being or coming together causing apprehension of a breach of the peace

2.53 The assembling of three or more persons with the necessary intent[123] in a way which causes or gives firm and courageous persons reasonable grounds to fear a breach of the peace makes them guilty of the offence of unlawful assembly.[124] The meeting (procession or demonstration as the

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120 R. v. Stephens (1839) 3 St.Tr. N.S. 1190, 1234 per Patteson J; R. v. Vincent (1839) 9 Car. & P. 91, 109 per Alderson B.

121 Ibid., pp. 115-116.

122 Smith and Hogan point out that Lord Hailsham referred to "innocent third parties" in the plural, but argue that, as for riot and affray, one innocent person is enough: Criminal Law (4th ed., 1978), p. 751.

123 See paras. 2.57 et seq., below.

124 R. v. Vincent (1839) 9 Car. & P. 91, 109 per Alderson B; R. v. Stephens (1839) 3 St.Tr. N.S. 1189, 1234 per Patteson J; R. v. Neale (1839) 9 Car. & P. 431, 435 per Littledale J; R. v. Cunninghame Graham and Burns (1888) 16 Cox C.C. 420, 434 per Charles J.

case may be) may be lawful at the start, but -

> " the moment when persons in a crowd, however peaceful their original intention, commence to act for some shared common purpose supporting each other and in such a way that reasonable citizens fear a breach of the peace, the assembly becomes unlawful. In particular that applies when those concerned attempt to trespass, or to interrupt or disrupt an occasion where others are peacefully and lawfully enjoying themselves, or show preparedness to use force to achieve the common purpose".[125]

2.54 The precise moment at which a lawful assembly becomes an unlawful assembly is very difficult in practice to define. This uncertainty has often been recognised. Thus the Home Secretary told the House of Commons in 1890:[126]

> " It is the duty not only of magistrates, but of every subject of the Queen, to prevent an unlawful assembly from taking place, if he can; but it is not always very easy to determine at what point an assembly previously lawful becomes an unlawful assembly. There are moments of excitement which, in some circumstances, may be overlooked, but the border line of danger to the peace is not always easy to discover, even by a calm and impartial onlooker. "

2.55 The jury must take all the circumstances into account including the language used, the attitude and size of the crowd, the nature of the group organising the event, whether it has been organised and so on.[127] It is not enough merely that a foolish or timid person would be alarmed. The question is whether "firm and rational men

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125 R. v. Caird and others (1970) 54 Cr. App. R. 499, 504-505 (C.A.).

126 Hansard (H.C.), 24 June 1890, vol. 345, cols. 1814-1815 (Mr. Matthews).

127 R. v. Hunt (1820) 1 St. Tr. N.S. 171.

having their families and property there would have reasonable ground to fear a breach of the peace".[128]

2.56 An unlawful assembly may involve a number of acts at various places. In R. v. Jones[129], for example, the defendants and others engaged during the course of one day in picketing a number of building sites in Shropshire, travelling between them by coach. Fighting and damage to property took place at the sites. The defendants were convicted on several counts including conspiracy to intimidate, unlawful assembly and affray. A single charge of unlawful assembly relating to conduct "in the county of Salop" was held on appeal not to be bad for duplicity, even though the activity involved a number of acts at various places. The ingredients of the offence continued uninterrupted throughout the expedition; having once assembled in pursuance of the unlawful intention, the accused continued to constitute an unlawful assembly so long as they remained together in pursuance of that unlawful intention.

3. The mental element (mens rea)

2.57 According to Smith and Hogan[130], "it must be proved that D intended to use or to abet the use of violence; or to do or abet acts which he knows to be likely to cause a breach of the peace ... If D is doing a lawful act, he does not intend to cause a breach of the peace merely because he knows that E will unlawfully breach the peace to impede or prevent D doing that which he may lawfully do. It may be different, however, if D's object is to provoke a breach of

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128 R. v. Vincent (1839) 9 Car. & P. 91, 109 per Alderson B.

129 (1974) 59 Cr. App. R. 120 (C.A.); cf. the position with regard to the charge of affray in that case, para. 2.13, above.

130 Criminal Law (4th ed., 1978), pp. 752-3.

the peace."

2.58 It is this aspect of unlawful assembly which has given rise to most comment and discussion, being of as much significance for constitutional as for criminal lawyers. Central to the discussions has been the case of Beatty v. Gillbanks[131], described recently by a leading writer in this field as "one of the most important decisions ever made by an English court in the search for a balance between the competing demands of public order and individual rights".[132] The question at issue is the extent to which the activities of persons seeking lawfully to exercise a right of assembly in public should be restricted because of the likelihood of opposition from others.

2.59 In Beatty v. Gillbanks[133] members of the Salvation Army marched in procession through the streets of Weston-super-Mare, knowing that they might be set upon by an opposing group, calling itself the Skeleton Army. On several occasions the Salvation Army had come into collision with the Skeleton Army which had led to stone throwing, free fights and uproar to the terror and alarm of the town's peaceful inhabitants. The local justices purported to ban further processions by the Salvation Army. Despite this, on the Sunday following the ban, the Salvationists formed into a procession and passed through the town, gathering as it went a "tumultuous and shouting mob". A police officer called on the leader to desist, but he refused and was promptly arrested. On a complaint against three of the

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131 (1882) 9 Q.B.D. 308. For a fuller report of this case see 15 Cox C.C. 138.

132 D.G.T. Williams, "The Law and Public Protest" in Cambridge - Tilburg Law Lectures: First Series (1978), p. 27.

133 (1882) 9 Q.B.D. 308.

leaders of the Salvation Army alleging unlawful assembly[134], the defendants were bound over by the local justices to keep the peace and be of good behaviour. But on appeal by way of case stated, the Divisional Court quashed the order, holding that the Salvationists could not legitimately be bound over.

2.60 The Court referred to the principle that a man must be taken to intend the natural consequences of his own acts and said that the justices would have been right in binding the appellants over if the disturbance had been a natural consequence of acts of the appellants.[135] After citing Hawkins' definition of an unlawful assembly,[136] Field J. said:

> " What has happened here is that an unlawful organization [the Skeleton Army] has assumed to itself the right to prevent the appellants and others from lawfully assembling together, and the finding of the justices amounts to this, that a man may be convicted for doing a lawful act if he knows that his doing it may cause another to do an unlawful act. There is no authority for such a proposition... "[137]

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134 The magistrates had no jurisdiction to try a charge of unlawful assembly but the case has nonetheless generally been treated as an authority on the common law offence.

135 Ibid., p.314.

136 See para. 2.46, above.

137 Ibid., p.314. Cave J. concurred (see 15 Cox C.C. 138, 147-8), adding: "The meeting or assembly of the Salvation Army was for a purpose not unlawful. Was there an intention on their part to use violence? If, though their meeting was in itself lawful, they intended, if opposed, to meet force by force, that would render their meeting an unlawful assembly; but it does not appear that they entertained any such intention."

As Dicey subsequently wrote:

> " A's right to do a lawful act, namely, walk down the High Street, cannot be diminished by X's threat to do an unlawful act, namely, to knock A down. This is the principle established, or rather illustrated, by the case of Beatty v. Gillbanks".[138]

2.61 While the decision in Beatty v. Gillbanks has sometimes been criticised on its facts,[139] the principle of the decision as stated by Field J. has since been observed and followed in a number of cases.[140] There are, however, several other cases which are sometimes cited as conflicting with Beatty v. Gillbanks. Of these, the leading case is Wise v. Dunning.[141] The appellant was a Protestant lecturer,

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138 A.V. Dicey, An Introduction to the Study of the Law of the Constitution (10th ed., 1959) ed. E.C.S. Wade, p. 274.

139 See e.g. Glanville Williams, "Arrest for Breach of the Peace" [1954] Crim. L.R. 578, 581: "it may be doubted whether the court paid adequate attention to what the Salvation Army itself was doing. According to the special case, the Salvationists were a terror to churchgoers, and used to fight and force their way through the streets". See also R. v. Londonderry Justices (1891) 28 C.R. Ir.440, 461 per Holmes J. and O'Kelly v. Harvey (1883) 15 Cox C.C. 435, 446 per Law L.C.

140 See e.g. M'Clenaghan v. Waters, The Times, 18 July 1882 (D.C.); Beaty v. Glenister (1884) 51 L.T. 304, (D.C.); R. v. Londonderry Justices (1891) 28 C.R. Ir.440 per Holmes J.; R. v. Clarkson (1892) 17 Cox C.C. 483 (C.C.R.). For an analysis of the present standing of Beatty v. Gillbanks in relation to the law of public order in general and its application by the police in practice, see D.G.T. Williams, "The Law and Public Protest" loc. cit (n. 132, above), pp. 27 et seq.

141 [1902] 1 K.B. 167. See also Duncan v. Jones [1936] 1 K.B. 218, in which Lord Hewart C.J. described Beatty v. Gillbanks as a "somewhat unsatisfactory case".

who described himself as a 'crusader'. He had held meetings on many occasions in public places in Liverpool, causing large crowds to assemble and obstruct the highways. In addressing the meetings he used gestures and language which were highly insulting to the faith of the Roman Catholics who formed a large proportion of the inhabitants of the city. Both his opponents and his supporters committed breaches of the peace, though he himself did not, nor had he incited others to do so in terms. It was held that the defendant had been properly bound over to keep the peace and be of good behaviour.

2.62 Wise v. Dunning was concerned primarily with the propriety of a binding over order in the context of preventive justice. The appellant had not actually been charged with the offence of unlawful assembly, although few seem to doubt that Wise and his supporters would have been properly convicted of unlawful assembly if they had been so charged.[142] Probably this case is best distinguishable from Beatty v. Gillbanks on its facts. As Darling J. said, "the whole question is one of fact and evidence".[143] It is clear that the appellant Wise had himself, in the words of Alverstone L.C.J. "used, with respect to a large body of persons of a different religion, language which the magistrate has found to be of a most insulting character, and that the appellant challenged any one of them to get up and deny his statements".[144] Furthermore, the Court considered as having "a very important bearing on this case" the fact that a local Act made it an offence for any person

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142 See e.g. Brownlie's Law of Public Order and National Security (2nd ed., 1981), p. 125; de Smith, Constitutional and Administrative Law (4th ed., 1981), p. 502; Smith and Hogan, Criminal Law (4th ed., 1978), p. 754.

143 [1902] 1 K.B. 167, 179.

144 Ibid., p. 176.

to use threatening abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned.[145] This, it has been presumed, provided a justification for the binding over order on the basis of an actual or an apprehended crime. In Beatty v. Gillbanks, on the other hand, "the Salvation Army could scarcely have been accused of being deliberately insulting; the insult, if any, in their activities lay in the eye and mind of the beholder".[146]

2.63 In the Irish case O'Kelly v. Harvey[147] a magistrate, who attempted to disperse a meeting to be addressed by Parnell, which was likely to be forcibly broken up by Orangemen, was held not to have committed any assault. The Court of Appeal distinguished Beatty v. Gillbanks, on the grounds that the magistrates' paramount duty was to preserve the peace even if, as the court assumed, the meeting concerned was not unlawful. The Court also disagreed with the application of the law to the facts in Beatty's case. Brownlie comments that "O'Kelly v. Harvey, the apparent seat of opposition to Beatty v. Gillbanks, is by no means inimical to it as a matter of principle. The Irish Court was justified in distinguishing the issues".[148]

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145 Ibid. The relevant words of the local Act were the same as those of the Public Order Act 1936, s.5, as to which, see paras. 7.19-7.22, below.

146 D.G.T. Williams, Keeping the Peace (1967), 107. Cf. Glanville Williams, loc. cit. (n. 139, above).

147 (1883) 15 Cox C.C. 435. This case has been followed and approved in Goodall v. Te Kooti (1890) 9 N.Z.L.R. 26; Coyne v. Tweedy [1898] 2 I.R. 167, at 192; R. v. Patterson [1931] 3 D.L.R. 267. Of this last decision Brownlie comments: "[this is] probably the only decision which disagrees in principle with Beatty v. Gillbanks in the context of a conviction for unlawful assembly ... The case was, however, decided on the interpretation of the precise words of s.87 of the Canadian Criminal Code": op. cit., p.128.

148 Op. cit., p.130.

4. Participation

2.64 "Any person who actively encourages or promotes an unlawful assembly or riot, whether by words, by signs or by actions, or who participates in it, is guilty of an offence which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose".[149] Those who are present by merest accident or curiosity, without taking a part in the proceedings, are not guilty of the offence even though they possess the power of stopping the assembly and fail to exercise it.[150] Presence may give rise to a presumption of fact and may be evidence of encouragement.[151]

5. Mode of trial and penalty

2.65 Unlawful assembly is an offence triable only on indictment. The maximum penalty is a fine and imprisonment at the discretion of the court. Few of those convicted of unlawful assembly receive penalties longer than twelve months' imprisonment.[152]

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149 R. v. Caird and others (1970) 54 Cr. App. R. 499, 505 per Sachs L.J. (C.A.).

150 R. v. Rankin (1848) 7 St. Tr. N.S. 711; R. v. Atkinson (1869) 11 Cox C.C. 330.

151 R. v. Coney (1882) 8 Q.B.D. 534 (C.C.R.). This was a case of "prize-fighting", which is by its nature illegal.

152 A penalty of nine months' was imposed on three of the defendants found guilty of unlawful assembly in the Garden House riot trial: see R. v. Caird (1970) 54 Cr. App. R. 499, 500. But see the comments in para. 2.40, above.

III GENERAL CONSIDERATIONS IN OUR APPROACH TO REFORM

3.1 Conduct which is a criminal offence at common law is an offence because judges in the past have found it to be so. Under a criminal code conduct is a criminal offence because the code declares it to be so. The code must define with precision what conduct it is which is a crime. Where it is proposed to abolish a criminal offence which exists only at common law, but at the same time to enact an offence to replace it, consideration must be given to the question whether the law needs the new offence. If our examination of the present common law offences relating to public order were to reveal major shortcomings in their scope or operation, there would exist a strong case, not simply for the defining of the existing offences in a modern statutory form, but for a fundamental recasting of the offences. The case for sweeping changes would be still stronger if there were substantial evidence of public disquiet either at the very existence of the offences or at the way in which they are used.

3.2 The shortcomings of the present law and the public's perception of it are matters which must be canvassed in this Working Paper. Our present impression is that while the common law exhibits some uncertainties, none of them is of major significance. Furthermore, we are at present unaware of any substantial criticism of the broad content of the common law offences. We are aware of criticisms of certain of the matters which have to be proved in riot and, from time to time and in relation to specific cases, criticism is made of charges being brought at all. There may also be some public unease that the law appears to be ineffective in preventing outbreaks of public disorder but, as the Scarman Report shows, the causes of a riot may be very complex and uncertain. However, there seems to be general acceptance that offences which

carry a heavy maximum penalty may be required for some persons concerned in the most serious disturbances to public order;[1] the heavy penalty may, in particular, be required for those who do not themselves commit any act of disorder but who incite others to do so. The activities of such persons could be a real threat to the very society in which we live. Furthermore, in this context we note Lord Scarman's conclusion that the existing law, while in need of a "modern restatement," is not inadequate "either in the powers of arrest which it confers or in the number and nature of the offences available for prosecution".[2] Finally, the area of the law with which we are here concerned - disturbances to public order - is closely connected with the exercise of fundamental liberties of the subject. In such an area it is necessary to move with great caution.

3.3 Thus we consider that our task is more in the nature of a restatement in a modern statutory form of the present common law than a radical restructuring such as would be required if the existing law contained fundamental defects. This makes our task easier in that many of the concepts which we shall be considering are well understood through their development over a long period of time. It will, however, be necessary for us to examine how far all the existing concepts should be retained in the proposed new statutory offences and, if retained, the degree to which they should be refined and explained for the purpose of legislation. Many of the authorities in this field are old and the common law offences which we are considering are entirely undefined by any statute. Words used by judges in charging a jury or in an appellate

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1 The Public Order Act 1936, s.5 will continue to be available for minor disturbances; see para. 4.5, below.

2 See para. 1.7, above.

court were never intended to be read as if they were words of exact definition in a statute. Moreover, in several of the cases the relevant statements of the law were made in relation to matters not actually in issue and on which there had been no argument. Caution is therefore necessary in translating concepts developed solely through the medium of judicial decision into words of precise definition suitable for modern legislation.

3.4 We invite comments upon the approach which we have adopted. In particular, we welcome the views of others upon the question whether there is, contrary to our provisional view, a need for any radical restructuring of the law in the field of the common law offences against public order, and if so, what form such a restructuring might take.

IV AFFRAY

4.1 We now examine the need for an offence of affray and make provisional proposals for replacement of the common law.

A. Is there a need to retain a separate offence of affray?

4.2 It may seem surprising that we have troubled to raise the question of "need" in relation to an offence which now finds a well-established place in the criminal law.[1] There are, however, two reasons for doing so: the first is that, for many years until 1957,[2] the offence

1 As the statistics show (see Appendix A) the level of prosecutions has resulted in around 1000 convictions for the offence in each of the last few years.

2 R. v. Sharp and Johnson [1957] 1 Q.B. 552: see para. 2.5, above.

appears to have been ignored as obsolete, yet there can be little doubt that serious fighting occurred before then, and presumably it did not go unpunished. This might suggest that other offences in the field of public order and offences against the person were considered to be adequate then and might equally well be considered adequate now.[3] The second reason is that a detailed examination of the need for the offence assists in determining how the elements of any possible replacement are to be defined.

4.3 The common law offence of affray is typically charged in cases of pitched street battles between rival gangs, spontaneous fights in public houses, clubs and at seaside resorts, and revenge attacks on individuals. The offence is apparently rarely resorted to in the context of demonstrations or protests where disorder has broken out,[4] although there is nothing in law to prevent a charge of affray being brought where serious fighting is involved in those circumstances.

4.4 Affray is commonly charged on its own, but it is often accompanied by charges of one or more other offences triable on indictment. The more important of these are set out in the following table together with the appropriate maximum penalties.

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3 Some other common law jurisdictions still have no offence of affray: see Appendix B.

4 D.G.T. Williams, "Protest and Public Order" [1970] C.L.J. 96, 102.

TABLE OF OFFENCES[5] COMMONLY ACCOMPANYING CHARGES OF AFFRAY		
Offence	Statute	Maximum Penalty
Murder	(Common law)	Life (mandatory)
Manslaughter	(Common law)	Life
Unlawful wounding/ causing grievous bodily harm with intent to do some g.b.h.	Offences against the Person Act 1861, s.18	Life
Unlawful wounding/ inflicting grievous bodily harm	Offences against the Person Act 1861, s.20	5 years
Assault occasioning actual bodily harm	Offences against the Person Act 1861, s.47	5 years
Common assault	(Common law)	1 year[6]
Possession of offensive weapons	Prevention of Crime Act 1953, s.1	2 years[7]

5 It should be noted that all the offences listed with the exception of the last were recently the subject of a review by the Criminal Law Revision Committee: see Fourteenth Report, Offences Against the Person (1980), Cmnd. 7844. Implementation of the Report would not affect the arguments adopted in relation to offences against the person at para. 4.6, below.

6 This offence is also triable summarily with a maximum penalty of six months' imprisonment or a fine of £1,000 or both.

7 This offence is also triable summarily with a maximum penalty of three months' imprisonment or a fine of £1,000 or both.

4.5 All the offences listed above may also be charged as alternatives to affray, depending of course on the particular facts and the evidence available to the prosecution in each case. As regards offences which are triable only in magistrates' courts, the most important is section 5 of the Public Order Act 1936 which, broadly speaking, prohibits threatening, abusive or insulting words or behaviour in a public place or at a public meeting which are likely to lead to a breach of the peace. The maximum penalty for this offence is six months' imprisonment or a fine of £1,000 or both. However, the courts regard affray and section 5 as covering conduct at opposite ends of the spectrum.[8] Thus, in a recent case of affray[9] involving a fight between a small number of persons outside a public house, the Court of Appeal said that the incident was all too common but one with which magistrates were capable of dealing. The Court said that prosecutors should think hard before charging affray, "which should be reserved for serious cases which were not far short of a riot".

4.6 The range of offences other than affray for dealing with unlawful fighting is considerable, and this is one reason which prompted the appellants in each of the two leading cases on affray to argue that there can be no case of affray which, if properly analysed, does not involve the

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8 In R. v. Oakwell [1978] 1 W.L.R. 32, the Court of Appeal held that on a charge of using threatening behaviour under the Public Order Act 1936, s.5, the fact that the defendant was actually fighting and could have been charged with affray did not preclude a charge under s.5 if there was evidence of such threats. And see R. v. Gedge, The Times, 16 November 1977.

9 R. v. Crimlis [1976] Crim. L.R. 693.

commission of some other offence.[10] The very act of fighting must, it was said, involve an assault. Nevertheless, abolition of affray without replacement would in our view leave a significant gap in the law. The fundamental reason for this is that affray is designed to deal with a type of conduct in which, by contrast with offences against the person, both the identity of the victim and the extent of his injury are immaterial. Such factors are highly relevant, for example, in cases of assault, where proof that a particular person was assaulted is necessary before a charge can be brought; and they are relevant in more serious offences against the person, such as causing grievous bodily harm, where the fact that an identifiable victim has suffered a particular degree of injury is material to the formulation of the charge. But while the fact that serious injuries are inflicted in the course of an affray may affect the general level of sentences imposed, it is not necessary to show that the particular defendant inflicted those particular injuries on a particular victim. The essence of affray lies rather in the fact that the defendant participates in fighting or other acts of violence inflicted on others of such a character as to cause alarm to the public: it is essentially an offence against public order. So important is this distinction that it could well be maintained that, in the absence of the offence of affray, the general approach of offences against the person, requiring the identification of victims and their degree of injury, would itself require reconsideration.

4.7 Arising out of this distinction between affray and offences against the person, the approach required of

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10 See Button v. D.P.P. [1966] A.C. 591, 622 and Taylor v. D.P.P. [1973] A.C. 964, 979 and 981.

the prosecution is different. From its point of view, the most significant advantage which attaches to affray as against any of the specific offences against the person is that there are fewer problems of evidence. It is a common feature of all offences against the person, the gravity of which depends both on the extent of the injuries caused and the accompanying intention, that the prosecution must prove that the defendant committed the prohibited act in relation to another particular person. In a fight involving a number of participants this may not always be easy, although there may be abundant evidence as to the nature of the event in which the defendant was engaged. The Solicitor General submitted in Button v. D.P.P.[11] that:

> "if each one [of the participants] were charged with an assault, there might be great confusion and difficulties as to evidence and as to what injuries were inflicted by which person. Then the appropriate course is to charge an affray."

The House of Lords clearly accepted the force of this submission, and endorsed the view that affray was for this reason a useful part of the criminal law in modern times.[12] We would only add that, although the problems of evidence may be fewer in these cases, there must still be evidence to prove participation in the fighting. Mere presence on the scene of a fight will never be sufficient on its own to constitute the offence or even a charge of complicity in the offence.[13]

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11 [1966] A.C. 591, 620.

12 Ibid., at p. 628. See also Taylor v. D.P.P. [1973] A.C. 964.

13 See para. 2.15, above.

4.8 Another distinction between affray and assault is that, since the maximum penalty is at large, the court has a wide discretion in sentencing. Common assault carries a maximum penalty on indictment of only one year's imprisonment, while, as we have seen,[14] sentences for affray range up to eight years in the most serious cases. This does not mean that the statutory maximum penalty for assault may be circumvented by a charge of affray. As we have seen, the essence of affray lies in the serious nature of the activity in which the defendant takes part, rather than in the consequences of any particular blow; and it is only in the most serious cases of fighting that it will be appropriate to impose long terms of imprisonment.[15]

4.9 These considerations convince us that the case for retaining an offence of affray is a strong one and that its abolition without replacement would remove an important weapon for dealing with cases of very serious fighting involving several participants. We have indicated that this was the view taken by the House of Lords in Button[16] and later confirmed in Taylor.[17] While there has been some criticism of the way in which the courts, in particular the House of Lords, seem to have widened the criminal law,[18] we are not aware of any body of

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14 See para. 2.19, above.

15 A procedural advantage of charging affray arises in fights of long duration, since affray may be charged as continuing over a period of time (see para. 2.13, above) whereas assaults would have to be charged separately in different counts: see Glanville Williams, Textbook of Criminal Law (1978), p. 170.

16 [1966] A.C. 591, 628.

17 [1973] A.C. 964, passim.

18 See e.g. D.G.T. Williams, Keeping the Peace (1967) p.248 and J.R. Spencer, [1973] C.L.J. 185 (commentary on Taylor v. D.P.P.).

opinion holding that the offence of affray should either be abolished or substantially reformed. Moreover, in 1966 a sub-committee of the Criminal Law Revision Committee, which was charged with considering the abolition or conversion into statutory offences of what were, prior to the Criminal Law Act 1967, common law misdemeanours, recommended that affray should be converted into a statutory offence with a maximum penalty of ten years' imprisonment.

4.10 Accordingly, while we provisionally propose the abolition of the common law offence of affray, we propose its replacement by a statutory offence having broadly similar elements.

