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Assemblies in the Public Streets

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ASSEMBLIES IN THE PUBLIC STREETS

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The assemblies which have offered probably the most frequent occasion for legal and physical clashes between police officials and individuals attempting to exercise their right to assemble, or to collect assemblies, have been those taking place on municipal streets. The problem of street meetings is pre-eminently an urban problem, and customarily one which faces only cities with a substantial population.

Since the problem of street meetings raises several common law questions, an examination of pertinent English cases is made to furnish background for American practice. In certain other aspects of the problem English law has developed in a fashion nearly parallel to that in the United States, and the English cases on these points are included to bring into sharper focus the major questions of law and administration which street meetings present.

It can be stated with some certainty that there exists no right in England to hold a meeting on the public streets.[1] Until recent years the same statement could be made concerning United States practice, but holdings of the United States Supreme Court in *Hague v. C.I.O.*[2] and in *Kunz v. State of New York*[3] indicate a strong trend in the direction of a clear statement of a basic right to speak and assemble in the public streets.[4] But even the assumption that there is no right of meeting in the streets does not mean that all such meetings are *per se* either nuisances or unlawful meetings. In *Fairbanks v. Kerr*[5] the Pennsylvania Supreme Court pointed this out clearly with respect to nuisances:

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1. For discussions of the right of assembly in England see: DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION c. VII (9th London ed. 1948); 2 KEITH, THE CONSTITUTION OF ENGLAND FROM QUEEN VICTORIA TO GEORGE VI 408-415 (London 1940); Goodhart, *Public Meetings and Processions*, 6 CAMB. L. J. 161 (1937); Jennings, *The Right of Assembly in England*, 9 N. Y. U. L. Q. REV. 217 (1931); WADE AND PHILLIPS, CONSTITUTIONAL LAW (2nd London ed. 1935); D. G. Hitchner, *Freedom of Public Meeting in England Since 1914*, 36 AMER. POL. SCI. REV. 516 (1942).

2. 307 U. S. 496 (1939).

3. 340 U. S. 290 (1951).

4. For discussions of the right of assembly in the United States see: J. M. Jarrett and V. A. Mund, *The Right of Assembly*, 9 N. Y. U. L. Q. REV. 1 (1931); *Public Order and the Right of Assembly in England and the United States*, 47 YALE L. J. 404 (1938). For annotated collections of the earlier cases concerning street speakers see: 10 A. L. R. 1483; 62 A. L. R. 404.

5. 70 Pa. 86, 10 Am. Rep. 664 (1872).

> A street may not be used, in strictness of law, for public speaking; even preaching or public worship, or a pavement before another's house may not be occupied to annoy him; but it does not follow that every one who speaks or preaches in the street, or who happens to collect a crowd therein by other means, is therefore guilty of the indictable offense of a nuisance. His act may become a nuisance by his obstruction of the public highway, but it will not do to say it is a nuisance *per se*. Such a stringent interpretation . . . . is scarcely suited to the genius of our people or to the character of their institutions, and would lead to the repression of many usages of the people now tolerated as harmless, if not necessary.[6]

This opinion by Justice Agnew would be considered by today's advocates of free speech and assembly as overly restrictive of our constitutional rights. But the case is one of the earliest reported American cases on the general subject of street meetings. The importance of these earlier decisions is not to be minimized because they do not categorically state that there is a right to speak in the public streets. Evidence as to the latitude allowed by municipalities in street meetings prior to the latter nineteenth century is inconclusive. But it would seem to be a safe presumption from the general tenor of the opinion in the *Fairbanks* case that the decision represented either an enlargement of individual freedom as compared to prior periods or at least a restraint on contemporary efforts to restrict such freedom more closely. The Court used only a rather vague reference to the "genius of our people" and the "character of their institutions" in holding that a street meeting is somewhat different from the type of situation or action which is a nuisance *per se*. In all probability, however, the cautious statements in the *Fairbanks* case represent the initial step toward the broader judicial protection for such meetings offered by *Hague v. C.I.O.*[7]

A legislative prohibition against all street meetings would solve the difficulties of determining whether in individual cases a nuisance was constituted. However, this remedy would leave no room for any meeting, whether a nuisance or not, and from the legal standpoint the American courts have in a number of instances held that such a prohibition would be considered violative of fundamental rights. The decision in an Illinois case is illustrative of the general

6. *Ibid.*, at 669, *per* Agnew, J. A similar holding on this point by an English court is found in Burden v. Rigler, (1911) 1 K. B. 337.
7. 307 U. S. 496 (1939).

sentiment of state courts with respect to such a prohibition. The case involved the question of the validity of an ordinance permitting street assemblies only upon receipt of a permit from the mayor. The court upheld the requirement of a permit but limited the powers of the municipality with respect to such assemblies by stating:

> If, however, the true construction [of the ordinance] would apply it to all "meetings or gatherings of any kind, or for any purpose, upon the public streets or public grounds of said city," then because it makes no distinction, nor enables the court to make any, between such meetings, on any ground, we think it not a rightful exercise of the police power.[8]

In a habeas corpus proceeding, *In re Gribben,*[9] in the Territory of Oklahoma the validity of a "Salvation Army ordinance" was questioned which prohibited the "making of any noise upon streets or sidewalks of the city, by means of drums or musical instruments or otherwise, of such a character . . . as to annoy and disturb others." While on its face the ordinance was a regulation of noise, it was clearly directed to the end of preventing meetings and processions of the Salvation Army. The opinion of Justice Tarsney, speaking for the Supreme Court of Oklahoma, emphasized the discriminatory aspects of the administration of the ordinance, but implicit in other parts of the opinion was the recognition of a fundamental right of lawful meeting and procession in the public streets. The Justice stated:

> So long as there have been municipal codes, so long as cities have existed, the use of public streets for processions, for the movement of bodies of the people, whether organized as political, religious, or social organizations, has been recognized as a proper and lawful use of such streets; . . . A city implies a large aggregation of people. The use of its streets contemplates not quietude and repose, but the noise, bustle, and confusion incident to the transaction of the lawful business of the people, and their lawful and harmless amusements and recreations, pleasures and devotions. These are but incidents of a city's life.[10]

Certainly the Court was not trying to state that every anti-noise ordinance would receive similar treatment. The conclusion must be

8. Bloomington v. Richardson, 38 Ill. App. 60, 61 (1889).
9. 5 Okla. 379, 47 P. 1074 (1897).
10. *Ibid.*, at 1078.

that the Court felt that the holding of meetings and processions in the public streets was of sufficient importance to overcome the contention that the accompanying noise and, in this instance, music were so disturbing to the public as to permit municipal prohibition of such meetings. In addition, the opinion indicates a strong presumption in favor of street meetings generally, and, further, an implied rejection of municipal power to prohibit completely any and all such meetings.

Other state courts during the same period were, however, holding differently, to the effect that municipalities can restrict or prohibit completely the use of public places for speeches or assemblies. The leading case illustrating this view is *Commonwealth of Massachusetts v. Davis,*[11] decided in 1895. The Massachusetts courts have traditionally taken a highly conceptual approach to the subject of civil liberties, as subsequent cases treated here illustrate, and apparently have felt that emphasis on the rights of property is the safer legal ground, even though resulting decisions be restrictive of the exercise of basic personal rights. The *Davis* case presented the question of whether a permit could constitutionally be required of persons using the public parks for speeches. Justice Holmes, speaking for the majority of the Massachusetts Supreme Court, made the statement which has ever since been the major thorn in the side of the advocates of broad use of the streets and parks for public speeches and assemblies:

> For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his own house. When no proprietary rights interfere, the legislature may end the right of the public to enter upon the public place by putting an end to the dedication to public uses. So it may take the less step of limiting the public use to certain purposes.[12]

Until 1939 the United States Supreme Court was committed to the *Davis* rule and the implications it contained. The various state courts took a diverging path with respect to street meetings, some following the view outlined in *Bloomington v. Richardson*[13] and others following the more restrictive *Davis* rule. In 1939 the United States Supreme Court, apparently attempting to change the *Davis*

11. 162 Mass. 510, 39 N. E. 113 (1895), *aff'd,* 167 U. S. 43 (1897).
12. 162 Mass. 510, 511, 39 N. E. 113 (1895), *aff'd,* 167 U. S. 43 (1897).
13. 38 Ill. App. 60 (1889).

rule without expressly overruling it, stated in *Hague v. C.I.O.*[14] the view that street meetings must be accorded a special protection. Justice Roberts, speaking for the Court, said:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.[15]

Since the *Hague* case, the state courts have generally inclined to the view that the *Davis* rule has been reversed in substance, even if not by name. While the decision of the Court in *Hague v. C.I.O.* reflected in great part the liberalizing influence of the Roosevelt appointees, it is probable that by that year the general sentiment in the United States was that past treatment of such groups as the Salvation Army, in the latter nineteenth century, and the Socialists, in the twentieth century, represented a discomfiting phase in the history of a free country and should not be continued. Judges are responsive to the fears and remorses of society as a whole, and they, too, could begin to relax somewhat the restrictive attitudes toward minorities in those years of optimism toward the end of the depression years. The new minority of the late thirties was the militant, aggressive C.I.O., and very possibly the Court thought that a timely restraint could forestall attempts to focus old discriminatory practices on a new minority.

