Freedom of Assembly and the Right to Passage in Modern English Legal History

Rachel Vorspan

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“Freedom of Assembly” and the Right to Passage in Modern English Legal History

RACHEL VORSPAN*

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It is a commonplace of the Anglo-American legal system that the law of nuisance protects a landowner’s enjoyment of an interest in land as well as the public’s exercise of common rights to health, safety, comfort, and morality. In contrast, the regulation of popular protest activity has
seemingly been entrusted to the traditional criminal law governing public order. This dichotomy, however, presents an incomplete and misleading picture of the historical role of nuisance law, which during the past two centuries has served a critical function in controlling outdoor political activity. The central inquiry of this Article is to explore why, given the availability of specifically tailored public order offenses, the authorities nevertheless relied extensively on nuisance to regulate street assemblies during major periods of domestic disturbance in the nineteenth and twentieth centuries. A related undertaking is to unfold the consequences of the political uses of nuisance law for both evolving legal doctrine and popular attitudes toward the right of public assembly.

A study of the political applications of nuisance leads ineluctably to the concept of the “right to passage.” Residing at the core of nuisance doctrine in the public order context, it is arguably the only positive right recognized in English common law. Since the Middle Ages, the English legal system has been preoccupied with easing and facilitating movement along the “highway.” A vast network of nuisance offenses developed to preserve travel against obstruction, and for the past two centuries the right to passage has featured prominently in political and legal discourse. It was a curious right—literal, physical, indeed in all
senses pedestrian—that simply protected travellers from annoyance, injury, inconvenience, or delay caused by physical impediments in the street. The right was, however, restricted to passing and repassing “for the purpose of legitimate travel” in accordance with “reasonable and ordinary use,” concepts that underwent considerable permutation and reinterpretation in response to changing historical circumstances.

Obviously, a right implicating permissible uses of the streets could be critical to the regulation of popular protest activity, and beginning in the mid-nineteenth century outdoor meetings and processions became increasingly important forms of political expression. If applied restrictively, nuisance doctrines defining street demonstrations as “obstructions” to passage could easily become devices for inhibiting freedom of assembly. This Article will argue that although the authorities generally tolerated outdoor meetings, in five critical periods—the 1880s, the early twentieth century, the 1930s, the 1960s, and the 1980s—they significantly enhanced their public order powers by selectively invoking doctrines of highway obstruction against particular religious and political movements.

The political uses of obstruction law, however, informed developing legal doctrine itself. In the early nineteenth century, the emergence of an inchoate distinction between meetings and processions conferred on moving demonstrations a more favorable legal status than stationary assemblies. This distinction flowed partly from formalistic and literal notions inherent in the concept of passage—most notably, the fact that marches, unlike stationary meetings, actually “passed” along the street. However, the literal interpretation of processions as “passage,” though plausible, was hardly the result of inexorable logical command. Processions could be wholly obstructive and, when serving as vehicles for concerted political expression, arguably did not promote purposes of “legitimate passage” at all. Nonetheless, in the 1880s this tentative distinction crystallized in the face of concurrent but quite divergent challenges to social order posed by the Salvation Army and the socialists. The two movements emphasized different tactics—the Salvationists relied primarily on street processions, whereas the socialists organized mass street meetings—and the law responded by solidifying a distinction that preserved the relatively benign activities of the former while suppressing the more threatening conduct of the latter. The privileged status of processions then rigidified as a matter of legal

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8. Id. at 147.
theory, and by the turn of the century it had become a fundamental and "quasi-autonomous" feature of nuisance law.

This doctrinal framework, treating meetings with rigor and marches with leniency, remained congruent with political exigencies through the early twentieth century and enabled the government to deal effectively with stationary picketing activity by the suffragettes. In the 1930s, however, the framework became increasingly anomalous and dysfunctional as marches and countermarches by Communists and Fascists emerged as the major threats to public order. The history of the "right to passage" after the depression era largely concerned the differing strategies adopted by the government and the courts to counter the constraints of formal doctrine. By the 1980s the judicial and political authorities had subtly but significantly transformed the doctrinal resolution of the 1880s even as they continued to affirm its formal vitality.

Two major conclusions emerge from this study. First, nuisance law historically played a critical and as yet insufficiently appreciated role in securing public order. The reliability, elasticity, and seeming neutrality of the law of highway obstruction permitted interferences with civil liberties in periods of domestic crisis in a manner that more finely tuned public order doctrines could not. Second, the evolution of the "right to passage" can only be understood as the product of both external historical pressures and internal doctrinal constraints. On the one hand, historical events powerfully influenced the development of the doctrine of highway obstruction; on the other, the independent force of legal rules produced unintended formalistic results, necessitating political and legal adjustments that respected the integrity of established doctrine while altering its content. The history of the right to pass thus illustrates the complex interplay between the formal law and the pressures generated by specific threats to domestic order.9

This exploration of the historical fortunes of the "right to passage" and its corollary, the nuisance doctrine of "obstruction of the highway," comprises six main sections. Part I traces the origins of the "right to

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9. The focus of this Article is on political meetings and processions and the distinct issues that they raise regarding the constitutional status of "freedom of assembly" in England. Nuisance doctrines predicated on the "right to pass" were, however, ubiquitous in English law, appearing in circumstances of industrial picketing, popular recreations, commercial activity, and personal injury. The author is also exploring the use of obstruction doctrine in those areas.
passage,” identifies its essential components, and examines the diverse methods of its enforcement. Part II discusses doctrinal and societal changes occurring in the first three-quarters of the nineteenth century, including the earliest articulations of passage law in the public order context and the emerging social phenomenon of outdoor public meetings. Part III examines two critical periods, the 1880s and the early twentieth century, when the doctrinal distinction between meetings and processions was consonant with government policy toward the Salvation Army, the socialists, and the suffragettes. Part IV analyzes the use of obstruction in three later periods of domestic turbulence, when the right to passage was adapted and ultimately reconceived to cope with street activity by Communists, Fascists, and a variety of other political demonstrators in the 1930s, the 1960s, and the 1980s. Turning from periods of disorder to more tranquil periods, Part V considers the consequences of the general practice of tolerating strict obstructions for emerging concepts of “freedom of assembly.” It argues that the general pattern of underenforcing obstruction law paradoxically nourished a popular belief in a right to assemble that was inconsistent with the formal legal status of meetings, and it suggests that popular perceptions of rights were shaped to a greater extent by de facto enforcement patterns of the police than by de jure pronouncements of legal authorities. Finally, Part VI provides a general assessment of historical and doctrinal developments relating to the right to passage. The fortunes of obstruction law over the past two centuries, both in its use and disuse, sharply illuminate the complex and equivocal relationship between formal legal doctrine and its instrumental applications.10

10. This Article attempts to provide a broad interpretive analysis of nuisance law over two centuries. It is based primarily on printed sources such as case reports, legal treatises, journals, newspapers, parliamentary reports and debates, and autobiographies and memoirs. For the larger historical context, it relies on secondary studies by historians in specialized areas. The analysis in this Article points to the need for more detailed empirical studies that will identify more specifically the ways and extent to which both formal obstruction law and informal mechanisms of social control (such as threats of nuisance prosecutions) were used in different localities, in different periods, and against different groups.
I. THE RIGHT TO PASSAGE IN ENGLISH LAW

A. Origins of the Right

The right to passage originated in the Middle Ages and was predicated on two somewhat unusual but resilient features of the English highway. First, a highway was legally conceptualized not as a road, but as a right. Second, highways were private property even though they might be "owned" by a governmental entity rather than a private party. Both characteristics significantly affected the legality of all forms of street activity.

From at least the early medieval period, a highway was conceived not as a strip of land with definite boundaries but as a legal and customary "right of passage in the sovereign, for himself and his subjects, over another's land." A road was legally not a corporeal entity, but an easement or right of way over a customary private course.

11. To clarify the terminology used in this Article: "right to passage," "right of passage," and "right to pass" were used synonymously in the nineteenth and twentieth centuries, and this Article follows that usage; "obstruction law" and "highways law" are similarly interchangeable. The terms "assembly" and "demonstration" include both stationary meetings and processions.

12. All land in England was—and still is—private property vesting within a legal person or entity with either a legal estate or statutory powers of control; thus, technically there have never been any "public" highways, streets, or pavements. After 1875 all highways "maintainable at the public expense," by that time most roads in England, vested in fee simple in the local highway authority. See Public Health Act, 1875, 38 & 39 Vict., ch. 55, § 149. Those remaining in private hands were owned by the adjacent landowners, each to the midpoint of the road. See R.F.V. HEUSTON & R.S. CHAMBERS, SALMOND AND HEUSTON ON THE LAW OF TORTS (18th ed. 1981) § 25 [hereinafter SALMOND AND HEUSTON]; SUPPERSTONE, supra note 3; J.F. Garner, Rights in a Highway, 24 THE CONVEYANCER 454, 454 (1960).

13. See SIDNEY & BEATRICE WEBB, ENGLISH LOCAL GOVERNMENT: THE STORY OF THE KING'S HIGHWAY 5 (1913). The word "road," which some scholars believe derives from the Anglo-Saxon "riday," to ride, may actually be connected with the verb "to rid," meaning to be cleared of obstruction. Id. at 6.

14. See id. at 5. The easement was created, except in the case of highways authorized by statute, by the express or presumed dedication by an owner of land of a right of passage to the public at large and the acceptance of that right by the public. PRATT AND MACKENZIE, supra note 5, at 16. Whereas the ownership of a highway was subject to the public's easement of passage, other open spaces such as parks, commons, and beaches—which also were "privately" owned, generally by the Crown or local authorities—did not confer such an easement and could be entirely closed to travellers. See, e.g., Blundell v. Blundell, 5 B. & Ald. 533, 106 Eng. Rep. 1286 (K.B. 1821)
easement first attached to the “King’s Highways,”¹⁵ which in the eighth or ninth century comprised only four great arteries remaining from the Roman period.¹⁶ By the end of the eleventh century, however, most major roads were denominated “King’s Highways” and conferred an easement of passage.¹⁷ Although in the eighteenth century the term “highway” came to denote the land as well as the easement, the notion that a road conveyed a positive right persisted in modern jurisprudence. To the present day, in fact, the definition of a “highway” continues to embody the concept of a “right to passage.”¹⁸

In the late seventeenth and eighteenth centuries, cases began to appear in which travellers or the Crown brought nuisance suits against persons or entities obstructing the right to passage. The cases usually involved interferences with commercial activity, for example, where obstacles such as ditches, gates, or hedges prevented the transportation of crops or coal.¹⁹ By the early nineteenth century, concomitant with the accelerat-

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15. The phrase “King’s Highway” is obscure, but it apparently referred to a place embraced by “the King’s Peace” or criminal jurisdiction; persons using these particular roads were guaranteed the king’s protection. 2 FREDERIC POLLOCK & FREDERIC MAITLAND, THE HISTORY OF ENGLISH LAW 44-45 (Cambridge, 2d ed. 1898). Interestingly, personal security was itself linked to the idea of unobstructed passage. The first English statute governing the highways, the Statute of Winchester, ordered that highways be enlarged and cleared of bushes and woods so that a man not “lurk to do hurt” to someone on the way. Statute of Winchester, 1285, 13 Edw. 3, ch. 5; see SIDNEY & BEATRICE WEBB, supra note 13, at 7.


18. See, e.g., 20 HALSBURY’S STATUTES OF ENGLAND AND WALES 2 (4th ed. 1992) (declaring that “a highway is a way over which members of the public have the right to pass and re-pass”); PRATT AND MACKENZIE, supra note 5, at 3 (stating that the right of the public in a highway “is an easement of passage only—a right of passing and re-passing”); A. V. SHERR, FREEDOM OF PROTEST, PUBLIC ORDER AND THE LAW 61 (1989) (defining a highway as “a way over which all members of the public are entitled to pass and re-pass”).

ing pace of industrialization, there was a dramatic increase in litigation involving obstructions to commercial travellers. Before exploring the use of highways law in the public order context, it is useful to delineate its basic doctrinal characteristics as elaborated in the commercial cases. The formal rules governing the “right to passage,” whatever the vagaries of their interpretation or application, have remained remarkably consistent over the past two centuries.

B. Doctrinal Content of the Right

From its inception the right to unobstructed passage along the highway was universal, perpetual, inalienable, and inextinguishable. It was common to all the king’s subjects, did not lapse upon the public’s disuse of a road, and precluded even the owner from interfering with a highway’s fitness for passage. As an easement, however, the right of passage was also limited. It did not affect the ownership of the land over which it was exercised, and it extended to passage and passage alone.


22. According to a popular adage whose origins are obscure, “[t]he King has nothing but the passage for himself and his people; but the freehold and all profits belong to the owner of the soil.” PRATT AND MACKENZIE, supra note 5, at 53 (quoting 1 Roll. Abr. 392); see, e.g., JAMES B. BIRD, THE LAWS RESPECTING HIGHWAYS AND
The concept of passage embraced two further notions, "reasonable use" and "obstruction": any use of the street that was both unreasonable and obstructive constituted illegitimate passage and infringed the public right. The Court of Appeal explicated the notion of "reasonable use" in two late-Victorian cases, Harrison v. Duke of Rutland and Hickman v. Maisey. As authoritative pronouncements on the scope of permissible activity on the highway, the decisions indicated both the importance of the right to passage and the narrow range of conduct that it embraced.

In Duke of Rutland, a neighbor of the Duke deliberately interfered with a grouse shoot by walking back and forth on a highway that traversed the Duke's land, opening and closing his umbrella and waving his pocket handkerchief in an effort to frighten birds away from the awaiting shooters. The Court of Appeal, viewing the case as one "of great importance," concluded that Harrison was a trespasser because he had used the road in an improper fashion and had exceeded the conditions of the easement. According to Lord Esher, Master of the Rolls, the highway had not been used "in its reasonable and usual mode" for purposes of passage, but only out of a "perverted" desire to interfere with the shooting.