B. The elements of a proposed statutory offence of affray

1. General

4.11 In defining the ingredients of the offence, we have taken into account the need to resolve the uncertainties which, as we have earlier indicated,[19] still remain in the present law, in particular whether affray is capable of encompassing a mere display of force and whether it is necessary to prove the presence of innocent bystanders in order to satisfy the element of terror. We first summarise our proposed definition of the offence.

4.12 We provisionally propose that there should be a statutory offence of affray with a maximum penalty of ten years' imprisonment and a fine, triable only on indictment. The conduct penalised would consist of fighting, or acts of violence (other than mere threats or displays of violence) inflicted by one or more persons upon another or others. A person will be guilty of affray if, without lawful excuse, he fights or inflicts such acts of violence,

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19 See paras. 2.7 and 2.10-2.12, above.

provided that his conduct, together with that of any others involved, is such as would reasonably have caused any other person, if present, to be put in fear of his personal safety. The offence would be capable of commission in a public or private place. We consider each of the elements of this offence in the following paragraphs.

2. The prohibited conduct

(a) Fighting or acts of violence inflicted by one or more persons upon another or others

4.13 By their decision in Taylor v. D.P.P.,[20] the House of Lords removed previous doubts as to the number of persons required to be "fighting" to be guilty of affray and thereby clarified the scope of the common law offence. This now requires only that one person be unlawfully fighting another;[21] there is no need for both of them to be unlawfully fighting. For example, if one of two men fighting is found by the jury to have been acting in self-defence and therefore not fighting unlawfully, the other may be convicted of affray. A new offence of affray may either adopt the present law, or restrict the law by, for example, modifying the decision in Taylor to require that either two persons be unlawfully fighting each other or two persons be taking part together in an attack against another or others.

4.14 Academic opinion supports Taylor: "if, as appears to be the case, the essence of affray is the terror which may be caused to the public, it would seem to matter little whether the offence is committed by one or by two persons".[22] Another commentator, agreeing with

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20 [1973] A.C. 964.

21 See paras. 2.5 - 2.6, above.

22 [1972] Crim. L.R. 773 (comment by Professor J.C. Smith).

this, has said that "Taylor makes practical sense. To require two persons fighting unlawfully would enable a man to answer a charge of affray by saying, 'I was not brawling with B, I attacked him' - scarcely a meritorious defence".[23] On the other hand, it may be argued that "the disturbance of the peace assumes a new dimension when more than one person is involved, as with the offences of conspiracy, riot, rout and unlawful assembly",[24] and affray properly belongs with that group of offences.

4.15 Our provisional view is that the law as decided by Taylor should not be changed. The gravity of the individual's behaviour in affray lies in his participation in the violent conduct which constitutes the affray. Thus if at the trial of several defendants on charges of affray the evidence is found insufficient to convict more than one participant, there is every reason for him alone to be found guilty of the offence. Moreover, if the offence were to require proof that two persons were unlawfully fighting, where only one was being prosecuted the prosecution would have to exclude the possibility of self-defence in the defendant and in the person assaulted by him.[25] This could in some cases lead to undue complexity in summings-up and place an impossible burden on the prosecution. We provisionally conclude that a new offence of affray should require proof only that one defendant was engaged in unlawful fighting or acts of violence.

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23 J.R. Spencer, [1973] C.L.J. 185-186.

24 Taylor v. D.P.P. [1973] A.C. 964, 969 (counsel for the appellant).

25 Where a number were being prosecuted, the prosecution would have to exclude the possibility of self-defence in the defendant and at least one co-defendant: see Taylor v. D.P.P. [1973] A.C. 964, 985-986 per Lord Hailsham.

4.16 We have described this part of the prohibited conduct as "fighting" and "acts of violence inflicted by one or more persons upon another or others". It is clear that the latter includes the former, but we have added "fighting" for the purposes of this Working Paper because it conveys the flavour of the offence even though strictly it adds little to "acts of violence". In any event we must emphasise that our words are not necessarily those which would appear in legislation but we have used them to illustrate what we have in mind. Indeed, it is precisely because of the potential width of the term "violence" that we have felt the need to clarify and qualify its scope. There is also a link here with the question whether a display of force should be sufficient to constitute our proposed offence.

(b) Other than mere threats or displays of violence

4.17 All the recent reported cases of affray appear to have involved actual fighting or violence. But as we have seen,[26] it was accepted in Taylor v. D.P.P. (although the issue was not raised by the facts of that case) that a display of force in such a manner that a person of reasonably firm character is likely to be terrified probably also constitutes an affray. However, we have no evidence that charges of this type are ever brought today. It is therefore for consideration whether our proposed offence need include this type of conduct. For this purpose it is necessary to examine the scope and adequacy of other existing offences.

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26 See para. 2.7, above.

4.18 In accepting that affray includes a display of force at common law, Lord Hailsham suggested that "in most cases where this is done by an individual, a charge under the Prevention of Crime Act 1953 would now seem preferable".[27] Section 1(1) of this Act provides that "any person who without lawful authority or reasonable excuse, the proof whereof shall lie on him, has with him in any public place any offensive weapon shall be guilty of an offence". The maximum penalty on indictment is two years' imprisonment or a fine, or both, and on summary conviction, three months' imprisonment or a fine of £1,000, or both. Apart from the Prevention of Crime Act 1953,[28] there is also the offence under section 5 of the Public Order Act 1936 which covers threatening behaviour in a public place likely to lead to a breach of the peace.[29] Neither of these offences contains any element of terror, but while they are in that respect broader in scope than affray constituted by a brandishing of offensive weapons, they are also narrower in that, unlike affray, they do not extend to conduct in private places.

4.19 It is arguable that there are two situations where removal of the possibility of a conviction for affray in the circumstances under discussion might leave a gap in the criminal law. An illustration of the first is where a gang brandishing bicycle chains or other offensive weapons terrorises the public in the streets without

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27 Taylor v. D.P.P. [1973] A.C. 964, 987.

28 There is also the offence under the Public Order Act 1936, s.4, which penalises the possession of offensive weapons at any public meeting or on the occasion of any public procession: see further para. 1.15, above.

29 Triable only summarily with a maximum penalty of six months' or a fine of £1,000, or both: and see further para. 4.5, above.

actually attacking anyone. Is the maximum penalty of two years' under the Prevention of Crime Act 1953 for those apprehended in possession of such weapons an adequate penalty for this not uncommon behaviour?[30] Save perhaps for the gang leader, we think it is, though we invite comments on this issue. We would add, however, that a display of force by a group would, in addition to the offences mentioned, almost certainly involve an offence of unlawful assembly under our proposals,[31] which would carry a maximum penalty of 5 years' imprisonment. The second case is where the brandishing of weapons takes place in a private place. Here the offences of possessing offensive weapons do not apply, but other sanctions provided by the criminal law include common assault, where there is evidence that a particular individual was threatened, an attempt to commit one of the more serious offences against the person, and possibly burglary, having regard to the wide terms in which that offence is drawn. Since we have no evidence that affray is ever charged in these circumstances, our provisional view is that it is not needed to deal with this type of situation.[32]

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30 In suggesting that a charge under the Prevention of Crime Act would now seem preferable, Lord Hailsham's words of qualification should be noted - "in most cases where this is done by [a single] individual": see para. 4.18, above.

31 And probably also under the present law: see paras. 6.17 et seq., below.

32 It should also be borne in mind that "affray" in its ordinary usage signifies fighting or the actual use rather than the threatened use of violence: the Oxford English Dictionary defines affray as "a breach of the peace caused by fighting or riot....".

4.20 We should emphasise that there are strong reasons for attaching serious penalties to conduct in the nature of displays of force. But for the reasons which we have given, we take the view that a display of force, however terrifying, should be insufficient for the purposes of a new offence of affray. In our view, affray is not the right offence to deal with disturbances falling short of the use of violence: actual violence should be required, so that if the prosecution fails to prove an act of violence inflicted by the defendant upon someone (no matter whom), he should be acquitted of affray.[33] We stress, however, that this conclusion is provisional in character, and that if on consultation we receive evidence of the continuing use of or need for affray to deal with displays of force we should wish to reconsider the matter. Finally, in this connection we note that the authorities appear to suggest that an act of violence includes by definition the threatened use of violence.[34] For this reason we have for the purposes of this Working Paper described the conduct to be covered by a new offence of affray in terms of "acts of violence other than mere threats or displays of violence".

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33 Although the evidence may in some cases be sufficient to justify a conviction for aiding and abetting others to commit the offence.

34 See e.g. R. v. Howell [1981] 3 W.L.R. 501, 509, where the Court of Appeal gave a definition of a breach of the peace which includes an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done". The court criticised a definition of this concept in Halsbury as "inaccurate because of its failure to relate all the kinds of behaviour there mentioned to violence". See further paras. 6.22 et seq., below.

(c) In public or private places

4.21 Before we consider the element of terror, a preliminary question to be decided is whether the proposed offence should be capable of being committed anywhere or whether it should be restricted to fighting which occurs in a public place, as was thought to be the case for affray before Button v. D.P.P.[35] In other words, would there be a gap in the law as regards places which are clearly "private", if the offence were limited to fighting in a "public place"? In favour of retaining the present rule, it can be argued that the distinction between a public and private place is irrelevant so far as the seriousness of the prohibited conduct is concerned. Innocent bystanders may be as terrified by such conduct in a private place as in a public place. The inappropriateness of any such distinction is suggested by the example of a building, such as a public house, part of which is open to the public during "hours" and part of which is not. Why should affray be limited to fighting in the public part but not a fight at a private party in a part of the building to which the public do not have access? Furthermore, the fact that affray is an offence against "public" order is not in point since a number of the most serious offences against public order are not restricted in this way.[36] As Lord Gardiner L.C. stated in Button, "to distinguish affray in this respect is captious and illogical".[37] We are of the same view.

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35 [1966] A.C. 591 and see paras. 2.8-2.9, above.

36 For example, riot and unlawful assembly are not, nor would they be under our proposed new statutory offences: see paras. 5.37 and 6.35 , below. Cf. the Public Order Act 1936, s.5.

37 [1966] A.C. 591, 628.

We therefore provisionally propose that it should not be an essential ingredient of the proposed statutory offence of affray that the prohibited conduct should take place in a public place.

(d) Such as would reasonably have caused any other person, if present, to be put in fear of his personal safety

4.22 Under this heading, we examine an important element of the existing offence of affray, namely, the element of terror. There are a number of issues arising for consideration here, some of which need attention since the cases do not provide any clear answers which would enable this element to be directly translated into legislation.

(i) Terror

4.23 Not only does the element of terror distinguish an affray from an assault,[38] but it also serves to emphasise that not every act of violence will amount to an affray. It was for this reason that Lord Hailsham considered that this element should not be weakened.[39] Affray is an offence against public order, and its removal would alter the nature and rationale of the offence and would relate it more closely to assault. This would in our view be an undesirable result. However, we do have some reservations about using the word "terror" in a new offence of affray. We think it has an antique flavour which makes it an inappropriate expression for a modern statutory offence. Certainly, we know of no precedents

38 "In each case the wrongful act is the same yet the mischief of the act falls on the victim in the offence of assault but on the bystander in the offence of affray": Button v. D.P.P. [1966] A.C. 591, 625 per Lord Gardiner.

39 Taylor v. D.P.P. [1973] A.C. 964, 987 and see para. 2.12, above.

for the use of "terror" in legislation. We believe that "put in fear" would more suitably convey the essence of the concept required, which we note has been used in recent legislation, albeit in the distinct context of terrorism.[40] It might be argued that use of the term "put in fear" rather than "terror" would unduly widen the offence.[41] Provisionally we think not, since in our view the distinction between the two is marginal and would be unlikely to have any significant effect on the number of persons who could be found guilty of the offence. However, we should welcome the views of others as to whether this would unduly widen the offence and, if necessary, alternative suggestions for avoiding this result.

(ii) Innocent bystanders

4.24 It is on the questions of whether there must be proof of the presence of innocent bystanders and whether they must be actually terrified that the case law has as yet given no clear guidance.[42] We must therefore examine the arguments relating to these questions afresh. Should it be necessary to prove the presence or likely presence of one or more innocent bystanders? Or should it be sufficient to prove objectively that anyone present and witnessing the affray would have been put in fear? If it is necessary to show that there were innocent bystanders, should it be necessary to prove that they were actually

40 In the Prevention of Terrorism (Temporary Provisions) Act 1976, s.14(1), "terrorism" is defined to include "the use of violence for the purpose of putting the public or any section of the public in fear."

41 "Terror" according to the Oxford English Dictionary means "extreme fear".

42 Discussed at paras. 2.10-2.11, above; and see R. v. Farnill [1982] Crim. L.R. 38, para. 4.27, n. 46, below.

put in fear? Is there any need to distinguish between public and private places for these purposes? With the latter possibility in mind, we examine the arguments relating to these questions under separate headings.

Affrays in a public place[43]

4.25 We take the principal arguments for requiring proof of the presence of one or more innocent bystanders where the fighting occurs in a public place to be, first, that this is a necessary restriction to avoid the offence being unduly widened having regard to the otherwise close links between affray and the general law of offences against the person and, secondly, that it strengthens the rationale of affray as an offence penalising conduct which strikes terror in the bystander. On the other hand, it is arguable that it is the mere likelihood of the presence of members of the public in any public place which makes the violence a threat to the security of the community, and that this should therefore suffice for the offence. Lord Hailsham appeared to support the latter view of the present law when he said:

> "I am not prepared to say that a fight between rival gangs on the front of a seaside resort, or a duel with lethal weapons on Putney Heath, would not be an affray if the prosecution failed to establish the presence of bystanders or their actual terror."[44]

4.26 Those who favour a requirement of proof of the presence of innocent bystanders[45] have not argued that the law should require proof that an innocent bystander was

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43 Including private places to which the public are permitted to have access.

44 Taylor v. D.P.P. [1973] A.C. 964, 987.

45 See ibid., at pp. 989-990 per Lord Reid.

actually terrified by the fighting which occurs in a public place. It is suggested that this is correct. A positive requirement of proof of actual terror would be likely to lead to the exclusion from the ambit of the offence of many cases of serious fighting. If that is right the utility of a rule which requires the calling of evidence to say that a bystander was actually present at or near the scene of a fight may be doubted. As we have observed, the essence of affray lies in the fact that sufficiently violent conduct took place and that the defendant participated in it. The function of the bystander is really to act as a measure of the requisite degree of violence. For this purpose it matters not whether there was a bystander close by, or a bystander who was actually terrified: his actual presence is, indeed, irrelevant. What is really in issue is whether a reasonable bystander, if present, would have been put in fear by the violence of the conduct in question. In practice, in most cases of affray there will be innocent bystanders who are witnesses to the fighting. It will be their evidence (coupled with the evidence of the participants in the fight and of the police) which will normally establish guilt. But, in our provisional view, to elevate the giving of such evidence into a positive requirement without which there can be no conviction for the offence misapprehends the real function of the concept of the bystander in this offence. Accordingly, we provisionally propose, at least so far as fighting in a public place is concerned, that there should be no need to prove the actual presence of one or more innocent bystanders.

4.27 Should there, however, be a requirement of the reasonable likelihood of the presence of others?[46] We think not, for several reasons. In cases of very serious affrays, the mere fact of the fighting would probably prevent members of the public approaching and at the first sign of trouble any bystanders who might have been there would have left. Consequently, the defence could argue that it was unlikely that any members of the public would have been present. We cannot think it right that a provision in a statutory offence should afford the opportunity of raising such a spurious plea. Moreover, inclusion of the provision would impose upon the jury the burden - in itself undesirable - of considering two hypothetical questions: first, whether it was reasonably likely that another person was present and, secondly, if it was, whether he would have been put in fear. In so far as the latter raises the question of what the reaction of the reasonable man would have been, this imposes no unusual burden, for it is a matter eminently suitable for decision by the jury. But in the first question the term "reasonable likelihood" refers, not to the beliefs or reactions of the reasonable man, but to the likelihood of an event occurring, viz., the presence of someone else in the locality. In our view, to require proof beyond reasonable doubt of the reasonable likelihood of the occurrence of an event would cause problems for both prosecution and jury. Furthermore, it may be argued that

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46 In R. v. Farnill and others [1982] Crim. L.R. 38 (Leeds Crown Court) it was held that where an affray occurs in a public place it must be proved that there was a reasonable likelihood of a third party coming on the scene. On the facts of the case (involving a gang attack on "innocent persons" in a public house car park at 11.15 p.m.) there was no evidence of any such likelihood, and a plea of no case to answer was accordingly upheld.

a "public place"[47] is by definition a place where a member of the public may be, and that the extra requirement of reasonable likelihood of the presence of others therefore involves an arbitrary qualification of the scope of that term. These reasons persuade us that a requirement of the "reasonable likelihood" of the presence of others should, at least in regard to affrays in public places, find no place in the offence. It will in addition be noted that most of these arguments are equally applicable to affrays occurring in private places.

4.28 It will in our view suffice for commission of the offence if the fighting or violence would reasonably have caused a hypothetical person "present" to be put in fear. We doubt whether it is either possible or desirable to be more specific as to how far away from or how near to the fighting such a notional person need be. We think a jury will sufficiently understand what is meant by a "person present", that is, anyone who would have been in real danger of becoming involved in the affray. In our provisional view, therefore, this element of the offence is best described for the purposes of this Working Paper as conduct "such as would reasonably have caused any other person, if present, to be put in fear of his personal safety". We now consider whether the same element should apply to affrays in a private place.

Affrays in a private place

4.29 Under the existing law, it seems that where the conduct occurs in a private place there must be proof that there were persons present other than the participants and

47 The definition of this term in the Criminal Justice Act 1972, s.33 "includes any highway and any other premises or place to which at the material time the public have or are permitted to have access, whether on payment or otherwise".

that they were terrified.[48] An important reason for maintaining a distinction between private and public places for this purpose is that, unlike a public place, there may be little or no likelihood of others, that is to say members of the public, being present in a private place. Moreover, without some public element in the office, such as the requirement of the presence of innocent bystanders to be put in fear, arguably the offence loses its connection with "public" order and thus part of its rationale.

4.30 There are contrary arguments which support the same rule applying to affrays in public and private places. First, there may be occasions when those who fight in a private place choose to do so in the knowledge that no one else will be present. As a recent Court of Appeal decision shows, there is a public interest in preventing unlawful fighting (other than "minor struggles" involving no attempt to cause actual bodily harm) wherever it occurs regardless of the consent of the participants.[49] Furthermore, there may be cases where the only bystanders present fear trouble and leave before the fighting starts. Arguably it is wrong that a charge of affray on private premises should fail because of the absence of innocent bystanders during the actual fighting. And these may

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48 One other person present may suffice: see para. 2.11, above.

49 Attorney-General's Reference (No.6 of 1980) [1981] 3 W.L.R. 125. The question referred to the Court of Appeal was: "Where two persons fight (otherwise than in the course of sport) in a public place can it be a defence for one of those persons to a charge of assault arising out of the fight that the other consented to fight?" Held, the answer was "No".

well be exactly the types of case where evidence of particular assaults on individuals makes a charge of an offence against the person difficult to sustain, even though there is evidence of participation in the fighting.[50]

4.31 The arguments here seem to us to be fairly evenly balanced. Tentatively we take the view that no distinction should be made between public and private places so far as this element of the offence is concerned. Although our proposal may represent a small extension of the criminal law, we think that there may in any event be a gap in the law here which ought to be closed. Whether this extension is acceptable is a matter on which we would specifically welcome comments.

(iii) Provisional conclusion as to the element of terror

4.32 To sum up our provisional proposals for replacement of the element of terror in affray, we conclude that:

(1) there should be an element additional to fighting and violence which indicates that the offence is not concerned with minor outbreaks of disorder and which measures the degree of violence;

(2) the degree of violence penalised should be measured by the likely consequences for bystanders whether or not actually present;

(3) "terror" is an inappropriate expression in a modern criminal offence;

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50 See para. 4.7, above.

(4) the offence should require proof that the prohibited conduct was such as would reasonably have caused any other person, if present, to be put in fear of his personal safety;

(5) no distinction need be drawn between affrays in public and private places.

3. The mental element

4.33 Proof of a "specific" intent as to the consequences of fighting is not required for affray under the existing law.[51] If a man is proved to have taken part in a fight without lawful excuse he is guilty of affray if the jury is satisfied that the fighting was such as to terrify a person of reasonably firm character. It is not required that the prosecution prove that he intended that consequence, or knew of the nature and extent of the violence of any other persons engaged in the fight which produced that consequence. We do not propose any change in this rule.

4.34 This means that a defendant, who is proved only to have committed one or more batteries in an incident which the jury finds was an affray, may be guilty of the more serious offence of affray without proof of any extra mental element. We provisionally consider that such a rule is acceptable because there is no indication that it has caused any difficulty or injustice in the past. The charge of affray is normally only used in cases of serious fighting in which the participants must know that the incident is not merely an isolated battery by one man. The addition of a requirement of proof of intention or

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51 See para. 2.14, above.

knowledge of circumstances would add an unnecessary complication to the summing-up in affray cases, in which there are frequently several defendants with varied defences, which does not appear to have been necessary for the fair trial and disposal of such cases. As in any offence in which the seriousness of the conduct arises from the activity of a number of participants, a particular defendant's contribution to that activity may or may not be grave. Thus, if it should appear after verdicts that the full part played by a particular defendant in an affray was not any more grave than some particular act of violence proved against him, the court would surely sentence him accordingly.

4.35 It therefore seems appropriate that the mental element in affray should continue to have the same characteristics as that for assault and battery, that is, "proof that the defendant intentionally or recklessly applied force to the person of another".[52] Affray would therefore require proof that the defendant intentionally or recklessly fought or inflicted acts of violence upon another.

4.36 Should the new offence expressly refer to the mental element in terms of intention and recklessness? Against this course, it may be argued that if, as we propose, there is a specific requirement that the defendant be acting without lawful excuse,[53] there is little, if any, need for express terms. As we explain below, this requirement will suffice to indicate that self-defence and any defence of general application will be available to the defendant according to the circumstances of the case. If it is granted that the defendant was neither acting in

52 R. v. Venna [1976] Q.B. 421, 429.

53 See para. 4.39, below.

self-defence, nor acted under duress or automatism, it would seem that the nature of the prohibited acts - fighting or inflicting violence - leaves no scope for any conclusion other than that the defendant acted intentionally or, possibly, recklessly. If the mental element were expressly stated,it would be necessary for us to consider for the purposes of legislation what meaning should be attributed to the terms"recklessness"and"intention". This would entail considering, in particular, the meaning given to the concept of recklessness in Commissioner of Police of the Metropolis v. Caldwell[54] and deciding whether, in the context of affray, recklessness should bear that meaning or should alternatively be defined in accordance with the recommendations in our Report on the Mental Element in Crime.[55] Were we to propose a definition in accordance with the latter, further provision would probably be

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54 [1981] 2 W.L.R. 509. The decision held that "a person charged with an offence under section 1(1) of the Criminal Damage Act 1971 is 'reckless as to whether any such property would be destroyed or damaged' if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it": ibid., p.516 per Lord Diplock (emphasis added). See also R. v. Lawrence (Stephen) [1981] 2 W.L.R. 524 and R. v. Pigg, The Times, 11 February 1982.

55 (1978) Law Com. No. 89; see Appendix A (Draft Criminal Liability (Mental Element) Bill), cl. 4(1) where the "standard test" of recklessness as to a result is stated to be: "Did the person whose conduct is in issue foresee that his conduct might produce the result and, if so, was it unreasonable for him to take the risk of producing it?". The essential difference between this definition of recklessness and the meaning given to the term in Caldwell (n.54, above) relates to the person who has not given any thought to the possibility of there being any risk.

required to cover the case of voluntary intoxication.[56] And whatever definition of the terms were proposed, they would constitute an additional matter requiring the consideration of the jury in an area which has not hitherto given rise to any practical difficulty. In addition, it would be necessary to make clear in legislation that the element of intention or recklessness referred only to the acts of fighting or violence, and not to the quantitative element - the causing of fear - which makes those acts an affray. This again might be a further complicating factor for the jury. These considerations, it may be argued, strongly suggest that, where exceptional cases do arise, such as those involving the issues of recklessness and voluntary intoxication, they might be better dealt with by the judge explaining the matter to the jury in his own words on the basis of the existing authorities.[57]

4.37 On the other hand, it may be argued that the mental element required for the crime of affray should be expressly stated. In our Report on the Mental Element in Crime[58] we expressed the view that as a matter of general

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56 As we explain in more detail below (see para. 5.47) where a statute uses the term recklessness without providing a definition, evidence of voluntary intoxication will not negative this element: Caldwell. It would only be where recklessness is defined along the lines of the test provided in our Report on the Mental Element in Crime that specific provision would be required to exclude the possibility of voluntary intoxication being raised: a person who is in a state of drunkenness is not capable of foreseeing the consequences of his acts.