Even to presume the existence of a constitutional right to assemble in the streets is not to say, however, that the right is any more absolute than other similar rights, and certain restrictions may constitutionally be placed upon its exercise. Since there definitely appears to be an area of street meetings which offer no legal objections, the question arises as to just where the line is to be drawn. What types of meetings can be held legally and with constitutional protections thrown about them, and what types of meetings are not so protected by law or constitution? Who is to decide whether or not a particular meeting is permissible, and on what basis is the decision to be made? As would be expected, the cases reveal no clear-cut definition of just what types of street meetings are absolutely guaranteed against abridgment. Time, place, and circumstances must all be considered

14. 307 U. S. 52 (1939).
15. 307 U. S. 52, at 515 (1939). See also the more recent case of Kunz v. State of New York, 340 U. S. 290 (1951), in which Vinson, C. J., speaking for a majority of the Court, quoted with approval this section of Justice Roberts' opinion.

in making the decision as to the legality of particular meetings, and the courts can only pick out the line between permissible and non-permissible meetings in case by case investigations, often shifting previous lines toward more, or less, restriction, as the occasion seems to demand.

One might attempt to shrug the whole problem off with the facile remedy, "Hire a hall!" But the crux of the problem of assemblies on the public streets lies in the recognition of two facts: first, oftentimes the groups or persons participating are adherents of a locally unpopular political or religious creed and are not in a secure financial position, and, therefore, they are unable because of local prejudice or lack of money to rent an auditorium; and, second, in the great preponderance of cases of street assemblies, the sponsors must depend on collaring the casual passerby to acquire an audience for the dissemination of their views. In either situation these minorities must rely on public places such as streets or parks if their advocacy is to be at all effective. Masons, Elks, American Legionnaires, and members of organized, "acceptable" religious or political groups usually have no difficulty in holding their meetings, since they normally will have not only meeting places but a readymade audience of their own members, and recruiting of new members or followers is carried out through more formal, community-acceptable procedures. The advocate of a new faith or new political theory or even a theme which is not new but which is unpopular locally does not speak under such propitious circumstances. He might well find that owners of local auditoriums claim to be booked solidly for the next year or so when he attempts to rent a place to speak.[15a] And, presuming he has both money and opportunity to rent such a place, he might well find that no one has bothered to attend his speech when the time arrives. The only practicable solution from his point of view is for him to attempt

15a. See *Public Order and Right of Assembly in England and the United States,* 47 YALE L. J. 404 (1938). At p. 421 the author states: "Municipal authorities employ numerous techniques to thwart indoor meetings (of minority groups). Most direct and blunt is Mayor Hague's ordinance which, in effect, forbids the owner of a meeting hall to rent it for Communist meetings unless police permission is first secured. It is exceptional to require permits for meetings held in private halls; a more common technique stems from laws requiring licenses for theaters and public halls. These are presumably operative to safeguard buildings against fire and similar hazards. Nevertheless owners who do not cooperate with the police by refusing to rent their halls to objectionable radicals sometimes find their licenses revoked because of the 'structural . . . condition' of the building. A final source of discrimination arises in connection with the administration of statutes authorizing municipalities to issue permits for the use of school buildings to permit 'discussion of matters of . . . public interest.' A recent survey has disclosed frequent and confessed discriminations against political minorities seeking such permits."

to reach the audience wherever it is most available — in the streets and parks. Aside from any constitutional right involved, it is submitted that there is a considerable value in the mental nudges which the more conservative groups of our society receive from the unpopular and unorthodox views which are often confined to street-corner advocacy. Even though the listener remain unconverted, he at least will be forced to some degree of rethinking and restating of his own position, and there is certainly some gain inherent in this process. And, after all, the right of free speech is of no consequence if there be no concurrent right of assembly or right to try to induce an assembly to gather. The right to speak is not confined to speech *in vacuo*. The law, however, has only casually, if at all, recognized the sociological and financial aspects of street meetings up to about the time of the *Hague* case.[16]

Generally, English and American courts have in the past taken a position in favor of legislative restrictions on street meetings. The emphasis has been on the rights of the municipality as a property owner rather than on the protection of broad individual rights. The street meeting has been regarded as a privilege which could be restricted or revoked more or less at the pleasure of the legislative body or, to a lesser degree, the police. The English view, and that of a number of our state courts, seems to be well stated in the case of *Regina v. Graham*.[17] The case involved the question of the right of the people to assemble on Trafalgar Square. Justice Charles, in charging the jury, said:

> Undoubtedly Trafalgar-square has been used from time to time for public meetings, . . . (but) I can find no warrant for telling you that there is a right of public meeting either in Trafalgar-square or any other public thoroughfare. So far as I know the law of England, the use of public thoroughfares is for people to pass and repass along them. That is the purpose for which they are dedicated by the owner of them to the use of the public, and they are not dedicated to the public use for any other purpose that I know of than for the purpose of passing and repassing; . . . and it seems to me (Trafalgar-square) would be very analogous to the case of public thoroughfares; and equally on the part of the public they have no right, although

16. See Murdock v. Pennsylvania, 319 U. S. 105, 111 (1943) in which Justice Douglas, for the majority, said, "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way." It is to be presumed that freedom of assembly would also be included among those mentioned.

17. 16 Cox C. C. 420 (1888).

> they may often do it without objection, the public have no right to hold there any meetings for discussion upon any questions, be they social, political, or religious.[18]

Commonwealth v. Davis,[19] a Massachusetts case decided about the same time as *Regina v. Graham,* shows a very similar approach to the question of the right to assemble in the streets. The *Davis* case has been cited as precedent by many American courts in upholding various restrictions on such assemblies. English law seems to have remained very conservative in this respect, while American law has tended to develop along lines somewhat more favorable to the holding of street meetings. Certainly the opinions in *Hague v. C.I.O.* and *Kunz v. State of New York*[20] indicate a substantial deviation in the direction of greater freedom to assemble in the streets and parks. In fact, it is difficult to see how the distinguishing of the latter two cases from the *Davis* case can be anything other than an overruling of the earlier holding.

Since we do not enjoy an absolute right of assembly in the public ways, the question arises as to the conditions under which such a meeting might be properly held. The simpler legal approach to this question is an examination of the methods employed (and the basis for their employment) by public officials and private parties in preventing or dispersing street meetings. Such meetings which fall in the category of unlawful assemblies have been considered earlier. A number of other methods have been and are being used, and these will be considered separately.

An early New York case, *Adams v. Rivers,*[21] points to the possibility of an action in trespass. The theory is that a public highway has been dedicated, or an easement acquired, in order that the public have the right to pass and repass at their pleasure for the purpose of legitimate travel. Any purpose other than this for which the street is used becomes immediately a trespass. Adams brought an action in trespass against Rivers, who stood on the street in front of Adams' property and used abusive and insulting language to him. In a verdict for the plaintiff Willard, P. J., stated:

> Subject to the right of mere passage, the owner of the soil is still absolute master. The horseman can not stop to graze his steed, without being a trespasser; it is only in case of in-

18. *Ibid.,* at 429, 430. For a similar view see *Ex parte* Lewis, 21 Q. B. D. 191 (1888).
19. 162 Mass. 510, 39 N. E. 113 (1895).
20. 340 U. S. 290 (1951).
21. 11 Barbour 390 (N. Y. 1851).

evitable, or at least accidental detention, that he can be excused even in halting for a moment.[22]

He stated further:

The public have no need of the highway but to pass and repass. If it is used for any other purpose not justified by law, the owners of the adjoining land are remitted to the same rights they possessed before the highway was made. They can protect themselves against such annoyances, by treating the intruders as trespassers.[23]

Implicit in this opinion is the assumption that the adjoining landowner owns the fee in the street.[23a] It would appear, from the holding in this case, that the public is severely restricted in its activities in the public streets by the possibility of an action in trespass. The Court is not clear as to just how narrowly this doctrine would be applied, but such an action would offer the probability of success, according to the opinion, if the behavior of the user of the street were either unlawful or a substantial annoyance to the adjoining property holder.