Eight years later the Court of Appeal considered the situation of Maisey, the proprietor of a racing publication, who paced up and down a fifteen-yard strip of highway to observe with binoculars the training of horses on Hickman's adjacent land. Reaffirming the importance of the "right to pass and repass," the court again limited its exercise to the "legitimate" use of a highway as a highway, which did not include

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26. A landowner, whether an adjacent owner or the local authority, could bring a trespass action against any person who used the highway for a purpose other than passage. Id. at 152; see R. v. Pratt, 4 El. & Bl. 860, 868-69, 119 Eng. Rep. 319, 322 (Q.B. 1855) ("If a man use the land over which there is a right of way for any purpose, lawful or unlawful, other than that of passing and repassing, he is a trespasser."); PRATT AND MACKENZIE, supra note 5, at 4. In Duke of Rutland, the Duke's keepers forcibly restrained Harrison, who brought a pro se action for assault and to "defend the public right." [1893] 1 Q.B. at 160. The Duke successfully counterclaimed in trespass.
27. Duke of Rutland, [1893] 1 Q.B. at 143, 146. Though finding for the Duke, Lord Esher sought "to express the reasons for our judgment so carefully that we may not, in upholding the legal right of the owner of the land, interfere with the largest possible rights of the public to the enjoyment of the highway as such." Id. at 144.
carrying on business as a "racing tout."\(^{28}\) Invoking *Duke of Rutland*, the court acknowledged that "modern times" might require adaptations of the right to pass, but it insisted that any "reasonable extensions" must not be "inconsistent with the maintenance of the paramount idea that the right of the public is that of passage."\(^{29}\) The two cases thus confirmed and reinforced the principle that the criterion of legitimate passage was "reasonableness" and that this concept was narrowly limited to activities that were "incidental to passage."\(^{30}\)

The second core element of the right to passage was "obstruction," an exceedingly wide notion that encompassed virtually every activity in the street. Its breadth was the result of several specialized rules. First, an obstruction was actionable even if it only partially blocked the road and could be easily avoided by passers-by. In the rather astonishing case of

\(^{28}\) *Hickman*, [1900] 1 Q.B. at 759. Two additional features of the decisions are worth noting. First, in balancing the right of the public to pass against the right of an adjacent landowner, the Court of Appeal was solicitous of private property rights, an orientation that consistently influenced the scope of public passage rights. Second, although the judges interpreted "reasonable use" narrowly when forced to decide a case, they were impatient with claims of mere technical obstruction. As Mr. Justice Kay noted in *Duke of Rutland*, many violations of the easement were simply too trivial to justify an action. For example, "no one in his senses" would bring an action against an artist for making a sketch by the side of the highway, although the artist might technically be a trespasser. *Duke of Rutland*, [1893] 1 Q.B. at 156. These themes—concern for private property owners and annoyance with technical prosecutions—appeared repeatedly in cases involving political street activity.

\(^{29}\) *Hickman*, [1900] 1 Q.B. at 758.

R. v. United Kingdom Electric Telegraph Co., Ltd.,\(^{31}\) for example, the court held that telegraph poles at the side of the road constituted a nuisance because it was impermissible to withdraw any part of the highway from the general purposes of traffic.\(^{32}\) Second, an obstruction could be merely potential, that is, it was sufficient to establish circumstances suggesting that "persons may be obstructed" even though no actual obstruction had occurred.\(^{33}\) Following from this rule, it was not a defense that an obstacle was on a portion of the highway not habitually used for traffic.\(^{34}\) Third, an obstruction did not even have to be located in the street. Conduct on adjacent private land—for example, activity that attracted a crowd of spectators to the sidewalk—was actionable if calculated to cause an obstruction that might impede the passing public.\(^{35}\)

The concept of the "right to passage" was thus at the same time exceptionally specific and exceedingly vague. On the one hand, it was suffused with concreteness and physicality, directed toward protecting the basic and elemental activity of moving along the street. On the other hand, owing to the absence of any requirement of actual blockage or injury, it was curiously intangible and elusive. The almost metaphysical nature of "obstruction," combined with the exceedingly restrictive interpretation of "reasonable use," meant that virtually any activity in the street—certainly activity of a stationary nature—was a nuisance that infringed the "right of passage."

\begin{flushleft}
\textit{C. Enforcement of the Right}
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The importance of the "right to passage" was reflected in the formidable legal arsenal that developed to enforce it, consisting of

\begin{itemize}
\item \(^{31}\) 31 L.J. (M.C.) 166, 176 Eng. Rep. 33 (Q.B. 1862).
\item \(^{32}\) Id. at 34; see also R. v. Train, 2 B. & S. 640, 121 Eng. Rep. 1209 (Q.B. 1862) (holding that a tramway, despite being on the whole a public convenience to passengers, was a nuisance because it withdrew part of the highway from its ordinary use); R. v. Matthias, 2 F. & F. 570, 175 Eng. Rep. 1191 (N.P. 1861) (allowing a jury to determine whether a baby carriage on wheels was a public nuisance); 16 HALSBURY'S LAWS OF ENGLAND 355 (2d ed. 1935) (stating that it was no defense to the Highways Act that sufficient space was left for passengers).
\item \(^{33}\) Gill v. Carson and Nield, [1917] 2 K.B. 674, 677-78. As The Law Times observed in 1878, an obstruction could be "purely theoretical." \textit{The Consequences of an Obstruction of the Highway, 65 LAW TIMES 76, 77 (Nov. 30, 1878).}
\item \(^{34}\) See, e.g., Harvey v. Truro Rural Dist. Council, [1903] 2 Ch. 638; PRATT AND MACKENZIE, supra note 5, at 108.
\item \(^{35}\) See, e.g., R. v. Carlile, 6 C. & P. 636, 172 Eng. Rep. 1397 (Cent. Crim. Ct. 1834) (collecting a crowd of spectators to the sidewalk to view a window display was a public nuisance); Back v. Holmes, 56 L.T.R. (n.s.) 713 (Q.B. 1887) (religious meeting on private front yard attracting crowd on highway was actionable).
\end{itemize}
actions that were both civil and criminal, private and public, common law and statutory. Although landowners such as the Duke of Rutland and Hickman occasionally brought civil trespass actions,\textsuperscript{36} enforcement more commonly took the form of nuisance suits. Nuisance law from its origins was linked to highway obstruction; in fact, after the thirteenth century the prototypical nuisance was the "stopping up of a way."\textsuperscript{37} Adjacent owners or occupiers could institute a civil action in private nuisance for obstruction of access to their premises,\textsuperscript{38} and the Crown could bring a criminal public nuisance prosecution for interference with the right of the travelling public\textsuperscript{39} or a civil action on behalf of the public for an injunction.\textsuperscript{40} A person who suffered "particular damage" from an interference with travellers—for example, a shopkeeper deprived of customers by a street obstruction—also had standing to bring a public nuisance suit, thereby transforming the criminal offense into a tort action for damages or injunctive relief.\textsuperscript{41} The substantive illegality, causing

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36. The right to a civil trespass action passed to the local authority when it gained ownership of a road—as it did over most roads after 1875—but local bodies rarely bothered to exercise this power because they did not suffer much loss and could recover only nominal damages. See Peter Wallington, \textit{Injunctions and the "Right to Demonstrate."} 1976 CAMBRIDGE L.J. 82, 96. Trespass, unlike private nuisance, involved a direct rather than indirect interference with the plaintiff's land and was actionable without proof of special damages. C.D. Baker, \textit{Tort} 177 (3d. ed. 1981); Clerk & Lindsell on \textit{Torts}, \textit{supra} note 1, ¶ 24-22.

37. See, e.g., Newark, \textit{supra} note 1, at 482; Spencer, \textit{supra} note 1, at 58-59.

38. See, e.g., Pratt and Mackenzie, \textit{supra} note 5, at 56 (right of access of adjoining landowner was a private right, distinct from the right to use the highway as one of the public, and the owner could sue whether or not the obstruction also constituted a public nuisance); Clerk & Lindsell on \textit{Torts}, \textit{supra} note 1, ¶ 24-67; Winfield & Jolowicz on \textit{Tort}, \textit{supra} note 1, at 390; Wallington, \textit{supra} note 36, at 98.

39. See Clerk & Lindsell on \textit{Torts}, \textit{supra} note 1, ¶ 24-02; Salmond and Heuston, \textit{supra} note 12, § 26. Theoretically, the common law crime of public nuisance by obstruction was punishable, as were all common law misdemeanors, by a fine or up to life imprisonment at the discretion of the court. R.F.V. Heuston, \textit{Essays in Constitutional Law} 124-25 (1961).

40. See, e.g., Oldham, \textit{supra} note 19, at 893; Winfield & Jolowicz on \textit{Tort}, \textit{supra} note 1, at 354; Spencer, \textit{supra} note 1, at 66-73. The main difference between public and private nuisance was that the latter was an ordinary tort actionable by anyone with an interest in land, whereas public nuisance was both a common law crime and a tort actionable by the Attorney General or someone who suffered particular damage. See Wallington, \textit{supra} note 36, at 98.

an obstruction of the highway by an activity not reasonably related to passage, was the same in all instances.

In addition to common law offenses, numerous statutes and local regulations prohibited the nuisance of street obstruction. A series of national Highways Acts, for example, established the crime of "wilfully obstructing the free passage along a highway without lawful authority or excuse." The Metropolitan Police Act 1839, a critical statute in the history of public order, contained broad prohibitions on street obstructions in the capital. Moreover, by the late nineteenth century numerous municipal authorities had promulgated local bylaws against obstruction and other nuisances. These statutory and regulatory offenses paralleled the common law actions in their substantive requirements, but they offered enforcement advantages such as summary trials before magistrates and police authority to arrest without warrant.

The law thus directed an extensive battery of weapons at the specific offense of obstructing passage along the street. This phenomenon provokes the intriguing question why the legal arsenal was so formidable stocked against such a seemingly insignificant problem. Although the

42. Highways Act, 1835, 5 & 6 Will. 4, ch. 50, § 72. The penalty was a sum not exceeding forty shillings in addition to the damages caused. This section was substantially reenacted as section 121 of the Highways Act 1959, 7 & 8 Eliz. 2, ch. 25, and section 137 of the Highways Act 1980, ch. 66. Prosecutions under the Highways Act increased enormously in the course of the nineteenth century. Although the available statistics do not reveal the particular type of highways offense charged, the numbers are suggestive. In 1864, for example, 8,176 persons were prosecuted under the Act, rising to 26,143 in 1895 and to 64,900 in 1913. In the late nineteenth and early twentieth centuries the statistics included a special category of "obstruction and nuisance" cases, instances of which increased from 13,886 in 1893 to 23,023 in 1913.

43. 2 & 3 Vict., ch. 47, §§ 52, 54. Section 52 authorized the police commissioner "from time to time, and as occasion shall require, 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 or may be liable to be obstructed." Section 54 imposed penalties on persons who committed a nuisance in the thoroughfare by various means, including anyone who "by means of any cart, carriage, sledge, truck, or barrow, or any horse or other animal" wilfully caused any obstruction in the thoroughfare. An analogue to the Metropolitan Police Act, the Town Police Clauses Act, 1847, 10 & 11 Vict., ch. 89, §§ 21, 28, gave urban authorities outside London similar powers to regulate street obstruction.

44. See infra notes 138-142 and accompanying text.

45. See Highways Act, 1835, 5 & 6 Will. 4, ch. 50, § 79(2); Highways Act, 1959, 7 & 8 Eliz. 2, ch. 25, § 121(2); Highways Act, 1980, ch. 66, § 137(2).
increasing complexity of traffic control was doubtless a factor, it cannot alone explain the plethora of available remedies. The answer lies, rather, in the fact that obstruction doctrine facilitated the discretionary, decentralized, and effective regulation of many divergent forms of street activity. "Unreasonable obstruction" was a highly malleable concept, encompassing objects on or off the road, buildings, signs, animals, vehicles, individuals, and groups of all kinds. Further, in any particular circumstance plaintiffs and prosecutors could choose from a variety of attractive legal options, all imposing the same meager evidentiary requirements. Finally, obstruction prosecutions enabled the authorities to claim with at least some credibility that they were not discriminating against particular forms of conduct but rather were vindicating a significant public right. As wielded by the state, landowners, and employers in the nineteenth and twentieth centuries, the law on highway obstruction became a powerful tool for achieving specific social and political objectives. It was particularly effective in securing public order.

II. HIGHWAY OBSTRUCTION AND THE LAW OF PUBLIC ORDER IN THE EARLY AND MID-NINETEENTH CENTURY

The first three quarters of the nineteenth century established three necessary preconditions for widespread use of obstruction law in the public order context. First, a few early cases, particularly R. v. Carlile,\textsuperscript{46} experimented with political uses of obstruction and adumbrated an approach that would be exploited and refined in later judicial decisions. Second, outdoor political meetings became an important form of popular political expression, creating an inviting target for the application of highways law. Finally, judges and scholars clarified the constitutional status of street meetings, uniformly declaring that English law recognized no positive right of public assembly to balance against the "right of passage."

A. Early Doctrinal Development: R. v. Carlile

The first reported decision to address the use of obstruction against protest activity was the 1834 case of R. v. Carlile. In this initial and tentative application of nuisance, the court displayed no particular self-consciousness about transferring general obstruction rules to the wholly novel situation of political expression. Yet in the guise of applying settled rules, the court in fact created new law, and Carlile became a major precedent for later cases involving political obstructions on the highway.

Richard Carlile was a secularist bookseller in Fleet Street whose shop windows in October 1834 displayed various anti-clerical effigies, most notoriously an Anglican bishop linking arms with the devil. For several days the exhibit drew a continuous crowd of about forty people to the sidewalk, forcing “old persons and females” into the street and injuring the trade of neighboring shops. The government had previously prosecuted Carlile on several occasions for blasphemous and seditious libel. Finally, it adopted a new approach and successfully indicted him on a common law charge of public nuisance for obstructing the highway.

During his trial at the Old Bailey, Carlile argued pro se that he was the victim of political persecution. “[H]is Majesty never goes to the theatre, or to open the Parliament,” he charged, “without a much greater crowd than ever were at my shop.” Lord Mayor’s Day, Bartholomew Fair, and more mundane activities, Carlile pointed out, also collected a crowd: “Illuminations attract a crowd; so do military movements; so do the learned Judges when they go in state to St. Paul’s, and even the people coming from the churches on a Sunday morning sometimes are so numerous as to oblige persons to walk in the carriage way.” His defense elicited only a cursory response from the court. Mr. Justice Park charged the jury that the other events were not analogous and that in any case the failure to prosecute others similarly situated was irrelevant. “[I]f there were 500 other nuisances,” the judge declared, “they will not

47. Carlile was one of the few reported cases in the early nineteenth century where obstruction was used against political activity. This does not represent the extent of its use, however, because throughout the nineteenth and twentieth centuries the vast majority of obstruction prosecutions, largely adjudicated in magistrates’ courts, went unreported. Moreover, most instances of obstruction did not lead to arrests but simply provided a basis for police dispersal of street activity. See infra note 464.