57 I.e. R. v. Venna [1976] Q.B. 421 (see para. 4.35, above) and D.P.P. v. Majewski [1977] A.C. 443.

58 See (1978) Law Com. No. 89, para. 75.

principle the mental element should be specified in any new statutory offence. Moreover, to state the mental element in the definition of the offence removes what might otherwise be a matter of doubt at the trial. It may be thought that it is not desirable for the judge to have to hear argument on the point, with the citation of authorities, when a definition in the statute would put the matter beyond argument. Finally, if the policy were that the definition of "recklessness" stated by the majority of the House of Lords in Caldwell is not the definition which the judge should apply, then clearly the statute would have to state the mental element and define the exact meaning of the words used.

4.38 On the whole, we think that the first approach is to be preferred. If the mental element is expressly specified it may differ from the present common law and this would mean that the mens rea for affray and battery would differ.[59] The question of mens rea is most unlikely to arise in cases of alleged affray having regard to the actus reus. Yet if the mental element is defined and the words used are further defined, the words will have to be considered in every case, a course which is likely to confuse the jury rather than to assist it. Provided that the definition of the offence makes it clear that it may be committed only if the accused acts without lawful excuse, the addition of specific words describing the mental element would seem to us to serve no useful

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59 Following R. v. Pigg, The Times, 11 February 1982 (a case of rape under the Sexual Offences (Amendment) Act 1976) it seems reasonably clear that the courts will take the view that the meaning of recklessness in existing offences where the mental element is expressed in terms of intention or recklessness is governed by the decision in Caldwell (n.54, above). The element of recklessness in the mental element of battery (see para. 4.35, above) must therefore be construed accordingly.

purpose in practice and could well cause confusion in the jury's mind. We have no doubt that the court could come to only one conclusion as to the requisite mental element having regard to the actus reus which will have to be proved, viz., that the accused intentionally or recklessly (as those words are understood at common law) did the acts in question. We would welcome the views of commentators on this provisional conclusion.

4. Defences

(a) Without lawful excuse

4.39 We think that a new offence of affray should provide that the defendant will be penalised for fighting or inflicting acts of violence only if his acts are done without lawful excuse. This will make clear that, not only will any general defence apply according to the circumstances of the case, but that other defences, such as the common law defence of self-defence and the provisions of section 3 of the Criminal Law Act 1967,[60] may in appropriate cases exonerate the defendant. We note that self-defence was considered by the Criminal Law Revision Committee who recently recommended its replacement by a defence in statutory terms.[61] We are content that, if the Committee's recommended definition of self-defence is enacted before the offence we propose here, this should apply to it in place of the common law defence.

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60 See the Criminal Law Revision Committee's Fourteenth Report: Offences against the Person (1980), Cmnd.7844, paras. 283 and 287; see also para. 2.17, above and R. v. Cousins, The Times, 12 February 1982.

61 See ibid., paras. 281-288. The redefined defence would provide that a person may use such force as is reasonable in the circumstances as he believes them to be in the defence of himself or any other person, or in defence of his property or that of any other person, provided he fears an imminent attack.

(b) Voluntary intoxication

4.40 Affray is in all probability an offence which is frequently committed by persons under the influence of drink. Should a defendant be able to rely on intoxication, whether by drink or drugs, as a defence to a charge that he was unlawfully fighting? Provisionally, we think that a defendant should be unable to rely upon his voluntary intoxication when charged with affray. This appears to represent the present law,[62] although this point has not directly arisen in any reported case.

5. Penalty

4.41 Our proposals as to maximum penalties are intended to indicate the degree of seriousness with which we view each offence in this Working Paper both in relation to each other and in relation to existing offences with which they are connected. It follows from what we have said above that, as is the case with the common law offence of affray, our proposed replacement offence is intended to be a serious offence, more serious, for example, than any but the gravest assaults. Thus the maximum penalty must, in our view, be set at a level which will enable the courts to retain adequate powers of sentencing to deal with the worst cases of unlawful fighting, such as those involving defendants who engage in premeditated attacks and who have a number of previous convictions for violence. We therefore provisionally propose a maximum penalty of ten years' imprisonment and a fine. In so proposing, we have taken into account, on the one hand that sentences of eight years' imprisonment

62 See D.P.P. v. Majewski [1977] A.C. 443 and Commissioner of Police of the Metropolis v. Caldwell [1981] 2 W.L.R. 509.

for affray have on occasions been imposed.[63] On the other, we think that cases of unlawful fighting which will not also be capable of being successfully prosecuted for one of the more serious of the offences against the person (or an attempt to commit one) which carry a maximum penalty of life imprisonment, could not justify a penalty greater than ten years' imprisonment.

4.42 Provisionally, therefore, we propose that affray should carry a maximum penalty of ten years' imprisonment and a fine. We would welcome comments on this proposal.

6. Mode of trial

4.43 The James Committee's Report on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts[64] considered at some length whether affray, which at present is triable only on indictment, should be capable of being tried summarily. The Committee recommended that affray should remain in the category of offences triable only on indictment, because it "tends to involve a large number of defendants ...., cases are likely to last several days" and "difficult matters relating to the involvement of individual defendants often arise which .... are particularly suitable for determination by a jury".[65] Affray is intended to be a far more serious offence than either assault or threatening behaviour contrary to section 5 of the Public Order Act 1936 and we have marked this by suggesting a maximum

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63 See e.g. R. v. Luttman [1973] Crim. L.R. (sentence of twelve years reduced on appeal to eight years); R. v. Bogan (1972, unreported) (ten years reduced on appeal to eight years). See also Appendix A, below.

64 (1975) Cmnd. 6323.

65 Ibid., para 131.

penalty of ten years' imprisonment. We therefore propose that the present law should not be changed and that the offence should be triable only on indictment.

7. Consent provision

4.44 We can see no reason for proposing that a new offence of affray should carry with it a requirement that proceedings should be instituted only by or with the consent of the Director of Public Prosecutions.

C. Summary

4.45 A summary of our provisional proposals as to affray will be found at the end of this Working Paper in Part VIII.

V RIOT AND ROUT

A. Introduction

5.1 Our principal concern in this Part of the Working Paper is to examine the need for a statutory offence of riot in place of the existing common law offence and to consider the elements of a new offence. We reiterate the point made earlier that we are not concerned with making proposals for what has been termed a "new Riot Act", that is, provisions to allow the police to clear the streets in cases of public disorder, coupled with an offence penalising those present at the scene of a riot who fail to disperse when ordered to do so. Our reasons for not doing so are set out in the Introduction.[1]

5.2 The common law offences of riot and unlawful assembly are closely linked.[2] One of the important considerations which we have therefore taken into account in examining both the need to replace these offences and their definitions is how best to avoid any unnecessary overlap between them in the future. We shall be considering unlawful assembly in Part VI. Apart from riot and unlawful assembly there remains for examination the common law offence of rout. Since rout has played so small a part in this field, it is convenient at this point to examine whether there is any need for its retention as a separate offence.

B. Rout

5.3 Prosecutions for the common law offence of rout[3]

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1 See para. 1.14, above.

2 See paras. 2.23 (in particular, the quoted passage from the judgment of Sachs L.J. in R. v. Caird (1970) 54 Cr. App. R. 499, 504-505) and 2.43 et seq., above.

3 See para. 2.41, above as to the definition of the offence.

appear to have been non-existent in modern times. Indeed, it has been doubted whether rout was ever a commonly-invoked offence.[4] We think that there is nothing to sustain the theory that there may have been a gap between the conduct penalised by unlawful assembly and riot, consisting of an unlawful assembly which is "on the move" but does not constitute a riot. Conduct which does not amount to a riot by reason only that the common purpose is not being executed may still be charged as unlawful assembly; under the existing law the jury may bring in an alternative verdict either for that offence or for rout. The fact that the unlawful assembly is "on the move" does not make the participants any the less guilty of unlawful assembly. We note too that the Criminal Law Commissioners[5] as long ago as 1840 criticised the distinction between the three offences as "unnecessary and inconvenient", and the English draft Code of 1879, while providing for codified offences of unlawful assembly and riot, made no provision for rout.[6]

5.4 These considerations lead us to conclude that there is no need to consider any direct replacement for rout in the scheme of statutory offences we are proposing in place of the common law. Accordingly, we propose the abolition of the common law offence of rout.

C. Consideration of the need for an offence of riot

1. Rationale and present use

5.5 The description of the common law offence of riot as

4 D.G.T. Williams, Keeping the Peace (1967), p. 239.

5 242 Parl. Papers (Reports 1840), Vol. 20, p.1. See para. 2.44, above.

6 See Appendix B, para. 2, below. Most of the common law jurisdictions examined by us have not retained a separate offence of rout, but it remains a common law offence in New South Wales and is included in the draft Code for the Australian Territories: ibid., para. 5.

"a crime of the utmost importance in the law of public order"[7] does not in our view predetermine the need to give consideration to the question whether an offence of riot is required. It does, however, serve as a reminder that any suggestion that this offence could be abolished without replacement would require very strong evidence of the adequacy of other available criminal sanctions. We shall return to this point in the course of this discussion. First, however, we examine the rationale of the common law offence.

5.6 As an indication of the rationale and practical need for an offence of riot, we cannot do better than set out the views expressed by the Court of Appeal in the case arising out of the Garden House Hotel riot in Cambridge. In the course of the Court's judgment, given by Sachs L.J., it was stated:[8]

> "It is the law - and, indeed, in common sense it should be the case - that any person who actively encourages or promotes an unlawful assembly or riot, whether by words, by signs or by actions, or who participates in it, is guilty of an offence which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose ... Any participation whatever, irrespective of its precise form, in an unlawful or riotous assembly of this type derives its gravity from becoming one of those who, by weight of numbers, pursued a common and unlawful purpose. The law of this country has always leant heavily against those who, to attain such a purpose, use the threat that lies in the power of numbers."
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> "Over and over again it was submitted on behalf of the applicants that their individual acts should be regarded as if they had been committed in isolation. Attempts were made on this footing to make light of such matters as

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7 D.G.T. Williams, Keeping the Peace (1967), p.239.

8 R. v. Caird (1970) 54 Cr. App. R. 499, 505-508, passim.

> pushing a police officer on one side, breaking a window, or throwing a lighted mole fuse at one of the officers. In the view of this Court, it is a wholly wrong approach to take the acts of any individual participator in isolation. They were not committed in isolation and, as already indicated, it is that very fact that constitutes the gravity of the offence." (emphasis added)

5.7 To this we would add only that penalties for those found guilty of the offence are likely to take into consideration not only the defendant's own conduct but also the defendant's responsibility for a share in the overall conduct of the riot and for the resulting harm, whether this be damage to property, injury to persons or widespread feelings of alarm. Moreover, particularly heavy penalties are likely to be imposed on those who incite or conspire to commit a riot and those who lead a riot, for they must bear the major responsibility for creating the dangers engendered by the riot.

5.8 On the other hand, we note the suggestion that "the responsibility of the individual in a crowd is diminished because of the emotionalism, contagion, the impression of universality and other crowd effects" and that "the crowd factor must be considered not as an aggravating, but as a mitigating, circumstance as far as sentencing is concerned".[9] On this basis, it might be maintained that the need for a separate offence of riot which focusses on the aspect of numbers is thereby diminished. It is of course true that the sentencing policy of the courts will distinguish between the leaders and mere participants in a riot, but, as the judgment of the Court of Appeal in the Garden House Hotel

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9 Quotations from Trivizas, "Sentencing the 'Football Hooligan'" (1981) 21 Br. Jo. Crim. 342, 343; the writer refers to the Italian and Cuban Penal Codes where "with certain exceptions, it is a mitigating factor that the offender has acted under the influence of a mass suggestion or a general riot".

case illustrates, the courts here do not seem to view the "crowd factor" as a mitigating circumstance. Whatever view may be taken by other societies as to the mitigating factor of the behaviour of the mob, we believe that it is not one which would be generally shared by our own society. We therefore reject it as an argument against the need for an offence of riot.

5.9 By comparison with affray and other offences in this field, the offence of riot is not frequently prosecuted.[10] This would be less surprising if the scope of the offence accorded with the ordinary understanding of the term riot, but, as we have indicated,[11] its scope is significantly wider than this. There are a number of possible reasons for the infrequent resort to prosecutions for riot. First, this may be due to what are regarded as the difficulties of proving the formal requirements of the offence, such as common purpose.[12] Nevertheless, it is also significant that the statistics[13] show that in recent years the proportion of convictions for the offence in relation to those charged has been very high. In any event, such difficulties as there have been do not support the case for abolishing the offence, although they may of course be relevant in the context of redefining it. Secondly, the infrequency of prosecutions may be due to the fact that charges of riot may raise issues of some sensitivity which, in a broad sense, may be termed "political". If there is any substance in this, it may justify the need for the consent of a prosecuting authority, such as the Director of Public Prosecutions, for the

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10 See Appendix A, below.

11 See paras. 2.21 et seq., above.

12 Thus the Bristol riots case (R. v. Binns and others, 2 February - 20 March 1981) gave rise to public interest in and concern over the definition of the offence: see e.g. The Times, 22 April 1981.

13 See Appendix A, below.

institution of proceedings, but it cannot justify abolition of the offence.[14] It is clear beyond doubt that, as recent events have demonstrated, there are occasions when the term "riot" is justified both in its legal and ordinary meanings.[15] However, it may finally be argued that other offences are adequate to deal with participants in a riot. This raises the question whether the offence is needed at all, and whether such participants could be dealt with by charges of some other offence.

2. Possible alternative offences

5.10 Those who participate in a riot nearly always commit some other offence such as an offence against the person, criminal damage, affray or some lesser offence against public order. Thus many (but by no means all) of those convicted of offences associated with last summer's disturbances were dealt with in magistrates' courts and tried for offences such as threatening behaviour under section 5 of the Public Order Act 1936.[16] We have already referred to the relevant offences against the person, together with their maximum penalties, in our discussion of the need to retain affray.[17] Offences of criminal damage are to be found in the Criminal Damage Act 1971. Again, it is sufficient to summarise these in the form of a table:

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14 See para. 5.48, below. It has also been suggested that charges of the offence tacitly imply a breakdown of law and order, particularly in the case of small-scale "riots": see Trivizas, "Offences and Offenders in Football Crowd Disorders" (1980) 20 Br. Jo. of Crim. 276, 279, who states that in the context of football match disorders "riot charges may have a bad effect on the morale of the public".

15 See the Report of an Inquiry by Lord Scarman into the Brixton Disorders 10-12 April 1981 (1981), Cmnd. 8427, paras. 3.97-3.100.

16 See the analysis in The Times, 23 November 1981 and the further news item in the issue of 3 February 1982.

17 See the table in para. 4.4, above.

Offence	Section of Criminal Damage Act 1971	Maximum penalty
Destroying or damaging property	s.1(1)	10 years
Destroying or damaging property intending to endanger life	s.1(2)	Life
Arson (i.e. committing either offence by fire)	s.1(3)	Life
Possessing anything with intent to commit an offence of criminal damage	s.3	10 years

There are also the offences under sections 2 and 3 of the Explosive Substances Act 1883 of causing or attempting to cause explosions with intent to endanger life or property, the maximum penalty being life imprisonment.

5.11 Can these other offences be regarded as adequate for dealing with participants in a riot? It seems to us that where large numbers of rioters are involved there may be overwhelming evidential difficulties in charging the commission of some of the more serious of these offences. As we pointed out in our discussion of affray,[18] proving an offence against the person requires evidence that the defendant committed the prohibited act in relation to a particular person. Likewise, on a charge of an offence of damaging property, there must be proof of the particular property damaged by the defendant's act. And these difficulties are still present where the charge is one of

18 See para. 4.7, above.

complicity, that is, aiding and abetting the commission of one or other of the offences mentioned, since there the prosecution must prove that the accomplice had full knowledge of the circumstances which must be proved in order to constitute the offence.[19] A simple example will illustrate some of these difficulties. A mob engaged in a serious disturbance in the streets causes widespread damage to property and injury to persons. The defendant is seen to throw several pieces of paving-stone, but there is no evidence that the result of his acts was to cause personal injury or damage to property, perhaps because many other missiles were being thrown by others at the same time or because, in the confusion of the disturbance, it is impossible for the police to ascertain what has happened. In these circumstances it may be impossible to prove a charge of any offence[20] save the summary offence under section 5 of the Public Order Act 1936 and the maximum penalty under this offence[21] may well not match the seriousness of the defendant's participation in the riot. In such a case a charge of the offence of riot may be appropriate.

5.12 It may, however, be argued that there is no adequate reason for retaining two serious offences, affray and riot, for dealing with broadly similar conduct, that is, violent outbreaks of disorder involving a number of people. This would suggest that there is room for only one offence: there

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19 Smith and Hogan, Criminal Law (4th ed., 1978), p. 122 et seq.

20 There would of course be no offence against person or property committed if the prosecution could only prove that the missile fell harmlessly to the ground, although this might amount to an attempt if there is sufficient evidence of the defendant's intention to commit a particular offence against the person or property: Criminal Attempts Act 1981, s.1(1).

21 I.e. six months' imprisonment or a £1,000 fine, or both.

is, after all, a similarity between the principal arguments put forward for retaining these offences, that is, to deal with cases where, because of the numbers involved, not only does the conduct put the public in fear but it is also not easy to identify the individual's contribution to the unlawful conduct.[22]

5.13 Nevertheless, we do not at present find the arguments for creating only one offence convincing. An essential difference between affray and riot is the need to prove the element of fighting or violence to the person in affray; in a riot the essence is the common purpose[23] of the group carried out in such a way as to alarm others. Fighting as such is not an essential element. Thus affray, both under the present law and our proposals for its replacement, deals only with cases of violence directed towards persons, while riot is capable of dealing with violent acts directed against both persons and property, whether or not persons are injured or property is damaged.[24] Abolition of riot and retention of affray might therefore leave a significant gap in the criminal law in the context of both riots which involve only damage to property and riots where violent acts, such as the hurling of missiles, succeed neither in damaging property nor in injuring others. On the other hand, to abolish affray and retain riot might leave a gap in situations where fewer than three persons are unlawfully fighting, for which, in our provisional view, an offence of affray is required.[25] And while it might be possible to devise an all-embracing general offence, this would itself have disadvantages. It could not be done, in

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22 See paras. 4.7 and 5.11, above.

23 Our proposals substitute for this the concept of a "course of conduct": see paras. 5.24 et seq., below.

24 See para. 5.11, n.20, above.

25 We have provisionally concluded that affray should not be restricted to fighting by two or more persons: see paras. 4.13 et seq., above.

our view, without removing some of the substantive requirements of each offence. In the result, it is likely that such a general offence would be scarcely narrower in terms of the conduct penalised than the offence under section 5 of the Public Order Act 1936. This would raise problems both as to the appropriate court to try such an offence and as to sentencing, which require further consideration.

5.14 Where a defendant is charged with conduct of an extremely serious character such as leading or taking a prominent part in what is, in ordinary parlance, a riot, he should be charged with an offence framed in appropriate terms which entitles him to a trial by jury, and, if found guilty, he should be given an appropriately heavy penalty. But section 5 of the 1936 Act is the principal offence used to deal expeditiously with less serious conduct; it is triable only summarily and its maximum penalty is limited accordingly. Thus a general offence which excluded the distinctive elements of riot and affray would in our view not answer the requirement that he should be charged with an offence appropriate to his conduct, and would scarcely justify maximum penalties far heavier than those under section 5 such as we consider to be appropriate for conduct in the nature of an affray or riot. In our view distinct offences are required, one for dealing summarily with relatively trivial conduct and others for dealing with more serious conduct. We think that the best means of delimiting the latter is by means of separate offences of affray and riot; this has the additional presentational advantage of two offences bearing names which, despite some overlap between them, broadly reflect the public's perception of the type of conduct at which each is aimed.

5.15 As we have already said in our general observations

in Part III,[26] we are unaware of any substantial criticism in relation to the broad, general content of the common law offences which would provide a case for a radical restructuring of the law in this field. We do not therefore propose to pursue further in this Working Paper the possibility of a single offence to replace riot and affray.

5.16 Another important consideration which we think lends support to the case for retaining an offence of riot with a high maximum penalty is the need to penalise those who incite or conspire to riot,[27] who may not even be present on the scene, and the ringleaders of a riot who may not themselves be directly responsible for damage to property or injury to the person. Here again we do not think that charges of incitement or conspiracy to commit offences other than riot would be an adequate replacement.

3. Provisional conclusion

5.17 The considerations outlined in the preceding paragraphs in our view demonstrate a clear need for an offence penalising the type of conduct at present dealt with by the common law offence of riot. Accordingly, while we provisionally propose the abolition of the common law offence of riot, we propose its replacement by a new statutory offence of riot. In discussing the common law offence, we have not so far alluded to the principal criticism which has been made of the present law, namely, that it has "become so bound up with technical distinctions ... as to prove almost unworkable in practice".[28] This is an

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26 See para. 3.2, above.

27 Incitement is still an offence at common law with a penalty at large; and see paras. 2.35 and 2.39, n.90, above. Conspiracy charges would be brought under the Criminal Law Act 1977, s.1, under which the maximum penalty is the same as the substantive, indictable offence to which the charge relates.

28 (1981) 145 J.P. 464 (editorial comment).

important point, but one which we think relates more to the redefinition of the offence than to the question of the need for it; this is therefore a matter to be dealt with in the paragraphs which follow.

D. The elements of a proposed statutory offence of riot

1. General

5.18 We now examine the elements which might be included in a new statutory offence of riot. In setting out the existing law, we referred to particular points where the law appears to be uncertain and where it has caused some misgivings. In the latter connection, we have in mind in particular the elements of common purpose and the intent by the rioters to help each other in its execution,[29] which have given rise to the criticism that the offence has become bound up with technical distinctions.[30] As with affray, for convenience we discuss these problems further in the context of our proposals for redefining the elements of the offence, rather than as a preliminary to this examination. First, however, we summarise the elements of our proposed statutory offence of riot.

5.19 We provisionally propose that there should be a statutory offence of riot, triable on indictment, with a maximum penalty of fourteen years' imprisonment and a fine. This offence would penalise any person who knowingly and without lawful excuse takes part in a riot. A riot would consist of -

(a) three or more persons present together in a public or private place;

(b) at least three or whom engage in an unlawful course of violent conduct; and

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29 See paras. 2.25-27 and 2.30, above.

30 See para. 5.17, above.

(c) the violence of that conduct is such as would reasonably have caused any other person, if present, to be put in fear of his personal safety.

Conduct consisting of the mere threat or display of violence would not suffice for these purposes. The consent of the Director of Public Prosecutions would be required for the institution of proceedings. Each element of the offence will now be examined in turn.

2. Three or more persons

5.20 Under the existing common law, it must be proved that at least three people participated in the alleged riot, that is, the defendant and two others (whether or not the others have been charged). Riot and unlawful assembly are unusual in this respect since, with the exception of conspiracy, the commission of which requires at least two persons agreeing on a course of conduct, no other major offence[31] depends for its definition on proof of the commission of an offence by more than one person. Should the statutory offence of riot retain this element? In our view, some reference to a number of persons participating is necessary as an element of the offence. We have already indicated that the importance of numbers was emphasised by the Court of Appeal in R. v. Caird:[32] "riot ... is an offence which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose". Indeed, as we stressed in our discussion of the need for an offence of riot, it is the fact that a large number of participants may

31 The Night Poaching Act 1828, s.9 provides for an offence penalising "three or more by night unlawfully entering or being upon land for the purpose of taking or destroying game". This was made a summary offence by the Criminal Law Act 1977, s.15(4).

32 (1970) 54 Cr. App. R. 499, 505 per Sachs L.J.

be involved, producing difficulties in proving the commission of other serious offences, which suggests the continued need for an offence. We believe that mere reference to the defendant's participation in conduct by a "group" of persons, without denominating a minimum number, would be an undesirable change in the law.[33] There would be no criteria upon which the jury could decide whether the "group" was sufficiently large, and hence no certainty in this respect as to whether or not this serious offence had been committed. Thus we believe that a particular number is required for the purpose of directing the jury as to what has to be proved for the commission of the offence. The question at issue, therefore, is whether it should be raised to some (and if so what) higher number than three.

5.21 To some extent, the number of participants required for riot is necessarily arbitrary. It can, however, be argued that three[34] is too low and that a higher figure

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33 Cf. the position in Scotland where there is an offence of mobbing at common law, and the public order offences in many of the civil law jurisdictions set out in Appendix B, paras. 3 and 13 et seq.