A later English case, *Harrison v. Duke of Rutland*,[24] considers the same legal question and draws a somewhat clearer distinction between actionable and non-actionable uses of the public ways in trespass cases. In that case the Duke was engaged in the traditional English sport of shooting grouse on his property and near the highway. His keepers were driving the grouse toward the Duke and his friends. Harrison walked along the highway waving his handkerchief and opening and shutting his umbrella to scare the grouse away from the hunters. The keepers, after their warnings were ignored, threw him to the ground and held him until the drive was over. Harrison's contention of assault was countered by a claim of trespass.

In upholding the Duke's claim Lord Esher, M. R., stated:

[Plaintiff] was using this part of the highway solely for the purpose of interfering with the rights which the owner of the land was exercising on another part of his land . . . . He was, therefore, not there for the purpose of using the highway as

22. *Ibid.*, at 393-4.
23. *Ibid.*, at 398.
23a. Of course, in some situations the fee may not be in the adjoining landowner but may be in the municipality by purchase, condemnation or otherwise. See 25 Am. Jur. 430. In the latter cases there would be no basis for an action in trespass by the adjoining landowner against a user of the street.
24. 1 Q. B. 142 (1893).

> such in any of the ordinary and usual modes in which people use a highway. Under these circumstances, I think that he was a trespasser. Cases might arise in which it would be a question whether what a person was doing was a reasonable and usual use of a highway. In such cases there might be a question for a jury as to whether such person was using the highway as a highway for passing, in accordance with the reasonable and ordinary user of it for that purpose. In this case, on the undisputed facts, it appears to me clear that the plaintiff was a trespasser . . . .[25]

It would appear, then, from the opinion quoted, that there are two tests employed to determine whether a trespass has been committed by a highway user against a property owner whose property adjoins the highway. First, the person on the highway must be engaging in some activity which is not a "reasonable and ordinary use" of the streets. Second, that activity must be an interference with the rights which the owner of the land exercises. The second qualification would, of course, serve to ameliorate an otherwise strained application of the law of trespass. Another English case, *Hickman v. Maisey*,[26] decided a few years after the *Duke of Rutland* case, illustrates the same rule of law, since the earlier case was followed explicitly. In *Hickman v. Maisey* the question was whether a racing tout, who walked up and down the highway for the purpose of watching horses which were being trained in an adjoining field, committed a trespass against the owner of the land on which the highway was situated. In holding this action a trespass, the Court apparently found that the effect of the watching was to depreciate the value of the plaintiff's land as a place for the training and trial of race-horses.

As to the law of England on the application of trespass cases to street meetings, Professor A. L. Goodhart states:

> Whatever acts may be considered to be included in the right to pass and repass . . . , it is obvious that a public meeting cannot be one of them. It follows that a public meeting is always a trespass against the person in whom the property in the highway is vested unless he has expressly or tacitly licensed the holding of such a meeting.[27]

25. *Ibid.*, at 147.
26. 1 Q. B. 752 [1900].
27. 6 CAMB. L. J. 161, 163 (1937).

The Public Health Act of 1875[28] vests streets repairable by the inhabitants at large within urban areas in the urban authority.[29] It would seem, then, that the urban authority may prevent the holding of street meetings. Thus via the route of the law of trespass the same conclusion can be reached which the courts did reach in the *Davis* case and in *Regina v. Graham,* discussed earlier: that the municipality may allow, restrict or prohibit street meetings, in the discretion of the municipal officers.

The fact that a street meeting constitutes a trespass does not, however, mean that it constitutes a wrong against the members of the general public. As far as they are concerned, the meeting is a wrong only if it is a nuisance or, presumably, if it is an unlawful assembly. And certainly not all such meetings can correctly or legally be classified as nuisances. As Justice Agnew of the Pennsylvania Supreme Court stated:

> Such a stringent interpretation . . . is scarcely suited to the genius of our people or to the character of their institutions, and would lead to the repression of many usages of the people now tolerated as harmless, if not necessary.[30]

Probably the most pervasive discouragement to street meetings lies in the application of two types of municipal ordinances: those designed to prevent obstructions in the streets and those requiring a permit before engaging in street meetings. The former is used as a basis for dispersal, and the latter customarily is used to prevent the gathering of a crowd in the first place, although it also comes into play as a ground for dispersal if the group holding the meeting has not obtained the requisite permit prior to the occasion.

States and municipalities generally have enacted broad prohibitions against obstructions to travel in the highways — certainly a subject requiring regulation.[31] England provided similar restric-

28. 38 and 39 Vict., c. 55, § 149.
29. 16 HALSBURY, LAWS OF ENGLAND § 299 (2nd ed. 1935).
30. Fairbanks v. Kerr, 70 Pa. 86, 10 Am. Rep. 664, at 669 (1872).
31. A typical state statute is that of South Carolina: "It shall be unlawful for any person wilfully . . . to place obstructions upon any . . . highway or to throw or place on any such highway any objects likely to cut or otherwise injure vehicles using them. A violation of this section shall be punishable by a fine of not more than one hundred dollars or imprisonment for not more than thirty days." S. C. CODE OF LAWS § 33-491 (1952). And the South Carolina courts have held that the mere obstructing of a highway is in itself a nuisance. State v. Harden, 11 S. C. 360, 366, 1 Am. St. Rep. 843 (1878).
It is said that it is a nuisance "to organize or take part in a procession or meeting which naturally results in an obstruction and is an unreasonable user of the highway." 16 HALSBURY, LAWS OF ENGLAND 362 (2d ed. 1935).

tions in the Highways Act of 1835.[32] And every street meeting constitutes at least a technical obstruction. Again referring to the theory regarding the public user of the highways, the right of the public with respect to the highways begins and ends, technically, with the use of passing and repassing. Since a public meeting does not come within the usual interpretation of passing and repassing, it can easily be classified as an obstruction in violation of the prohibitions against blocking highway travel. Then to prove a violation of these statutes must the officers show an actual obstruction to travel going on at the time? Suppose the participants arrange themselves so as to permit ample passage around them; is there then an "obstruction" within the terms of the statutes?

Both in English and American law it would seem that any meeting which appreciably obstructs the highway would constitute a nuisance.[33] The test is whether it "renders the way less commodious than before to the public."[34] The fact that sufficient alternative passage space is left is no defense. Moreover, it is not necessary to show that persons have actually been obstructed, since the offense is the *placing* of any obstructions in the highway,[35] even though evidence might be introduced to prove that no one was in fact obstructed in his travel on the highway. Halsbury's *Laws of England* states that, "It is no defence to show that . . . though a part of the highway actually used by passengers is obstructed, sufficient available space is left."[36] The Massachusetts Supreme Court followed a similar rule in *Commonwealth v. Surridge*[37] and upheld its traditionally narrow approach to personal liberties. In that case the Court affirmed the conviction of a street speaker for the common law offense of obstructing a public way. Chief Justice Rugg, speaking for the Court, stated:

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32. 5 and 6 Will. 4, c. 50, § 72.

33. R. v. Bartholomew, [1908] 1 K. B. 554, 561; Thomas v. Casey, 121 N. J. Law 185, 1 A. 2d 866 (1938), *aff'd*, 123 N. J. Law 447, 9 A. 2d 294 (1939). See Goodhart, *op. cit.*, 164. In Alred v. Miller, Sess. Cas. 117 (Ct. of Justiciary 1924), Lord Sands said at p. 121: "When meetings [in the highways] are customary, they are not interfered with. On the other hand, . . . if they cause an obstruction, they are an offence."

34. HAWKINS, PLEAS OF THE CROWN Bk. 1, c. 32 (8th London ed. 1824).

35. See the wording of the South Carolina Act regarding obstructions and the court's interpretation of it in note 31, *supra*. An interesting historical note is struck by an Iowa municipal ordinance of the late 19th Century which prohibited the collection of crowds "so as to obstruct travel [or] frighten horses." See Chariton v. Fitzsimmons, 87 Iowa 226, 54 N. W. 146 (1893). It is possibly some expansion of our area of freedom to assemble in the streets not to have such exercise dependent upon the emotional stability of horses in the vicinity.