49. Spencer, supra note 1, at 79.
51. Id. at 645, 172 Eng. Rep. at 1402.
In the view of the court, the issue had nothing to do with the content of the display but only with whether the “defendant caused the footway of Fleet Street to be obstructed, so that the public could not pass as they ought to do.”

Carlile was convicted, fined, and required to post the exorbitant sum of £200 to guarantee his good behavior for the next three years. The decision thus validated the innovative governmental strategy of relying on an ostensibly neutral charge of highway obstruction to conceal a prosecution obviously prompted by other motives.

The opinion was also significant for articulating a crude distinction between stationary and moving crowds. Mr. Justice Park distinguished the judges’ procession from Carlile’s conduct on the ground that “in that case, the crowd who look at the procession move on with it, and do not stand obstructing the street, as they have done in this case.” The judge did not underscore the distinction, and his remarks probably reflected a spontaneous desire to exempt customary processions from the force of obstruction law rather than a calculated attempt to create a formal dichotomy between two types of assembly. In the late nineteenth century, however, preferential treatment of processions emerged as a fundamental characteristic of highways doctrine, and Carlile’s holding that street obstructions were unlawful came to be limited to stationary assemblies.

Another salient feature of the opinion was its emphasis on the nature of the obstructive crowd, which apparently consisted in part of “idle, loose and disorderly people.” Three members of the crowd were arrested during the display for picking pockets, and Mr. Justice Park found this circumstance troubling. Although he was “not prepared to say that it was necessary to shew [sic] that they were disorderly persons,” he nevertheless reminded the jury that a defense witness had testified that he “never saw such a set of fellows in his life, both for

52. Id. at 650, 172 Eng. Rep. at 1404. The court noted that Lord Mayor’s day was only one day in the year (if it were longer, the judge observed, it would indeed be a nuisance) and that Bartholomew Fair probably was in fact a nuisance. Id. at 649, 172 Eng. Rep. at 1403.

53. Id. at 647, 172 Eng. Rep. at 1403.

54. Id. at 649, 172 Eng. Rep. at 1403.

55. Id. at 637, 172 Eng. Rep. at 1398. One witness described the crowd as “the lowest of the low.” Id. at 643, 172 Eng. Rep. at 1401.

56. Id. at 642, 172 Eng. Rep. at 1401.
The assumption that obstructive street demonstrations would inevitably attract unruly criminal elements subsequently became an important justification for nuisance prosecutions. In adapting general obstruction law to the political context, R. v. Carlile established a number of enduring propositions: that a person on private premises could be liable for obstruction merely by drawing spectators to the pavement; that a stationary political obstruction was not a reasonable use of the street; that the government's failure to prosecute similar nuisances was legally irrelevant; and that obstruction prosecutions were warranted by the tendency of street crowds to promote crime. The case further demonstrated how an obstruction charge could confer an aura of neutrality on a prosecution that was politically motivated. Through the mid-nineteenth century, however, Carlile remained a relatively isolated reported instance of the political use of obstruction. The doctrine did not emerge into prominence until the latter half of the nineteenth century, when public meetings became an increasingly important form of political expression.

B. The Emerging "Habit of Public Meeting"

The modern phenomenon of public meetings, originating in the eighteenth century, became widespread in the mid-Victorian period. 57

58. Other early nineteenth-century cases also made the connection between obstruction by crowds and disorderly or criminal conduct. In Cohen v. Huskisson, 2 M. & W. 477, 150 Eng. Rep. 845 (Ex. 1837), for example, a customer protested a baker's alleged overcharge by making a "great disturbance" in the street that attracted a crowd of one hundred persons. The court concluded that collecting a mob to obstruct the highway would inevitably produce a breach of the peace: "[S]uch acts tend to excite the passions of the crowd, and to endanger the person or house of the party so abused." Id. at 484, 150 Eng. Rep. at 848. Similarly, in Webster v. Watts, 11 Q.B. 311, 116 Eng. Rep. 492 (1847), when Webster's unruly behavior in a tavern drew a disorderly crowd to the adjoining highway, the court linked highway obstruction with inciting a crowd to disturbance and riot. Id. at 323, 116 Eng. Rep. at 497. On the assumed connection between street crowds and "ruffians" who would commit crimes and breach the peace, see R. v. Moore, 3 B. & Ad. 184 (K.B. 1832) (pigeon shooting range was a nuisance because idle persons collected in nearby streets); R. v. Hagan, 8 Ch. & P. 167 (N.P. 1837) (bagpipe playing in the street collected a crowd of dissolute persons including prostitutes and thieves); Walker v. Brewster, 5 L.R.-Eq. 25 (Ch. 1867) (fete was a public nuisance because it attracted idlers to Waterloo Road); Wise v. Dunning, [1902] 1 K.B. 167 (large meetings blocking the street were likely to cause potential breaches of the peace); Slee v. Meadows, 75 J.P. 246, 247 (K.B. 1911) ("meetings held in certain crowded places may not only tend but be extremely likely to produce disorder and bad conduct").
59. The origins of the practice of holding public meetings lay in the late eighteenth-century movement to petition Parliament. It was further encouraged by repeal of the repressive legislation enacted after the French Revolution and the movement for
The term "demonstration" as a description of a political meeting first entered the English vocabulary in the 1860s, and by 1872 The Times was complaining that organizing such events had become "a recognized branch of industry in this country." In the following decade Henry Matthews, the Home Secretary, characterized the popularity of outdoor meetings as a "national mania." Groups lacking community acceptance or financial resources often could not obtain private facilities for meetings, and they viewed streets and other open spaces as critical locations for their activities. Outdoor public meetings became a significant feature of Victorian community life—almost a form of entertainment—as the populace surged onto streets, parks, and commons to participate in rallies or listen to public lecturers and preachers. Hyde Park and Trafalgar Square were especially popular sites of public meetings and soon established themselves as the customary locations for large demonstrations.

For the most part, this increase in political street activity was not accompanied by either escalating disorder or governmental interference. After mid-century, owing to such factors as widespread absorption of middle-class values and the development of local police forces, English franchise reform in the 1820s and 1830s. Other factors combined in the early nineteenth century to intensify political awareness and activity: the urbanization that accompanied the industrial revolution, the incipient trade union movement, the formation of "modern" political parties following the Reform Act of 1832, improvements in education and the spread of literacy, and a widening dissemination of political views through newspapers and other publications. These developments coalesced in an explosion of public meetings after mid-century. See, e.g., 10 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 702 (6th ed. 1938); DONALD RICHTER, RIOTOUS VICTORIANS 87 (1981); E.C.S. WADE & A.W. BRADLEY, CONSTITUTIONAL LAW 556 (7th ed. 1965); Robin Handley, Public Order, Petitioning and Freedom of Assembly, 7 J. LEGAL HsT. 123, 126-30 (1986); Colin Leys, Petitioning in the Nineteenth and Twentieth Centuries, 3 POL. STUD. 451 (1955).

60. See RICHTER, supra note 59, at 87.
62. See RICHTER, supra note 59, at 87.
63. See, e.g., 314 PARL. DEB., H.C. (3d ser.) 1764-66 (May 12, 1887); Glenn Abernathy, Assemblies in Public Streets, 5 S.C.L.Q. 384, 389 (1953). London had a chronic shortage of indoor meeting facilities. See, e.g., 314 PARL. DEB., H.C. (3d ser.) 1746 (May 12, 1887) ("There is no town in England so badly off in regard to facilities for the holding of public meetings as London."); see also id. at 1758-59, 1766.
64. See, e.g., 333 PARL. DEB., H.C. (3d ser.) 995 (Mar. 5, 1889); RICHTER, supra note 59, at 51-61, 133-62; WILLIAMS, supra note 3, at 73-74.
society was increasingly law abiding. Despite episodic turbulence, the Victorian governing classes displayed little fear of revolution or sustained rioting and, especially between the 1850s and the 1870s, left most meetings undisturbed. This relaxed official attitude abruptly disappeared in the 1880s, however, when acute political and social pressures induced the authorities to refine the inchoate notions in Carlile and employ obstruction systematically as a political tool.

C. The Legal Status of Street Meetings

The clarification of the constitutional status of street activity in the late nineteenth century, a development prompted by the proliferation of public meetings, rendered outdoor meetings exceedingly vulnerable to the law of nuisance. By the 1880s it was settled law that there was no positive constitutional, statutory, or common law right to “freedom of assembly.” Lacking the constitutional guarantees of the American legal system, liberty in England lay (and lies) only in the interstices of the law, in the latitude provided by the absence of specific prohibitions. “The liberty of the subject,” the Queen’s Bench Divisional Court declared in 1884, “always consists in doing something a man is not

65. See, e.g., CLIVE EMSLEY, POLICING AND ITS CONTEXT 123 (1984); PHILLIP SMITH, POLICING VICTORIAN LONDON 10-12 (1985); Robert D. Storch, Police Control of Street Prostitution in Victorian London, in POLICE AND SOCIETY 50 (David H. Bayley ed., 1977). Crime statistics, for example, slowed or leveled during the second half of the century. See EMSLEY, supra.

66. Major episodes of disorder between the ebb of Chartism in 1848 and the civil unrest of the 1880s included the Sunday-trading riots of 1855, demonstrations on behalf of parliamentary reform in Hyde Park in 1866-67, periodic disturbances in Wales, Ireland and Scotland, and occasional rioting at elections. See, e.g., CLIVE EMSLEY, THE ENGLISH POLICE: A POLITICAL AND SOCIAL HISTORY 62-63 (1991); RICHTER, supra note 59, at 163; WILLIAMS, supra note 3, at 14. Historians are generally in agreement that the periodic rioting did not pose a revolutionary threat. See, e.g., RICHTER, supra note 59, at 164-65; Victor Bailey, The Metropolitan Police, the Home Office and the Threat of Outcast London, in POLICING AND PUNISHMENT IN NINETEENTH CENTURY BRITAIN 94, 94-95 (Victor Bailey ed., 1981). Home secretaries allowed local governments and police forces considerable autonomy in dealing with public order, partly because this was traditionally a local function but also because the sporadic disorder did not pose a general societal danger. Parliament retreated from enacting national public order legislation, passing few such statutes between the Seditious Meetings Act 1817 and the Public Order Act 1936. See, e.g., EMSLEY, supra, at 65; F.C. MATHER, PUBLIC ORDER IN THE AGE OF THE CHARTISTS 29-33 (1967).

67. The fact that there is no positive right to assemble explains why the law relating to public meetings and demonstrations, which Americans refer to as the law governing “freedom of assembly,” is generally referred to in England as the law of “public order.” Insofar as the right to assemble was discussed, it was usually referred to as the “right of public meeting.”
forbidden to do.”68 A few years later A.V. Dicey set forth the classic individualist statement on the right of public meeting. “English law does not recognize,” he stated, “any special right of public meeting either for a political or for any other purpose.”

There is no special principle of law allowing A, B, and C to meet together in the open air or under cover for the sake of discussion. But the right of A to go where he pleases so that he does not commit a trespass, and to say what he likes so that his talk is not libellous or seditious, and the right of B to do the like, and the existence of similar rights on the part of C, D, E, &c., and so on ad infinitum, leads to the consequence that A, B, C and ten thousand others may (as a general rule, and so that they do not create a nuisance) assemble together in any place where they have each a right to be for a lawful purpose and in a lawful manner.69

This pronouncement was somewhat misleading, as the qualification that people may only assemble “so that they do not create a nuisance” was hardly as trivial as the parenthetical reference suggests. Indeed, although the requirement that a meeting be “lawful” appears unexceptionable, the rigid contours of highway obstruction reduced the “right” of public assembly to a nullity.

This result followed inexorably from the general rules on obstruction and passage, which converted virtually every street meeting into a technical nuisance. As has been shown, the expansive notion of “obstruction” inevitably encompassed a collection of persons in the street. Although an exception existed for obstructions that constituted a “reasonable use” of the highway, such uses had to be incidental to passage and political meetings were necessarily excluded. Moreover, the absence of a legal right to assemble meant that participants in street gatherings enjoyed no countervailing positive right assertable against the public’s right to passage. Hence, the simple fact that an assembly took up space in the street—regardless of its purpose or disposition—rendered it defenseless against obstruction charges. Dicey himself acknowledged that meetings could not lawfully be held in public streets. “A crowd

69. A.V. Dicey, On the Right of Public Meeting, 1889 CONTEMP. REV. 508, 508; see also DICEY, supra note 3, at 266-67. In a similar vein he noted: “English law no more favours or provides for the holding of political meetings than for the giving of public concerts. A man has a right to hear an orator as he has a right to hear a band, or to eat a bun. But each right must be exercised subject to the laws against trespass, against the creation of nuisances, against theft.” Dicey, supra, at 511.
blocking up a highway will probably be a nuisance in the legal, no less than in the popular, sense of the term,” he explained, “for they interfere with the ordinary citizen’s right to use the locality in the way permitted to him by law.”70 Although highways were dedicated to the public use, “they must be used for passing and going along them,” and the law “negatives the claim of politicians to use a highway as a forum...”71

An important factor, however, mitigated the apparent harshness and rigidity of the formal law. The police had wide discretion in enforcing the rules against obstruction, and prior to the 1880s they generally wielded their power lightly, having neither the capacity nor will to enforce obstruction laws rigorously. The absence of official action created a significant amount of freedom of assembly as a cultural and historical fact, if not as a legal right.72 Obstruction, however, was always readily available as a form of discretionary social control, and in the 1880s the police effectively deployed it for this purpose—the combined result of the broad scope of highways law, the absence of a right to assemble, and the newly turbulent circumstances of the decade.