34 The requirement of a minimum of three for riot and unlawful assembly originated with the Star Chamber and was confirmed by the courts of common law in R. v. Sudbury (1700) 1 Ld. Raym. 484; 91 E.R. 1222: see Holdsworth, A History of English Law Vol. V, p.198 and Vol. VIII, p.325.

should be required.[35] This might, for example, be raised to twelve, which was the minimum number of persons required to be rioting before the Riot Act could be read.[36] Raising the minimum from three to twelve would serve to demonstrate the serious nature of the offence which, as R. v. Caird[37] stressed, results from the damage which can be done by a mob. It is arguable that a figure as low as three is difficult to reconcile with the rationale of the offence as expressed in Caird, and that the expression "two's company, three's a crowd" becomes, under the common law, the basis of a serious crime. Raising the figure would also restrict the offence to conduct which more closely resembles a "riot" in its ordinary meaning; that meaning is scarcely consistent with an offence requiring the participation of only three people. The higher number would exclude cases, for example, of robbery by three or more persons which, as the authorities under the Riot (Damages) Act 1886 show, could in theory be dealt with by charges of riot.[38] Moreover, some other jurisdictions favour a minimum higher than three. The

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35 See e.g. the stress placed on numbers in R. v. Caird (1970) 54 Cr. App. R. 499; see para. 5.6, above. It has been suggested that a "new legislative definition of riot is required in order to give effect to the principle behind the compensation concept ...": see A. Samuels, "Compensation for Riot Damage, The Riot (Damages) Act 1886" [1970] Crim. L.R. 336, 341. This refers to the point that under the 1886 Act compensation is only payable in respect of damage caused by persons "riotously and tumultuously assembled". In J.W. Dwyer Ltd. v. Metropolitan Police District Receiver [1967] 2 Q.B. 970, 979-980, Lyell J. said that the term "tumultuously" gives "the impression ... that the assembly should be of considerable size", and that it involved a concept additional to "riotously". Both requirements must be satisfied to render the Act applicable. Compensation was therefore refused in respect of a robbery of a shop by four armed men. See further para. 5.54, below.

36 See para. 2.1, n.1, above.

37 (1970) 54 Cr. App. R. 499; see para. 5.6, above.

38 See n.35, above.

American Model Penal Code[39] indicates the possibility of reasonable alternatives to three. Some revised state codes provide for a minimum of ten persons, with a substantial minority specifying five; most, however, follow the Model Penal Code. The draft Code for the Australian Territories contains an offence of riot defined in terms of twelve or more persons.[40]

5.22 There are, however, several arguments which weigh against any increase in the minimum number required. Although a higher number would not require all the participants to be charged together, it would be necessary to prove that they were all engaged in an unlawful course of conduct involving the use of violence.[41] If the minimum number were as high as twelve, this might present difficulties for the prosecution, who would be required to give evidence, not merely as to the numbers of persons present (which in many cases might be substantially higher than twelve), but as to the numbers who were actually pursuing a particular course of unlawful conduct involving the use of violence. There would be similar problems in cases of serious disturbances over a wide area involving separate groups of persons smaller than twelve in number; here again the prosecution might encounter difficulties in proving that a combination of such groups exceeding the minimum of twelve were pursuing a particular course of conduct. Another objection is the possible undesirability of severing the connection between riot and unlawful assembly, which at present requires the same minimum number of participants. Raising the number required to constitute a riot would require consideration of whether the number

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39 See Appendix B, para. 12.

40 See Appendix B, para. 5.

41 See paras. 5.24-5.31, below, where we consider the element of common purpose and propose as a substitute the concept of a "course of conduct".

should also be raised for unlawful assembly, while severing the connection would complicate directions to the jury in regard to returning a verdict of unlawful assembly as an alternative to a charge of riot.[42]

5.23 These considerations lead us to the conclusion that, on balance, the arguments favour retention of the present requirement of a minimum of three persons. We think that a requirement of the consent of the Director of Public Prosecutions for the institution of prosecutions would be sufficient to minimise the risk that riot might be charged in cases involving only a few people.[43] We stress, however, that this conclusion is provisional in character and that we particularly welcome comments on this issue.

3. Engaging in an unlawful course of conduct

5.24 Under this heading we consider the questions whether the element of "common purpose" should be retained as part of a new statutory offence of riot and, if so, whether the common law concept is in need of alteration or clarification.

(a) Function of the concept of common purpose

5.25 Common purpose is a key element of the common law offence of riot and for this reason alone arguably should retain a place in any new offence. It focusses attention on the fact that violent behaviour assumes a greater degree of seriousness when it is committed collectively by a crowd of persons than similar conduct committed by an individual in isolation. The oft-quoted passage from the judgment of the Court of Appeal in the Garden House Hotel case reinforces this:

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42 See para. 6.39, below.

43 See para. 5.48, below.

> "[riot is an offence] which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose."[44]

That this element may be difficult to prove is not necessarily a reason for not keeping it: on the contrary, it is in our view consistent with the argument that riot is a serious offence and should only be used in serious cases. Many of the suggested problems relating to it may, however, result from a misconception of what actually is required to be proved, which may in turn suggest the need at least for a change of terminology.

5.26 Such authority as there is seems to confirm that in proving a common purpose in riot there need be no proof of any prior plan or agreement upon the action to be taken.[45] Nevertheless, it has been suggested that proof of a common purpose does impose a serious practical difficulty because, for example, unless rioters are holding proclamatory banners, the only way of discovering the common purpose is by cross-questioning the defendant himself as to his intentions.[46] But such suggestions seem to us to equate "purpose" with "motive", which in our view does not correctly reflect the present law. Evidence of a defendant's purpose may be gathered not only from his own accounts but from all of his conduct in the circumstances. Such doubts are, however, indicative of the misapprehensions to which the concept, as it is formulated by the common law,

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44 R. v. Caird (1970) 54 Cr. App. R. 499, 505.

45 There is persuasive authority for this as part of the existing law in the Northern Irish case, O'Brien v. Friel [1974] N.I.L.R. 29, 42 per Lowry L.C.J., an appeal against conviction for the summary offence of riotous behaviour applying in the Province (Criminal Procedure (Miscellaneous Provisions) Act 1968, s.9), where reliance was placed on English authorities for the meaning of "riotous".

46 See e.g. Petty, "Mob Rules" (1981) 145 J.P. 334, 335.

may give rise, and to the consequent need for clarification in any statutory offence of riot.

(b) Course of conduct

5.27 In our view, omission of any concept of common purpose would unduly widen the scope of the offence and remove one of its rationalia. But it seems equally clear to us that for the purposes of a new offence the concept must be described in different terms which ensure that questions of motive and intent are excluded and that an objective test is applied in assessing the evidence of this element. We have come to the provisional conclusion that this element would be best described, for the purposes of this Working Paper, as a "course of conduct", a term which it may be observed is already current in the definition of statutory conspiracy under section 1 of the Criminal Law Act 1977. The adjective "common" is a requirement of the common law, but it seems to us to add nothing, having regard to the fact that to constitute the offence the prosecution would be required to prove that at least three people were pursuing the course of conduct in question. We believe that describing the element in these terms does little to alter the substance of the offence of riot in this respect: for example, attacks by rioters upon the police[47] may be described with equal aptness as a common purpose to attack the police, or as a course of conduct consisting of such attacks. The change which we propose is intended merely to clarify the law. It also serves to distinguish the offence of riot in this respect from unlawful assembly where, as we note below,[48] the element of common purpose in the common law offence serves a different function.

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47 See comments of Lord Scarman in his Report upon the Brixton Disorders 10-12 April 1981, Cmnd. 8427, paras. 3.97 et seq.

48 See paras. 6.29-6.30, below.

(c) Present together

5.28 The concept of a "course of conduct" is in our view not by itself sufficient to indicate that those engaging in the conduct must have some connection with each other, at least in the sense that it is their conduct which, taken together, inspires alarm in the observer. By this we do not mean that the defendants must have been acting together or in concert with each other: their acts may be unpremeditated and one individual may be scarcely aware in a general turmoil of precisely what others in the riot are doing. In our view the essential factor here is that together the participants form a crowd, or to use Hawkins' terminology,[49] an "assembly", from which some may depart and others may join during the course of the conduct in question. We think it sufficient for the purposes of this Working Paper to distinguish this factor by describing the three persons necessary for the offence as being "present together" at the place where the riot occurs.

(d) Conduct of a private or public nature

5.29 There may still exist some uncertainty as to whether conduct ceases to be riotous if under the common law the common purpose is of a public as opposed to a private nature so as to amount to treason by levying war.[50] The only modern authority on this point is a dictum of the Court of Appeal in Northern Ireland which supports the view that the behaviour alleged to be riotous need not be of a private nature.[51] We think that this is correct and that there is no justification for, in effect, imposing a ceiling on the degree of violence required for the offence. It can, if necessary, be made clear in legislation that it is

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49 See para. 2.22, above.

50 See para. 2.26, above.

51 O'Brien v. Friel [1974] N.I.L.R. 29: see para. 2.26, n.67, above.

irrelevant whether the course of conduct alleged is of a private nature or directed to some general political end.

(e) The unlawful character of the course of conduct

5.30 Should it be possible for "lawful" conduct to be capable of amounting to the requisite course of conduct or should this element be restricted to "unlawful" conduct only? Bearing in mind our proposal that the offence should include an element of the use of actual violence,[52] it is arguable that nothing is gained by including the possibility of alleging a lawful course of conduct. An example may help to clarify this point. A crowd of persons lawfully walk down a street. Their way is barred by another group of persons. In order to assert their right to continue walking further down the street, they use excessive violence to gain a passage through those obstructing them. In particularising the charges of riot against members of the crowd, there are alternative courses of conduct which could be alleged: one is lawful - "a course of conduct consisting of walking along the street"; the other is unlawful - "a course of conduct consisting in the use of excessive violence against those who stand in their path". Provisionally, we think that in all cases the unlawful nature of the course of conduct should be stressed, since this more precisely describes the gravamen of the criminal conduct alleged than an allegation of lawful conduct. Accordingly, we propose that the course of conduct be qualified as "unlawful"; we welcome comments on the desirability of proposing this additional requirement.

(f) Engaging in the course of conduct

5.31 The final point to be mentioned in connection with this element is the requirement of proving that the course of conduct was being carried out. The relevant element of

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52 See para. 5.32, below.

the common law offence of riot as defined in Field v. Receiver of Metropolitan Police[53] is expressed in terms of the "execution or inception of the common purpose", there being no need to prove that the common purpose was actually achieved. The reference to inception seems to us unnecessary. For the purposes of this Working Paper, we think it sufficient for the offence to be described in terms of the rioters being "engaged in an unlawful course of conduct".

4. Violence

5.32 The element of violence is vital to a new offence of riot. According to the authorities, this element is defined as "force or violence not merely used in [and about the common purpose] but displayed in such a manner as to alarm at least one person of reasonable firmness and courage".[54] While the violence must be alarming to an individual, it is clear that the force or violence may be directed against persons or property or both. We think that this should remain the position in the statutory offence. It would also clarify the nature of the course of conduct in which the rioters are engaged if it were qualified by reference to the present element. For the purposes of this Working Paper we therefore refer to a course of violent conduct. The issues for consideration in connection with the element of violence are (a) whether the mere threat to use violence should suffice, (b) whether the element of "force" should be included, and (c) whether there should be a requirement that some person was alarmed or put in fear.

(a) Threats or displays of violence

5.33 It is reasonably clear that the common law offence

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53 [1907] 2 K.B. 853, 860; see para. 2.28, above.

54 Field v. Receiver of Metropolitan Police [1907] 2 K.B. 853, 860: see paras. 2.31 et seq., above.

of riot can be committed in circumstances where actual violence has not been used, but where there is an immediate threat of violence.[55] It seems doubtful, however, whether in practice charges of riot have been brought where no personal injury or damage to property has resulted from the conduct of the rioters or where no acts of violence, such as the hurling of missiles, have occurred. It is therefore open to question whether the statutory offence of riot should include mere threats or displays of violence. A number of arguments may be advanced in favour of restricting this element of the offence to the actual use of violence, some of which bear a similarity to the arguments earlier put forward for excluding threats of violence against the person from the ambit of affray.[56] First, exclusion would serve to clarify the distinction between riot and unlawful assembly.[57] The distinction between these two offences under the existing law is slight, largely because of the possibility of a charge of riot being brought where there is a mere apprehension of violence.[58] Secondly, the maximum penalty of five years' imprisonment which we propose for the offence of unlawful assembly may be considered adequate to deal with displays of violence giving rise to an apprehension of violence, but falling short of the actual use of force or violence.[59] Thirdly, we doubt whether the term "riot" in its ordinary usage signifies the mere threatened use of violence, however large the crowd

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55 See para. 2.33, above.

56 See paras. 4.17 et seq., above.

57 See para. 5.2, above.

58 Unlawful assembly penalises conduct which threatens a breach of the peace, and there is little if any distinction between this and an apprehension of violence: see R. v. Howell [1981] 3 W.L.R. 501, 509 and para. 6.23, below.

59 See paras. 6.17 et seq., below.

which threatens it.[60] Our provisional view is that a display of force or a threatened use of violence should be insufficient to constitute the offence of riot. We are persuaded that such a change will serve to narrow the offence only in theoretical terms, since, as we have indicated, we doubt whether charges of riot are in practice brought where there has been no use of actual violence. Again, as with affray,[61] it seems to us that the width of the term "violence" otherwise undefined means that specific provision may be required to exclude the mere threatened use of violence.

(b) Force

5.34 We have seen that in describing the element of force required in the offence of riot, the authorities refer to "force or violence" and the display of force or violence. We have taken the view that the mere display of force or violence should be excluded from the offence. We must now consider whether the element of "force" should be retained in a new statutory offence. In the proposed statutory offence of affray we described the prohibited conduct in terms of "fighting" in addition to acts of violence, because, although it perhaps added nothing of substance to the latter, it aided the description of the kind of conduct which we consider should be penalised by the offence.[62] Such, however, is not the effect of the word "force" in the present context: it appears to us to widen the ambit of the proposed offence, for it is clear that in other contexts "force" has been subject to a wide interpretation, such as

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60 According to the Oxford English Dictionary, the definition of riot is "a violent disturbance of the peace by an assembly or body of persons".

61 See para. 4.20, above.

62 See para. 4.16, above.

the forcing of a lock to gain entry to premises.[63] It was for that reason, and for fear of too wide an interpretation in the future, that in the recommendations for a new offence of unauthorised entry into premises in our Report on Conspiracy and Criminal Law Reform[64], we limited the requisite element to "violence"; this is the criterion in the offence of securing entry to premises based upon those recommendations enacted in section 6 of the Criminal Law Act 1977. In the present context, we have stressed the requirement of the use of actual violence, and it would in our view be undesirable that this element should be any wider in scope. Provisionally, therefore, we describe the element in the new offence of riot in terms of violence without further qualification.

(c) Fear

5.35 The final issue in relation to this element is whether someone should be required to testify as a witness that he or another passer-by felt or appeared to be afraid or apprehensive or whether, as has been suggested, this is a superfluous requirement.[65] We examined much the same issue in relation to affray,[66] where we concluded that there should be an objective requirement, namely, that the fighting or violence must have been such as would reasonably have caused any other person, if present, to be put in fear of his personal safety.[67] We think that for similar reasons the same criterion would be appropriate for riot.

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63 See e.g. under the Forcible Entry Acts (rep.), and Halsbury's Laws of England (4th ed., 1976), vol.11, para. 863.

64 (1976) Law Com. No. 76, paras. 2.59-2.62.

65 Per Lord Goddard C.J. in R. v. Sharp and Johnson [1957] 1 Q.B. 552, 560.

66 See paras. 4.22 et seq., above.

67 See para. 4.32, above.

(d) Conclusion

5.36 Accordingly, we provisionally propose that it should be necessary to prove that the violence of the course of conduct in which the rioters were engaged was such as would reasonably have caused any other person, if present, to be put in fear of his personal safety. Conduct consisting of the mere threat or display of violence would not suffice for this purpose.

5. In public or private places

5.37 At common law, riot is capable of commission in both public and private places.[68] The conduct penalised by the offence may have equally serious repercussions whether it occurs in public or in private, and we see no need to distinguish between the two situations. We therefore provisionally conclude that the statutory offence of riot should also be capable of commission anywhere, whether in public or in private.

6. The mental element

(a) At common law

5.38 In the definition of riot in Field v. Receiver of Metropolitan Police,[69] the only express reference to the mental element is the requirement of "an intention to help one another by force if necessary against any person who may oppose them in the execution of their common purpose". It is for consideration whether such an element is required in a statutory offence of riot.

5.39 There seem to us to be three possible ways of treating this element. The first is to include in the new offence a requirement similar to the common law element

68 See para. 2.34, above.

69 [1907] 2 K.B. 853, 860; see para. 2.30, above.

quoted above. In our view, however, a requirement of proof that those engaged in the riot intended to help one another with force if necessary against any opposition would be bound to be interpreted as a strict mental element and could, as a result, create unnecessary difficulties for the prosecution in many cases. In may well be the case, for example, that no opposition is offered against the rioters, in which event the jury would be required in effect to answer a hypothetical question - what would they have intended, if there was resistance to the course of conduct in which they were engaged? A second possibility is to make this requirement an objective one, so that the question to be asked would be whether it was apparent from their actions that the rioters would have helped each other by force against any opposition to their course of conduct. However, we have already proposed that the prosecution should have to prove that those engaged in the riot used such violence as would reasonably have caused any other person, if present, to be put in fear of his personal safety, and such an additional requirement would seem to us to add an unnecessary complication. The third option is to leave out this element altogether, which would overcome the difficulties attendant on the first two possibilities. We think that this is the best course, since in our view the element adds nothing essential to the others proposed for the offence, which seem to us all that are needed to delimit with sufficient precision the conduct to be penalised by the offence. Its omission may also help to answer criticisms, if justified, that the common law offence contains too many technical elements.[70] Provisionally, therefore, we think that it will not be necessary to include any element such as the present law contains of intent by the rioters to use force against those opposing them.

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70 See para. 5.17, above.

(b) The new offence

5.40 What, then, should be the mental element in the new offence of riot which we propose? Should it be expressly stated, in contrast to the provisional conclusion to which we have come in the case of affray?[71] As we have indicated, the authorities do not raise the issue of intent in the common law offence save in the context of what constitutes a "common purpose" and the intention of the rioters to assist each other in that common purpose, both of which are matters already examined. But the elements of the new offence which we propose are expressed in different terms: we refer to the individual defendant as being guilty of the offence of riot, as described, if he "takes part" in the riot. The issue here is therefore what the mental element is to be which accompanies the prohibited act so described. As in the case of affray,[72] we have little doubt that, if the courts had to consider the question of the mental element, they could come to only one conclusion as to the mental element which must accompany the act of taking part: the defendant must have either intended to do the act, or have been reckless as to whether he was doing it.[73] But for several reasons we doubt if intention can here be regarded as an adequate mental element. We think there would be some ambiguity if, as in the case of affray, the mental element were to be defined (whether expressly or not) in terms of intention or recklessness, for without further elucidation there would be no certain answer to the question whether the mental element would be satisfied merely by proof of the defendant's intention to do the act that he did, or whether proof would be needed of his intention to participate in what he knew amounted to a riot.

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71 See para. 4.38, above.

72 See para. 4.36, above.

73 We discuss the defendant who has a lawful excuse at para. 5.46, below.

5.41 Another important consideration in this context is the serious character of the offence of riot. Of the three offences proposed in this Paper, riot is, we believe, the most serious; that is why we provisionally propose a maximum penalty of fourteen years' imprisonment.[74] It will often be charged as an alternative to other serious offences, such as criminal damage, criminal damage endangering life, and inflicting grievous bodily harm. Equally, as we have made clear, it will also be charged in circumstances where, although it is probable that such offences have occurred, there is insufficient evidence to prove their commission. Many of these offences bear heavy penalties;[75] and they have as one element in common an express mental element which, in substance, consists of intention or recklessness as to the prohibited act and, in some cases, an additional mental element as to the consequences or purposes of the prohibited act. This leads us to the provisional conclusion that an express mental element is needed in riot which requires the defendant to be aware of the serious character of the acts in which he is involved, and which at the same time will eliminate the ambiguity referred to above.

5.42 What should be the content of this mental element? Our provisional conclusion is that for a person to be found guilty of taking part in a riot, he should be aware at the time of his participation of the facts and circumstances which go to make it a riot: that is, put shortly, that there are at least three persons present using such violence as would put a reasonable person in fear of his personal safety. The concept which best expresses this element is, in our view, that of "knowledge". For present purposes,

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74 See para. 5.52, below.

75 These are set out in the tables at paras. 4.4 and 5.10, above.

therefore, we conclude that the mental element may be best expressed as "knowingly taking part". So expressed, the prosecution will have to prove, not only that the defendant knew what he was doing, but was aware of the circumstances in which he was doing it. In practice, we think that the courts will in most cases find it sufficient to direct the jury in terms of what the defendant must have seen with his own eyes of the events in which he was involved.

5.43 If such express words denoting the mental element are to be used, it will be for consideration whether they should be defined. In our provisional view, the definition given to the term "knowledge" in our Report on the Mental Element in Crime[76] would be appropriate for application in this context. Thus if a definition on these lines were to be included, proof would be required that, at the time when the defendant took part in the riot, he either knew or had no substantial doubt that what amounted to a riot (as defined by the proposed offence) was taking place.

5.44 We have also considered whether the term which we have used in this Paper to describe the defendant's activity - "takes part" - itself requires clarification. For present purposes, we think it necessary only to make it clear that by "taking part", we include both an individual who actively uses violence and an individual who is present on the scene of the riot, assisting or encouraging the acts of any other individual engaged in the riot.[77] In this connection it may be noted that there appears to be no authority on whether incitement to riot requires the

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76 See (1978) Law Com. No. 89, Appendix A, Draft Criminal Liability (Mental Element) Bill, cl.3(1), where the "standard test of knowledge" is stated to be: "Did the person whose conduct is in issue either know of the relevant circumstances or have no substantial doubt of their existence?".

77 Cf. R. v. Caird (1970) 54 Cr. App. R. 499, 505 per Sachs L.J., quoted at para. 2.35, above.

incitement of at least three others or whether the incitement of an individual to take part in a riot is sufficient. This, perhaps, adds weight to the view that clarification will be needed of the element of participation.

5.45 To summarise, we provisionally propose that proof should be required that the defendant knowingly took part in a riot. We think that the definition of knowledge in our Report on the Mental Element in Crime[78] would be appropriate in this context. Clarification of the element of participation will also be needed to ensure that the offence covers the defendant who is present on the scene of the riot, assisting or encouraging the acts of any other individual engaged in the riot. We welcome comment upon these proposals, particularly on the question whether the term "knowingly" is adequate to serve the purposes which we have outlined.

7. Defences

(a) Without lawful excuse

5.46 Consistently with our proposals in relation to affray,[79] we think that it should be made clear that the defendant will be guilty of taking part in a riot only if he acts without lawful excuse. It is clear that section 3 of the Criminal Law Act 1967[80] would apply in circumstances where, for example, a person is defending his property from rioters by himself throwing missiles, provided that he is using no more force than is reasonable in the circumstances.

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78 See para. 5.43, above.

79 See para. 4.39, above.

80 See para. 2.17, above.

(b) Voluntary intoxication

5.47 If, as we provisionally propose, proof of a mental element of knowledge is required for a person to be found guilty of a riot, special problems may arise in relation to those acting under the influence of drink and drugs. It seems that if on a charge of that offence evidence were given that, in consequence of his voluntary intoxication, a defendant was too drunk to be aware of the circumstances in which he was acting, he would if that evidence were accepted avoid conviction. It is certainly the case that where an offence requires a mental element of intention, without the possibility of a charge framed in terms of recklessness, evidence of voluntary intoxication may negative that intent,[81] and we think that this must also be the case with an offence having a mental element such as we propose. We believe that this would be an undesirable result. Some of those participating in riots may well be intoxicated; indeed it may be the case that some riots are started by individuals inflamed by alcohol or some other drug. Where an offence, such as riot, gains much of its seriousness through the violence of a crowd, we do not think that it should be possible for an individual defendant to avoid conviction for his part in it by evidence of voluntary intoxication. If this is accepted, a special provision will be required to ensure that on a charge of riot the defendant would not be able to secure an acquittal

81 D.P.P. v. Majewski [1977] A.C. 443, as explained by Commissioner of Police of the Metropolis v. Caldwell [1981] 2 W.L.R. 509, decided that evidence of self-induced intoxication will not negative an offence where recklessness is an element of the mens rea, whether relating to the actus reus or its consequences or not. However, if a mental element of intent is required, such evidence may negative the offence: see Caldwell at p.517 per Lord Diplock.

on the basis that, because of his voluntary intoxication,[82] he was unaware that the activities in which he took part amounted to a riot. Such a defendant would thereby be placed in the same position as a defendant who was sober. We are aware that this proposal represents a modification of the present law relating to offences having a mental element limited only to intent, and also differs from the proposals of the Criminal Law Revision Committee in relation to those offences against the person having a mental element limited to intent,[83] but we believe it to be justified in the circumstances of this particular offence. We provisionally propose accordingly, and welcome views.

8. Consent provision

5.48 In our examination of the need for an offence of riot, we referred to the fact that charges of riot may in

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82 In this context we refer to the definition of voluntary intoxication given by the Butler Committee:

> "intoxication resulting from the intentional taking of drink or a drug knowing that it is capable in sufficient quantity of having an intoxicating effect, provided that intoxication is not voluntary if it results in part from a fact unknown to the defendant that increases his sensitivity to the drink or drug."

(see Report of the Committee on Mentally Abnormal Offenders (1975), Cmnd. 6244, para. 18.56).