36. 16 HALSBURY, LAWS OF ENGLAND 355 (2d ed. 1935).

37. 265 Mass. 425, 164 N. E. 480, 62 A. L. R. 402 (1929).

> By the location of a highway an easement of passage is secured for the public with all incidental privileges thereby implied .... The easement of passage for the public ... includes reasonable means of transportation for persons and commodities and of transmission of intelligence. Whatever interferes with the exercise of this easement is a nuisance, even though no inconvenience or delay to public travel actually takes place.[38]

In an earlier case, *People v. Pierce*,[39] the New York Supreme Court, Appellate Division, was even more explicit in pointing out that actual obstruction to travellers need not be proved. Justice Smith, speaking for the Court, stated:

> It cannot be necessary to show that some travelers who attempted to pass through the crowd were hindered thereby. They might well have passed from the street before reaching the crowd that was before them, in order to avoid collision with the crowd.[40]

The more reasonable view, however, would seem to be that of the dissenting justice, Parker, who appeared to be strongly opposed to such a narrowly technical application of the law as would present a bar to any and all street meetings. For him, conviction for street obstruction, at least in the case of street speakers, should be obtained only where an actual obstruction to passers-by was proved.

> I do not dispute the power of the city to make the ordinance prohibiting the gathering of crowds to the hinderance of free travel, but no act should be deemed a violation of the provision that has not worked a substantial hindrance to the use of the street, or caused substantial and actual annoyance to the citizen. A crowd should not be condemned as having violated that ordinance, that is quiet and orderly, and affects public travel no more than to require it to slow up or turn to one side in passing.[41]

In 1948 in Ex parte *Bodkin*[42] the California District Court of Appeals for the First District upheld a conviction under a general municipal obstruction ordinance. But in so holding, the opinion of Justice Dooling, for the Court, made it clear that actual obstruction

38. Commonwealth v. Surridge, 265 Mass. 425, 164 N. E. 480, 481 (1929).
39. 85 App. Div. 125, 83 N. Y. Supp. 79 (1903).
40. 83 N. Y. Supp. 79, 81 (1903).
41. *Ibid.*, at p. 82.
42. 86 Cal. App. 2d 208, 194 P. 2d 588 (1948).

must be proved under the meaning of the ordinance. The ordinance in question provided: "Whenever the free passage of any street or sidewalk in the Town [of Emeryville] shall be obstructed by a crowd, the persons composing such crowd shall disperse or move on when directed to do so by a police officer. . . . "

Justice Dooling stated:

> It was established in this case that the passage of some members of the public along the street was in fact obstructed. If nobody had desired to use this street at the time another question would be presented . . . .
>
> Again, since the question of whether or not the free passage of the street or sidewalk was "obstructed" is one of fact, it was entirely possible for the petitioner herein to make the same speech on some other busier but broader street where the attendant crowd would not have constituted an "obstruction" within the meaning of the ordinance.[43]

In summary, then, it may be said that meetings in the public streets, no matter how reasonable or desirable their purpose may be, are nuisances if they cause any appreciable obstruction,[44] and that in some states it is not necessary to prove that in fact any one has been prevented from passing to prove the offense of obstructing the highways.

If this be the law regarding highway obstructions, the question arises as to whether any street meeting can be outside the interpretation of obstructions, and therefore legally permissible. Probably most, if not all, such meetings are technical obstructions or even nuisances. But it is the usual practice both in the United States and England to take no official action to halt meetings which constitute a technical obstruction only. The law regarding obstructions, however, does place the participants in a street meeting in the precarious position of enjoying such a privilege only at the whim of the police officials. Obstruction ordinances, nevertheless, have been upheld both against constitutional objections[45] and against attacks based on

43. *Ex parte* Bodkin, 194 P. 2d 588, 591 (1948).

44. Any use of the highway, however reasonable and convenient to the general public it may be, is a nuisance if it interferes with the right of passage. R. v. Train, 2 B & S 640 (1862).

45. Wilson v. Eureka City, 173 U. S. 32 (1899); *ex parte* Garrison, 18 Cal. App. 2d 495, 64 P. 2d 1007 (1937); Tacoma v. Roe, 190 Wash. 444, 68 P. 2d 1028 (1937).

the ground that the ordinances are unreasonable and therefore *ultra vires*.[46]

It does not require a great deal of imagination to suspect that unpopular groups will, in the eyes of the police, tend to create obstructions where a more acceptable organization will not. Cases from the police courts of a number of larger cities would be necessary for investigation before definite support for this surmise could be offered. Such information is not readily available in any satisfactory form. Even the recorded cases would not include the countless situations in which assemblies have been dispersed for obstructing traffic with no arrests having been made. The reported cases involving the use of devices other than obstruction ordinances give more substantial documentation for a contention of discriminatory police action;[47] but the obstruction cases indicate ground for suspicion that the extent of the obstruction quite probably varies inversely with the popularity of the doctrines expounded. The *Surridge*[48] case involved a soap-box orator who made a speech touching on "the right of the people to assemble in or use the streets for the purposes of free speech." In Ex parte *Bodkin*[49] the arrested speaker was addressing a group of workers in apparent protest over the Taft-Hartley Act then pending before Congress. In another obstruction case, *People v. Wallace*,[50] the police intervened to disperse an assembly being addressed by an organizer of the Socialist Labor Party. *Tacoma v. Roe*[51] involved the conviction of a "political speaker" — presumably a member of some minority party from the flavor of the opinion of the court. And while in its infancy the Salvation Army came in for its share of prosecutions under obstruction ordinances, e. g., *Mashburn v. City of Bloomington*.[52]

Of course, it would be unfair to conclude that prejudice alone is the determining factor in such prosecutions, since it can probably be shown that strange, new, or unpopular doctrines tend to draw larger crowds than speakers who have nothing novel to offer the strolling curiosity seeker. But the complete absence of such prosecutions against the more acceptable groups leads one to believe that on many occasions the police are more ready to recognize an obstruction

46. Chariton v. Fitzsimmons, 87 Iowa 226, 54 N. W. 146 (1893); State v. Sugarman, 126 Minn. 477, 148 N. W. 466 (1914); People v. Pierce, 85 App. Div. 125, 83 N. Y. Supp. 79 (1903).
47. See the discussion of permit ordinances, p. 399, *infra*.
48. 265 Mass. 425, 164 N. E. 480, 62 A. L. R. 402 (1929).
49. 86 Cal. App. 2d 208, 194 P. 2d 588 (1948).
50. 85 App. Div. 170, 83 N. Y. Supp. 130 (1903).
51. 190 Wash. 444, 68 P. 2d 1028 (1937).
52. 32 Ill. App. 245 (1889).

to traffic when the subject matter or the speaker is distasteful to them.

The most frequently used device today for regulating and restricting the street meeting is the requirement that a permit be obtained from some municipal officer prior to the holding of the meeting. The obvious advantage of the permit ordinance over the obstruction ordinance is in the fact that street meetings can be prevented or postponed prior to the occasion while the obstruction ordinance is only worthwhile as a dispersal measure. This does not mean, of course, that cities using the permit requirement discard obstruction ordinances. In *Commonwealth v. Surridge*[53] a speaker was convicted of obstructing the public street in spite of the fact that he had previously obtained a permit for such speech.