III. SOCIETAL CONFLICT AND THE FORGING OF LEGAL DOCTRINE:
THE SALVATION ARMY, THE SOCIALISTS, AND THE SUFFRAGETTES

The placid picture of official toleration, especially true in mid-century, abruptly shattered in the 1880s when Salvationism and socialism emerged as concurrent challenges to governmental authority. The movements were similar in recruiting working-class adherents, engaging in controversial street conduct, and offending the “respectable” classes by attracting disreputable elements as participants, antagonists, and spectators. There were, however, critical differences between them. First, they emphasized different tactics, the Salvation Army relying primarily on open-air processions and the socialists on massive organized demonstrations in Trafalgar Square. Second, the socialist mobilization of radical unemployed workers in the heart of London posed a far greater threat to the central government and the larger society than the comparatively innocuous efforts of the Salvation Army to convert souls in the scattered resort towns of southern England. The authorities’ response to these disparate but contemporaneous threats illustrated both the political efficacy of obstruction law and the formative influence of

70. Dicey, supra note 69, at 511.
71. Id. As a result, the “crowd who collect, and the persons who cause a crowd, for whatever purpose, to collect in a street, create a nuisance.” Id. See generally Eric Barendt, Dicey and Civil Liberties, 1985 Pub. L. 596 (1985).
72. See infra Part V.
historical contingencies on the evolution of legal rules. By the end of
the decade, highways law had proved itself a practical method of
controlling street assemblies, and a critical distinction between meetings
and processions had emerged as a permanent feature of obstruction
document.

A. Obstruction and Salvation

The Salvation Army, founded in 1878 by “General” William Booth,
was an evangelistic religious movement seeking to rescue urban working
people from the clutches of the brewer, the publican, and the music hall
proprietor. Its militant tactics, consisting of hymn-singing processions
and open-air meetings, severely tested the patience of local authorities
in provincial areas. Inhabitants of fashionable resort towns in southern
England viewed the Army’s recruitment efforts with abhorrence,
especially the robust Sunday parades conducted to the raucous accompa-
niment of tambourines and concertinas. In addition to offending
residents in general, the Army incurred special hostility from particular
segments of society. Merchants worried about possible disruptions to
the tourist trade; publicans and members of the working classes resented
the Army’s stern judgments on alcohol consumption and popular
recreations; and the police and special constables disliked working on
Sundays to protect the marchers.

The Army soon provoked organized opposition in the form of the so-
called “Skeleton Army,” a disreputable group allegedly financed by
publicans and brewers. The Skeletons marched alongside the
Salvationists on parade, banging on pots and pelting Salvation Army
members with lime dust, coals, tar, rotten eggs, rocks, clods of mud,

73. See Victor Bailey, Salvation Army Riots, the ‘Skeleton Army,’ and Legal
Authority in the Provincial Town, in SOCIAL CONTROL IN NINETEENTH CENTURY
74. See RICHTER, supra note 59, at 74-75; WILLIAMS, supra note 3, at 49-53.
75. See 267 PARL. DEB., H.C. (3d ser.) 990 (Mar. 16, 1882) (“special constables,
with their best clothes on ready for going to church, did not want to fight with the mob
on Sunday”); I PARL. DEB., H.C. (4th ser.) 1023, 1219 (Feb. 25, 1892) (Mayor of
Eastbourne complaining that practically the whole strength of the police force was
engaged on Sundays in protecting the Salvation Army and was unfairly deprived of its
Sunday rest); RICHTER, supra note 59, at 75; Bailey, supra note 73, at 238-43; Colin
Munro, Having a Riot at Weston-super-Mare, 141 NEW L.J. 762, 762 (1991).
76. See, e.g., RICHARD COLLIER, THE GENERAL NEXT TO GOD 109-10 (1965);
Bailey, supra note 73, at 233, 238-39.
dead rats, and household refuse. Altercations between the two groups frequently led to violence. In 1882 alone, 86 Salvationists were imprisoned, 669 were allegedly assaulted, and 56 Army buildings were seriously damaged; the victims included 251 women and 23 children under the age of fifteen. George Lansbury, a leader of the Labour Party, recalled that as a child he had seen William Booth and his followers so mishandled by mobs in Whitechapel that he “used to wonder whether they would come out alive.” Between 1878 and 1891 serious disturbances involving the Salvation Army occurred in more than sixty towns and cities. This alarming situation provoked a vigorous reaction from the provincial authorities. The police, town officials, and magistracy embarked on a calculated campaign to harass the Army while turning a blind eye to the behavior of its opponents, and they systematically employed highway obstruction law to this end.

I. The Suppression of Salvationist Street Meetings

R. v. Carlile, largely ignored for half a century, was revived in the 1880s as a relevant authority for prosecuting participants in Salvationist street meetings. Although the Army utilized processions as its major recruiting device, it also held open-air street meetings; obviously unrelated to passage, these meetings bore the full brunt of obstruction law. As a contemporary observed, under Carlile the Salvationists could be successfully indicted if they “stand and hold their services upon the highway.” The authorities’ reliance on this particular offense rested on its numerous procedural and substantive advantages. Obstruction charges usually involved summary trial before a magistrate, a procedure that was expeditious and generally assured the authorities a sympathetic

77. See Bramwell Booth, Echoes and Memories 28–29 (2d ed. 1926); Collier, supra note 76, at 104–06 (1965); Bailey, supra note 73, at 234.


79. See 1 Sandall, supra note 78, at 121.

80. See Bailey, supra note 73, at 234; Munro, supra note 75, at 762.

81. See, e.g., Booth, supra note 77, at 28–29; 2 Sandall, supra note 78, at 170–83; Bailey, supra note 73, at 243–44. As early as 1879 Booth wrote to his son that “the constables openly encourage the roughs to resist. . . .” 1 Begbie, supra note 78, at 441.

82. Note, The Salvation Army, 48 J.P. 658, 659 (1884). The author recommended other highways remedies against the Salvationists in addition to public nuisance prosecutions, including civil suits for injunctions and prosecutions under the Highways Act, the Town Police Clauses Act 1847, and local bylaws. He observed that although neither of the national statutes had yet been applied to an obstruction caused by persons passing along a street in procession, there was little doubt that both acts applied to persons standing upon a highway. Id. at 660.
factfinder. In terms of substantive law, street meetings invariably satisfied the requirements of both "obstruction" and "unreasonableness." The highway was inevitably obstructed by either members of the organization or the onlookers that they collected, and the meetings were necessarily unreasonable because they were not incidental to passage.

Moreover, whereas common law crimes required an actual or potential breach of the peace, even an entirely peaceful obstruction was unlawful provided only that it took up space in the street. In addition, obstruction required no meaningful inquiry into a speaker's intentions or even whether the defendant had actually interfered with passage. The utility of the rules on intent and partial obstruction was illustrated by *Homer v. Cadman*, which upheld the conviction of a street preacher—most likely a Salvationist—under the Highways Act 1835. Homer obstructed the "Bull Ring" at Sedgley, a triangle on the highway where six roads converged, by standing on a chair near a lamppost and addressing a crowd of 150 to 200 people. Although part of the audience extended onto the highway, there was ample room for pedestrians and vehicles to make their way. The defendant argued that he did not intend to obstruct, that he was not responsible for the actions of his audience, and that in any event the obstruction was only partial. The court summarily rejected his defenses, finding him liable for the collection of the crowd regardless of his lack of intent to obstruct and further holding that even a partial obstruction was unlawful because it rendered the highway "less convenient and commodious to the public."³⁸

In addition to its reliability, highway obstruction law also allowed the authorities to maintain the appearance of political neutrality. The
government repeatedly insisted that prosecutions were based on the commission of obvious criminal acts rather than on any desire to suppress political speech.\textsuperscript{86} When in 1886 the Radical atheist Charles Bradlaugh inquired in Parliament about the imprisonment of a Salvationist, the Conservative Home Secretary, Henry Matthews, replied that the defendant had been convicted “not of speaking in the streets, but of obstructing a public thoroughfare.”\textsuperscript{87} As evidence of the government’s impartiality, he pointed out with relish that recent prosecutions for obstruction had included “a preacher, a temperance lecturer, a Conservative politician, and a Home Ruler.”\textsuperscript{88} The following year the Home Secretary was grilled about Salvationists at Stamford, who in consequence of holding open-air services in the town square had been dragged from their beds at 5:30 in the morning, placed in handcuffs, and marched through the streets to the prison. The minister blandly responded that the justices had convicted the Army members “not for holding open-air services, but for wilfully obstructing the free passage of the highway.”\textsuperscript{89} The common police practice of handcuffing the Salvationists doubtless assisted in the effort to disguise political harassment as ordinary criminal law enforcement.\textsuperscript{90}

Obstruction dealt the central government another useful card in rebuting charges of discrimination. It enabled authorities to disclaim

\textsuperscript{86} Salvation Army members and their Parliamentary sympathizers often complained about the government’s use of “technical” obstruction charges. \textit{See, e.g.}, 267 PARL. DEB., H.C. (3d ser.) 1017 (Mar. 16, 1882); 319 PARL. DEB., H.C. (3d ser.) 1528 (Aug. 23, 1887); 320 PARL. DEB., H.C. (3d ser.) 29-30 (Aug. 20, 1887); 2 BEGBIE, \textit{supra} note 78, at 7; 4 SANDALL, \textit{supra} note 78, at 279-93.

\textsuperscript{87} 308 PARL. DEB., H.C. (3d ser.) 1460 (Sept. 7, 1886).

\textsuperscript{88} \textit{Id.} at 1461.

\textsuperscript{89} 317 PARL. DEB., H.C. (3d ser.) 943 (July 15, 1887). Government officials similarly affirmed their neutrality throughout the 1880s and 1890s. When challenged about five Salvationists imprisoned in Leicester Gaol for preaching on Sunday, Matthews insisted that there was no religious issue; the magistrates had convicted on “the mere facts of obstructing the public highway.” 320 PARL. DEB., H.C. (3d ser.) 30 (Aug. 26, 1887). He also defended police action in 1889 by contending that the arrests “had nothing in the world to do” with the fact that the Salvation Army was involved. 337 PARL. DEB., H.C. (3d ser.) 899 (June 27, 1889); \textit{see} 83 PARL. DEB., H.C. (4th ser.) 742 (May 21, 1900).

\textsuperscript{90} Handcuffing Salvationists and subjecting them to other forms of degrading treatment occurred frequently. In 1888 at Willenhall, three Salvationists were chained and handcuffed to convicted criminals en route from the police court, and at Needham Market, Suffolk, Salvationists were handcuffed and marched through the streets to Ipswich Gaol. \textit{See} 4 SANDALL, \textit{supra} note 78, at 285. Similarly, in 1889 five Salvationists were led in handcuffs through the streets of Dorking to Wandsworth Gaol for causing obstruction in the streets, \textit{see} 336 PARL. DEB., H.C. (3d ser.) 264-65 (May 16, 1889), 360-61 (May 17, 1889), and four members convicted of causing an obstruction for preaching in the square at Whitchurch were conveyed in handcuffs to Winchester Prison, \textit{see} 339 PARL. DEB., H.C. (3d ser.) 1336 (Aug. 15, 1889).
responsibility for arrests and prosecutions by contending that official action lay in the independent discretion of local police and magistrates. For example, in 1882 the Liberal Home Secretary, William Harcourt, maintained that he could do no more than "offer advice" about obstruction prosecutions as he had no authority over constables or magistrates. Two years later, when Booth sent a blistering memo to the Home Office charging that the Worthing magistrates had consistently refused to issue summonses to opponents of the Salvation Army, Harcourt again insisted that he lacked power over the local authorities. The Conservative government elected in 1886 followed the example of its Liberal predecessor in asserting the importance in enforcement of local initiative and independence.

Owing to these procedural, substantive, and political advantages, obstruction charges were heavily relied upon to suppress Salvation Army street meetings. The earliest use of the offense came in 1869, even prior to the formal creation of the Army, when the police arrested Booth supporters in Poplar for obstructing the thoroughfare at a meeting attended by only two dozen people. Imprisonment of Salvationists for obstruction probably first dated from 1879, when a woman officer and three soldiers in Pentre were jailed for three days for kneeling to pray in a large open space in the street. In the 1880s the pace of

91. See, e.g., 267 Parl. Deb., H.C. (3d ser.) 990 (Mar. 16, 1882); 270 Parl. Deb., H.C. (3d ser.) 1413 (June 16, 1882). When an M.P. complained that sellers of the War Cry, the Salvation Army publication, were prosecuted for obstruction whereas hawkers of indecent periodicals were not, Harcourt replied that he had no authority over magistrates or police. 267 Parl. Deb., H.C. (3d ser.) 1017 (Mar. 16, 1882).
92. COLLIER, supra note 76, at 112.
93. In 1887 the Under-Secretary of State predictably replied to a charge that police dispersal of Salvationists and socialists deprived them of their right to public meeting by stating that the question of obstruction was for the magistrate. 314 Parl. Deb., H.C. (3d ser.) 961 (May 5, 1887). Similarly responding to a complaint about the handcuffing of Salvationists in Whitchurch in 1889, Matthews claimed that he could "only lay down general principles for the guidance of the police, who must act according to the circumstances of each case." 339 Parl. Deb., H.C. (3d ser.) 1337 (Aug. 15, 1889).
94. 1 SANDALL, supra note 78, at 122. Obstruction prosecutions were frequent in the Army's early years. See, e.g., 269 Parl. Deb., H.L. (3d ser.) 819 (May 16, 1882); GENERAL FREDERICK CUTTLE, NO DISCHARGE IN THIS WAR: A ONE VOLUME HISTORY OF THE SALVATION ARMY 94 (1975); 1 ST. JOHN ERVINE, GOD'S SOLDIER: GENERAL WILLIAM BOOTH 405, 537 (1935); 1 SANDALL, supra note 78, at 121-22; WILLIAMS, supra note 3, at 50.
95. See CUTTLE, supra note 94, at 94. Although obstruction offenses carried the penalty of a fine, the Salvationists usually on principle refused to pay and were
enforcement accelerated, and several towns became particularly notorious for their prosecutorial zeal. Whitchurch, a village of fewer than two thousand inhabitants, pressed obstruction law to its limits by instituting sweeping arrests. In 1882, for example, four Army members who conducted a street meeting were sentenced to one month's imprisonment with hard labor merely for potentially obstructing the highway.\textsuperscript{96} The large number of obstruction prosecutions in the town provoked a major demonstration in 1890 at which Commandant Herbert Booth, Field-Secretary Major Alfred Barritt, and the Army solicitor were again arrested for obstruction and other offenses.\textsuperscript{97} According to one account, a Whitchurch magistrate commended the local police sergeant for leveling no fewer than ninety-three charges of obstruction against four local Salvationists.\textsuperscript{98}