83 In their Fourteenth Report, Offences against the Person (1980), Cmnd. 7844, para. 279, the Committee recommended that the common law rules should be replaced by a statutory provision, applicable to criminal offences generally, on the lines:

> "(a) that evidence of voluntary intoxication should be capable of negativing the mental element in murder and the intention required for the commission of any other offence; and
>
> (b) in offences in which recklessness does constitute an element of the offence, if the defendant owing to voluntary intoxication had no appreciation of a risk which he would have appreciated had he been sober, such a lack of appreciation is immaterial."

some cases raise issues of some sensitivity.[84] This is one factor which suggests to us that the statutory offence of riot should carry with it a requirement that proceedings should be instituted only by or with the consent of the Director of Public Prosecutions. Another reason for requiring the Director's consent is that it provides a method of ensuring that there is no prosecution save where it is proper in all the circumstances. For example, while we have indicated that the minimum number of participants in a riot should, in our provisional view, remain at three, we suggested that a prosecution for riot would rarely be justified in a case involving such a small number where the evidence for charges of other offences is available.[85] This is, we believe, the kind of consideration to which the Director might be expected to have regard in giving his consent to prosecute this offence. Bearing in mind the current level of prosecutions for riot and the existing role of the Director's office in many of these cases, we doubt whether this will place any substantial additional burden on him and his staff.

5.49 For these reasons, we provisionally propose that no prosecution for the offence of riot should be instituted without the consent of the Director of Public Prosecutions.

9. Mode of trial

5.50 Having regard to the seriousness of the offence, our view is that the statutory offence of riot should be triable only on indictment.[86] The question of the need for

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84 See para. 5.9, above.

85 See para. 5.23, above.

86 This also accords with the recommendation of the James Committee as to the common law offence of riot: see Report on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts (1975), Cmnd. 6323, para. 131.

additional summary offences to deal with those who fail to disperse when ordered to do so is, as we have indicated,[87] outside the scope of our review.

10. Penalty

5.51 The proposed statutory offence of riot is intended to cover a wide range of conduct principally of a serious nature falling short only of activities having more the character of an insurrection, which are currently covered by the offence of treason by levying war against the Crown.[88] It may be that such very serious cases will rarely occur, but we think that the maximum penalty must be sufficiently high to allow the courts to deal with them should they arise. We must also take into account the fact that the most serious forms of riot could well be incited and carried out by individuals with gravely criminal intention.[89] We regard the most serious cases of riot as more serious than affray, which we provisionally suggested should carry a maximum penalty of ten years.[90] If this is right, it suggests that the maximum for riot ought to be at least as high as fourteen years' imprisonment. It may even be argued that the maximum penalty should be greater than this, that is, life imprisonment, on the basis that this is the present maximum for offences of comparable gravity, such as destroying or damaging property with intent to endanger life,[91] arson[92] and unlawful wounding with intent

87 See para. 1.14, above.

88 And see further our provisional proposals for replacement of this offence by an offence penalising conduct aimed at the overthrow or supplanting of constitutional government by force contained in our Working Paper No. 72, Treason, Sedition and allied offences (1977) at para. 61.

89 See paras. 2.40 and 5.16, above.

90 See paras. 4.41 - 4.42, above.

91 See para. 5.10, above.

92 Ibid.

to do some grievous bodily harm.[93] At present, however, we think that fourteen years' imprisonment would be the appropriate maximum, although we regard it as a matter upon which the views of others would be particularly welcome.

5.52 We provisionally conclude that the maximum penalty for riot should be fourteen years' imprisonment and a fine.

E. Possible implications of our proposals as to riot outside the criminal law

5.53 As a matter of general principle we think it would be inappropriate for considerations material to the civil law to govern our proposals for new criminal offences. Nevertheless we think it right to draw attention here to two related areas outside the sphere of the criminal law for which our proposals as to a statutory offence of riot may have implications. These are (1) the Riot (Damages) Act 1886 and (2) insurance policies.

1. Riot (Damages) Act 1886

5.54 As we stated in the Introduction to this Working Paper,[94] the Riot (Damages) Act 1886 falls outside the scope of the present review. There has nonetheless existed a connection between the definition of riot and the circumstances under which compensation is payable out of the police fund.[95] This is because under the 1886 Act compensation is payable for damage to buildings etc. caused by persons "riotously and tumultuously assembled", and "riotously" here bears the same meaning as in the criminal law. It was, however, made clear in 1967 that the term "tumultuously" must also be considered, serving as it does

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93 See para. 4.4, above.

94 See para. 1.17, above.

95 As defined by the Police Act 1964, s.62 and Sched. 8.

to limit the circumstances in which compensation becomes payable.[96] Consequently, enactment of a new offence of riot would not in itself affect the basis on which compensation is at present paid. In any review of the way in which the Act operates, however, it would clearly be necessary to consider whether it is desirable both to maintain the link in the Act with the offence of riot and to perpetuate the somewhat archaic term "tumultuously".

2. Insurance

5.55 Insurance policies commonly provide that the insurer is not to be liable for loss arising from various forms of civil commotion, including any large scale civil disturbance which, for legal reasons, may not amount to a riot. Insurance falls outside the scope of this paper, but in so far as our proposals may have some effect on insurance policies, we have thought it right to draw them to the attention of those in the insurance field to afford them an opportunity to consider the implications of our proposals and, if necessary, to comment upon them.

F. Summary

5.56 A summary of our provisional proposals as to riot will be found at the end of this Working Paper in Part VIII.

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96 See J.W. Dwyer Ltd. v. Metropolitan Police District Receiver [1967] 2 Q.B. 970, 980 per Lyell J. and para. 5.21, n. 35, above.

VI UNLAWFUL ASSEMBLY

A. Introduction

6.1 The remaining common law offence against public order to be examined in this Working Paper is unlawful assembly. As with our examination of affray and riot in the two preceding Parts, we begin by considering whether there is a need for the conduct at present penalised by unlawful assembly to be covered by a new statutory offence. We come to the provisional conclusion that there is a need for a new offence in addition to our proposed offences of riot and affray; we then consider the elements which might be included in such an offence.

6.2 Our proposals for new statutory offences of affray, riot and unlawful assemby are of course intended to be considered together. As we explained at the outset of Part V,[1] one of the important matters which we have taken into account in examining both the need for new offences and the requirements of them is how best to avoid having offences which unnecessarily overlap, as seems to us possibly to be the position at present. Our proposed definition of riot was in part based on the assumption that there would continue to be a need for an offence of unlawful assembly, in particular to deal with the threatened use of violence falling short of actual violence.[2] Similar considerations arose in the context of defining a new offence of affray.[3] The

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1 See para. 5.2, above.

2 See para. 5.33, above.

3 See para. 4.19, above.

interrelationship of our proposed new offences is therefore an important factor which we believe that anyone wishing to comment on our proposals should bear in mind.

B. Consideration of the need for an offence of unlawful assembly

1. General considerations

6.3 In our statement of the existing law relating to unlawful assembly, we indicated that there still remains considerable uncertainty as to the precise scope of the common law offence and that the differing definitions of the offence which have been suggested at various times may not be of mere academic interest.[4] These uncertainties will require clarification as far as possible in any new statutory offence, but we deal with these problems later.[5] For present purposes, however, it may be helpful to refer to one of the definitions of unlawful assembly with which there appears to be at least some measure of agreement:

> "(1) An assembly of three or more persons;
>
> (2) A common purpose (a) to commit a crime of violence or (b) to achieve some other object, whether lawful or not, in such a way as to cause reasonable men to apprehend a breach of the peace."[6]

We consider first the rationale of this offence.

6.4 The rationale of unlawful assembly bears a close resemblance to that of riot. As we saw[7] when considering the latter offence, the Court of Appeal in the Garden

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4 See paras. 2.43-2.49, above.

5 See paras. 6.17 et seq., below.

6 Smith and Hogan, Criminal Law (4th ed., 1978), p. 750. See further para. 2.47, above.

7 See para. 5.6, above.

House Hotel case[8] dealt with these two offences together in emphasising the gravity of the conduct with which each offence is concerned. To quote again from a part of the judgment of the Court:[9]

> "It is the law - and, indeed, in common sense it should be the case - that any person who actively encourages or promotes an unlawful assembly or riot, whether by words, by signs or by actions, or who participates in it, is guilty of an offence which derives its great gravity from the simple fact that the persons concerned were acting in numbers and using those numbers to achieve their purpose...".

In the case of unlawful assembly, the conduct must be such as to cause an apprehension of a breach of the peace, although the offence may still be charged even where an actual breach of the peace has resulted from the defendant's conduct.[10] While the offence may be regarded as less serious than riot, it is needed as a safeguard against the threat which a number of persons are capable of posing to the public peace: it is this which characterises the nature and seriousness of an unlawful assembly and may lead to heavier penalties for those found guilty of the offence compared with similar conduct committed by individuals in isolation.

6.5 In any discussion of the offence, and the present need for it, it must, we think, be recognised at the outset that modern developments in the substantive law and in the common law powers of the police may well have reduced to some extent the significance which the offence undoubtedly had in the last century. The provisions of the Public Order Act 1936 dealing with processions and with police

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8 R. v. Caird (1970) 54 Cr. App. R. 499.

9 Ibid., p. 505.

10 E.g. R. v. Jones (1974) Cr. App. R. 120 (the Shrewsbury flying pickets case).

powers in relation to them cover much of the ground with which the common law previously had to deal, while the offence of insulting behaviour under section 5 of that Act, which we consider in more detail below,[11] is capable of dealing with almost all minor disturbances to the peace occurring in public places. The common law powers of the police have also been further defined in recent times. A police constable has long had the power to disperse an unlawful assembly using reasonable force if necessary.[12] He has the power to take reasonable steps to prevent a breach of the peace and a duty to prevent breaches of the peace which he reasonably apprehends.[13] He has the power to arrest for an actual or an apprehended breach of the peace.[14] And he has the power to enter private premises where it is expected that a breach of the peace may occur.[15] As we made clear in the Introduction, we are not dealing with police powers in this Working Paper; however, the present extent of these powers under statute and at common law has a bearing upon the practical need for a new offence of unlawful assembly, particularly

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11 See paras. 6.7-6.8, below.

12 O'Kelly v. Harvey (1883) 15 Cox C.C. 435.

13 Duncan v. Jones [1936] 1 K.B. 218; and see Albert v. Lavin [1981] 3 W.L.R. 955 (H.L.), and para. 6.24, below.

14 R. v. Howell [1981] 3 W.L.R. 501, which decided that the power of arrest lies where (i) a breach of the peace was committed in the presence of the person making the arrest, or (ii) he reasonably believed that such a breach would be committed in the immediate future by the person arrested although he had not yet committed any breach, or (iii) where a breach of the peace had been committed and it was reasonably believed that a renewal of it was threatened: see p. 508.

15 Thomas v. Sawkins [1935] 2 K.B. 249.

in such situations as arose in Beatty v. Gillbanks[16] and Wise v. Dunning.[17] Nevertheless, ultimately the issue must be whether the range of criminal offences would be adequate without an offence of unlawful assembly: where there has been a disturbance to the public peace for which individuals have been arrested, it is obvious that there must be offences to deal with them that match the gravity of their conduct. We must therefore examine in more detail the situations covered by the offence and the scope of existing alternative offences.

6.6 In essence unlawful assembly is concerned with penalising those who engage with others in a course of conduct which threatens to cause a breach of the peace. There are broadly two ways in which this threat can arise. Conduct which threatens to cause a breach of the peace may do so because those who assemble are themselves about to commit a breach of the peace, for example, by threatening to use force or violence. Alternatively, the conduct may threaten to cause a breach of the peace only because others may be provoked by it into committing a breach of the peace. In relation to the type of conduct falling within the first category, there is no question but that the criminal law must be allowed to intervene at an early stage before actual violence or fighting breaks out. Such conduct is plainly unlawful: the principal issue for discussion, therefore, is whether offences other than unlawful assembly may be considered adequate to deal with this type of conduct. As regards the second type of conduct covered by unlawful assembly, that is, conduct which may provoke others to commit a breach of the peace, more fundamental issues arise involving not only

16 (1882) 9 Q.B.D. 308; see paras. 2.59, above and 6.11, below.

17 [1902] 1 K.B. 167; see paras. 2.61, above and 6.11, below.

consideration of the adequacy of other criminal sanctions but also consideration of whether any substantial infringement of freedom of speech and freedom of assembly is involved. We deal with each of these types of conduct and the issues arising in turn.

2. Assemblies whose purpose is to commit a breach of the peace

6.7 Can offences other than unlawful assembly be considered adequate for dealing with persons acting together who threaten to engage in violence? The offence which has the closest connection with unlawful assembly in this context is section 5 of the Public Order Act 1936. Charges for this offence are commonly brought in cases involving a threatened disturbance to public order where summary trials with limited maximum penalties are considered adequate.[18] This section (as amended[19]) now provides that -

> "Any person who in any public place or at any public meeting -
>
> (a) uses threatening, abusive or insulting words or behaviour, or
>
> (b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting
>
> with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence, and shall on summary conviction be liable to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000 or to both".

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18 See para. 5.14, above. There are no proposals at present to change this provision: see Review of the Public Order Act 1936 and related legislation (1980), Cmnd. 7891, paras. 102-103.

19 By the Race Relations Act 1965, s.7 and the Criminal Law Act 1977, Sched. 1.

Clearly there may be cases under section 5 which would also constitute participation in an unlawful assembly and vice versa. However, there are differences in the elements of these offences which require analysis.

6.8 Unlawful assembly is in some respects both wider and narrower than section 5. In the first place, unlawful assembly is narrower by reason of the need to prove that at least three persons have assembled and that they share a common purpose. One person acting alone may be charged under section 5. On the other hand, unlawful assembly is wider in that the offence may be committed anywhere and is not restricted, as is section 5, to conduct committed in a public place or at a public meeting. Secondly, whereas under section 5 the conduct which gives rise to the likelihood of a breach of the peace is expressed in terms of "threatening, abusive or insulting words or behaviour", such terms, in so far as they have a limiting effect,[20] do not appear in any definition of unlawful assembly. Any common purpose, lawful or unlawful, suffices provided it causes a reasonable man to apprehend a breach of the peace.[21] A further distinction between these two offences is that a charge of unlawful assembly at present carries with it the automatic requirement of trial by jury with a maximum penalty at large, whereas an offence under section 5 is triable only before magistrates and carries with it a maximum penalty of six months' imprisonment or a fine of £1,000 or both. The range of penalties currently imposed by the courts for unlawful assembly is indicated in Appendix A.

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20 See further para. 6.12, below.

21 See Smith and Hogan's definition, para. 6.3, above.

6.9 Our proposed statutory offences of affray and riot, with high maximum penalties, are intended to cover serious forms of misconduct involving in the one case unlawful fighting and in the other the use of actual violence by a number of participants acting together. We have examined whether it would be necessary or desirable for these offences to cover mere threats of violence or displays of force giving rise only to an apprehension of violence, to which both affray and riot appear to be capable of applying under the existing law. Our provisional conclusion was that in neither case was it necessary to extend the scope of the proposed statutory offences to that degree. In regard to affray,[22] we pointed to the existence of other offences penalising, for example, the possession of offensive weapons and we indicated that unlawful assembly would be available to deal with displays of force by a group of persons. In regard to riot,[23] where similar considerations apply, we suggested that limitation of the offence to a requirement of the use of actual violence would clarify the boundary between riot and unlawful assembly and would serve to bring the legal meaning of riot closer to its ordinary meaning.

6.10 Having regard to the rationale of the offence of unlawful assembly and the scope of other offences, in our view there is a need for an offence which covers behaviour which falls short of a riot or an affray under our proposals. From our analysis of the differences between unlawful assembly and the offence under section 5 of the Public Order Act 1936,[24] it seems clear to us that the latter offence is inadequate for coping with disorder

22 See paras. 4,17 et seq, especially para. 4.19, above.

23 See para. 5.33, above.

24 See para. 6.8, above.

which is threatened by a number of persons acting together with a common purpose. An offence is required to deal with the more serious kinds of threatening behaviour which may arise from the activity of a crowd. Such an offence needs a higher penalty than that available under section 5, a consideration of particular relevance for the purpose of imposing adequate penalties upon those inciting or taking a leading part in a crowd which is threatening violence. Such cases are better dealt with in the Crown Court with a jury. And where behaviour of this degree of seriousness occurs, the limitation of section 5 to disturbances in public places becomes inappropriate: an offence is needed which covers threatened violence by the crowd in both public and private places. Our provisional conclusion is that these requirements would best be met by an offence of unlawful assembly broadly covering those who assemble in numbers and engage in a common purpose of threatening violence and whose behaviour thereby gives rise to an apprehension of a breach of the peace.

3. Assemblies whose purpose is to provoke others to commit a breach of the peace

6.11 In our statement of the existing law we drew attention to the considerable discussion there has been upon the issue of the extent to which the activities of persons seeking lawfully to exercise a right of assembly in public should be restricted because of the likelihood of opposition from others.[25] In particular, we referred to the attention given to the principles illustrated by the two cases of Beatty v. Gillbanks and Wise v. Dunning,[26] which may be summarised by saying that, in the context of freedom of speech and assembly, a man is free to do what it is lawful to do even though, in their efforts to

25 See paras. 2.58 et seq, above.

26 (1882) 9 Q.B.D. 308 and [1902] 1 K.B. 167.

prevent this, other people may commit a breach of the peace, but a man is not free to do an act if he intends thereby to provoke others to a breach of the peace. It may be argued that the fundamental freedoms of speech and assembly will not be affected if the principles illustrated by these cases are preserved; the problem then becomes one of finding a satisfactory formulation for the purposes of a statutory offence. For the moment, we confine ourselves to examining the strength of this argument and leave for later the consideration of any specific formulation.

6.12 In order to develop this argument, we must refer again to section 5 of the Public Order Act 1936 which, as we have seen, is also concerned with conduct provoking others to a breach of the peace.[27] In the case of section 5 the words or behaviour penalised must be "threatening, abusive or insulting". Despite these words of limitation, it has in the past been thought that this section was wide enough to cover almost any conduct likely to occasion a breach of the peace.[28] Although the Divisional Court followed this line in Cozens v. Brutus, the House of Lords firmly rejected it.[29] The following extract from the speech of Lord Reid[30] makes clear the reasons for this:

> "Parliament had to solve the difficult question of how far freedom of speech or behaviour must be limited in the general public interest. It

27 See Marsh v. Arscott, The Times, 3 March 1982: the conduct must be such as to be likely to bring about a breach of the peace.

28 Brownlie's Law of Public Order and National Security (2nd ed., 1981), p. 5. See e.g. Vernon v. Paddon [1973] 1 W.L.R. 663, 666.

29 [1972] 1 W.L.R. 484 (D.C.). Reported sub. nom. Brutus v. Cozens [1973] A.C. 854 (H.L.).

30 Ibid., at p. 862.

> would have been going much too far to prohibit all speech or conduct likely to occasion a breach of the peace because determined opponents may not shrink from organising or at least threatening a breach of the peace in order to silence a speaker whose views they detest. Therefore vigorous and it may be distasteful or unmannerly speech or behaviour is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why any of these should be construed as having a specially wide or a specially narrow meaning. They are all limits easily recognisable by the ordinary man. Free speech is not impaired by ruling them out. But before a man can be convicted it must be clearly shown that one or more of them has been disregarded."[31]

6.13 Since none of the definitions of unlawful assembly under the existing law contains any requirement that the conduct of the defendants must be "threatening, abusive or insulting", the question arises as to whether that part of the offence of unlawful assembly with which we are dealing reflects Lord Reid's statement regarding the extent to which freedom of speech may properly be limited. While the decision in Beatty v. Gillbanks[32] affirms that mere knowledge of the likelihood that the defendant's conduct will provoke a breach of the peace is insufficient for unlawful assembly, the case does not make entirely clear what additional conduct or mental element is required. In that case, Field J, referred to the principle that a man must be taken to intend the natural consequences of his own acts, and that the violence

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31 It has been suggested that this ruling was "an implicit reaffirmation of the principle in Beatty v. Gillbanks: that one's lawful behaviour, however distasteful, does not become unlawful because of the reactions of others": D.G.T. Williams, "The Law and Public Protest", Cambridge-Tilburg Lectures: First Series (1978), 27 at p. 31.

32 (1882) 9 Q.B.D. 308.

resulting from the defendant's lawful behaviour was not in that case a natural consequence of it.[33]

6.14 In our view, the difficulties arising from the authorities and the problem of avoiding undue interference with freedom of speech and assembly may be resolved by an offence which requires proof, first, that a number of persons acted in a way which was objectively likely to give rise to an apprehension of a breach of the peace, secondly, that they had the purpose of engaging in conduct which had as a minimum the characteristics specified by section 5 of the Public Order Act 1936 (that is, conduct which is threatening, abusive or insulting) and, thirdly, that they so acted with the object of provoking others to a breach of the peace. The first two requirements would, of course, render the individuals guilty of an offence under section 5. But it is the third which elevates it into a more serious crime: a crowd which by means of insulting behaviour is intent on provoking another crowd which is opposing it into acts of violence is, it seems to us, clearly indulging in behaviour of a greater degree of gravity than that which is appropriate to be dealt with by the summary offence under section 5.

6.15 If it is accepted that an offence with these elements would not involve any undue interference with freedom of speech and freedom of assembly, the only remaining issue is whether unlawful assembly should also

33 This principle is now subject to the provisions of the Criminal Justice Act 1967, s.8, which provides that: "A court or jury, in determining whether a person has committed an offence, - (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances."

cover this type of provocative conduct or whether other criminal sanctions are sufficient. We have already stated that in our view section 5 of the Public Order Act 1936 is not capable of dealing adequately with this kind of behaviour. It is evident too that a charge of incitement to commit an offence of violence would not be appropriate in every case. We provisionally conclude therefore that other criminal offences would not be adequate to deal with unlawful assemblies of this type.

4. Provisional conclusion

6.16 In considering whether there is any need for a new offence of unlawful assembly, we have suggested that there are two types of conduct covered by the present offence which must be examined and that different issues are involved in each case. The first is where a number of persons are assembled together to commit a breach of the peace by threatening violence. If a statutory offence of riot is to have the elements which we have proposed, there will be a need for a less serious offence to deal with disturbances to public order where the penalty under section 5 of the Public Order Act 1936 is inadequate. Such an offence is also required in our view to deal with threatened violence by a crowd of persons on private premises, to which section 5 does not apply. The second type of conduct is that consisting of threatening, abusive or insulting behaviour which has as its object to provoke others to a breach of the peace; penalising this would not in our view involve any undue infringement of freedom of speech or freedom of assembly. Again, we do not think that other offences are adequate to deal with this type of conduct. We, therefore, provisionally conclude that a new offence of unlawful assembly is required to deal with both these forms of behaviour.

C. The elements of a proposed statutory offence of unlawful assembly

1. General

6.17 We now examine in detail the elements which might be included in a new statutory offence of unlawful assembly. Our statement of the existing law[34] is sufficient to demonstrate that there are many uncertainties regarding the definition of the common law which must be resolved in any new offence. We first summarise the elements of the proposed new offence.

6.18 The common law offence of unlawful assembly should in our provisional view be replaced by a new statutory offence of unlawful assembly triable only on indictment. It would penalise anyone who knowingly and without lawful excuse takes part in an unlawful assembly. An unlawful assembly would consist of -

(a) three or more persons present together in a public or private place;

(b) whose purpose is to engage in, or who are engaged in, a course of conduct which either -

(i) involves the use of violence or threats or displays of violence by some or all of those present; or

(ii) has by means of threatening, abusive or insulting words or behaviour the object of provoking the use of violence by others;

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34 See paras. 2.43-2.65, above.

(c) and whose words or actions in that place would reasonably have caused any other person, if present, to apprehend an imminent breach of the peace.

The offence would be punishable on indictment with a maximum penalty of five years' imprisonment and a fine. We consider each of these elements in turn.

2. Three or more persons present together

6.19 The requirement of a number of participants is, as we pointed out earlier,[35] an important element which, coupled with the elements of common purpose and an apprehension of violence, provides one of the justifications for having an offence of unlawful assembly. In relation to the offence of riot, we considered[36] several alternatives in place of the similar requirement of a minimum of three persons. These included making reference merely to the defendant's participation in conduct by a "group" of persons or increasing the minimum to a higher figure, such as twelve. In the event, we provisionally concluded that neither of these alternatives would be satisfactory and that, on balance, the arguments favoured retention of the present requirement of a minimum of three persons. Although some other common law jurisdictions require a minimum of five persons for unlawful assembly,[37] we can see no reason for proposing that the minimum should be raised to a figure higher than three, particularly in view of our proposal to retain this requirement for riot. To have a requirement of a

35 See paras. 6.4 et seq.

36 See paras. 5.21-5.23, above.

37 E.g. New South Wales and India: see Appendix B, paras. 5 and 11.

minimum number for unlawful assembly higher than for the more serious offence of riot would in our view create an undesirable anomaly and make for difficulties in directing juries on unlawful assembly as an alternative verdict to a charge of riot.[38] Provisionally, therefore, we propose to retain the connection between riot and unlawful assembly by requiring the same minimum number of participants for both, that is to say, a minimum of three. As in the case of riot, we think it convenient to describe the three persons as being "present together". The act of assembling is not in itself essential to the offence: the crucial element is what they appear to be about to do when so assembled. To this we now turn.