Ordinances requiring the permit have generally been upheld in the state courts. Two main lines of reasoning have been followed by the courts in holding the permit requirement valid. The first is the proprietary theory of *Commonwealth v. Davis*[54] which holds that since the streets are the property of the municipality, the municipality can restrict the uses to which streets may be put in any way it chooses, and even forbid street meetings altogether. The second line of reasoning emphasizes the public convenience approach. The New York Court of Appeals, in upholding a permit ordinance, stated:

> The ordinance is valid, since it is a reasonable exercise of the police power over the public streets. . . . Public streets are primarily for public travel. They are dedicated to the public for that purpose. They are thoroughfares intended for the use of the public to enable persons to go from one place to another. Any obstruction on the streets, whether permanent or temporary, may be declared unlawful.[55]

The courts of some states have held the permit requirement invalid,[56] but in these cases it was pointed out that no standards were laid down by the ordinances to guide the administrative official in granting or refusing the permits. Even in those states in which the permit requirement has been upheld, the courts have usually stated that arbitrary or unreasonable action on the part of the licensing official in refusing permits will be considered *ultra vires* and give rise

53. 265 Mass. 425, 164 N. E. 480, 62 A. L. R. 402 (1929).
54. 162 Mass. 510, 39 N. E. 113 (1895).
55. People *ex rel.* Doyle v. Atwell, 232 N. Y. 96, 133 N. E. 364 (1921).
56. Anderson v. Tedford, 80 Fla. 376, 85 So. 673, 10 A. L. R. 1481 (1920); State v. Coleman, 96 Conn. 190, 113 A. 385 (1921).

to mandamus forcing the issuance of such permits.[57] The general view, then, appears to be somewhat similar — that officials cannot withhold permits unreasonably, but that the permit requirement is a valid exercise of the police power. The difference appears to be that some courts prefer to rely on mandamus for remedial action, if necessary, while others consider mandamus of doubtful value in such cases and prefer to place the emphasis on a properly drawn ordinance. As an example of the latter view, the opinion of the Connecticut Supreme Court in *State v. Coleman*[58] is interesting:

> It is assumed by the ordinance that some citizens will be permitted by the chief of police to use the streets and parks . . . for the purpose of exercising their constitutional right. That being so, it is certain that the chief of police may not, by any arbitrary process of selection, determine in advance who may and who may not exercise it. If the permit is to be granted in some instances and withheld in others, it must be in accordance with some uniform rule which is not expressed in the ordinance . . . . We find the ordinance hopelessly indefinite. No rule is laid down to guide or restrain that power, or to inform applicants on what terms a permit will be granted.
>
> Even in the absence of Connecticut precedent, we should be unwilling to leave the constitutional liberties of a citizen to be defined and protected by the good impulses of a subordinate official intrusted with unlimited discretion; if for no other reason than that the exercise of discretion cannot be controlled by mandamus.[59]

The more general view is that expressed in *City of Duquesne v. Fincke*,[60] in which the Supreme Court of Pennsylvania upheld the conviction of Fincke under a municipal ordinance requiring a permit before holding a public meeting on the streets of Duquesne. Fincke applied for a permit, but when the mayor took no action, he held the meeting without it. Upon being arrested, Fincke contended that the ordinance violated the free speech and assembly guarantees of the state and national constitutions. Judge Simpson, speaking for the court, stated:

> If he wishes to address an assemblage he must gather his audience together in places where he and they have the right

57. City of Duquesne v. Fincke, 269 Pa. 112, 112 A. 130 (1920).
58. 96 Conn. 190, 113 A. 385 (1921).
59. *Ibid.*, at 386, *per* Beach, J.
60. 269 Pa. 112, 112 A. 130 (1920).

to be for this purpose; and the streets are not such places, since they are intended for passage and not for assemblage.[61]

If they thought the city had power to authorize the meeting, but the mayor was acting arbitrarily in refusing the permit, their remedy was not by violating the ordinance, but by mandamus to compel a proper obedience to it, in which proceeding the courts would have overturned "arbitrary and intentional unfair discrimination in the administration of the ordinance."[62]

English local governmental units have also made rather extensive use of the permit power granted under various Parliamentary acts. Attacked on the ground that they are unreasonable and occasionally on the further ground that they are fatally indefinite, these ordinances have been upheld in the majority of cases.[63]

While the permit device has been generally accepted as a proper method for regulating street meetings and is widely used throughout the United States, the United States Supreme Court rendered a decision in 1951 in *Kunz v. New York*[64] which leaves considerable doubt as to whether the requirement of a permit prior to the holding of a street meeting is a constitutional exercise of the police power. In that case the Court merely held the New York City permit ordinance unconstitutional, and the majority pointed out that a properly drawn ordinance might not have invoked their disapproval. But the rather close circumscription of administrative authority in the New York City ordinance suggests the possibility that any such ordinance, if practicable as a regulatory device, would meet the same fate. It might very reasonably be concluded, as did Justice Jackson in dissenting from the majority view, that any ordinance attempting to require a permit prior to the holding of a street meeting which gives administrative officials power to withhold or revoke permits would be held unconstitutional. In other words, it seems that the Court held in the *Kunz* case that the requirement of a permit merely as a *notification* device—in order that policing could be properly effected or in order to avoid the confusion of two groups meeting at the

61. *Ibid.*, at 132.
62. *Ibid.*, at 134.
63. Cases sustaining the ordinances: Kruse v. Johnson [1898] 2 Q. B. 83 (church revival meeting); Reg. *ex rel.* Gay v. Powell, 51 L. T. (N. S.) 92 (Q. B. 1884) (music by Salvation Army); Slee v. Meadows, 75 J. P. 246 (K. B. 1911) (Salvation Army lecture). *Contra:* Johnson v. Mayor of Croyden, 16 Q. B. D. 708 (1886); Munro v. Watson, 57 L. T. (N. S.) 366 (Q. B. 1887) (Salvation Army singer). In the last case Mathew, J., said: "Permission to the mayor to license such music as he may see fit is an additional objection to the bye-law." *Ibid.*, at 367.
64. 340 U. S. 290 (1951).

same place and time — is legitimate. But municipal authorities cannot prevent the meeting in advance. The Court did not state this view explicitly, but it would seem to be implicit in the opinions of the majority.

The ordinance under question made it unlawful to hold public worship meetings on the streets without first obtaining a permit from the city police commissioner.[65] It also made unlawful the collecting of any assemblage of persons to ridicule or denounce any form of religious belief. The New York Court of Appeals construed the ordinance to require that all initial requests for permits by eligible applicants (ministers and clergymen) must be granted. The ordinance made no provision for revocation of permits or for denial of permits to eligible applicants. Construction by the Court of Appeals, however, was that after the required initial issuance, denial or revocation was proper if disorders occurred at previous meetings, or if the terms of the ordinance were violated. The administrative decision as to the denial of the permit was to follow a hearing at which complaints were to be filed, witnesses heard, and opportunity to cross-examine given. The applicant then could appeal adverse decisions to the courts.

Kunz was a Baptist minister. In 1946 he applied for and received a permit under the ordinance. In November, 1946, his permit was revoked after a hearing by the police commissioner. The revocation was based on evidence that he had ridiculed and denounced other religious beliefs in his meetings. He publicly denounced the Catholic Church and called the Pope "the anti-Christ." The Jews he called "Christ-killers," and, with reference to the burning of the Jews by the Nazis, he stated: "All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't." He testified that when an officer was not present at his meetings, there was disorder, "but with an officer, no trouble." Admittedly, he had planned to continue future speeches in the same vitriolic vein.

He applied for another permit in 1947 and again in 1948, but was notified each time that his application was disapproved. In September, 1948, Kunz was arrested for speaking at Columbus Circle

65. For earlier cases concerning this same ordinance see: People v. Smith, 259 N. Y. 48, 180 N. E. 891 (1932) and People v. Smith, 263 N. Y. 255, 188 N. E. 745 (1934). It is interesting to note the change in attitude of the Court between 1934 and 1951. The ordinance was challenged on a slightly different ground in the 1934 case and the Court dismissed appeal for want of a substantial federal question. Smith v. New York, 292 U. S. 606 (1934).

in New York City without a permit. Conviction was affirmed by the New York Court of Appeals, three judges dissenting.[66]

The question before the United States Supreme Court, according to the majority, was the validity of an ordinance which permitted the police commissioner to refuse to issue a permit for a religious street meeting on the basis of his own interpretation of what was deemed to be conduct condemned by the ordinance.

To Justice Jackson, the lone dissenter in the case, the issue was more narrowly drawn to meet the particular type of speech and assemblage covered by the facts. To him the issue was whether the individual has a constitutional right to provoke disorder by making inflammatory and insulting speeches directed at the religious beliefs of others.

Mr. Chief Justice Vinson, speaking for a majority of the Court, quoted approvingly from Justice Roberts' opinion in the *Hague* case: "Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[67] The Chief Justice said further, "Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places."[68]

The obvious question at this point would be, what steps, then, can the municipality take to protect itself against assemblies which have been disorderly in the past? The Chief Justice stated, "There are appropriate public remedies to protect the peace and order of the community if appellant's speeches should result in disorder or violence . . . . We do not express any opinion on the propriety of punitive remedies which the New York authorities may utilize. We are here concerned with suppression — not punishment. It is sufficient to say that New York cannot vest restraining control over the right to speak on religious subjects in an administrative official where there are no appropriate standards to guide his action."[69]

Mr. Justice Frankfurter, in a concurring opinion, said:

> Administrative control over the right to speak must be based

66. 300 N. Y. 273, 90 N. E. 2d 455 (1950).
67. Hague v. C.I.O., 307 U. S. 496, 515 (1939).
68. Kunz v. New York, 340 U. S. 290, 293-4 (1951).
69. *Ibid.*, 315.

on appropriate standards, whether the speaking be done indoors or out-of-doors. The vice to be guarded against is arbitrary action by officials. The fact that in a particular instance an action appear not arbitrary does not save the validity of the authority under which the action was taken.