Stamford was also the scene of persistent prosecutions, doubtless because of its prominent brewing industry.\textsuperscript{99} In June 1887 the magistrates sentenced two Salvationists to fourteen days' imprisonment for blocking the highway in the large marketplace of Red Lion Square—even though the Army had restricted its meetings to one small corner out of the line of traffic—and numerous other arrests followed in succeeding months.\textsuperscript{100} The town clerk freely admitted that the "obstruction" charges were purely technical. The prosecutions were for "obstructing the passage of the highway—nothing more," he declared. "I do not propose to prove that any person was obstructed."\textsuperscript{101} Although Stamford and Whitchurch were especially fervent in bringing obstruction charges, more than one hundred other towns also instituted prosecutions between 1886 and 1895.\textsuperscript{102}

\textsuperscript{96} See \textit{268 PARL. DEB., H.C. (3d ser.)} 1941 (May 2, 1882); \textit{CYRIL J. BARNES, GOD'S ARMY} 54 (1978); \textit{COUTTS, supra} note 94, at 94-95; 4 \textit{SANDALL, supra} note 78, at 287.\textsuperscript{97} See 265 \textit{PARL. DEB., H.C. (3d ser.)} 1941 (May 2, 1882). An Army general commented on this episode that "the charge stuck because it was not necessary to prove actual obstruction; the technical possibility was enough." \textit{COUTTS, supra} note 94, at 94. In 1889 seventeen Salvationists were arrested for forming a ring in the main square that ostensibly prevented the free passage of carts and carriages. 337 \textit{PARL. DEB., H.C. (3d ser.)} 1459 (July 4, 1889).\textsuperscript{98} See \textit{COLLIER, supra} note 76, at 108.\textsuperscript{99} See, e.g., 319 \textit{PARL. DEB., H.C. (3d ser.)} 1528 (Aug. 23, 1887); 4 \textit{SANDALL, supra} note 78, at 282-83; \textit{WILLIAMS, supra} note 3, at 207-08.\textsuperscript{100} See \textit{COUTTS, supra} note 94, at 95; 4 \textit{SANDALL, supra} note 78, at 282.\textsuperscript{101} 4 \textit{SANDALL, supra} note 78, at 282; see \textit{COUTTS, supra} note 94, at 95.\textsuperscript{102} 4 \textit{SANDALL, supra} note 78, at 290. For example, in 1886 five Salvationists, including "Salvation Smith," a London stockbroker, were charged with willfully obstructing the highway in the village of Markyate Street. All except Smith, who paid a fine, were sentenced to seven days' imprisonment. \textit{Id.} at 281. In the same year at
Harassment of Army members slackened in the 1890s, but the police continued to use obstruction as a device to curb stationary Salvationist meetings until shortly before World War I. Moreover, the courts persisted in construing the offense very broadly. For example, in the 1908 case of *Haywood v. Mumford*, two Salvationists were arrested for standing in the street in the early evening even though the assembled crowd of about eighty persons did not actually interfere with traffic. The magistrate acknowledged that on that particular place on a Monday night "it would be possible to fire a cannon down the street without doing any injury," but he felt constrained to convict them nonetheless. The defendants argued on appeal that an "obstruction" required an "appreciable interference" with the right to pass and repass. The court disagreed, proclaiming the relevant question to be not whether someone was actually prevented from exercising his right on the highway, but only whether the obstruction interfered with the right of every member of the public to use the whole highway at all

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East Grinstead an officer was sentenced to seven days' imprisonment for obstructing a cart even though the owner declined to lodge a complaint. *Id.* at 288. Three soldiers of the Warwick corps were prosecuted in August 1887 for wilfully causing an obstruction by holding a service in the Corn Market. 319 PARL. DEB., H.C. (3d ser.) 1807 (Aug. 25, 1887). In Somerset, Salvationists were fined for obstructing the free passage to the church, see 4 SANDALL, *supra* note 78, at 284, and at Willenhall, Suffolk, a captain and two soldiers were marched to prison in chains and handcuffs to serve a sentence "for nothing worse than alleged obstruction," BARNES, *supra* note 95, at 54; see also, e.g., 4 SANDALL, *supra* note 78, at 285. In 1890 the Chief of the Staff was charged at Dalston police court with aiding and abetting seven Upper Holloway bandsmen in an alleged breach of the Highways Act, 4 SANDALL, *supra* note 78, at 290, and in 1893 a Poplar officer was sentenced to 31 days' imprisonment for holding an open-air meeting, *id.* at 291. In 1900 the police in Belfast dispersed Army meetings on obstruction grounds apparently because they disturbed the services of Protestant churches in the street. 83 PARL. DEB., H.C. (4th ser.) 742 (May 21, 1900). As a result, the Army advised its members regarding open-air meetings: "In selecting a stand always avoid those spots where you will be likely to cause any obstruction to the thoroughfare." 1 ST. JOHN ERVINE, *supra* note 94, at 392.

103. See 4 SANDALL, *supra* note 78, at 290.
104. See COUTTS, *supra* note 94, at 95. The last instance of a pre-war charge of obstruction appears to have been in 1912. *Id.*
105. (1908) 7 C.L.R. 133 (Austl.).
106. See *id.* at 134. They were charged under a bylaw of the borough of Sale that required any person obstructing any carriageway by standing or loitering to move on when requested to do so.
107. *Id.* at 135.
108. *Id.*
times for the purpose of passing and repassing.\textsuperscript{109} The Lord Chief Justice observed that as a man standing in the middle of the road with his arms stretched out might well supply the requisite diminution of space, a crowd gathered on the road would certainly do so.\textsuperscript{110} The \textit{Carlile} court's notion that a stationary street meeting was per se an unreasonable obstruction thus had wide application after the 1880s.

2. Beatty v. Gillbanks and the Law of Processions

Processions presented a more complex problem, because by the 1880s the tentative distinction between meetings and processions broached in \textit{Carlile} had evolved into a common understanding that marches, as exercises of the "right to passage," deserved legal protection. The Salvationists themselves believed that their processions were less vulnerable to legal reprisal than their meetings, and they consciously exploited this apparent exemption by emphasizing the tactic of street processions. General Booth's "Rules for Open-Air Work," circulated in 1879, counselled that against "people who move along at a good pace the police have no power, therefore there can be no need for you to be distressed, even if they will not allow you to stand still anywhere."\textsuperscript{111}

The cacophonous Army processions, however, infuriated the residents of provincial towns, and in 1881 the Stamford magistrates preemptively sought Harcourt's advice.\textsuperscript{112} Their goal was to prevent marches in advance, which they believed would secure public order more effectively than prosecuting participants after the fact. The Home Secretary proved to be accommodating. Although he cautioned that Salvation Army parades were not "illegal in themselves" and could not be lawfully prevented in the absence of special circumstances, he suggested that a procession might well provoke a hostile reaction that would endanger the peace. If the magistrates anticipated disorder and obtained a sworn information to that effect from the chief constable, they could issue a common law proclamation banning a march.\textsuperscript{113} Numerous towns in southern England seized upon Harcourt's recommendation and instituted

\begin{itemize}
\item \textsuperscript{109} \textit{Id.} at 140.
\item \textsuperscript{110} \textit{Id.} at 138.
\item \textsuperscript{111} \textit{Reprinted in} 2 \textit{SANDALL, supra} note 78, at 311.
\item \textsuperscript{112} The magistrates consulted Harcourt even though in 1881 there was not yet any Salvation Army corps in Stamford. See 1 \textit{ST. JOHN ERVINE, supra} note 94, at 536.
\item \textsuperscript{113} \textit{TIMES} (London), Oct. 11, 1881, at 6. In March 1882 Harcourt justified his action in the House of Commons, stating that in researching what his predecessors had done in similar situations, he had discovered that the matter was settled by the law officers; he had therefore written the letter that had "always been written" in these circumstances, even though he saw in some newspapers that his advice was "bad law, and worse sense." 267 \textit{PARL. DEB.}, H.C. (3d ser.) 990 (Mar. 16, 1882).
\end{itemize}
prior restraints on processions based on the anticipated reaction of a hostile audience.114 The enraged Salvationists quickly condemned the policy. In October 1881 Booth sent a telegram to Gladstone, the Prime Minister, warning that unless “something is done immediately to neutralize the effect of the Home Secretary’s letter to Stamford, which is already the war-cry of the roughs everywhere, there will be riot and bloodshed all over the land.”115

The Army soon received substantial assistance from an unexpected quarter. The following June the Queen’s Bench Divisional Court adjudicated the correctness of Harcourt’s advice in *Beatty v. Gillbanks,*116 a decision attentively awaited by the entire country.117 *Beatty* arose out of a series of processions that the Army conducted in the Somerset resort town of Weston-super-Mare. As a result of frequent collisions between rival troops of the Salvation and Skeleton armies, the town experienced “great uproar, blows, tumult, stone throwing, and disorder.”118 A particularly disturbing episode occurred in March 1882 when the antagonism of a large mob to a Salvationist parade sparked a general melee. To prevent further such occurrences, the magistrates posted a notice conforming with Harcourt’s advice that directed all persons to “abstain from assembling to the disturbance of the public peace.” Testing the legality of the ban, the Army proceeded to march on the following Sunday. During the procession the police arrested three Salvationist leaders on charges of unlawful assembly,119 and the

114. The magistrates of Basingstoke, Exeter, and Salisbury, in addition to those of Stamford, issued proclamations forbidding Salvation Army processions. Harcourt, however, consistently denied the power to direct them to take any particular course of action. 267 PARL. DEB., H.C. (3d ser.) 991 (Mar. 16, 1882).
115. Telegram from William Booth to W.E. Gladstone (Oct. 12, 1881), quoted in 1 BEGBIE, supra note 78, at 444. Booth also wrote to Harcourt that he was surprised at Harcourt’s letter to Stamford, because “the Salvation Army is not in Stamford.” Id.; see, e.g., BOOTH, supra note 77, at 28 n.1 (“The question whether peaceable subjects of the Crown were to be allowed to exercise their legal right and to walk in procession was to be referred to the good pleasure of the roughs.”).
116. 9 Q.B.D. 308 (1882).
117. See Note, *The Salvation Army,* 16 IR. LAW TIMES 290, 290 (June 24, 1882).
118. *Beatty,* 9 Q.B.D. at 309.
119. Unlawful assembly was committed when three or more persons gathered together “[w]ith intent to carry out any common purpose, lawful or unlawful, in such a manner as to give firm and courageous persons in the neighbourhood reasonable grounds to apprehend a breach of the peace.” STEPHEN, DIGEST, supra note 2, at 41; see HEUSTON, supra note 39, at 125; Wallington, supra note 36, at 109.
In perhaps the most abbreviated opinion ever issued in such a celebrated case, Mr. Justice Field quashed the binding-over order on the ground that the Army procession was lawful and the disturbances were not the "natural consequence" of the march but rather were attributable to a hostile group:

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

A superior court thus adjudicated Salvation Army processions to be lawful—at least with respect to a charge of unlawful assembly—and ruled as a corollary that magistrates had no common law power to impose a prior restraint on a legitimate march.

The explanation for this favorable result cannot be located in the opinion itself, which was virtually devoid of analysis and cited not a single precedent. The surrounding circumstances, however, were

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120. Beatty, 9 Q.B.D. at 308. "Binding over" involved a criminal court (usually a magistrates' court) ordering a person to agree to forfeit a certain sum of money to the Crown in the event of failing to keep the peace or be of good behavior. The formal undertaking was set out in a "recognizance." The origins of this power lay in the Middle Ages, probably in the Justices of the Peace Act 1361. WDE & BRADLEY, supra note 59, at 567. A binding-over order could be imposed in the absence of a conviction for a specific criminal offense, see R. v. Justices of Londonderry, 28 L.R. Ir. 440, 444-45 (Q.B. 1891), and failure to enter into a recognizance or to find sureties could lead to imprisonment. The breadth of this discretionary preventive power and its utility in the field of public order are indicated by its frequent use against Salvationists, suffragettes, Communists, Fascists, hunger marchers and nuclear disarmers. See generally WILLIAMS, supra note 3, at 87-96; Asher D. Grunis, Binding-Over to Keep the Peace and Be of Good Behaviour in England and Canada, 1976 PUB. L. 16.

122. Technically only the binding-over order was at issue, but the prosecution attempted to justify it by demonstrating that the Army was indeed guilty of unlawful assembly. Inasmuch as the court found the Salvationists not guilty of the crime, it discharged the order. Id. at 315; see Note, supra note 117, at 291.

123. Although the case formally dealt with binding-over powers and the crime of unlawful assembly, it was interpreted to deal with the broader issue of the legitimacy of prior restraints. "In form the case only decides that a person charged with creating an unlawful assembly cannot be bound over to keep the peace because he is taking part in a procession which is, without his so intending it, likely to lead to a breach of the peace; but, in effect, the judges decide the larger proposition, that by no form of proceeding can this kind of procession be prevented." Note, Processions in the Streets, 16 IR. LAW TIMES & SOLIC. J. 451 (Sept. 9, 1882); see Note, The Right of Public Meeting, 21 IR. LAW TIMES & SOLIC. J. 565, 566 (Oct. 22, 1887) ("[T]he mere fact that a notice or proclamation has been issued forbidding it to be held will not prevent it from being lawfully held.")
suggestive. First, Beatty was decided after widely publicized complaints that constables and magistrates were harshly and unfairly discriminating against the Salvationists. A Times editorial published shortly before the events giving rise to the case castigated local authorities for ignoring the misconduct of the Skeleton Army. "Magistrates have been too lenient," it charged, "in their dealings with criminals of this stamp."