3. Whose words or actions would reasonably have caused any other person, if present, to apprehend an imminent breach of the peace

6.20 According to some of the definitions of unlawful assembly at common law, the offence is capable of encompassing conduct which lacks the ingredient of causing an apprehension of an imminent breach of the peace.[39] Two specific examples may be given: first, where three or more are assembled together to plan a fraud or any other non-violent crime; secondly, where the same number meet to plan a crime of violence to take place at some future time. In neither of these two cases is there any immediate threat to public order; indeed, in the first example, there may be no threat to public order at all. We are unaware of any modern case of unlawful assembly involving conduct of this sort. It is clear that in both examples the participants may be guilty of other serious offences, such as conspiracy to commit an offence. Most modern definitions of unlawful assembly exclude these two types of case by including a requirement that the

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38 See para. 6.39, below.

39 See paras. 2.46-2.47, above.

assembly must cause reasonable men to apprehend a breach of the peace.

6.21 The last-mentioned factor seems to us, indeed, to be essential to unlawful assembly, and may be expressed as a requirement that the conduct of those concerned in the place where they are present must be such as would cause a reasonable person, if present, to apprehend an imminent breach of the peace. To the extent that the objective standard of the reasonable man is here the yardstick, this criterion for the measurement of the necessary degree of alarm resembles that which we have proposed for affray and riot.[40] However, we have provisionally concluded that, in place of the concept which we proposed for those offences of putting a person in fear of his personal safety, the appropriate concept in the present context is the apprehension of an imminent breach of the peace. This preserves the existing link between the offence and the exercise by the police of their common law powers, to which we referred above.[41] Since we are considering the possible elements of a new statutory offence we must now consider whether it is necessary or desirable to define or qualify the common law concept of breach of the peace for present purposes.

4. Should breach of the peace be defined?

6.22 Apart from the common law offence of unlawful assembly itself, the concept of breach of the peace is of fundamental importance because "every citizen in whose presence a breach of the peace is being, or reasonably appears to be about to be, committed has the right to take

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40 See paras. 4.32 and 5.35, above.

41 See para. 6.5, above.

reasonable steps to make the person who is breaking or threatening to break the peace refrain from doing so".[42] The concept is also fundamental to many of the police powers at common law for maintaining public order to which we have already referred.[43] It is also relevant to the criminal court's jurisdiction to bind over a person to keep the peace and to be of good behaviour.[44] In addition, the term"breach of the peace"is to be found in section 5 of the Public Order Act 1936,[45] without any definition.

6.23 The recent decision of the Court of Appeal in R. v. Howell[46] does much to clarify not only the circumstances in which the common law power of arrest for a breach of the peace exists but also the meaning of the term "breach of the peace". After pointing out that a comprehensive definition of the term had very rarely been formulated in any of the decisions going back to the 18th century, Watkins L.J. (giving the judgment of the Court) went on:[47]

> "The older cases are of considerable interest but they are not a sure guide to what the term is understood to mean today, since keeping the peace in this country in the latter half of

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42 Albert v. Lavin [1981] 3 W.L.R. 955, 958 per Lord Diplock.

43 See para. 6.5, above.

44 We are conducting a separate examination of this power under a reference from the Lord Chancellor under s.3(1)(e) of the Law Commissions Act 1965.

45 And in the offences of local application on which this section was based: see further paras. 7.19-7.22, below.

46 [1981] 3 W.L.R. 501. The House of Lords refused the defendant leave to appeal: [1981] 1 W.L.R. 1468.

47 Ibid., at p. 508.

> the 20th century presents formidable problems which bear upon the evolving process of the development of this branch of the common law. Nevertheless, even in these days when affrays, riotous behaviour and other disturbances happen all too frequently, we cannot accept that there can be a breach of the peace unless there has been an act done or threatened to be done which either actually harms a person, or in his presence his property, or is likely to cause such harm, or which puts someone in fear of such harm being done. There is nothing more likely to arouse resentment and anger in him, and a desire to take instant revenge, than attacks or threatened attacks upon a person's body or property." (emphasis added)

Significantly the Court criticised previous definitions[48] of the term for their failure to relate all the kinds of behaviour to violence and rejected the notion that the term "disturbance" in isolation could constitute a breach of the peace.[49]

6.24 On the other hand, dicta of the Court of Appeal in the later case of R. v. Chief Constable of Devon and Cornwall, Ex parte Central Electricity Generating Board[50] suggest that a wider meaning might be given to the term "breach of the peace" than the definition given in R. v. Howell.[51] Thus, in the later case, passive and peaceful obstruction by demonstrators at a site which the C.E.G.B. were attempting to inspect was characterised by Lord Denning M.R. as "unlawful conduct [which] gives rise to a reasonable apprehension of a breach of the peace"

48 Referring in particular to the definitions given in Halsbury's Laws of England (4th ed., 1976) vol. 11, para. 108 and by the Attorney General, in argument, in Gelberg v. Miller [1961] 1 W.L.R. 153, 158.

49 Ibid., at p. 509.

50 [1981] 3 W.L.R. 967.

51 This case was cited in argument, but not referred to in any of the judgments.

because the obstruction itself was a criminal offence. He commented that:

> "if anyone unlawfully and physically obstructs the worker - by lying down or chaining himself to a rig or the like - he is guilty of a breach of the peace."[52]

These observations go somewhat wider than those of Lawton and Templeman L.JJ. in the same case and also wider than the definition of breach of the peace in R. v. Howell above.

6.25 In our view, unlawful assembly should be restricted to conduct which at least gives rise to a fear of violence of some kind. To avoid the term "breach of the peace" being given any wider meaning in this context, such as on one interpretation might appear to have been the view of Lord Denning M.R. in the C.E.G.B. case,[53] it might be possible to qualify the element of breach of the peace by adding the element of violence: conduct which reasonably puts a person in fear of a violent breach of the peace. But if legislation were expressly to qualify the term in this way, it might lead to conflicting arguments: either that the use of the qualifying adjective adds nothing to the meaning of the term in view of the decision in Howell,[54] or that, by so qualifying it, "breach of the peace" at common law possesses a wider meaning, such as that attributed to it by Lord Denning. The alternative to such qualification of the term is to provide

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52 Ibid., p. 975. Lord Denning also said that the conduct of the demonstrators amounted to an unlawful assembly, but Lawton L.J. said this required "the factor of either violence or tumult". See further para. 2.49, above.

53 [1981] 3 W.L.R. 967, 975.

54 [1981] 3 W.L.R. 501.

a comprehensive definition of "breach of the peace" for the purpose of this offence. However, in our view a number of arguments weigh against this course.

6.26 The principal objection to defining "breach of the peace" for the purpose of a new statutory offence of unlawful assembly is that it is a term which, as we have seen, is fundamental in considering both the rights of all citizens and the powers of the police, and to supply a definition for the purposes of an offence could have unintended repercussions. For example, it could indirectly affect the scope of the common law police powers already mentioned,[55] including the power to disperse an unlawful assembly, to which the concept of breach of the peace is fundamental. And, as we indicated earlier,[56] it is not part of our remit to consider the difficult issues surrounding the reform or codification of these powers. Another important reason for not defining the term is that it was not defined in 1936 for the purposes of the Public Order Act and it has not, so far as we are aware, given rise to problems in the context of that Act. Were the concept to be defined it would, we think, be necessary to do so also for the purposes of that Act. Finally, it is worth noting that, even if the dicta of Lord Denning M.R. in the C.E.G.B. case are followed in future cases, so that the concept of breach of the peace is developed beyond the limits suggested in Howell, we do not think that this would have serious consequences for the offence which we propose. This is because of the limitations which we place upon the prohibited acts by reference to the concepts of violence or threatened violence, which we examine below.[57] Any anxiety which there may be about

55 See para. 6.5, above.

56 See para. 1.13, above.

57 See para. 6.32, below.

the consequences of the C.E.G.B. case is in our view more likely to be felt in other areas of the law relating to public order. For these reasons we are at present of the view that the term "breach of the peace" should be included in the proposed offence of unlawful assembly without qualification or definition. We would welcome comments on this proposal.

5. Common purpose

(a) Its function at common law

6.27 We examined the element of common purpose in some detail in the context of our discussion of the new statutory offence of riot.[58] We concluded that for the purposes of the new offence of riot the common law concept required clarification and that, in our provisional view, "course of conduct" (with the additional qualification of "unlawful") would best describe the concept in the new offence; apart from the advantage of clarification, our purpose was not to effect any significant change in the law. This earlier discussion is clearly relevant to our consideration here of the element of common purpose in unlawful assembly.

6.28 In considering the need for an offence of unlawful assembly, we emphasised the potentially serious threat to public order which would result from a number of persons being engaged in a course of conduct together in a way which causes others to apprehend a breach of the peace. It seems to us that it is necessary to retain the element of common purpose in any new offence of unlawful assembly, since this is one of the important elements which justifies imposition of substantial penalties.[59]

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58 See paras. 5.24-5.31, above.

59 See R. v. Caird (1970) 54 Cr. App. R. 499, 505 per Sachs L.J. and para. 6.4, above.

An offence which penalised individuals merely for conduct putting a reasonable person in fear of a breach of the peace would result in the creation of an offence wider than section 5 of the Public Order Act 1936, where the individual's conduct must be "threatening, abusive or insulting" and must at least be objectively likely to cause a breach of the peace.

6.29 It is necessary to observe, however, that the function of the term "common purpose" appears to differ in the common law offences of riot and unlawful assembly. In the case of riot its real function is to indicate that three or more people are acting together in a violent manner. But its use in that context is uncertain because it leaves open the question "common purpose to do what?" and may therefore lead to possible queries as to the motives of the individual participants. Such considerations led us to use "course of conduct" to describe the concept which we think appropriate for that offence.[60]

6.30 On the other hand, the term "common purpose" in unlawful assembly indicates not only that at least three people are acting together, but that their purpose is to engage in some further course of conduct. Precisely what that conduct consists of is, under the present law, specified in various ways according to whichever definition of the offence is adopted.[61] In our view it is essential to retain the concept of "purpose" to indicate that the assembly has further ends in view: those ends must, of course, be specified in a new offence, not only in order to indicate which kinds of assembly are to be penalised by the offence, but also to eliminate the

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60 See para. 5.27, above.

61 See paras. 2.44-2.48, above.

possibility of individual motives being in issue. The question will then be whether in the light of all the facts and circumstances the assembly as a whole has the specified purpose, irrespective of the individual motivation of each of its participants.

(b) Its scope in a new offence

6.31 What, then, should be the content of this "purpose"? It is evident that merely to qualify it by describing it as "unlawful", as we proposed in the case of riot,[62] would be inappropriate for the purposes of unlawful assembly, because the additional requirement of the use of actual violence in riot which justified this restriction would not be an essential element in unlawful assembly, and would in any event leave a large measure of uncertainty. Our discussion of the need for an offence has indicated two types of conduct with which any new offence of unlawful assembly ought to be concerned,[63] and which are broadly covered by the existing common law offence. The first is where those assembled themselves threaten to commit a breach of the peace; the second is where those assembled act together with the object of provoking others to a breach of the peace. Should the purpose accordingly be described in terms of the commission of a breach of the peace, or provoking others to commit such a breach? We have said that unlawful assembly should be restricted to conduct which at least gives rise to a fear of violence of some kind,[64] and have pointed out that the prevailing view of the courts is that the concept of breach of the peace involves some act of violence, actual or threatened. But while for the reasons given above[65]

62 See para. 5.30, above.

63 See paras. 6.7-6.16, above.

64 See para. 6.25, above.

65 Para. 6.26.

we have retained this common law concept for the purpose of indicating the alarm to which the assembly gives rise in the observer, we do not think its use here would be appropriate. To the extent that the concept is one which is still developing at common law, as the authorities referred to in the previous paragraphs indicate that it is, we think it lacks sufficient precision in the present context. Furthermore, it will be noted that apparently not all forms of violence fall within the concept, for, according to the definition advanced in R. v. Howell,[66] where the violence involves harm to property it can only constitute a breach of the peace if threatened or inflicted in the presence of the person to whom the property belongs.

6.32 Our provisional conclusions may best be considered by reference to the two main situations with which the offence is to deal. In cases where the purpose of the assembly itself is to commit a breach of the peace[67] we think that this element is best described as a course of conduct involving the use of violence or threats or displays of violence by some or all of those present.[68] In so far as we refer to violence here, our proposal is consistent with those which we have made in relation to affray and riot.[69] But unlike those proposals, we think that in this offence the threat or display of violence must be covered, in order to deal with groups whose conduct falls short of the actual use of violence, or those who by their behaviour, appearance and numbers have a menacing character. The offence would, like the present law, deal

66 [1981] 3 W.L.R. 501; see para. 6.23, above.

67 See para. 6.7, above.

68 There must be a minimum of three who are to engage in this course of conduct.

69 See paras. 4.20 and 5.36, above.

both with those who are about to act, and with those who have already started to act, in the specified way.

6.33 In cases where the purpose of the assembly is to provoke others to commit a breach of the peace[70] we think that the conduct of the assembly for that purpose must as a minimum consist of threatening, abusive and insulting words or behaviour.[71] Conduct which falls short of this is not generally penalised by the criminal law even if it is likely to cause a breach of the peace,[72] and we think that the demands of free expression therefore require this minimum criterion of misconduct. In the absence of this criterion, we think that excessive reliance would in any particular case have to be placed upon the past reputation of those forming the assembly or circumstances external to their actual conduct, such as the place and timing of the assembly; in our view this would be undesirable.[73] In addition to behaviour of this character, we provisionally take the view that to be criminally liable the assembly must have as its object the provocation of others to commit acts of violence: it is in our view insufficient that they know that it is likely that their conduct will have this result.[74] This does not, however, mean that the sole object of the assembly must be to provoke violence: it will suffice if there is evidence to prove that this must have been one of the

70 See para. 6.11, above.

71 This is the terminology of the Public Order Act 1936, s.5: see para. 6.7, above.

72 See para. 6.12, above.

73 Such factors might even so be relevant to the question whether the assembly was such as to cause a reasonable person, if present, to apprehend an imminent breach of the peace: see para. 6.21, above.

74 Compare Smith and Hogan, Criminal Law (4th ed., 1978), p. 752; see para. 2.57, above.

assembly's main objects. It will be noted that, in this context, we refer to the provoking of violence, by which we mean acts of physical violence. In our provisional view, if the object falls short of this - if what is intended to be provoked by threatening behaviour is the mere counter-threat or display of violence - there should be no liability for this offence, although, of course, there would in most cases[75] be liability for acts of insulting behaviour under section 5 of the Public Order Act 1936 if the purpose is carried out.

(c) Summary

6.34 We provisionally propose that members of an unlawful assembly must have the purpose of engaging in, or must be engaged in, a course of conduct which either -

(i) involves the use of violence or threats or displays of violence by some or all of those present; or

(ii) has by means of threatening, abusive or insulting words or behaviour the object of provoking the use of violence by others.

6. In public or private places

6.35 Should the statutory offence apply to unlawful assemblies in private places as well as in public places? The House of Lords confirmed in Kamara v. D.P.P.[76] that the common law offence can be committed otherwise than in a public place, holding that the public element necessary for the commission of the offence was the danger to the security of innocent third parties either present or likely to be present. We accept this approach: it cannot in

75 I.e. in all cases save where the activities take place on private premises.

76 [1974] A.C. 104; see para. 2.52, above.

our view be a relevant factor that the conduct in question took place on private premises if it nonetheless was such as to cause a reasonable person, if present, to apprehend an imminent breach of the peace. In accordance with our proposals in relation to affray and riot[77] we therefore propose that the offence of unlawful assembly should be capable of commission anywhere.

7. The mental element

6.36 Under our proposals a person will be guilty of an offence if he takes part in an unlawful assembly having the elements which we have described in the preceding paragraphs. Put in this way, it is clear that the mental element in this offence raises many of the same issues as those considered in relation to the proposed offence of riot.[78] Thus it seems to us that the act of "taking part" must require a mental element of intention or recklessness, but, whether or not express provision were made to that effect, such a requirement would leave it unclear as to whether it was sufficient for the defendant to intend to do the act which he did or whether he must have intended to participate in what he knew amounted to an unlawful assembly. It is therefore for consideration, as it was in the case of riot, whether express provision should be made in this offence to eliminate possible difficulties. Unlawful assembly is, under our proposed scheme, to be a less serious offence than riot. Consequently the arguments which we canvassed in the context of riot in favour of an express mental element of knowledge[79] have less force. On the other hand, the purposive element in the proposed offence of unlawful assembly is predominant, by contrast with riot; and it seems to us reasonable to

77 See paras. 4.21 and 5.37, above.

78 See paras. 5.40 et seq, above.

79 See paras. 5.41 and 5.42, above.

require that, before a defendant may be found guilty of taking part in an unlawful assembly, he should be shown to have been aware of the character of the assembly in which it is alleged that he participated. Thus on balance we favour the inclusion of a specific mental element of "knowingly" taking part in an unlawful assembly. For the reasons given in relation to the proposed offence of riot,[80] we think that it would be appropriate to clarify the meaning of "taking part" and to apply in this context the definition given to "knowledge" in our Report on the Mental Element in Crime.[81]

8. Defences

6.37 Consistently with our approach in the proposed offence of riot, and for the reasons which we set out in that Part of the Paper,[82] we provisionally propose, first, that a defendant should be guilty of taking part in an unlawful assembly only if he acts without lawful excuse and, secondly, that express provision should be made to ensure that evidence of the defendant's voluntary intoxication would not negative the mental element required for the offence.

9. Mode of trial

6.38 The statutory offence of unlawful assembly is intended to be a less serious offence than riot, there being no need to prove the use of actual violence. On the other hand, the offence is more serious than the summary offence penalising threatening behaviour under section 5 of the Public Order Act 1936, because it requires proof that at least three persons were engaged in

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80 See paras. 5.43-5.44, above.

81 (1978) Law Com. No. 89; see para. 5.43, n.76, above.

82 See paras. 5.41-5.42.

a course of conduct involving a threat to public order. Under the existing law unlawful assembly is triable only on indictment. Magistrates' courts have not hitherto had to consider cases of unlawful assembly and the concept of common purpose, except in rare cases where defendants have been brought before them for a binding over order on the basis of conduct alleged to have constituted an unlawful assembly.[83] The James Committee[84] were in favour of retaining unlawful assembly in the category of offences triable only on indictment because of the possible complexity of some trials and the likelihood that a large number of defendants may be involved; the same reasons, in fact, which persuaded them that affray should be triable only on indictment. These factors, and the possible length of some trials of unlawful assembly, persuade us that, although the offence is intended to be less serious than the worst cases of affray or riot, it should be triable only on indictment. We provisionally propose accordingly.

10. Alternative verdicts

6.39 We have noted that at common law it is open to a jury to convict of unlawful assembly if they acquit on a charge of riot. The general principle at common law was that conviction of a lesser offence than that charged was permissible provided that the definition of the greater offence necessarily included the definition of the lesser offence. Section 6(3) of the Criminal Law Act 1967 now provides that, save in cases of treason or murder, if a jury find the defendant not guilty of the offence charged, but the allegations in the indictment

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83 E.g. Beatty v. Gillbanks (1882) 9 Q.B.D. 308; see para. 2.59, above.

84 Report on the Distribution of Criminal Business between the Crown Court and Magistrates' Courts (1975), Cmnd. 6323, para. 131.

amount to or include an allegation of another offence falling within the court's jurisdiction, the jury may find him guilty of the other offence or of an offence of which he could be found guilty on an indictment specifically charging that other offence. In so far as the proposed offence of unlawful assembly covers under its first limb acts of violence or threatened violence, it is an offence in which, on a charge of riot, the allegations in the indictment would necessarily include an allegation of unlawful assembly. That would, however, not be so in the case of other types of unlawful assembly. Nevertheless, we think that in the appropriate case the jury should be able to return a verdict of unlawful assembly on a charge of riot, particularly where the allegations in the indictment indicate that the purpose of the assembly was to perpetrate acts of violence. In order to eliminate doubts as to whether section 6(3) applies in these cases, we provisionally propose the inclusion of an express provision to this effect.

11. Penalty

6.40 The proposed offence is less serious than either riot or affray; the maximum penalty must therefore be lower than ten years' imprisonment to reflect this difference. Sentences actually imposed for unlawful assembly in recent times have rarely been longer than twelve months,[85] although a penalty of three years' imprisonment was imposed in the case in 1973 involving the Shrewsbury flying pickets.[86] Bearing in mind that the offence may be required to deal with the ringleaders of dangerous situations such as disturbances falling short of a riot or the display of force in large numbers, an

85 See Appendix A.

86 R. v. Jones (1974) 59 Cr. App. R. 120 (C.A.). See para. 2.56, above.

appropriate maximum penalty on indictment may be thought to be five years' imprisonment. We provisionally propose accordingly.

12. Consent provision

6.41 Finally, it is necessary to consider whether it should be a requirement of unlawful assembly that proceedings should be instituted only by or with the consent of the Director of Public Prosecutions. There are factors which suggest that, as in the case of riot,[87] the Director's consent should be required. These include the possibility of prosecutions being brought in cases raising issues of some sensitivity, especially where it is alleged that the defendant took part in an unlawful assembly which had the object of provoking others to a breach of the peace; this is the aspect of the offence most closely involved with issues of freedom of speech and freedom of assembly. On the other hand, it may be argued that many other offences in the field of public order may also involve such issues and that these factors alone are not sufficiently compelling to require the Director's consent. On balance, we do not consider that the Director's consent should be required for the institution of proceedings for unlawful assembly.

D. Summary

6.42 Our provisional proposals as to unlawful assembly are summarised in Part VIII below.

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87 See para. 5.48, above.

VII MISCELLANEOUS STATUTORY OFFENCES RELATING TO PUBLIC ORDER

A. Introduction

7.1 So far in this Working Paper we have only been concerned with the common law offences against public order. In this Part, we examine a number of statutory offences in the field of public order which bear a very archaic look and seem to be ripe for repeal or restatement in modern form. We have already explained in the Introduction[1] the reasons why our review of statutory offences is limited to the particular examples considered in the following paragraphs.

B. Offences relating to the prevention of disorder around Parliament

1. Tumultuous Petitioning Act 1661

7.2 The Tumultuous Petitioning Act 1661 was one of a number of measures passed in the period immediately following the Restoration of the Monarchy aimed at restoring and maintaining order in the country. The Act, which remains in force[2], provides in section 1 that:

> " no person or persons whatsoever shall repair to His Majesty or both or either of the Houses of Parliament upon pretence of presenting or delivering any petition, complaint, remonstrance or declaration or other addresses accompanied with excessive number of people, nor at any one time with above the number of ten persons ...."

The maximum penalty for this offence is a fine of £100 and 3 months' imprisonment on indictment.[3] By section 2 the

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1 See paras. 1.4 et seq, above.

2 See Appendix C for the full text of the Act as amended.

3 The offence must be prosecuted within six months after the offence committed, and there must be proof by "two or more credible witnesses" (s.1).

provisions of the Act do not extend to hinder any person or persons not exceeding the number of ten to present any public or private grievance or complaint to any member or members of Parliament or the Sovereign, nor to any Address to the Sovereign by either House of Parliament.

7.3 It was contended in 1781 at the trial of Lord George Gordon[4] that the 1661 Act had been "virtually repealed" by Article 5 of the Bill of Rights 1688 which declares:

> " that it is the right of the subjects to petition the King and that all commitments and prosecutions for such petitioning are illegal."

But in directing the jury in that case, Lord Mansfield C.J. said that "the Bill of Rights did not mean to meddle with [the 1661 Act] at all" and that consequently it remained in full force.[5] So far as is known, however, there have been no prosecutions under this Act at all in modern times.[6] The last occasion on which a prosecution was apparently threatened was in 1908 against members of the suffragette movement.[7]

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4 R. v. Lord George Gordon (1781) 2 Dougl. 590; 99 E.R.372.

5 Ibid., at pp. 592-593 and p. 374 respectively.

6 In 1947, s.1 of the Tumultuous Petitioning Act 1661 was invoked by the organisers of a petition to the House of Lords advocating the admission of women to the House. Under the first part of s.1, it was necessary to obtain the consent of three justices before a petition "for alteration of matters established by law in church or state" became legal. Permission in this case was granted: see The Times, 7 November 1947, p.3. However, this part of s.1 was subsequently repealed by the Statute Law Revision Act 1948, Sched.1, and the only remaining part now is that which is quoted in para. 7.2, above.

7 D.G.T. Williams, Keeping the Peace (1967), p. 203.

7.4 Before coming to our proposals regarding this Act, it will be necessary to consider the scope of section 23 of the Seditious Meetings Act 1817 and other provisions specifically concerned with the preservation of order around Parliament at Westminster.

2. Seditious Meetings Act 1817, section 23

7.5 Section 23 of the Seditious Meetings Act 1817 places restrictions on certain meetings in Westminster during the sitting of Parliament. It provides in substance[8] that:

> " it shall not be lawful for any person or persons, to convene or call together or to give any notice for convening or calling together any meeting of persons consisting of more than fifty persons, or for any number of persons exceeding fifty to meet, in any street, square, or open place in the city or liberties of Westminster, or County of Middlesex, within the distance of one mile from the gate of Westminster Hall ..., for the purpose or on the pretext of considering of or preparing any petition, complaint, remonstrance, declaration, or other address to the King ..., or to both Houses or either House of Parliament,[9] for alteration of matters in Church or State...."

and that:

> " such meeting or assembly shall be deemed and taken to be an unlawful assembly, by whomsoever or in consequence of what notice soever such meeting or assembly shall have been holden:"

There is a proviso that:

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8 The full text of this section (as amended) is set out in Appendix C.