In the present case, Kunz was not arrested for what he said on the night of arrest, nor because at that time he was disturbing the peace or interfering with traffic. He was arrested because he spoke without a license, and the license was refused because the police commissioner thought it likely on the basis of past performance that Kunz would outrage the religious sensibilities of others. If such had been the supportable finding on the basis of fair standards in safeguarding peace in one of the most populous centers of New York City, this Court would not be justified in upsetting it. It would not be censorship in advance. But here the standards are defined neither by language nor by settled construction to preclude discriminatory or arbitrary action by officials. The ordinance, as judicially construed, provides that anyone who, in the judgment of the licensing officials, would "ridicule" or "denounce" religion creates such a danger of public disturbance that he cannot speak in any park or street in the City of New York. Such a standard, considering the informal procedure under which it is applied, too readily permits censorship of religion by the licensing authorities.[70]

Mr. Justice Jackson, in a strong dissenting opinion, gave the arguments in favor of public order at the sacrifice of some freedom of assembly and expression. He pointed out that Kunz preached, among many other things of like tenor, that "The Catholic Church makes merchandise out of souls," that Catholicism is "a religion of the devil," and that the Pope is "the anti-Christ." The Jews Kunz denounced as "Christ-killers." Justice Jackson classified such speech in the same category as insulting or fighting words, which were held not to be constitutionally protected in *Chaplinsky v. State of New Hampshire*.[71] In support of this contention he stated:

These terse epithets come down to our generation weighted with hatreds accumulated through centuries of bloodshed. They are recognized words of art in the profession of defamation. They are not the kind of insult that men bandy and laugh off when the spirits are high and the flagons are low. They are not in

70. 340 U. S. 285-6 (1951).
71. 315 U. S. 568, 571-572 (1942).

> that class of epithets whose literal sting will be drawn if the speaker smiles when he uses them. They are always, and in every context, insults which do not spring from reason and can be answered by none. . . . Of course, people might pass this speaker by as a mental case, and so they might file out of a theatre in good order at the cry of "fire." But in both cases there is genuine likelihood that someone will get hurt.[72]

Justice Jackson objected strenuously to the action of the Court in invalidating the New York ordinance because of the absence of proper standards.

> I do not see how this Court can condemn municipal ordinances for not setting forth comprehensive First Amendment standards. This Court never has announced what those standards must be, it does not now say what they are, and it is not clear that any majority could agree on them. In no field are there more numerous individual opinions among the Justices. The Court as an institution not infrequently disagrees with its former self or relies on distinctions that are not very substantial. It seems hypercritical to strike down local laws on their faces for want of standards when we have no standards.[73]

Finally, he pointed out that the City of New York has special problems because of the "diverse nationalities, races, religions, and political associations" which make up the "vast hordes of people living in its narrow confines." He stated:

> In this case there is no evidence of a purpose to suppress speech, except to keep it in bounds that will not upset good order . . . . This Court should be particularly sure of its ground before it strikes down, in a time like this, the going, practical system by which New York has sought to control its street-meeting problem.[74]

Justice Jackson's emphasis here was on the practical, orderly system by which the City of New York undertook to solve its problems, and he objected to what he considered rather arbitrary action by the Court in overturning this system.

72. Kunz v. State of New York, 340 U. S. 290, 299 (1951).
73. *Ibid.*, 308.
74. *Ibid.*, 314. In his concurrence with the majority Justice Frankfurter pointed out that the majority in the New York Court of Appeals, which upheld the ordinance, were, to a man, non-residents of New York City, while all of the three dissenting judges were New York City residents who, presumably, were acquainted with the "special problems" of that city.

> We find that issuance [of a permit] the first time is required. Denial is warranted only in such unusual cases as where an applicant has had a permit which has been revoked for cause and he asserts the right to continue the conduct which was cause for revocation. If anything less than a reasonable certainty of disorder was shown, denial of a permit would be improper. The procedure by which that decision is reached commends itself to the orderly mind — complaints are filed, witnesses are heard, opportunity to cross-examine is given, and decision is reached by what we must assume to be an impartial and reasonable administrative officer, and, if he denies the permit, the applicant may carry his cause to the courts. He may thus have a civil test of his rights without the personal humiliation of being arrested as presenting a menace to public order. It seems to me that this procedure better protects freedom of speech than to let everyone speak without leave, but subject to surveillance and to being ordered to stop in the discretion of the police.[75]

This case appears to develop the embryonic ideas of *Hague v. C.I.O.*[76] to full maturity. Here is conduct and speech completely repulsive to all canons of good taste and rationality, but which, nevertheless, the majority of the Court holds cannot be prohibited *in advance* by an ordinance which, it would seem, is drawn rather carefully in favor of the applicant for a permit. There would seem to be no question, however, but that the ordinance does place a prior restraint on freedom of speech and assembly. The Court's emphasis on a properly drafted ordinance indicates that not all prior restraints are unconstitutional, but only those which are unreasonable. However, if the New York City ordinance be unconstitutional, then it appears that the Court need take only a slight step further — if, indeed, it has not already done so — to deliver the *coup de grace* to the permit system in such situations by holding that any permit requirement other than one which constitutes merely a notification or reservation device represents unconstitutional restraint.

One writer agrees with Justice Jackson that a properly drawn permit ordinance would actually result in greater protection to legitimate assemblages than would the practice of requiring no permits and leaving the problem of determining whether particular speeches should be stopped to the discretion of the police officer who happened

75. *Ibid.*, 312.
76. 307 U. S. 496 (1939).

to be in the neighborhood.[77] The suggestion is that the police officer will have a presumption in favor of the legitimacy of the assembly if it be previously approved by some municipal licensing official and will not be so apt to disperse the meeting, in the event of disorders, as he will be to offer protection to the speaker. This argument is based on two premises. First it assumes discretion on the part of the licensing official since the police officer need not consider the meeting presumptively valid if permits are issued to all merely on request. Second it presupposes a police officer with a rather capricious nature if presumed to feel a compulsion to make arrests under the no-permit system which he does not feel under a permit system. In at least one case there is evidence that the obtaining of a permit does not preclude the possibility of arrest for obstruction or, *a fortiori,* disorderly conduct.[78]

There would seem to be two major arguments against this position. In the first place, any permit system which does not leave the way open for at least a limited number of areas in which non-permit, spontaneous speeches and assemblies may be held does not leave the individual the full measure of freedom which would be desirable in an open society. The more popular streets, insofar as street speakers are concerned, might well be allocated on a permit basis of first come first served, leaving license official to refuse or revoke. To protect even more carefully the freedom to assemble in the public ways, meetings in even these latter streets might be considered to "require" a permit only in the sense that they are reservations, and thus unannounced or "unlicensed" speeches and assemblies would still be proper where no previous group had made a reservation.

In the second place, Justice Jackson's argument that the permit system, as a discretionary licensing arrangement, gives more freedom than would derive from leaving a determination of the propriety of a meeting to the unbridled discretion of the local police officer assumes that these are the only alternatives in solving the problem. A third possibility is a liberal permit system and a properly supervised and trained police force which will protect, rather than restrict, the rights of free speech and free assembly. The point that the majority of the Court since the *Hague* case has been apparently trying to drive home is that the people in the United States are guaranteed

77. Quillian, *Soapbox Oratorical Privilege v. Municipal Tranquility,* 14 GA. B. J. 191 (1951).

78. Commonwealth v. Surridge, 265 Mass. 425, 164 N. E. 480 (1929), at p. 482: "To undertake to authorize such obstruction of a public way . . . . was beyond the ordinance making power of the city council. The permit afforded no protection to the defendant."

very broad rights of speech and assembly. If there be unreasonable restraints placed on their exercise by local police officers, then these practices should also be attacked by the Court under its review powers. The police officer must be instructed that the presumption, if there are to be presumptions, must be in favor of continuing the meeting. This assumes that there is no incitement to riot or unlawful assembly, of course. The only excuses for dispersing a lawful meeting in the public ways would be either that the flow of traffic would have been substantially impeded or that disorders would have been imminent which he could not have suppressed with the forces at his command.[79]