A procession which the law and the police allow, however preposterous in its character and ridiculous in its insignia, is as entitled to go on its course free from insult as a merchant on his way to business. No rabble can safely be allowed to decide for itself that a pageant deserves to be cheered or stoned.124

Second, as these observations suggest, though many people considered the Salvationists "preposterous" and "ridiculous,"125 they did not consider them dangerous. More important, they strongly preferred the Salvationists to their Skeleton Army adversaries, who comprised precisely the rabbleome crowd that the late Victorians found so unsettling.126 Finally, on the doctrinal level, the "right to pass" was a significant factor in the result. The court was influenced by the circumstance that the Salvationists were conducting a procession rather than a stationary meeting and thus were asserting a positive right to passage. Noting that they "marched in procession through the streets," Mr. Justice Field observed that "[n]o one can say that such an assembly is in itself an unlawful one."127 Beatty was quickly interpreted as

124. See 2 SANDALL, supra note 78, at 182. A month before the decision was announced, Lord Fortescue objected in the House of Lords to the "outrages" committed by convicting Salvation Army members "of obstructing some highway by processions, or halts for singing and prayer, or of disobeying some prohibition of their proceedings by the local authorities..." 269 PARL. DEB., H.L. (3d ser.) 819 (May 16, 1882).
125. For example, in R. v. Justices of Londonderry, 28 L.R. Ir. 440, 463 (Q.B. 1891), a case favorable to the Army, Mr. Justice Holmes commented that many townspeople disapproved of the Salvation Army, and he was "far from suggesting that such disapprobation was not natural." Even a sympathizer wrote of the early years: "We are disposed, on the whole, to think that the public of that period might be forgiven for their suspicion and dislike of the Salvation Army." 1 BEGBIE, supra note 78, at 438.
126. The Solicitors' Journal observed soon after the decision: "Everyone must feel, as a matter of justice, that proceedings should rather have been taken against the leaders of the Skeleton Army than against those of the Salvation Army. Binding over the leaders of the Salvation Army to keep the peace was rather like binding the lamb over to keep the peace towards the wolf." Note, Assembly When Unlawful, 26 SOLIC. J. & REP. 689, 689 (Sept. 9, 1882); see Note, supra note 117, at 291-92.
announcing a rule about processions, a limiting construction critical for the developing law on obstruction.\textsuperscript{128}

The distinction between processions and meetings had, of course, predated \textit{Beatty}. Indeed, Harcourt's advice to the magistrates in 1881 had presumed that processions were "lawful in themselves," and while \textit{Beatty} was before the court Lord Chief Justice Coleridge stated in the House of Lords that "walking through the streets in order and in procession, even if accompanied by music and the singing of hymns, was an absolutely lawful act, an act in the doing of which every subject had a right to be protected."\textsuperscript{129} \textit{Beatty} was significant in acknowledging and validating the growing belief that processions were lawful.\textsuperscript{130}

Although \textit{Beatty} established that magistrates' bans on marches were invalid and that charges of unlawful assembly would be ineffective against their participants, it did not rule on any issue of highways law and therefore left obstruction untouched as an enforcement tool.\textsuperscript{131} The Irish case of \textit{R. v. Justices of Londonderry}\textsuperscript{132} confirmed that obstruction might succeed where unlawful assembly would fail. A group of Salvationists, accompanied by a band, paraded down a thoroughfare in Londonderry. Although the march was entirely peaceful, two days later several Army members were arrested for parading under circumstances calculated to provoke a breach of the peace and were bound over to keep the peace and be of good behavior. In the spirit of \textit{Beatty}, the Queen's Bench Divisional Court overturned the binding-over orders, refusing to restrain the Salvationists on mere speculation that a breach of the peace might occur. Lest one think that the opinion was sympathetic to the Army, however, the court went out of its way to explain

\textsuperscript{128} See, e.g., Note, \textit{The Salvation Army}, supra note 123, at 451; Note, supra note 82, at 659 (\textit{Beatty} had "pretty clearly laid down that the mere processions of the Salvation Army are not in the nature of unlawful assemblies."). The month after \textit{Beatty} was decided the Queen's Bench Divisional Court reversed the convictions of Salvationists who had marched in procession in violation of a magistrates' ban in Whitchurch. The court held that the case was indistinguishable from \textit{Beatty} and that "[i]n taking part in a procession, the appellants had been doing only an act strictly lawful. ..." M'Clenaghan v. Waters, \textit{Times} (London) (Q.B.), July 18, 1882, at 4.

\textsuperscript{129} 269 PARL. DEB., H.L. (3d ser.) 821-22 (May 16, 1882). He added, however, that "there was hardly any act which could not be so done as to become a nuisance to the public peace." \textit{Id.} at 822. That is, even processions had to be conducted reasonably.

\textsuperscript{130} The Army, for example, viewed \textit{Beatty} as a final statement on the common law legality of processions and considered the matter settled. 4 \textit{SANDALL}, supra note 78, at 264.

\textsuperscript{131} As a comment on \textit{Beatty} noted, unlawful assembly did not exhaust the legal possibilities, because if an Army procession substantially interfered with ordinary traffic, it might be liable for obstruction. However, the author conceded that there were practical difficulties in using obstruction against processions. Note, supra note 126, at 689.

\textsuperscript{132} 28 L.R. Ir. 440 (Q.B. 1891).
that it would happily have found the Salvationists guilty of obstruction of the highway. The Lord Chief Justice wished "to make the ground of his judgment clear," that the magistrates had not found any obstruction of the highway:133

It must be remembered that the fact of being engaged in the performance of religious exercises is no justification of the obstruction of those lawfully using the streets, and that an unjustifiable obstruction of the highway renders the person responsible for it amenable, not only to the magistrates' jurisdiction to compel sureties for good behavior, but also to be criminally indicted.134

This was a reminder, albeit in dictum, that processions might unreasonably obstruct the streets and violate the right to passage.

The fact that the magistrates had declined to find a highway violation, however, indicated the extent to which the preference for processions had permeated obstruction law. While the authorities occasionally used highways law to prosecute Salvation Army processions,135 and it was obviously a more potent device than unlawful assembly,136 it was not especially satisfactory. The pervasive influence of Beatty encouraged the view that processions were "reasonable." Moreover, arrests and prosecutions of marching Salvationists were unpopular when the criminal mobs attacking their processions were apparently immune from punishment. The use of obstruction was thus far less effective in the

133. Id. at 447. A charge of obstruction had been brought but was dismissed, for unstated reasons, by the magistrates. Id. at 441.

134. Id. at 447 (O'Brien, C.J.). Mr. Justice Holmes offered the comment that although the question of obstruction was not before the court, the public was undoubtedly entitled to use the streets of a town "for the purpose of passing and repassing, and of whatever is naturally incidental to this use, but for no other purpose." Persons who interfered with such lawful use might be liable even for acts performed on private land "if the obstruction of the highway is the natural consequence of such acts or conduct." Id. at 461.

135. For example, a prosecution of a procession for obstruction took place in 1889, when hundreds of Army members marched in London from the City through the Strand to Exeter Hall. Commenting on the resulting arrests for obstruction, Henry Matthews, the Home Secretary after Harcourt, contended that "a body of 600 persons marching in procession with bands and banners through a crowded thoroughfare is a public nuisance." 337 PARL. DEB., H.C. (3d ser.) 898 (June 17, 1889). Matthews observed that the general practice of organizing processions had caused much public concern, but he claimed that in the preceding decade only three marches had been stopped from passing along the Strand. Id. at 1151-52.

136. Charges of unlawful assembly were sometimes brought against the Salvation Army—a procession calculated to produce a breach of the peace still constituted the offense—but after Beatty they were largely unsuccessful. See, e.g., R. v. Londonderry, 28 L.R. Ir. 440 (Q.B. 1891); R. v. Clarkson, 17 Cox C.C. 483 (Cent. Crim. Ct. 1892).
case of processions than meetings. As the official Salvation Army historian recounted, the police took action against the Salvationists only "when standing—not marching—and playing on the Sunday." The local authorities in any event sought a mechanism to prevent Salvation Army processions entirely, the objective that had prompted the original appeal to Harcourt. Fortunately for them, a stronger, preventive form of obstruction doctrine was at hand.

3. Local Acts and Bylaws: Drawing the Line on Prior Restraints

Although Beatty established that there was no common law or national statutory authority to prohibit processions in advance, prior restraints were permissible under local acts and bylaws directed against the nuisance of obstruction. Between 1883 and 1891, therefore, numerous towns sought calculated recourse in obstruction regulations to control Salvation Army processions. Some municipalities promulgated bylaws prohibiting Sunday processions, while others obtained parliamentary approval of clauses banning street marches in their local acts. By

137. 4 SANDALL, supra note 78, at 274. An observer noted in 1884 that Beatty had not put the Army out of reach of the law because members could be prosecuted for public nuisance if they "stand and hold their services on the highway." Note, supra note 82, at 659. He suggested that Army processions might also be an unreasonable use of the highway but conceded that the courts had not yet held them to be a public nuisance nor subjected them to the Highways Act or Town Police Clauses Act. Id. at 659-60.

138. A series of nineteenth-century statutes empowered the local authorities to enact bylaws for the preservation of order and the prevention of obstruction and other nuisances. These included the Metropolitan Police Act, 1839, 2 & 3 Vict., ch. 47, §§ 52, 54, the Town Police Clauses Act, 1847, 10 & 11 Vict., ch. 89, §§ 21, 28, the Municipal Corporations Act, 1882, 45 & 46 Vict., ch. 50, § 23, and the Local Government Act, 1888, 51 & 52 Vict., ch. 41, § 16. For the provisions of the first two statutes, see supra note 43. The Municipal Corporations Act permitted borough and county councils to make such bylaws "as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances." Section 16 of the Local Government Act gave county councils powers analogous to those conferred on urban districts by section 28 of the Town Police Clauses Act.

139. These included Ryde, Truro, and Colchester. See RICHTER, supra note 59, at 83; Bailey, supra note 73, at 245-46. As the official historian of the Salvation Army declared, Beatty might have ruled on the right to march in procession so far as the common law was concerned, but special acts continued to forbid Salvation Army marches. 4 SANDALL, supra note 78, at 264. The Salvation Army immediately began to violate the newly enacted bylaws, thus sacrificing most of its residual popularity in these areas. See id. at 264-67.

140. Local acts were parliamentary acts applicable to particular localities. See O. HOOD PHILLIPS & PAUL JACKSON, CONSTITUTIONAL AND ADMINISTRATIVE LAW 530 (6th ed. 1978). When the Salvation Army appeared in Sussex in 1884, a conference of coastal resorts agreed to seek parliamentary amendment of their local acts to include clauses banning Sunday street processions with music. Hastings and Eastbourne secured such provisions in 1885, Torquay in 1886. See GEORGE F. CHAMBERS, EAST BOURNE MEMORIES 209 (1910); Bailey, supra note 73, at 246. Carlisle and Reading also passed
1892 thirty-six local areas had enacted some sort of regulatory banning provision.\textsuperscript{141} Despite the prima facie legitimacy of processions, there was widespread recognition that Salvation Army marches could cause serious annoyance, and there was less resistance to reasonable regulations directed at preventing nuisances than to prosecuting Salvationists for criminal offenses.\textsuperscript{142}

Most local authorities applied their obstruction acts and bylaws with restraint and negotiated reasonable compromises with the Salvationists. The officials of Torquay and Eastbourne, however, engaged in zealous enforcement efforts that generated substantial public, judicial, and parliamentary resistance. The widespread opposition to their policies reflected broad national agreement on the outer limits of local preventive action. These two towns, applying their prohibitions with excessive rigor, crossed the line of cultural consensus.

Torquay obtained an amendment of its local act in 1886 to prohibit Sunday processions accompanied by music, and between 1886 and 1888 the magistrates imprisoned dozens of Salvationists for violating the new local acts allowing the mayor in his discretion to prohibit Sunday processions. See 323 Parl. Deb., H.C. (3d ser.) 859 (Mar. 12, 1888).

\textsuperscript{141} 2 Parl. Deb., H.C. (4th ser.) 481 (Mar. 10, 1892) (Admiral Field).

\textsuperscript{142} Although bylaws were governed by a reasonableness test, no successful challenge was ever mounted against an obstruction bylaw. See, e.g., Deakin v. Milne, 20 Sc. L.R. 30 (H.C.J. 1883) (upholding the conviction of members of the Salvation Army for conducting processions in breach of a local proclamation); McGill v. Garbutt, [1886] 5 N.Z.L.R. 73, 78 (upholding a bylaw prohibiting processions without the permission of the borough council and noting that the question was simply whether the Napier bylaw was "good as a general measure of precaution" and not whether the Salvation Army parade could be treated as an unlawful assembly); Abernathy, supra note 63, at 401; V.T. Bevan, Protest and Public Order, 1979 Pub. L. 163, 176. Although it was difficult to overturn any municipal bylaw for being ultra vires the enabling legislation, the courts did occasionally strike down Salvation Army bylaws directed against noise if they did not require actual annoyance as an element of the offense. See, e.g., Johnson v. Mayor of Croyden, 16 Q.B.D. 708 (1886) (invalidating as unreasonable a bylaw prohibiting music on Sundays because it could apply to music that was not in fact a nuisance); Munro v. Watson, 57 L.T.R. (n.s.) 366 (Q.B. 1887) (striking down a bylaw prohibiting music in the street without a mayoral license because it empowered the mayor both to legalize a nuisance and to prohibit something innocent). Obstruction bylaws, in contrast, were deemed valid even if they did not require any independent evidence of harm. It was presumed that any obstruction of the highway would cause inconvenience, which was entirely consistent with the fact that proof of actual injury was never required to ground any obstruction offense.
clause.\textsuperscript{143} This official conduct provoked a national repeal effort, and Army supporters submitted petitions containing 250,000 signatures—including those of Canons Wilberforce and Holland and other religious worthies—to the House of Commons. In 1888 Henry Fowler, M.P. for Wolverhampton and a staunch supporter of the Salvationists, successfully introduced a bill to repeal the objectionable clause.\textsuperscript{144}

The focus of public attention then shifted to Eastbourne, which in 1885 had secured amendment of its local act to incorporate a provision identical to that of Torquay. As evidence of the panic that the Army instilled in the town's residents, no Salvationists were present in Eastbourne at the time and the Army did not even establish a foothold until 1890.\textsuperscript{145} Not surprisingly, immediately upon commencement of band operations in May 1891, the police arrested numerous Salvationists for violating the prohibitory clause.\textsuperscript{146} In December the judges again intervened to rescue the Army. \textit{R. v. Clarkson}\textsuperscript{147} involved nine members of a visiting band from Camberwell, London, who had travelled to Eastbourne in July 1891 to support the local Salvationists. The Camberwell group, somehow separated from the local Army contingent, marched to the beach accompanied by a menacing crowd of over 1200 persons. They were arrested upon personal order of the mayor and charged with unlawful assembly and conspiring to violate the statute. At their trial at the Central Criminal Court, where H.H. Asquith, M.P., assumed their defense,\textsuperscript{148} the jury acquitted the bandsmen of conspiring to violate the ban on processions but found them guilty of unlawful assembly.\textsuperscript{149} The appellate court unanimously overturned the convictions. Speaking for his fellow judges, Mr. Justice Hawkins characterized the behavior of the mob as a "most brutal outrage" on the band. "The bandsmen had as much right to walk through the streets

\textsuperscript{143} 323 PARL. DEB., H.C. (3d ser.) 859 (Mar. 12, 1888), 1790 (Mar. 20, 1888); 2 PARL. DEB., H.C. (4th ser.) 467 (Mar. 10, 1892); see Coutts, supra note 94, at 91; Sandall, supra note 78, at 264-67.