9 The section only applies to meetings held on any day on which the two Houses meet and sit or "on any day on which His Majesty's Courts of Chancery, King's Bench [etc.] ... shall sit in Westminster Hall ...". Russell on Crime (12th ed., 1964), vol. 1, p.260 states "it is doubtful whether this applies to the sittings at the Royal Courts of Justice".

> "nothing in this enactment contained shall by any construction whatever be deemed or taken to apply to or affect any meeting convened, called or holden for the election of members of Parliament, or any persons attending such meeting, or to any persons attending upon the business of either House of Parliament, or any of the said courts".

The maximum penalty for contravening the terms of section 23 is the same as for an unlawful assembly at common law, that is to say, at large.

7.6 There have been no reported prosecutions as such under section 23 since the 19th century, although it was invoked in 1932 when two defendants were bound over for inciting others to take part near Parliament in mass demonstrations against unemployment contrary to the 1817 Act.[10]

3. Other related provisions

7.7 Both these provisions are broadly concerned, albeit in different ways, with the prevention of disorder around Parliament and with ensuring the freedom of access thereto by members of both Houses of Parliament, although it is clear that their scope is potentially a great deal wider than that. While the 1661 Act is aimed at penalising those who actually petition the Sovereign or Parliament in large numbers, section 23 is aimed at conduct by a larger number of persons preparatory to such petitioning. The need for controls which deal with potential threats to public order in the vicinity of Parliament is undoubted, but there are other provisions which must be considered in this connection, in particular section 52 of the Metropolitan Police Act 1839.

7.8 At the commencement of each Parliamentary Session

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10 See The Times, 17 and 19 December 1932 and also D.G.T. Williams, Keeping the Peace (1967), p. 203, where reference is made to this case.

both Houses of Parliament by order give directions that the Metropolitan Police Commissioner shall keep the streets leading to Parliament open and that access to Parliament by members of both Houses shall not be obstructed.[11] The power to give such orders derives from Parliamentary privilege. The orders are enforced in practice by the Commissioner giving directions under section 52 of the Metropolitan Police Act 1839. That section empowers the Commissioner:

> " to make regulations for the route to be observed by all carts, carriages, horses, and persons, and for preventing obstruction of the streets and thoroughfares within the metropolitan police district, in all times of public processions, public rejoicings, or illuminations, and also to give directions to the constables for keeping order and for preventing any obstruction of the thoroughfares in the immediate neighbourhood of Her Majesty's palaces and the public offices, the High Court of Parliament, the courts of law and equity, the police courts, the theatres, and other places of public resort, and in any case when the streets or thoroughfares may be thronged

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11 See T. Erskine May, Parliamentary Practice (19th ed., 1976), p. 220. The latest Sessional Order of the House of Commons is dated 4 November 1981 and reads as follows:-

> METROPOLITAN POLICE
>
> Ordered, that the Commissioner of the Police of the Metropolis do take care that during the Session of Parliament the passages through the streets leading to this House be kept free and open and that no obstruction be permitted to hinder the passage of Members to and from this House, and that no disorder be allowed in Westminster Hall, or in the passages leading to this House, during the sitting of Parliament, and that there be no annoyance therein or thereabouts; and that the Serjeant at Arms attending this House do communicate this order to the Commissioner aforesaid. (Hansard (H.C.), vol. 12, col. 2.)

or may be liable to be obstructed. "[12]

7.9 Directions issued by the Metropolitan Police Commissioner specify the streets around Parliament (the "Sessional Area") along which "assemblies or processions" are to be prevented from proceeding while Parliament is sitting. In Papworth v. Coventry[13] three defendants were convicted on a charge under section 54(9) of wilfully disregarding directions made under section 52 by remaining in Whitehall when asked by a constable to depart. They and four others were taking part in a "vigil" in Whitehall to call attention to the situation in Vietnam. It was held on appeal that the sessional order referred to in paragraph 7.8, above of itself could have no effect outside the precincts of the Houses of Parliament and would be incapable of creating an offence in respect of conduct outside that area.[14] Moreover, the term "assemblies or processions" in the Commissioner's directions could not mean literally all conceivable assemblies or processions, but rather "such assemblies or processions of persons as are capable of causing consequential obstruction to the free passage of members to and from the Houses of Parliament or their departure therefrom, or disorder in the neighbourhood or annoyance thereabouts".[15] The case was remitted to the stipendiary magistrate to determine whether the conduct of

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12 Sect. 54 prescribes the penalties for, amongst other offences, wilfully disregarding the regulations or directions made thereunder: see Papworth v. Coventry [1967] 1 W.L.R. 663. The Sessional Orders and the directions made under s.52 have also been enforced by the prosecution of persons for wilfully obstructing the police in the execution of their duty: see Pankhurst v. Jarvis (1909) 22 Cox C.C. 228 and Despard v. Wilcox (1910) 22 Cox C.C. 258.

13 [1967] 1 W.L.R. 663 (D.C.).

14 Ibid., at p. 670.

15 Ibid., at p. 671.

the seven taking part in the assembly "constituted an assembly which was capable of giving rise consequentially either to obstruction of streets and thoroughfares in the immediate neighbourhood of the Houses of Parliament, or to disorder, annoyance of the kind itself likely to lead to a breach of the peace".[16] The defendant was subsequently acquitted.[17]

4. Provisional conclusions

7.10 Irrespective of whether some offence is needed for the special protection of Parliament, we take the view that the provisions of the Tumultuous Petitioning Act 1661 and section 23 of the Seditious Meetings Act 1817 should be repealed. It would be unsatisfactory to leave this important issue to be dealt with by such an archaic provision as the former, while the reference in the latter to the common law offence of unlawful assembly would obviously require change in the light of our proposals in relation to that offence.

7.11 So far as the substance of these offences is concerned, it seems to us difficult to justify their breadth in modern circumstances. To take first the 1661 Act, it may be observed that lobbying and petitioning Parliament is today a commonplace and accepted practice[18], together with the citizens' freedom of access to those who represent them

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16 Ibid., at p. 673.

17 Supperstone, Brownlie's Law of Public Order and National Security (2nd ed., 1981), p. 31.

18 By contrast, petitions to the Sovereign are comparatively infrequent in modern times. It seems that the practice is for these to be presented through the Home Office: see Pankhurst v. Jarvis (1909) 22 Cox C.C. 228, 232 per Lord Alverstone C.J.

in Parliament.[19] Yet under this widely drawn offence, a group of eleven people seeking to present a petition to Parliament, no matter how peaceful they may be, would be guilty of an indictable offence and liable to a fine or imprisonment. Under the terms of the 1817 Act, a meeting in, for example, Trafalgar Square[20], to discuss a constitutional issue such as reform of the House of Lords with a view to drawing up a petition is, if held on a day when Parliament is sitting, deemed to be an unlawful assembly, and the organisers are liable to prosecution for that offence.

7.12 The archaic character and remarkable breadth of these offences, however, does not in our view entirely dispose of the question whether some special offence of public order is required for the protection of Parliament. It is true that the provisions of section 52 of the Metropolitan Police Act 1839 and the directions given under it, which we have described above[21], give a substantial measure of protection, but it must be noted that the maximum penalty for contravening such orders is only £50[22], while related offences which may be used in appropriate circumstances, such as wilfully obstructing the police or the public highway, are also only summary offences. The principal offences against public order which we have

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19 It is sometimes claimed that the citizen has a "right" to petition Parliament. Although section 2 of the Tumultuous Petitioning Act 1661 recognises the legality of presenting petitions by groups of ten or less, the case-law shows that there is only a right to have the petition presented and there is no right to enter the Palace of Westminster with a deputation: see Pankhurst v. Jarvis (1909) 22 Cox C.C. 228.

20 See also Trafalgar Square Act 1844 and Trafalgar Square Regulations 1952: Supperstone, Brownlie's Law of Public Order and National Security (2nd ed., 1981), pp. 35-36 and 348-349.

21 See paras. 7.8-7.9, above.

22 See Criminal Law Act 1977, s. 31 and Sched. 6.

proposed, such as unlawful assembly or riot, may also be used if disturbances to public order in the vicinity of Parliament warrant it. But how would the law cope with a peaceful mass demonstration in the neighbourhood of Parliament? We believe that most people would support the view that Parliament should be able to conduct its deliberations entirely free of any external pressure in the form of mass lobbying outside it which, having regard to its sheer size, might be considered to have an intimidating factor notwithstanding its entirely peaceful character. Of course, the police have powers to disperse an unlawful assembly[23], but such lobbying would not necessarily constitute an unlawful assembly under our proposals, nor would it necessarily do so under the present law apart from the provisions of the 1817 Act. Thus it might well be that the only powers available to the police would be those under the 1839 Act, with the limited penalties prescribed by that Act.

7.13 We have not come to any final conclusion about the necessity for replacing the legislation which at present provides for special offences against public order in the vicinity of Parliament. Nor have we formulated the elements of an appropriate offence. However, these are matters which we think should at this stage be open to consultation, and we therefore welcome comment upon the need for such an offence and its possible content.

C. Shipping Offences Act 1793

7.14 Section 1 of the Shipping Offences Act 1793[24]

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23 O'Kelly v. Harvey (1883) 15 Cox C.C. 435; these powers are not considered further in this Working Paper: see para. 1.13, above.

24 This Act was originally temporary, but was made perpetual by the Merchant Shipping Act 1801; the full text of the 1793 Act (as amended) is set out in Appendix C.

provides that:

> " If any seamen, keelmen, casters, ship carpenters or other persons, riotously assembled together to the number of three or more, shall unlawfully and with force prevent hinder or obstruct the loading or unloading or the sailing or navigating of any ship, keel or other vessel, or shall unlawfully and with force board any ship, keel or other vessel with intent to prevent, hinder or obstruct the loading or unloading or the sailing or navigating of such ship, keel or other vessel, ... "

they are guilty of an indictable offence punishable by imprisonment not exceeding 12 months.[25] Anyone convicted a second or subsequent time for the offence is liable to an increased maximum penalty of 14 years' imprisonment.[26] By section 4, the Act does not extend to matters done by the authority of the Crown. And by section 8, a prosecution must be commenced within twelve calendar months after the commission of the offence.

7.15 The offence created by section 1 of this Act deals with a particular form of riotous assembly in relation to ships and their cargo. It appears that the 1793 Act is no longer used and that the conduct with which it is concerned would be adequately covered, first, by the general law relating to offences against the person and of criminal damage and, secondly, by other provisions relating to

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25 It may be noted that s.40 of the Offences Against the Person Act 1861 makes it a summary offence punishable with a maximum penalty of 3 months' imprisonment to assault any seaman, keelman, or caster working at his lawful trade, business, or occupation, or to hinder or prevent him from doing so. The Criminal Law Revision Committee recommended the repeal of s.40, stating that the general offences against the person recommended by them were an adequate replacement: Fourteenth Report, Offences Against the Person (1980), Cmnd. 7844, paras. 179-180.

26 Sect. 3.

public order including the statutory offences which we propose in place of the common law offences of riot, rout and unlawful assembly. Accordingly, we provisionally propose the repeal of the Shipping Offences Act 1793.

D. Vagrancy Act 1824, section 4

7.16 Section 4 of the Vagrancy Act 1824, as amended[27], prohibits, inter alia:

> " every person ... being armed with any gun, pistol, hanger, cutlass, bludgeon, or other offensive weapon, or having upon him or her any instrument with intent to commit an arrestable offence .... "

A defendant convicted under section 4 is liable to a maximum penalty of three months' imprisonment or a fine of £200.[28] In addition to any fine or imprisonment which is imposed, any such gun etc. or other offensive weapon must be forfeited after the conviction of the offender.

7.17 This offence was considered by a Home Office Working Party in the course of a review of the law relating to vagrancy and other street offences. The Working Party in its working paper[29] referred to the adequacy of other more recent legislation, mentioning in particular offences under the Firearms Act 1968, the Prevention of Crime Act 1953, the Criminal Damage Act 1971 and the Theft Act 1968. It also referred to the difficulties of proving that a person armed with an offensive weapon intended to commit an arrestable offence and the low maximum penalties compared with those available under the modern legislation just mentioned. The

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27 See Criminal Law Act 1967, s. 10 and Sched. 2.

28 Raised by the Magistrates' Courts Act 1980, s.34(3). Sect. 5 of the Vagrancy Act 1824 permits higher penalties to be imposed by the Crown Court if the offences are repeated.

29 Working Party on Vagrancy and Street Offences Working Paper (1974), paras. 206-212.

Working Party's provisional view that this offence should be repealed without replacement met with almost universal approval and was confirmed in its Report.[30] However, this recommendation has not been implemented.

7.18 In view of the close connection between this offence and other public order provisions, we have, with the agreement of the Home Office, included it in our review. For the reasons given by the Home Office Working Party, which we endorse, we propose that this part of section 4 of the Vagrancy Act 1824 should be repealed without any comparable provision being put in its place.

E. Metropolitan Police Act 1839, s.54(13) and City of London Police Act 1839, s.35(13)

7.19 Section 54(13) of the Metropolitan Police Act 1839 makes it an offence for a person to -

> " use any threatening, abusive or insulting words or behaviour with intent to provoke a breach of the peace or whereby a breach of the peace may be occasioned. "

The conduct penalised must occur "in any thoroughfare or public place" within the limits of the metropolitan police district. This summary offence is now punishable with a maximum fine of £50.[31] Section 35(13) of the City of London Police Act 1839 provides a similar offence for the City of London police area.

7.20 These provisions and many more like them in local Acts and byelaws formed the basis of the offence in section

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30 Report of the Working Party on Vagrancy and Street Offences (1976), para. 73.

31 Criminal Law Act 1977, s. 31 and Sched. 6.

S of the Public Order Act 1936.[32] Prior to the enactment of that section, there was no comparable national provision: such conduct was penalised in some districts, but not in others. Although the introduction of section 5 was seen as correcting this "very curious"[33] situation, no steps were taken at the time to repeal either the provisions in the 1839 Acts mentioned or any of the local provisions in similar terms.

7.21 Apart from the national extent of its application, the scope of section 5 of the Public Order Act 1936 is wider than these local provisions in three respects. First, section 5 applies to public meetings whether held in a public place or on private premises. As we have seen, under the Metropolitan Police Act, for example, the offence is restricted to conduct in "any thoroughfare or public place". Secondly, as a result of amendments to section 5 which were not extended to the local provisions, the former now also covers the distribution or display of any writing, sign or visible representation which is threatening, abusive or insulting. Finally, section 5 carries a higher penalty than is provided under the local provisions.[34]

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32 As amended, this section provides that "any person who in any public place or at any public meeting (a) uses threatening, abusive or insulting words or behaviour, or (b) distributes or displays any writing, sign or visible representation which is threatening, abusive or insulting, with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned, shall be guilty of an offence and shall on summary conviction be liable to imprisonment for a term not exceeding six months or to a fine not exceeding £1,000 or both".

33 Hansard (H.C.), 16 November 1936, vol. 317, cols. 1362-3 (Sir John Simon, Home Secretary).

34 See R. v. Troke and others, The Times, 19 July 1977 (a news item), where a stipendiary magistrate complained in forceful terms about the low maximum penalties under the Metropolitan Police Act 1839: "why on earth are they not charged under the Public Order Act?"

7.22 This extensive overlap can in our provisional view no longer be justified. It seems to us to be desirable that prosecutions for "threatening, abusive or insulting words or behaviour" should in future be brought under section 5 of the Public Order Act 1936 rather than the equivalent local provisions. It is unnecessary for us to make recommendations regarding the repeal of these provisions in local Acts since we are satisfied that by virtue of section 262 of the Local Government Act 1972[35] these will all have lapsed or been repealed before the end of 1986.[36] However, this provision does not apply to either of the two Police Acts in London.[37] Accordingly, we need only provisionally propose repeal of the Metropolitan Police Act 1839, section 54(13) and the City of London Police Act 1839, section 35(13).

F. Summary of provisional proposals

7.23 We provisionally propose the repeal of the following statutory provisions -

(1) the Tumultuous Petitioning Act 1661 (paragraphs 7.2-7.4 and 7.10);

(2) the Seditious Meetings Act 1817, section 23 (paragraphs 7.5-7.6 and 7.10);

(3) the Shipping Offences Act 1793 (paragraphs 7.14-7.15);

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35 This complicated provision sets out the procedure by which local legislation is to be rationalised in stages.

36 Many already have: for example, s. 416 of the Liverpool Improvement Act 1921 was repealed by the County of Merseyside Act 1980; s. 102 of the Manchester Police Regulation Act 1844 lapsed on 30 June 1981, see Greater Manchester Act 1981 and the Greater Manchester (Local Statutory Provisions) Order 1980 S.I. 1980 No. 1845.

37 Sect. 262 applies only to local statutory provisions in force outside Greater London: see s.262(12).

(4) the part of section 4 of the Vagrancy Act 1824 dealing with being armed with an offensive weapon with intent to commit an arrestable offence (paragraphs 7.16-7.18); and

(5) the Metropolitan Police Act 1839, section 54(13) and the City of London Police Act 1839, section 35(13) (paragraphs 7.19-7.22).

7.24 We invite comment on the issue whether special legislation is needed in the field of public order for the protection of Parliament in place of the statutes specified in paragraph 7.23(1) and (2), above (paragraph 7.13).

VIII CUMULATIVE SUMMARY OF PROVISIONAL PROPOSALS

8.1 We now set out a summary of the provisional proposals contained in this Working Paper. Comments and criticisms are invited on all aspects of this review.

8.2 We have examined the common law offences against public order, namely, affray, riot, rout and unlawful assembly. We have considered in detail whether there is a need to replace them with new statutory offences and how such offences might be defined. Our provisional conclusion is that these common law offences should be abolished and replaced by three statutory offences of affray, riot and unlawful assembly (paragraphs 4.2-4.10, 5.3-5.17 and 6.3-6.16). The constituent elements of these proposed offences are summarised in the following paragraphs; these summaries indicate the concepts discussed in the Paper and are not drafts of a future Bill.

8.3 In relation to affray, we propose that in place of the common law offence there should be a statutory offence of affray, triable only on indictment with a maximum penalty of ten years' imprisonment and a fine. The conduct penalised would consist of fighting, or acts of violence (other than mere threats or displays of violence) inflicted by one or more persons upon another or others. A person will be guilty of affray if, without lawful excuse, he fights or inflicts such acts of violence, provided that his conduct, together with that of any others involved, is such as would reasonably have caused any other person, if present, to be put in fear of his personal safety. The offence would be capable of commission in a public or private place (paragraphs 4.11-4.44).

8.4 In relation to riot, we propose that in place of the common law offence there should be a new statutory offence of riot with a maximum penalty of fourteen years' imprisonment and a fine. The offence would penalise anyone who knowingly and without lawful excuse takes part in a riot. A riot would consist of -

(a) three or more persons present together in a public or private place;

(b) at least three of whom engage in an unlawful course of violent conduct (the mere threat or display of violence would not suffice); and

(c) the violence of that conduct is such as would reasonably have caused any other person, if present, to be put in fear of his personal safety.

The offence would be triable only on indictment and the consent of the Director of Public Prosecutions would be required for the institution of proceedings (paragraphs 5.18-5.52).

8.5 In relation to unlawful assembly, we propose that the common law offence should be replaced by a new statutory offence of unlawful assembly, triable only on indictment, with a maximum penalty of five years' imprisonment and a fine. The offence of unlawful assembly would penalise anyone who knowingly and without lawful excuse takes part in an unlawful assembly. An unlawful assembly would consist of -

(a) three or more persons present together in a public or private place,

(b) whose purpose is to engage in, or who are engaged in, a course of conduct which either -

(i) involves the use of violence or threats or displays of violence by some or all of those present; or

(ii) has by means of threatening, abusive or insulting words or behaviour the object of provoking the use of violence by others;

(c) and whose words or actions in that place would reasonably have caused any other person, if present, to apprehend an imminent breach of the peace (paragraphs 6.17-6.41).

8.6 We provisionally propose the repeal of the following ancient statutory provisions in the field of public order -

(1) Tumultuous Petitioning Act 1661 (paragraphs 7.2-7.4 and 7.10);

(2) Seditious Meetings Act 1817, section 23 (paragraphs 7.5-7.6 and 7.10);

(3) Shipping Offences Act 1793 (paragraphs 7.14-7.15);

(4) the part of section 4 of the Vagrancy Act 1824 dealing with being armed with an offensive weapon with intent to commit an arrestable offence (paragraphs 7.16-7.18); and

(5) Metropolitan Police Act 1839, section 54(13) and City of London Police Act 1839, section 35(13) (paragraphs 7.19-7.22).

We invite comment on the issue whether special legislation is needed in the field of public order for the protection of Parliament in place of the statutes specified in (1) and (2) above (paragraph 7.13).

APPENDIX A

Statistics drawn from the Criminal Statistics 1973-80

	1973	1974	1975	1976	1977	1978	1979	1980
OFFENCES RECORDED BY POLICE								
Riot[1]	18	6	10	4	2	5	3	6
Unlawful assembly[2]	7	16	6	7	10	9	11	19
Other offence against the State or public order[3]	331	322	340	305	233	269	512	503
DEFENDANTS FOR TRIAL (Crown Court)								
Riot[4]	33	55	31	31	20	24	17	43
Unlawful assembly	96	139	28	46	48	56	69	96
Other offence against the State or public order	1330	1207	1375	1421	1204	1224	1111	1383
FOUND GUILTY								
Riot	18	31	27	23	19	22	15	37
Unlawful assembly	85	124	26	43	44	51	68	90
Other offence against the State or public order	1077	974	1096	1157	965	965	884	1006

1 Including Rioting and Riotously preventing the sailing, etc., of ship.

2 Including Unlawful Assembly, Rout, Unlawful political meeting in Westminster.

3 Including causing an affray and (from 1976) offensive conduct in public conducive to a breach of the peace. However, it should be noted that the latter offence ceased to be triable on indictment after 1977 (see Criminal Law Act 1977, s. 15).

4 The figures for all three categories of offences are higher than those "recorded by the police"; they take account, inter alia, of offences in respect of which more than one defendant was committed for trial.

Duration of Custodial Sentences Imposed by the Crown Court
From the Criminal Statistics 1976 - 1980

Riot

Year	Borstal	Suspended Sentence	Up to 6 months	6 - 12 months	12 months - 2 years	2 - 3 years	3 - 5 years	Over 5 years	TOTAL
1976	-	8	2	-	-	-	-	-	10
1977	1	1	7	-	3	-	-	-	12
1978	9	-	3	4	1	-	-	-	17
1979	3	2	2	1	3	-	-	-	11
1980	3	2	2	1	7	6	8	-	29

Unlawful assembly

1976	1	1	4	1	-	-	-	-	7
1977	8	1	1	-	-	-	-	-	10
1978	4	9	-	1	1	-	-	-	15
1979	1	15	5	1	-	-	-	-	22
1980	2	25	4	2	-	-	-	-	33

Other offence against the State or public order[5]

1976	97	169	59	49	45	35	11	-	465
1977	89	125	89	51	35	32	7	-	428
1978	64	145	85	46	39	26	4	-	409
1979	66	132	89	51	55	25	6	1	425
1980	131	181	96	75	55	34	5	-	577

5 Including affray, but excluding after 1977 the offence of offensive conduct in public (see n. 3, above).

APPENDIX B

RIOT AND RELATED OFFENCES IN OTHER LEGAL SYSTEMS

1. This appendix summarises provisions relating to riot and kindred offences at common law and in civil law systems. Caution is needed in using this material to draw conclusions about foreign laws. The extracted part is only one part of the whole framework of the law of the jurisdiction concerned and also imperfections of translation may leave ambiguities.

A. English Draft Code 1879

2. Because many of the criminal law codes in the common law countries follow the English draft Code, the relevant provisions of that Code[1] are set out in full to provide a basis for comparison.

TITLE II. OFFENCES AGAINST PUBLIC ORDER, INTERNAL AND EXTERNAL

PART VI

UNLAWFUL ASSEMBLIES, RIOTS, BREACHES OF THE PEACE

SECTION 84

DEFINITION OF UNLAWFUL ASSEMBLY

An unlawful assembly is an assembly of three or more persons who, with intent to carry out any common purpose, assemble in such a manner or so conduct themselves when assembled as to cause persons in the neighbourhood of such assembly to fear on reasonable grounds that the persons so assembled will disturb the peace tumultuously, or will by such assembly needlessly and without any reasonable occasion provoke other persons to disturb the peace tumultuously.[2]

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1 Report of the Royal Commission on the Law Relating to Indictable Offences (1879), C.2345, Appendix.

2 The Commissioners stated in the Report accompanying the draft Code that "in declaring that an assembly may be unlawful if it causes persons in the neighbourhood to fear that it will needlessly and without reasonable occasion provoke others to disturb the peace tumultuously, we are declaring that which has not as yet been specifically decided in any particular case": ibid., p.20. This antedated Beatty v. Gillbanks (1882) 9 Q.B.D. 308, para.2.59, above.