While highway obstruction ordinances and permit requirements are probably the most frequently used devices for dispersing or limiting street meetings, another possibility for dispersals in the hands of the police officer is arrest on a charge of disorderly conduct. In this, as in the enforcement of highway obstruction ordinances, the problem is squarely one of administration of the law. And it is to be suspected that in this field, just as in the two mentioned, arrests are frequently made as much on the basis of prejudice as on the basis of a real finding of disorderly conduct. No matter with what eloquence and fervor the Court denounce the arbitrary administration of a licensing system, the patrolman customarily has a broad area of discretion in determining whether or not a highway is obstructed or whether or not a breach of the peace is imminent. These, of course, are questions of fact. But the presumption of validity which police courts usually accord the actions of police officers makes it difficult for a defendant in such a case to controvert the conclusions or apprehensions of a police officer, no matter what evidence the defendant may introduce.[80]

Even a civil liberties conscious United States Supreme Court seems to have fallen into this same pattern in its decision in *Feiner*

79. Even so enlightened a treatment of the subject as that published for police instruction by the Chicago Park District, *The Police and Minority Groups* (Chicago, 1947), discusses the role of the police officer in tension situations from the standpoint of the techniques for breaking up an assembly without a single point of emphasis on the intelligent attempt on the part of the officer to determine whether the assembly is a lawful one requiring him, constitutionally, to prevent hostile groups from interfering with it, or whether he can constitutionally disperse the entire group.

80. See 47 YALE L. J. 404 (1938), notes 49 and 50 in which the author cites support for a suspicion that police magistrates "usually exhibit a decided propensity to agree with the police, become impatient with defendants who do not plead guilty and with the unskilled manner in which those defendants who cannot afford counsel conduct their own defense." *Id.*, p. 412.

v. People of New York,[81] rendered on the same day as the *Kunz* decision.

In the *Feiner* case, Irving Feiner was addressing, from a wooden box, a group of listeners on a street corner in Syracuse, New York. A crowd of some seventy-five or eighty people was gathered on the sidewalks and spilling into the street. Feiner was urging the audience to attend a speech later that night on the subject of racial discrimination, and during the appeal Feiner made derogatory remarks about President Truman, the American Legion, the Mayor of Syracuse, and other local political officials. He also said that "colored people don't have equal rights and they should rise up in arms and fight for them."

Two officers were sent to the meeting and stated that the crowd was restless and there was some pushing, shoving and milling around. One man said to the police officers, "If you don't get that son of a bitch off, I will go over and get him off there myself." The police officers told Feiner to cease speaking, and, when he refused, arrested him for disorderly conduct.

A majority of six in the Supreme Court considered that the facts clearly indicated sufficient evidence of a possible breach of the peace to warrant Feiner's arrest for disorderly conduct.

The Chief Justice, speaking for the majority, stated that "Petitioner was neither arrested nor convicted for the making or the content of his speech. Rather it was the reaction which it actually engendered."[82] He stated further:

> We are well aware that the ordinary murmurings and objections of a hostile audience cannot be allowed to silence a speaker, and are also mindful of the possible danger of giving overzealous police officials complete discretion to break up otherwise lawful public meetings. . . . But we are not faced here with such a situation. It is one thing to say that the police cannot be used as an instrument for the oppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.[83]

It is submitted that there is a substantial contradiction in the reasoning of the Chief Justice. If Feiner was not arrested and convicted for either the making or the content of his speech but, instead,

81. 340 U. S. 315 (1951).
82. *Ibid.*, 319-320.
83. *Ibid.*, 320-321.

for the "reaction which it actually engendered," then it is difficult to see how incitement to riot can be concluded. It would seem more reasonable, from the facts, to conclude that this was a case of a lawful assembly which attracted a hostile audience. No testimony was entered to indicate that the police made any effort to still the pushing and muttering of the crowd. The "trigger" which set off the arrest was not mob action in obedience to the exhortations of the speaker but the statement of a hostile listener that he would get Feiner off the box from which he was speaking. It appears from the holding in this case that it should be no very difficult matter for a few people to get an unpopular speaker arrested for incitement to riot through the simple device of telling a policeman that they intended to pull the speaker from his podium. Since the majority admittedly did not upheld the conviction on the basis of the content of the speech, rebuttal to the above argument cannot properly center on the words used by Feiner. The Chief Justice flatly stated that it was rather the reaction which the speech actually engendered. If this be not conditioning the right of speech and assembly on the degree of hostility of the audience to the speaker, then it is difficult to see what facts would present such a situation.[84]

Justices Black and Douglas gave vigorous dissenting opinions, Justice Minton concurring with the latter. Justice Black stated:

> As to the existence of a dangerous situation on the street corner, it seems far-fetched to suggest that the "facts" show any imminent threat of riot or uncontrollable disorder. It is neither unusual nor unexpected that some people at public street meetings mutter, mill about, push, shove, or disagree, even violently, with the speaker. Indeed, it is rare where controversial topics are discussed that an outdoor crowd does not do some or all of these things. Nor does one isolated threat to assault the speaker forbode disorder . . . .
>
> Moreover, assuming that the "facts" did indicate a critical situation, I reject the implication of the Court's opinion that the police had no obligation to protect petitioner's constitutional right to talk. But if, in the name of preserving order, they ever can interfere with a lawful public speaker, they first must make all reasonable efforts to protect him. Here the policemen did not even pretend to try to protect petitioner. . . . Their

84. On the problem of a hostile audience see: A. V. Dicey, *op. cit.*, pp. 273-276; Chafee, *The Problem of the Hostile Audience,* 49 COL. L. REV. 1118 (1949).

> duty was to protect petitioner's right to talk, even to the extent of arresting the man who threatened to interfere. Instead, they shirked that duty and acted only to suppress the right to speak.[85]

He continued by pointing out an "alarming similarity" between the power the majority would hereby allow the police and that possessed by English officials under an act passed by Parliament in 1795.[86] In that year Justices of the Peace were authorized to arrest persons who spoke in a manner which could be characterized as "inciting and stirring up the People to Hatred or Contempt . . ." of the King or the Government.

Justice Douglas was in substantial agreement with the sentiments expressed by his brother dissenter. He stated:

> [This record] shows an unsympathetic audience and the threat of one man to haul the speaker from the stage. It is against that kind of threat that speakers need police protection. If they do not receive it and instead the police throw their weight on the side of those who would break up the meetings, the police become the new censors of speech. Police censorship has all the vices of the censorship from city halls which we have repeatedly struck down.[87]

It would seem that if the Court were interested in erecting safeguards around the exercise of freedom of speech and assembly, it would not stop at a perusal of permit ordinances but would review closely the enforcement of common-law and statutory provisions regarding highway obstructions and breaches of the peace, where First Amendment freedoms come into play. The heart of the problem of the exercise of these rights is, after all, quite frequently not in the accidental phrasing of an ordinance but in the day-to-day actions of administrative personnel — and this includes the neighborhood police officer. It matters little that the Court, in a burst of rhetoric, condemns an ordinance which "on its face invades First Amendment freedoms" when in the next breath it condones police action in dispersing a meeting on grounds which a reasonable man might consider equally as arbitrary as those offered as reasons for denying or revoking a permit.

The emphasis by the trial court and the majority in the Supreme Court on the fact that the police officer had to "request" and then

85. Feiner v. New York, 340 U. S. 315, 325-327 (1951).
86. 36 Geo. III, c. 8, § 7.
87. Feiner v. New York, 340 U. S. 315, 331 (1951).

"tell" Feiner to stop implies that there is something illegal in itself in a refusal to obey a police officer. If the assembly were lawful, then it would seem that the speaker had the right to ignore the order of the policeman. If it were not lawful, then the refusal to comply would constitute a separate offense, and there would seem to be no reason to belabor the question in an examination of the propriety of the conviction for making an unlawful speech. The gravamen of the offense assuredly should have been the improper speech, not the refusal to obey the officer.