\textsuperscript{144} See 4 Sandall, supra note 78, at 267-68.

\textsuperscript{145} See id. at 270-71. The town councillor who drafted the bill admitted that the clause was inserted for the express purpose of preventing the Salvation Army from conducting its processions should it extend its operations to Eastbourne. See Chambers, supra note 140, at 210.

\textsuperscript{146} See, e.g., 353 PARL. DEB., H.C. (3d ser.) 1821 (June 8, 1891); 354 PARL. DEB., H.C. (3d ser.) 400 (June 15, 1891); 1188-89 (July 14, 1891); see also Chambers, supra note 140, at 209; Coutts, supra note 94, at 93; 4 Sandall, supra note 78, at 270-72.

\textsuperscript{147} 17 Cox C.C. 483 (Cent. Crim. Ct. 1892).

\textsuperscript{148} See Coutts, supra note 94, at 93.

\textsuperscript{149} The jury apparently found no specific intention to breach the act. Clarkson, 17 Cox C.C. at 488. The defendants were convicted of unlawful assembly for disturbing and terrorizing the Queen’s subjects “then passing and repassing along the Queen’s common highways.” Id. at 484.
carrying their musical instruments," he remarked, "as anyone has to walk through the streets without a musical instrument." Clarkson demonstrated the unreliability after Beatty of an unlawful assembly charge against marchers, substantial judicial sympathy for the beleaguered missionaries in contrast to their vicious opponents, and a strong affirmation of the Salvationists' "right to passage."

Only a few months after Clarkson was decided, Parliament repealed the Eastbourne provision. The vigorous judicial condemnation of the town's behavior no doubt spurred the repeal effort, and the bill was widely endorsed by the government, the press, and public opinion. The debate in the House of Commons indicated that although some M.P.'s were concerned about the inflexibility of the relevant provision in Eastbourne's local act, the general validity of prior restraints on

150. Id. at 489. The judge's sympathy for the Salvation Army and antipathy toward the Army's opponents were obvious. "[T]here cannot be conceived, under the circumstances, a more peaceable body of men than these nine defendants. Not so the crowd, however; they, without the smallest ground for taking the action they did, raised their sticks in the air close to the defendants; and one cannot help thinking that blows were falling on the heads of the bandsmen from them, and that, if the bandsmen did retaliate, it was not such a retaliation as would in our judgment cause an unlawful assembly. . . ." Id. at 190. A similar attitude was evident in Beaty v. Glenister, 51 L.T.R. (n.s.) 304 (Q.B. 1884), where the court quashed the conviction of 15 members of the Salvation Army for disturbing the peace in violation of the Hastings Local Act. The Hastings group had also been accosted during a march by a large, hostile mob. Lord Coleridge concluded that there was no evidence of a disturbance of the peace within the meaning of the Act. Id. at 305.

151. The press and the government generally supported repeal. See 4 SANDALL, supra note 78, at 277. Indeed, the Solicitor-General, Sir Edward Clarke, rather surprisingly wrote to Bramwell Booth: "I feel the force of what you say as to the necessity of maintaining an actual protest against the Eastbourne Act in order to have any chance of getting it repealed. I personally shall be glad to help in securing the appeal." 2 PARL. DEB., H.C. (4th ser.) 491 (Mar. 10, 1892); 4 SANDALL, supra note 78, at 276. Predictably, the residents of Eastbourne overwhelmingly opposed repeal. In a poll of the ratepayers, 3257 opposed the bill and 470 supported it. 2 PARL. DEB., H.C. (4th ser.) 481 (Mar. 10, 1892); CHAMBERS, supra note 140, at 210.

152. The facial problem with the Eastbourne provision was that its prohibitory clause was contained in a local act, which as a parliamentary statute was absolute and inflexible and could not be altered locally to permit processions. 2 PARL. DEB., H.C. (4th ser.) 469 (Mar. 10, 1892). Moreover, the absolute ban on processions gave Eastbourne a power "in excess of the general law." Id. at 473. These defects were not dispositive, however, because other towns—for example, Carlisle, Reading, and Hastings, see 323 PARL. DEB., H.C. (3d ser.) 859 (Mar. 12, 1888)—had similar local acts in effect that aroused little controversy. In moving the second reading of the Eastbourne Amendment Act, H.H. Fowler noted that "[c]ommon sense and common justice have prevailed in the town of Hastings, and no difficulty has arisen there." 2 PARL. DEB.,
processions by means of nuisance bylaws was not in question. Henry Matthew, the Home Secretary, suggested that “the inhabitants of Eastbourne can get all they can legitimately desire under the powers of the Municipal Corporation Act by bye-laws: they can prevent processions by Salvationists or any other persons that are a nuisance to the inhabitants, and they ought not to desire more.” In the case of this particular town, however, his statement was not prophetic. When the Eastbourne council followed the Home Secretary’s suggestion and proposed new but extremely restrictive bylaws, Matthews refused to approve them. An M.P. pointed out that this was “a very exceptional state of circumstances” involving “a Municipality not likely to be impartial in the treatment of those who chose to assemble for the processions.” Eastbourne, in other words, had departed from prevailing political norms in its overly sweeping and inflexible denial of the Salvationists’ freedom to march.

The episodes in Eastbourne and Torquay were significant in disclosing the existence of an institutional and popular understanding regarding the boundary that separated acceptable from unacceptable prior restraints on processions. Rigid and unreasonably enforced prohibitions infringed unnecessarily on passage rights and unfairly injured a group that did not pose a substantial national threat and was more “deserving” than its disreputable opponents.

Legal doctrine and social consensus thus

154. See 4 SANDALL, supra note 78, at 279. Admiral Field, an Eastbourne council supporter, complained in the House of Commons: “Well, Sir, it seems to me in this business Eastbourne is ‘between the devil and the deep sea’—not allowed to keep the clause and not allowed to have the bye-laws she wants.” 4 PARL. DEB., H.C. (4th ser.) 1273 (May 19, 1892).
155. 4 PARL. DEB., H.C. (4th ser.) 1280 (May 19, 1892).
156. The Army did, however, forfeit considerable sympathy when it broke the law. In proposing repeal of the Eastbourne provision, Fowler somewhat abashedly admitted:

There is a strong feeling against them I know, and the feeling has been expressed in letters from all classes. . . . Their commander is not very modest, and in the instructions he issues to his lieutenants he rules with an almost papal authority. Nevertheless, we must bear testimony to the honesty of their intentions, and the courage with which they carry them out.

2 PARL. DEB., H.C. (4th ser.) 474 (Mar. 10, 1892). At the second reading of the Eastbourne Amendment Bill in the House of Lords, Lord Fortescue, while supporting the bill, observed:

Now, for some time the Salvation Army, as it is called, was sinned against rather than sinning; they were law-abiding, and inadequately protected as law-abiding and benevolent citizens. But after a time, I suppose feeling the need of fresh excitement on their part and on their behalf, Mr. Booth encouraged them to violate the law, and to persevere in violating the law, at Torquay; and since then, to a far worse degree, as we all know, quite recently at Eastbourne. . . . [H]aving on a previous occasion taken upon myself to speak on behalf of
established both the legitimacy of local regulation of Salvationist processions and the need to contain such regulation within reasonable limits.

By the 1890s, as the Eastbourne repeal movement also reflected, Army activities had become more commonplace and even respectable; as indicated, prosecution of Salvationists for holding meetings also radically diminished in this decade. The Army increasingly enjoyed the freedom to march, ceased to suffer from overzealous enforcement, and began to acquire broader social legitimacy. Indeed, in 1903 President Theodore Roosevelt invited William Booth to the White House, and the following year King Edward VII received him at Buckingham Palace. With their growing respectability, the importance of the Salvationists in the history of obstruction law came to an end. The events of the 1880s, however, had demonstrated both the efficacy of obstruction law as compared with standard criminal law doctrines and the favored status of processions, which could only be restrained by special regulation.

5 PARL. DEB., H.L. (4th ser.) 326-27 (May 31, 1892). Nonetheless, the House of Commons in March 1892 soundly approved the repeal bill on its second reading by a vote of 269 to 122. 2 PARL. DEB., H.C. (4th ser.) 502 (Mar. 10, 1892).

157. See supra note 103 and accompanying text; K.S. INGLIS, CHURCHES AND THE WORKING CLASSES IN VICTORIAN ENGLAND 193 (1963) ("Police and magistrates tended, however, to become more tolerant as they realized that the Army, whatever its eccentricities, was on the side of public order."); Bailey, supra note 73, at 252 n.65 (riots against the Army probably ceased because familiarity bred indifference and the Army's social work attracted the support of the middle classes); Munro, supra note 75, at 762 ("It is not entirely clear why the wave of disorder ceased, but perhaps the Salvationists appeared less threatening as their activities became more familiar.").

158. BARNES, supra note 95, at 60.

159. The doctrine continued, however, to be used as an occasional means of harassment through the twentieth century. For example, the Chief of the Staff of the Salvation Army complained in 1954 that the authorities were still using local obstruction bylaws to regulate Army activities and were "constantly seeking new powers to control the use of the roads." JAMES E. NORTHEY, OUTREACH: TOWARD EFFECTIVE OPEN-AIR EVANGELISM 13 (1954).

160. Another advantage that obstruction gave the authorities after Beatty was that it circumvented Beatty's ruling, in the context of unlawful assembly, that members of a procession were not responsible for the hostile reaction of a crowd. A charge of obstruction could reach precisely this situation, because it was a settled proposition as far back as R. v. Carlile in 1834 that the collection of a crowd, even a sympathetic one, was a basis for liability. See, e.g., Note, supra note 126, at 689. On the hostile
The legal preference for processions, however, was a product of more than the logic of the "right to passage" and sympathy for the Army marchers. It also resulted from the fact that contemporaneously with the activities of the Salvation Army, a far more ominous challenge had emerged to test the resources of the government.

B. The Socialists, the Unemployed, and the Road to Trafalgar Square

While the Salvationists were engaged in rescuing souls in the provinces, the socialists were proceeding to mount a major challenge to the central government in the capital. In the 1880s economic hardship and intensifying international competition caused severe unemployment and distress among unskilled and casual workers in London. Socialists and radicals of various stripes—especially the Social Democratic Federation (SDF) founded by Henry Hyndman in 1881—achieved substantial success in mobilizing unemployed workers against the government's political and economic policies. In contrast to the Salvation Army, the socialists resorted primarily to the tactic of open-air meetings, and the government deployed obstruction law effectively against both street meetings scattered throughout London and the massive demonstrations in Trafalgar Square.

1. The Suppression of Socialist Street Meetings

Throughout the 1880s the police frequently used the obstruction devices of dispersal, arrest, and prosecution to control small socialist street meetings. A typical instance was the suppression of the "nui-
sance" of Sunday street speakers in the popular radical gathering place of Dodd Street in London's East End. In the summer of 1885 the police arrested SDF leaders and other reformers for blocking up Dodd Street even though it contained only warehouses and had no appreciable traffic at the time in question.163 At a major protest rally organized in September, the police again made arrests for open air preaching and causing an obstructive crowd to assemble.164 When the magistrate sentenced some of the defendants to hard labor, the courtroom burst into fury. William Morris cried "shame" and scuffled with police, and a few days later a philosophy professor angrily charged that the magistrate had "made it plain that what he desired to put down was not street obstructionism but the preaching of socialism."165

With the advent of a Conservative administration in 1886, the police intensified the policy of harassment.166 Their determination to curb socialist meetings was apparent, for example, in events in 1887 involving the Lambeth branch of the SDF. The members typically held peaceful meetings on Sunday mornings, and for several weeks a militant anti-socialist group calling itself the "Primrose Society" physically assaulted the socialists and disrupted their activities. Rather than protecting the socialists from their adversaries—as Beatty would have required in the case of a procession—the police banned the radicals from the street or dispersed them on obstruction grounds.167 Throughout the decade and beyond, the practice of using obstruction law to disrupt socialist meetings occasioned frequent complaints in the House of Commons.168
Obstruction doctrine offered the government the same benefits against socialists as against Salvationists, providing a reliable and flexible discretionary tool that enabled it both to claim impartiality and to deny responsibility. Radicals in Parliament, echoing Salvationist sympathizers, frequently charged the government with selective enforcement of the law. Charles Bradlaugh, for example, accused the administration in 1887 of "a great deal of harsh treatment" toward socialists that was not shown to street preachers, even though preachers "very often assemble in places where they stop the traffic and cause inconvenience to the neighbourhood." He offered to "drive the Home Secretary round in a Hansom cab next Sunday morning, and show him 200 or 300 such meetings in places where the traffic in the streets is certainly greatly impeded." The use of obstruction against socialist meetings, he and other critics charged, was the result of a deliberate and coordinated governmental policy.