Persons lawfully assembled may become an unlawful assembly if they conduct themselves with a common purpose in such a manner as would have made their assembling unlawful if they had assembled in that manner for that purpose.

An assembly of three or more persons for the purpose of protecting the house of any one of their number against persons threatening to break and enter such house in order to commit any indictable offence therein is not unlawful.

SECTION 85

DEFINITION OF RIOT

A riot is an unlawful assembly which has begun to act in a tumultuous manner to the disturbance of the peace.

SECTION 86

PUNISHMENT OF UNLAWFUL ASSEMBLY

Every member of an unlawful assembly shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment.

SECTION 87

PUNISHMENT OF RIOT

Every rioter shall be guilty of an indictable offence, and shall be liable upon conviction thereof to two years' imprisonment with hard labour.

SECTION 88

READING THE RIOT ACT

It is the duty of every sheriff under sheriff and justice of the peace of any county, and of every mayor bailiff or other head officer, sheriff under sheriff and justice of the peace of any city or town corporate, who has notice that there are within his jurisdiction persons to the number of twelve or more unlawfully riotously and tumultuously assembled together to the disturbance of the public peace, to resort to the place where such unlawful riotous and tumultuous assembly is, and where the nature of the case requires it among the rioters or as near to them as he can safely come with a loud voice to command or cause to be commanded silence to be whilst the proclamation hereinafter mentioned is made, and after that

openly and with loud voice to make or cause to be made a proclamation in these words, or to the like effect:

> "Our Sovereign Lady the Queen chargeth and commandeth all persons being assembled immediately to disperse themselves and peaceably to depart to their habitations or to their lawful business, upon the pain of being guilty of an offence, on conviction of which they may be sentenced to penal servitude for life.
>
> GOD SAVE THE QUEEN."

All persons shall be guilty of an indictable offence, and shall upon conviction thereof be liable to penal servitude for life, who

(a) With force and arms wilfully and knowingly oppose obstruct hinder or hurt any person who begins or who is about to make the said proclamation, whereby such proclamation is not made; or

(b) Continue together to the number of twelve for and do not disperse themselves within one hour after such proclamation has been made, or if they know that its making was hindered as aforesaid, then within one hour after such hindrance:

Provided that no person shall be prosecuted for any offence under this section unless such prosecution be commenced within twelve months after the offence committed.

Every one charged with an offence under this section may be arrested without warrant, and shall be bailable at discretion.

SECTION 89

DUTY OF JUSTICE IF RIOTERS DO NOT DISPERSE

If the persons so unlawfully riotously and tumultuously assembled together as aforesaid, or twelve or more of them continue together, and do not disperse themselves for the space of one hour after proclamation made, or after such hindrance as aforesaid, it is the duty of every such sheriff justice and other officer as aforesaid and of all persons required by them to assist to cause such persons to be apprehended and carried before a justice of the peace; and if any person so assembled is killed or hurt in the apprehension of

such persons or in the endeavour to apprehend or disperse them by reason of their resistance every person ordering them to be apprehended or dispersed and every person executing such orders shall be indemnified against all proceedings of every kind in respect thereof: Provided that nothing herein contained shall in any way limit or affect any duties or powers imposed or given by Sections 49, 50, 51, 52, 53, 116, and 117 as to the suppression of riots before or after the making of the said proclamation.

SECTION 96

DEFINITION OF AFFRAY

An affray is the act of fighting in any public street or highway, or fighting to the alarm of the public in any other place to which the public have access.

Every one who commits or takes part in an affray shall be guilty of an indictable offence, and shall be liable upon conviction thereof to one year's imprisonment with hard labour.

B. Scotland

3. Mobbing is an offence at common law[3] in Scotland. It is described by G.H. Gordon[4] thus:

> "A mob is a group of persons acting together for a common illegal purpose, which they effect or attempt to effect by violence, intimidation, or a demonstration of force, and in breach of the peace and to the alarm of the lieges, and it is a crime to form part of a mob.
> No fixed number is necessary to constitute a common law mob. Whether the group is large enough in any case to constitute a mob is a question of fact depending on circumstances, and

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3 Under Scots law the maximum penalties for common law offences are fixed by the maximum powers given to the various courts of criminal jurisdiction. High Court - life imprisonment; sheriff and jury court - two years' imprisonment; sheriff summary court - three months' imprisonment and in certain instances six months' imprisonment; justice of the peace, burgh and police courts - sixty days' imprisonment.

4 The Criminal Law of Scotland (2nd ed., 1978), p.979.

> in particular on the nature of the group's behaviour. In one case in which there was no actual outbreak of violence but only intimidation, 17 people were held to be sufficient to constitute a mob, and it was suggested that five would be too few.[5] The most important distinction between mobbing and breach of the peace is that the former requires a common purpose."

4. A magistrate is bound to use force where necessary in order to suppress a riot and as a last resort he may order troops to fire on the mob as a whole in the event of a general disturbance.

C. Other common law systems

1. Australia

5. Provisions very similar to those in the English draft Code are to be found in respect of the offences of unlawful assembly, riot and affray in the Criminal Codes of Queensland, Tasmania and Western Australia, and the draft Criminal Code Bill of the Northern Territory[6], although in the latter only thirty minutes, not one hour, is permitted for dispersal after direction. The draft Code for the Australian Territories also basically follows the English draft Code except that it does not contain any provision for the dispersal of rioters and it does contain an offence of rout. Moreover, riot is defined in terms of twelve or more persons. Riot is an offence at common law in New South Wales and Victoria but in the former there is also a statutory offence of unlawful assembly. Section 545C of the Crimes Act 1900 provides that:

> (3) Any assembly of five or more persons whose common object is by means of intimidation or injury to compel any person to do what he is not legally bound to do or to abstain from doing what he is legally entitled to do, shall be deemed to be an unlawful assembly.

New South Wales also has common law offences of affray and rout but the latter "where the intention is in any degree effected is usually prosecuted as a riot."[7]

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5 Sloan v. Macmillan, 1922 J.C. 1, 6 (per L.J.-C. Scott Dickson).

6 The second published draft was tabled in June 1981.

7 Watson and Purnell, Criminal Law in New South Wales (1971), p.1187.

6. Most states classify the offences as misdemeanours and the most common maximum penalty for the offence of riot is three years' imprisonment and for unlawful assembly and affray one year's imprisonment. New South Wales makes the offence of joining or continuing in an unlawful assembly punishable on summary conviction with imprisonment not exceeding six months or a fine not exceeding forty dollars.

2. Canada

7. The Criminal Code of Canada follows the English draft Code but contains no offence of affray and allows only thirty minutes for dispersal after the proclamation has been read. Riot is an indictable offence carrying a maximum penalty of two years' imprisonment and unlawful assembly is punishable on summary conviction.[8]

3. New Zealand

8. The New Zealand Crimes Act 1961 follows the pattern of the English draft Code although it contains no offence of affray. Every member of an unlawful assembly is liable to imprisonment for a term not exceeding one year and every person taking part in a riot is liable to imprisonment for a term not exceeding two years.

4. St Lucia and Belize

9. Although the English draft Code of 1879 is well known, it is less widely known that another draft code was produced in 1874 at the request of the Colonial Office.[9] This was a draft criminal code for Jamaica which was to serve as a model for all the colonies, and although it was not adopted by Jamaica it does form the basis of the Criminal Code of St Lucia (1889):

> s.638.-(1) If five or more persons together in any public or private place commence or attempt to do either of the following things, namely -

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8 Under the Criminal Code there are five general divisions of maximum sentences of imprisonment for indictable offences. These are life, fourteen years, ten years, five years and two years. Where the offence is punishable by summary conviction imprisonment may be imposed for a period not exceeding six months except where otherwise provided by law.

9 The background and history to this code and its author R.S. Wright is set out in Friedland, "R.S. Wright's Model Criminal Code: A forgotten chapter in the history of the Criminal Law" (1981) Oxford Journal of Legal Studies, Vol. 1, p.307.

(a) to execute any common purpose with violence, and without lawful authority to use such violence for that purpose;

(b) do execute a common purpose of obstructing or resisting the execution of any legal process or authority;

(c) to facilitate, by force or by show of force or of numbers, the commission of any crime,

they are guilty of riot.

(2) Persons are not guilty of a riot by reason only that they, to the number of five or more, suddenly engage in an unlawful fight, unless five or more of them fight with a common purpose against some other person or persons.

(3) For the purpose of this section 'violence' means -

(a) any criminal force or harm to any person;

(b) any criminal mischief to any property;

(c) any threat or offer of such force, harm, or mischief;

(d) the carrying or use of deadly, dangerous, or offensive instruments in such a manner as that terror is likely to be caused to any persons;

(e) such conduct as is likely to cause in any persons a reasonable apprehension of criminal force, harm or mischief to them or their property.

s.639 Any magistrate, or, in the absence of any magistrate, any justice of the peace or any commissioned officer in His Majesty's military or naval service, in whose view a riot is being committed, or who apprehends that a riot is about to be committed by persons assembled within his view may make or cause to be made a proclamation in the King's name, in such form as he thinks fit, commanding the rioters or persons so assembled to

disperse peaceably.

> s.640 If, upon the expiration of one hour after such proclamation made or after the making of such proclamation has been prevented by force, twelve or more persons continue riotously assembled together, any person authorised to make proclamation or any peace officer, or any other person acting in aid of such person or officer, may do all things necessary for dispersing the persons so continuing assembled or for apprehending them or any of them, and, if any other person makes resistance, may use all such force as is reasonably necessary for overcoming such resistance, and is not liable in any criminal or civil proceedings for having, by the use of such force, caused harm or death to any person. But nothing herein contained shall affect or limit the power to use such force as is in this section mentioned at any time before the expiry of one hour from the making of the said proclamation, or after the making thereof has been prevented, if in the circumstances it is reasonably necessary to use such force for the suppression, or to prevent the continuance of any riot.

10. Belize[10] The provisions of the new Criminal Code for relating to riot follow closely the wording of the St Lucia Code but the code also contains a separate offence of unlawful assembly:

> s.233 If any persons assemble or be together with a purpose of committing a riot, each of them is guilty of a misdemeanour.

Section 251, dealing with dispersal of the rioters, unlike section 640 of the St Lucia Code is not limited by time or numbers.

5. India

11. The Indian Penal Code of 1860[11] contains at Chapter VIII "offences against the public tranquillity" which include unlawful assembly, riot and affray:

> 141. An assembly of five, or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is -

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10 Gazetted 15 November 1980.

11 See Ranchoddas and Thakore, The Law of Crimes (21st ed., 1966), p.338.

(a) To overawe by criminal force, or show of criminal force, the Central or any State Government of the Parliament or the Legislature of any State or any public servant in the exercise of the lawful power of such public servant; or

(b) To resist the execution of any law, or of any legal process; or

(c) To commit any mischief or criminal trespass, or other offence; or

(d) By means of criminal force, or show of criminal force, to any person to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

(e) By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly.

146. Whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting.12

151. Whoever knowingly joins or continues in any assembly of five or more persons likely to cause a disturbance of the public peace, after such assembly has been lawfully commanded to disperse, shall be punished with imprisonment of either description for a term which may extend to six months, or with fine, or with both.

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12 This offence carries imprisonment of up to two years and/or a fine - s.147.

If the assembly is an unlawful assembly within the meaning of section 141, the offender will be punishable under section 145.[13]

159. When two or more persons, by fighting in a public place, disturb the public peace, they are said to 'commit an affray'.[14]

6. The United States of America

12. The American Law Institute's Model Penal Code (1962) does not contain any provisions dealing with unlawful assembly not amounting to riot. All revised codes follow the Model Code in eliminating a distinct offence of rout, but many jurisdictions follow New York in maintaining riot and unlawful assembly as separate crimes. Section 250.1 provides:

(1) A person is guilty of riot, a felony of the third degree[15], if he participates with [two][16] or more others in a course of disorderly conduct:

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13 Sect.145 provides for imprisonment of up to two years and/or a fine.

14 Affray is punishable with imprisonment of up to one month and/or a fine of one hundred rupees.

15 Among the distinctive features of the adult felony sentencing and correction provisions of the Model Penal Code are three degrees of felonies. Articles 6.01-6.06 provide minima and maxima:

Degree	Minimum	Maximum
1st	1-10 yrs	Life
2nd	1-3 yrs	10 yrs
3rd	1-2 yrs	5 yrs.

16 The number of required participants is placed in square brackets in order to indicate the possibility of reasonable alternatives. The majority of revised codes and proposals follow the Model Penal Code on this point although the critical number ranges from two in Illinois to ten in Michigan, with a substantial minority specifying five.

(a) with purpose to commit or facilitate the commission of a felony or misdemeanour;

(b) with purpose to prevent or coerce official action; or

(c) when the actor or any other participant to the knowledge of the actor uses or plans to use a firearm or other deadly weapon.

(2) Where [three] or more persons are participating in a course of disorderly conduct likely to cause substantial harm or serious inconvenience, annoyance or alarm, a peace officer or other public servant engaged in executing or enforcing the law may order the participants and others in the immediate vicinity to disperse. A person who refuses or knowingly fails to obey such an order commits a misdemeanour.

Section 250.2 provides:

(1) A person is guilty of disorderly conduct if, with purpose to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof, he:

(a) engages in fighting or threatening, or in violent or tumultuous behaviour; or

(b) makes unreasonable noise or offensively coarse utterance, gesture or display, or addresses abusive language to any person present; or

(c) creates a hazardous or physically offensive condition by any act which serves no legitimate purpose of the actor.

It should be noted that this offence of disorderly conduct, which can be used inter alia to charge the sort of conduct which in England and Wales is covered by the offence of affray, is not limited to conduct in public places or at public meetings.

D. Civil law countries

1. South Africa

13. The principal common law offence against public order in the criminal law of South Africa is "public violence", which according to the leading textbook on criminal law[17] consists in -

> "the unlawful and intentional commission by a number of people acting in concert of acts of sufficiently serious dimensions which are intended forcibly to disturb the public peace or security or to invade the rights of others."

2. France[18]

14. Article 314[19] of the French Penal Code provides that when, as a result of a concerted action, conducted with open force by a group, violence or assaults are committed against persons, or goods are destroyed or damaged, the instigators and the organisers of that action, and also those who have willingly participated, are punishable ... with imprisonment for a term of one to five years.

When violence, assault, destruction or damage which are categorised as crimes or misdemeanours [délits] are committed as a result of a meeting which is illegal or has been prohibited by Government authority, punishment shall be imposed on -

1. Those instigators and organisers of the gathering who failed to order the meeting to disperse as soon as they became aware of the violence, assault, destruction or damage: imprisonment for a term of six months to three years;

2. Those who continued to participate actively in the gathering after the commencement of, and with knowledge of, the violence, assault, destruction or damage: imprisonment for a term of three months to two years.

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17 Hunt, South African Criminal Law and Procedure (1970) vol.II, pp.74-75.

18 Paragraphs 14-17 are given in Law Commission translations.

19 Articles 314 and 440 of the Penal Code, passed in the wake of the Paris riots of 1968 and frequently invoked in the case of violent student and other protests, were repealed on 25 November 1981: see The Times, 27 November 1981.

Imprisonment for a term of one to five years will be imposed on those who join in a gathering, whether legal or not, with a view to themselves committing, or procuring the others present to commit, violence, assault, destruction or damage.

Article 440

All looting of goods or merchandise, effects and personal property [propriétés mobilières], committed in a gathering or group and with open force is punishable with imprisonment for a term of ten to twenty years ....

15. The Law of 30 June 1881 on public meetings, and the Decree-law of 23 October 1935, concerning the regulation of measures relating to the better maintenance of public order, provide that with certain exceptions meetings may not be held on the public highway, and may not continue after 11.00 p.m. Prior notification to the authorities is required for all processions, marches and gatherings and all demonstrations on the public highway. Such notification must give the names and addresses of the organisers, and must state the object, place, date and time of the demonstration. The demonstration may be banned if the authorities consider it to be such as might disturb public order. Penalties of up to six months' imprisonment and a fine may be imposed on those who supply an incomplete or misleading notification and on those who organise an undeclared or prohibited demonstration.

The Law of 10 January 1936 on combat groups and private militia provides (in part) as follows:

Article 1 provides for the dissolution of all societies or groups which (inter alia):

1. would provoke armed demonstrations on the highway;

2. would by their military organisation and form give the appearance of combat groups or private militia;

3. (added in 1972) would either provoke discrimination, hatred or violence against a person or group of persons by reason of their origin, or of their belonging or not belonging to an ethnic group, nation, race or particular religion, or would propagate ideas or theories tending to justify or encourage such discrimination, hatred or violence.

Article 2 punishes everyone who helps to support or recreate any such society or group with six months' or two years' imprisonment and a fine.

3. Germany

16. The German Penal Code provides:

Article 125 : Interference with the public peace

Anyone who uses or takes part in violent force against people or property, or threatens people with violent force which will be used by a group of people with combined forces in a way which endangers public safety, or who encourages a group of people to be prepared to perpetrate such action will be sentenced up to 3 years in prison provided the action is not subject to a heavier sentence under other regulations.

Article 125a : Serious interference with the public peace

In particularly serious cases under Article 125 the penalty will be a prison sentence of 6 months to 10 years. A particularly serious case is normally one in which the perpetrator:

1) Has a gun with him;

2) Carries another weapon in order to use it for the action;

3) When due to the use of force a third person is in danger of death or serious injuries;

4) Is looting or damaging substantially other people's property.

Article 126 : Acts endangering public peace

Anyone who disturbs the public peace by threatening action which is dangerous to the public peace will be sentenced to imprisonment for up to one year.

4. Switzerland

17. The Swiss Penal Code (21 December 1937) (as revised incorporating modifications to 1 July 1971) provides:

Article 260 : Riot

Anyone who takes part in an assembly formed in public, and in the course of which violent acts are committed collectively against persons or property, is punishable with imprisonment or a fine.

No person will incur punishment if he withdraws when required to do so by the authorities without having committed any violent acts or incited others to commit them.

5. Norway

18. The Norwegian Penal Code 1902[20] provides:

Section 135

Anybody who endangers the general peace by publicly insulting or provoking hatred of the Constitution or any public authority, or publicly inflaming one group of the population against another, or is accessory thereto, shall be punished by fines or jailing or imprisonment up to one year.

Section 136

Anybody who brings about the occurrence of a riot with the intent to use violence against person or property, or to threaten therewith, or is accessory to bringing about such a riot, or who, during a riot where such intent has been revealed, acts as a leader, shall be punished by imprisonment up to three years.

To stay after an order to disperse has been given is an offence punishable with up to three months' imprisonment.

6. Sweden

19. The Swedish Penal Code of 1965[21] contains the following provisions:

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20 As amended to 1 March 1961. See The American Series of Foreign Penal Codes, The Norwegian Penal Code (1961) transl. Harald Schjoldager.

21 As amended, 1 January 1972. See The American Series of Foreign Penal Codes, The Penal Code of Sweden (1972) transl. Thorsten Sellin.

Chapter 16 : of Crimes Against Public Order

S.1. If a crowd of people disturbs public order by demonstrating an intention to use group violence in opposition to a public authority or otherwise to compel or obstruct a given measure and does not disperse when ordered to do so by the authority, instigators and leaders shall be sentenced to imprisonment for at most four years and other participants in the crowd's business to pay a fine or to imprisonment for at most two years for riot.

If the crowd disperses on order of the authority, instigators and leaders shall be sentenced for riot to pay a fine or to imprisonment for at most two years.

S.2. If a crowd, with intent referred to in section 1, has proceeded to use group violence on person or property, whether a public authority was present or not, sentences for violent riot shall be imposed; on instigators and leaders to imprisonment for at most ten years and on participants in the crowd's business to pay a fine or to imprisonment for at most four years.

S.3. If a member of a crowd that disturbs public order neglects to obey a command aimed at maintaining order, or if he intrudes on an area that is protected or has been closed off against intrusion, he shall, if no riot is occurring, be sentenced for disobeying police order to pay a fine or to imprisonment for at most six months.

E. Conclusion

20. This survey of other legal systems shows that, while the civil law jurisdictions have offences drafted in characteristically broad terms, common law jurisdictions have in many instances retained offences similar to the common law offences of unlawful assembly, riot, and affray and (in a few cases) rout. It is noteworthy that in most instances these offences are punishable with periods of imprisonment ranging up to only two years[22], and that some of the civil law provisions also prescribe relatively low maximum sentences. However, no firm conclusion should be drawn from this survey in the absence of more detailed information about the contexts in which these and related offences, such as offences against the person and offences against the state, are in practice used.

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22 Following in this respect the English draft Code of 1879: para. 2, above.

APPENDIX C

Selected texts of statutory provisions (Part VII)

Tumultuous Petitioning Act 1661 (paragraph 7.2)

No person or persons whatsoever shall repaire to His Majesty or both or either of the Houses of Parliament upon ptence of presenting or delivering any Peticon Complaint Remonstrance or Declaracon or other Addresses accompanied with excessive number of people nor att any one time with above the number of ten persons upon pain of incurring a penalty not exceeding the sum of One hundred pounds in money and three months Imprisonment for every offence which offence to be prosecuted ... within six moneths after the offence committed and proved by two or more credible witnesses.

Provided alwaies That this Act or any thing therein contained shall not be construed to extend to debar or hinder any person or persons not exceeding the number of Ten aforesaid to present any publique or private Grievance or Complaint to any Member or Members of Parliament after his Election and during the continuance of the Parliament or to the Kings Majesty for any remedy to bee thereupon had nor to extend to any Address whatsoever to His Majesty by all or any the Members of both or either Houses of Parliament during the sitting of Parliament but that they may enjoye theire freedome of Accesse to His Majesty as heretofore hath beene used.

Seditious Meetings Act 1817 (paragraph 7.5)

S.23 It shall not be lawful for any person or persons, to convene or call together or to give any notice for convening or calling together any meeting of persons consisting of more than fifty persons, or for any number of persons exceeding fifty to meet, in any street, square, or open place in the city or liberties of Westminster, or county of Middlesex, within the distance of one mile from the gate of Westminster Hall, save and except such parts of the parish of Saint Paul's Covent Garden as are within the said distance, for the purpose or on the pretext of considering of or preparing any petition, complain, remonstrance, declaration, or other address to the King ..., or to both Houses or either House of Parliament, for alteration of matters in Church or State, on any day on which the two Houses or either House of Parliament shall meet or sit, or shall be summoned or adjourned or prorogued to meet or sit, nor on any day on which his Majesty's Courts of Chancery, King's Bench, Common Pleas, and Exchequer, or any of them, or any judge of any of them, shall sit in Westminster Hall, any thing herein-before contained to the

contrary notwithstanding: and if any meeting or assembly, for the purposes or on the pretexts aforesaid, of any persons shall be assembled or holden on any such day, contrary to the intent and meaning of this enactment, such meeting or assembly shall be deemed and taken to be an unlawful assembly, by whomsoever or in consequence of what notice soever such meeting or assembly shall have been holden: Provided that nothing in this enactment contained shall by any construction whatever be deemed or taken to apply to or affect any meeting convened, called or holden for the election of members of Parliament, or any persons attending such meeting, or to any persons attending upon the business of either House of Parliament or any of the said courts.

Shipping Offences Act 1793 (paragraph 7.14)

S.1 If any seamen, keelmen, casters, ship carpenters or other persons, riotously assembled together to the number of three or more,... shall unlawfully and with force prevent hinder or obstruct the loading or unloading or the sailing or navigating of any ship, keel or other vessel, or shall unlawfully and with force board any ship, keel or other vessel with intent to prevent, hinder or obstruct the loading or unloading or the sailing or navigating of such ship, keel or other vessel, every seaman, keelman, caster, ship carpenter and other person, being lawfully convicted of any of the offences aforesaid, upon any indictment ..., shall be committed either to the common gaol for the same county, shire, riding, division or district, there to continue and remain ... or to the house of correction for the same county, shire, riding, division or district, there to continue and remain ..., and to be kept ... for any term not exceeding twelve calendar months nor less than six calendar months in either case respectively.

S.3 And if any seaman, keelman, caster, ship carpenter or other person shall be convicted of any of the offences aforesaid in pursuance of this Act and shall afterwards offend again in like manner, every such seaman, keelman, caster, ship carpenter and other person so offending again in like manner, and being lawfully convicted thereof upon any indictment ..., shall for such second and every subsequent offence be adjudged guilty of felony, and shall be transported to some of his Majesty's dominions beyond the seas for any space of time or term of years not exceeding fourteen years nor less than seven years.

S.4 Provided always, that none of the pains, penalties or punishments herein-before inflicted or authorized to be inflicted shall be deemed, construed or taken to extend to any act, deed, matter or thing whatsoever committed, done or suffered in the service or under or by virtue of the authority of his said Majesty or his successors, any thing herein contained to the contrary thereof in anywise notwithstanding.

S.8 Provided always, that no person or persons shall be prosecuted by virtue of this Act for any of the offences aforesaid, unless such prosecution be commenced within twelve calendar months after the offence committed.

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