The facts and the holding in the *Feiner* case very closely parallel an English case in 1936, *Duncan v. Jones,* which aroused substantial criticism among English students of constitutional law.[88] That case centered around the offense of "obstructing an officer in the execution of his duty." The *Feiner* case suggests, at least to the minority, that Feiner's conviction was upheld as much because he ignored the officer's request to cease speaking as for incitement to riot. In the *Duncan* case, Mrs. Duncan was about to make a speech in a street near a training center for unemployed. One year previously, Mrs. Duncan had made an address on the general subject of free speech at the same location, and following the meeting a disturbance took place inside the center which the superintendent of the center attributed to the meeting. In the instant case, Jones. a police inspector, told Mrs. Duncan that she could not make the address on that street, but could make it on some other street. She persisted, and was arrested for obstructing an officer in the execution of his duty. It was not alleged that there was any obstruction of the highway, nor was it alleged that any of the persons at the meeting had either committed, incited or provoked any breach of the peace. Conviction for the stated offense was obtained in the lower court. On appeal, conviction was upheld, with the court stating, *per* Lord Hewart, C. J., that "English law does not recognize any special right of public meeting for political or other purposes." (This is, of course, the basic difference between English and American *law* regarding public meetings. The differences between English and American *practice* regarding public meetings are not, however, as substantial as the legal differences might lead one to expect.) It was further stated, *per* Humphreys, J., that "Here it is found as a fact that the respondent reasonably apprehended a breach of the peace. It then . . . be-

88. Duncan v. Jones, 1 K. B. 218 (1936). For comment see: DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 274 (9th London ed. 1948); WADE, CONSTITUTIONAL LAW 179 (2nd London ed. 1935); 18 Canadian Bar Rev. 646-649 (1940).

came his duty to prevent anything which in his view would cause that breach of the peace. While he was taking steps so to do he was wilfully obstructed by the appellant. I can conceive no clearer case within the statutes than that."[89]

In *Burton v. Power*,[90] a New Zealand case, a member of the "Pacifist Society" held a meeting in a public reserve and persisted in addressing it after being forbidden by a police constable to do so. His conviction for wilfully obstructing the constable in the execution of his duty was affirmed because the Court, following *Duncan v. Jones, supra,* was satisfied that the constable had a reasonable apprehension that breaches of the peace would occur which it was his duty to prevent. Support for this was found in the history of previous meetings of the society at which incidents occurred which gave reasonable cause for apprehending a breach of the peace on this occasion. In his decision Myers, C. J., stated: "This is not a charge against the appellant for being a pacifist or for holding opinions of any particular subject, nor does the case involve the law of unlawful assembly or any question of freedom of speech in any fair sense of the term."[91]

Certainly there was no question of unlawful assembly, but equally certain there is a question of freedom of speech. In effect the courts in both the *Duncan* and the *Burton* cases were saying that so long as the speech is popular with all the audience, then the assembly may congregate and the speaker continue. But no matter what the speaker is saying, if some of the audience is or becomes hostile and threatens a breach of the peace, then the police officer is bound to disperse the assembly and stop the speaker. And a refusal to disperse or cease speaking constitutes the statutory offense of obstructing an officer in the execution of his duty.

It is difficult to see how a judge could so blandly brush aside basic freedoms of speech and assembly and leave the exercise of these entirely dependent on whether or not the police officer "reasonably" apprehends a breach of the peace. It also leaves broad powers of obstruction in the hands of groups hostile to the particular participants in such an assembly, since all that is necessary to prevent future meetings is to create a disturbance at a meeting. Such disturbance, then, would give the police officer grounds for "apprehending a breach of the peace" at all future gatherings of the group. The proper course would appear to be to permit the assembly, if it be

89. *Ibid.*, 218.
90. [1940] N. Z. L. R. 305.
91. *Ibid.*, 306.

lawful, and offer sufficient protection to the speaker and his followers to forestall any breach of the peace. If sufficient police protection to prevent a disturbance be unavailable, then it would be time enough to sacrifice the rights of speech and assembly in the interest of public order.

Until the *Feiner* case, the American courts had been drawing away from the narrowly restrictive view indicated by the English and New Zealand courts in *Duncan v. Jones* and *Burton v. Power,* respectively. Now the distinction between English and American practice seems to be less apparent, although it is to be suspected that the United States Supreme Court would probably have held differently on the facts presented in the *Duncan* and *Burton* cases.

The City of White Plains, New York, presents an interesting example of the use of the disorderly conduct ordinance to control street meetings. No ordinance requiring permits for street meetings has been passed by White Plains. But the *practice* (apparently endorsed by both police and city council) has been to disperse all street meetings except those held by religious organizations.[92]

In November of 1948 two leaders of the American Labor Party made a political address on a street corner in White Plains.[93] The two men had mounted a stepladder and in their ensuing speech criticised the Republican and Democratic bipartisan foreign policy as "leading down the road to war and Fascism." Police testified that the meeting had blocked the sidewalks and the street, and that the speakers were arrested for disorderly conduct when they refused to stop after being ordered to do so by the police.

City officials contended that political meetings should be confined to halls and lots, with streets reserved for traffic.

The defendants offered proof that they had written to the city asking protection at the meeting and that the public safety commissioner had replied that he had no authority to permit political street meetings. Six witnesses testified that lanes for pedestrians were kept open on the sidewalks and that traffic moved continuously on the streets. The police chief conceded "nothing disorderly" occurred at the meeting. He estimated the crowd at fifty to seventy-five persons and said his patrolmen had to "struggle to keep traffic moving."

The party leaders were eager to hold such meetings in working-

92. The New York Times, Nov. 29, 1948, p. 22, col. 3.
93. The facts in the case are set out in The New York Times, Nov. 5, 1948, p. 5, col. 3.

class residential areas because of the audiences there that might otherwise not be reached.[94]

The trial court found the defendants guilty as charged, and the speakers were sentenced to fines of ten dollars or a term in jail of ten days.[95]

Here is a city which attempts informally to prohibit all street meetings except those held by religious organizations. The holding in *Hague v. C.I.O.*,[96] while directly applicable to parks rather than streets, would seem to have been broad enough to put the official stamp of disapproval on such practices. Both this example and the use of an ordinance, as in the *Kunz* case, to limit street speaking to religious persons or organizations raise another question — that of the constitutionality of permitting religious street meetings, whether by permit or by custom, and denying that privilege to other groups. Customarily, the Court has permitted the states broad powers of classification, but where a classification, otherwise reasonable, interferes with a proper exercise of First Amendment freedoms, then it is to be assumed that such classification is unconstitutional.

The White Plains incident raises another question which is fundamental to a determination of exactly how much freedom Americans have to assemble in their public streets: how faithfully do the police courts in American cities follow the mandates of the United States Supreme Court with regard to freedom of speech and assembly? In spite of the holding in the *Hague* case the White Plains court held the speakers guilty of disorderly conduct in 1948. Very possibly, in spite of the holding of the *Kunz* case and *Niemotko v. State of Maryland*[97] in 1951, the White Plains officials will continue in the future with their restrictive policy with respect to street meetings. A proper analysis of the right to assemble in the public ways in the United States would require a close study of police practices and training with regard to street meetings in all cities of sufficient size to encounter the problem — virtually an impossible task because of the paucity of records of police court trials. But this is the focal point of conflict between public order and freedom to assemble, since only a very small percentage of the total number of cases go beyond this stage — only a handful have reached the United States Supreme Court. If the Recorders' courts choose to "distinguish" their cases from those decided in the United States Supreme Court, then only

94. Editorial, The New York Times, Nov. 29, 1948, p. 22, col. 3.
95. The New York Times, Nov. 30, 1948, p. 24, col. 6.
96. 307 U. S. 496 (1939).
97. 340 U. S. 268 (1951).

appeal to higher state courts or even to the United States Supreme Court can correct the error. Appeals are expensive and time-consuming, and the result oftentimes is that the convicted defendant simply pays the fine and the restrictions against street meetings continue to operate. It is to be hoped that such instances represent a small minority of the total number.

As the cases analyzed have indicated, the basic problem in the regulation of street assemblies is the reconciliation between public order and convenience on the one hand and individual liberty on the other. While it would be impracticable to require that a city such as New York, for example, allow complete freedom to any and all types of street assemblies, it does appear that municipalities might properly sacrifice some aspects of public convenience in favor of a broader right to speak in the streets. Meeting places in larger cities are at a premium at the present time — particularly for groups with little money backing. Municipal streets and parks may very well be their only forum. Regimentation of thought appears to be a major fear in the minds of many Americans today. If we are to avoid being cast in a mold of single-mindedness, every encouragement should be given to the gestation of new ideas and opinions. It would seem that the guarantee of broad protections to street speakers and street assemblies would be a step in this direction. The advantages to an open society which accrue from free discussion of new or even unpopular ideas more than offset the disadvantages of inconvenience or even some violence. Maintaining the King's peace is not always the paramount consideration.

The question is, of course, one of balancing conflicting interests. The suggestion here is that the scales might fruitfully be shifted in the direction of broader individual liberty.