Despite the plausibility of this accusation, considering that the Home Office was ultimately responsible for the actions of the Metropolitan Police, the government invariably responded that its only concern was to prevent obstruction of the highway. In 1887 Home Secretary Matthews denied that the Home Office exhibited any particular animus against socialist meetings. "I assure the House that that is absolutely untrue," he insisted. "I have never given any directions of any sort or kind with regard to socialist meetings. The only directions I have given

H.C. (5th ser.) 22 (Mar. 8, 1909); GERTRUDE WILLIAMS, THE PASSIONATE PILGRIM: A LIFE OF ANNIE BESANT 162 (1931).
169. 314 PARL. DEB., H.C. (3d ser.) 1765 (May 12, 1887).
170. See id. at 1754 (claiming that the action of the police "has been inspired from very high quarters"); 339 PARL. DEB., H.C. (3d ser.) 173 (Aug. 2, 1889) (insisting that socialist meetings were suppressed in Westbourne Grove when religious meetings on the same spot were not disturbed); 192 PARL. DEB., H.C. (4th ser.) 49 (July 9, 1908) (contending that the police had dispersed socialists while permitting temperance meetings to be held on Sunday mornings near Regent's Park); TOM MANN, MEMOIRS 168-69 (1967) (recounting persecution of socialist groups when Salvation Army and temperance meetings were tolerated); James Stuart, The Metropolitan Police, 55 CONTEMP. REV. 623, 629 (1889) (charging that interference with radical and socialist meetings was "rife under the present Government"). A government report in 1892, indicating places where open air meetings had been held in London between March 1891 and March 1892 without police interference, gave credence to the charge. It listed a full 472 meetings that were left undisturbed, most of them taking place on highways. The vast majority, however, involved religious and temperance groups, with only a handful of socialist and trade union meetings. BRIT. PARL. PAPERS, HOME OFFICE RETURN, H.C., 1892, METROPOLITAN POLICE DIST. (OPEN AIR MEETINGS).
have tended to prevent obstruction in the streets. . .”172 Moreover, the Home Office claimed that it did not issue detailed instructions to the police on the treatment of street obstructions. “Each case must depend on its own particular circumstances,” the Under-Secretary of State maintained, “and must be left to be dealt with according to the discretion of the Chief Commissioner.”173 In 1889 the Radicals seized on a statement allegedly made by a constable to the effect that the police were under orders “to suppress socialist meetings only.”174 Matthews responded with the familiar refrain that the only orders of the police were to break up meetings “by whomsoever held which infringe upon the public right of free passage in the streets.”175 When the Liberals returned to power in 1892, they hewed to the same line. The new Home Secretary, H.H. Asquith, contended that the police did not interfere with a meeting “unless it occasioned serious obstruction to the traffic.” What constituted an obstruction, according to Asquith, depended on “a number of local circumstances.”176 Similar charges and rebuttals continued into the early twentieth century.177

The government bolstered its ostensibly nonpolitical stance by asserting that prosecutions were necessary not to suppress “respectable” demonstrators but rather to subdue the “undeserving” elements that obstructive crowds inevitably attracted. Matthews pointed out to the House that if a space in the crowded business area of London became known as a regular meeting place, “the vultures—the birds of prey of

172. 314 PARL. DEB., H.C. (3d ser.) 1759 (May 12, 1887). Matthews continued that if “any body of men, whether the Socialists or the Primrose Society, chose to hold large meetings in streets, and inconvenience arises, and interruption of traffic takes place, they ought to be dispersed.” Id.
173. Id. at 1752.
175. Id. at 1132. He also claimed that the “object of the meeting can have no bearing whatever on the question, which is, whether the meeting obstructs the thoroughfare or not.” 333 PARL. DEB., H.C. (3d ser.) 962 (Mar. 5, 1889); see 339 PARL. DEB., H.C. (3d ser.) 173 (Aug. 2, 1889).
177. In 1907, for example, the M.P. for West Ham complained about police violence against a demonstration in Whitehall to protest the Russian alliance. Herbert Gladstone, the Home Secretary, insisted that the action was taken only to stop obstruction to traffic. 179 PARL. DEB., H.C. (4th ser.) 772-73 (July 30, 1907). Similarly, when asked in 1909 why the police had dispersed an unemployed meeting in Berkeley Square, he replied that the police had done so because “traffic was being completely obstructed.” 2 PARL. DEB., H.C. (5th ser.) 22 (Mar. 8, 1909).
society—will flock there.”

Even the Radicals admitted that their meetings attracted undesirable elements. "It is an unfortunate fact," conceded the member from Bethnal Green, "that there is a large criminal class in London which always finds its harvest on every occasion when large masses of people are collected." Again, the link between obstructive crowds and criminality served as a useful justification for official action.

The government's routine reliance on obstruction law to suppress small socialist gatherings, however, was of lesser magnitude than its vigorous response to the major demonstrations occurring in Trafalgar Square in 1886-87. In those years the government faced an exceptional challenge from the unemployed workers who inhabited the Square, and it exploited obstruction law relentlessly to combat street activity that it viewed as a serious threat to its authority.

2. The Battle for Trafalgar Square

The unfolding crisis in Trafalgar Square illuminated the shifting strategies of the government in dealing with socialist meetings in the most prominent site of political protest activity in Britain. For almost forty years after the Chartist riots of 1848, the population of London assumed that the Square was a legitimate public forum. The events of the 1880s, however, established that Trafalgar Square was a highway. That determination, in turn, enabled the government to apply—and

178. 333 PARL. DEB., H.C. (3d ser.) 1013 (Mar. 5, 1889). According to Matthews, the organizers of demonstrations gave a "plausible excuse and a decent occasion for the roughs of London to gather together, and then . . . plunder shops and commit other outrages." Id. at 1008. The Police Commissioner himself informed Matthews in 1888 that he did not apprehend trouble from the organized Socialist movement, "but it is from the roughs and criminals who always attach themselves to large processions and meetings that I anticipate serious damage to property." Bailey, supra note 66, at 108.

179. 333 PARL. DEB., H.C. (3d ser.) 996 (Mar. 5, 1889). The speaker added, however, that the situation was the same during public illuminations or royal processions. Id.; see 333 PARL. DEB., H.C. (3d ser.), 1002–03, 1016 (Mar. 5, 1889). The Radical M.P. James Stuart, however, complained that the police consistently confused extreme political views with "violence and criminality." Stuart, supra note 170, at 629.

180. The Square was the site of many major demonstrations in the second half of the nineteenth century, including rallies concerning parliamentary reform (1867), the French Republic (1870), the bombardment of Paris (1871), the early closing movement (1872), the Tichborne case (1878), duties on beer (1885), and the activities of Charles Bradlaugh (1881 and 1883). See WILLIAMS, supra note 3, at 74. In a debate in the House of Commons in 1889, members pointed to the fact that for nearly forty years Trafalgar Square had been used for purposes of public meeting. See, e.g., 333 PARL. DEB., H.C. (3d ser.) 995, 1001, 1029 (Mar. 5, 1889).
indeed abuse—obstruction law to control what it perceived as an intolerable threat to public order.

The escalating drama began with an economic downturn and an exceptionally severe winter in 1886. Outdoor employment disappeared, and there was acute suffering among dock and construction workers.181 Various socialist groups, including the SDF, the Socialist League, and the Fabian Society, organized an ambitious program of daily open-air rallies in the Square.182 A particularly large demonstration took place on “Black Monday,” February 8, 1886, when Henry Hyndman and three other prominent socialists addressed thousands of unemployed dockers and building workers. Following the meeting, the four leaders and a handful of supporters spontaneously marched through the West End of London, gathering a crowd that numbered two or three thousand by the time it reached the gentlemen’s clubs in Pall Mall. Members of the crowd smashed the windows of clubs and looted several shops, spreading intense panic among middle and upper-class residents of London.183

Worsening economic conditions the following year transformed Trafalgar Square into a literal encampment of the homeless poor, and the government confronted enormous public pressure to suppress the continual meetings that disrupted local trade and frightened area residents.184 Initially, however, the government reacted indecisively, owing both to internal policy disagreements and uncertainty about the legal status of the Square. The Conservative government was divided between two strong personalities: Charles Warren, a former hero of the Egyptian campaign, who as Police Commissioner favored vigorous action against the unemployed; and Henry Matthews, the Home Secretary, who tended to be more respectful of legal forms. Two critical

181. See JONES, supra note 161, at 291.
182. See id. at 291-92; MACE, supra note 161, at 161-62; RICHTER, supra note 59, at 103. The London United Workmen’s Committee, an arm of the Tory Fair Trader movement, organized counter-rallies that competed with the socialists for working-class support. RICHTER, supra note 59, at 103.
183. See RICHTER, supra note 59, at 107-20; TSUZUKI, supra note 162, at 73-74. The SDF leaders attempted to control the crowd but were powerless to do so, and The Times considered the resulting riot to be even more alarming than the Chartist demonstration of 1848. TSUZUKI, supra note 162, at 73-74 (citing TIMES (London), Feb. 10, 1886). The four leaders were prosecuted for sedition but were acquitted by the jury. Id. at 74-75.
184. Bailey, supra note 66, at 104-05.
legal issues were unresolved. The first was whether Trafalgar Square was legally a highway, and the second was, if so, whether the government could legally impose permanent prior restraints on meetings held there. After Beatty there was no common law or national statutory power adequate to the purpose. The only possible instrument was a local act, the Metropolitan Police Act 1839, which granted the police broad authority to regulate street obstructions. It was questionable, however, whether the Act was expansive enough to authorize an indefinite closure of the Square to meetings. The relevant section permitted the police to prevent street obstructions only on particular occasions when the streets were “liable to be obstructed,” and a general ban might well exceed this limiting condition.

In the face of both legal uncertainty and internal policy conflict, the government vacillated. Through October it alternately allowed and prohibited meetings and demonstrations in Trafalgar Square. In early November, however, without Home Office approval, Warren posted a public notice warning that he would disperse disorderly crowds. At this point the law officers of the Crown rendered an opinion rejecting a general prohibition on “wandering bands” as ultra vires the Metropolitan Police Act. Such a measure, they concluded, would “practically prohibit groups of men wandering through the streets,” that is, would interfere with public passage. Nonetheless, the government remained under relentless pressure—from proprietors of stores and hotels abutting the Square, from the press, and from members of the Cabinet—to cleanse the area of the unemployed. Anticipating a major demonstration on November 9, Lord Mayor’s Day, the Cabinet on November 8 finally authorized a police notice banning public meetings in the Square.

Although the legality of the notice was dubious, the government persisted in its policy. Rainy weather enabled it to avoid confronta-

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185. It was unclear whether the Trafalgar Square Act 1844, 7 & 8 Vict., ch. 6, rendered the Square an ordinary highway containing an easement of passage or whether it created another legal entity conferring other rights on the public.
186. 2 & 3 Vict., ch. 47, § 52.
187. See Richter, supra note 59, at 139; Bailey, supra note 66, at 107-08.
188. Bailey, supra note 66, at 108.
189. Id. at 110.
190. Id. at 110-11; Mace, supra note 161, at 171-79.
192. In casting about for some legal justification, the government briefly toyed with the theory that Trafalgar Square was not a street but rather a park in the possession of the Crown. For example, on November 11 Matthews told a deputation that the Square was Crown property and that the Queen could therefore ban meetings there. Bailey,
tion on Lord Mayor's Day, but the Metropolitan Radical Federation—an umbrella organization comprising various socialist and Radical groups—scheduled a further demonstration for Sunday, November 13. On November 12 Matthews issued a second notice under the Metropolitan Police Act forbidding "organized processions" from approaching the Square the following day, and Warren assigned five thousand constables to special Sunday duty. The precautions failed to deter a massive number of demonstrators, estimated at between twenty and fifty thousand, from mobilizing to protest infringements on free speech.

Initially, the November 13 demonstration proceeded according to the Federation's plan. In the afternoon, nearly sixty groups held neighborhood rallies and then marched toward the Square from different directions. Many contingents found their way blocked, however, and those reaching the Square confronted 1500 police officers amassed in a cordon two to four deep. No such display of military might had occurred in London since the days of the Chartists! The police repelled the enormous crowds in what was alternately described by the press as "The Defence of Trafalgar Square" and by the demonstrators as "Bloody Sunday."

The socialist John Burns and a Radical Scottish M.P., Cunninghame Graham, together led a few hundred men in a

\[supra\] note 66, at 123 n.89. A park did not confer an easement of passage and could be closed to the public entirely. \See, e.g., 184 PARL. DEB., H.L. (3d ser.) 1371 (July 24, 1866) (Earl of Derby stating that there "can be no doubt that the Crown is the owner of these Parks" and had undoubted powers to prevent them from "being diverted from their proper purposes" of enjoyment and recreation); 186 PARL. DEB., H.C. (3d ser.) 1956 (May 3, 1967) (John Bright conceding that the government could close Hyde Park on any occasion). The government abandoned this line of argument when the law officers advised that Trafalgar Square was a highway.

193. BRIT. PARL. PAPERS, TRAFALGAR SQUARE REGULATIONS: RETURN GIVING THE REGULATIONS ISSUED BY THE CHIEF COMMISSIONERS OF POLICE WITH RESPECT TO TRAFALGAR SQUARE, H.C., 1889.
194. \See RICHTER, supra note 59, at 143-45.
195. HUTT, supra note 161, at 110.
196. \See MACE, supra note 161, at 179-89; TSUZUKI, supra note 162, at 78; CEDRIC WAITS & LAURENCE DAVIES, CUNNINGHAME GRAHAM: A CRITICAL BIOGRAPHY 67-69 (1979); WILLIAMS, supra note 3, at 78.
197. On November 12, Cunninghame Graham published the following remarks in the Pall Mall Gazette:

I imagine that, save at Luxor, Memphis (or perchance Glasgow), no square in any city is so deserted as Trafalgar-square on Sunday. But even supposing that it were not, I hold that the right of free speech and free meeting is a more precious one to Englishmen than even the right of free traffic... for that reason I intend to address the meeting on Sunday.
frontal attack on the police line at the Square’s southeastern corner. The
two leaders were arrested along with three hundred others, Cunninghame
Graham suffering a head wound in the process. The Grenadier Guards,
armed with fixed bayonets, later conducted a mopping-up operation.\textsuperscript{198}
Altogether two hundred persons were injured, including seventy-seven
policemen, and three demonstrators later died of their wounds.\textsuperscript{199}

Fearing additional assaults on the Square,\textsuperscript{200} the government again
solicited the opinion of the law officers as to the propriety of a
permanent ban. On this occasion they proved more cooperative,
advising that although Trafalgar Square was a highway, section 52 of the
Metropolitan Police Act authorized an indefinite prohibition if the Police
Commissioner anticipated serious obstruction to the thoroughfare.\textsuperscript{201}
Presumably the officers were now relying on the November disturbances
to support an argument that the Square was “likely to be obstructed” by
meetings on a continuing basis. On November 18, therefore, Warren
issued a further police notice banning meetings and processions in the
Square indefinitely.\textsuperscript{202}

Although the notice was generally observed,\textsuperscript{203} the Home Office
remained uncomfortable with the ban. To strengthen its position, it
sought judicial ratification by means of a successful prosecution on
indictment for a serious common law crime. Matthews in particular
desired a jury verdict in favor of the government in a case “of an
aggravated kind,” calculating that it was not sufficient “to rest on
decisions of Police Magistrates.”\textsuperscript{204} For this reason, although the
government could have charged the participants with obstruction of the
highway, it declined to do so. It preferred judicial rulings that would
squarely establish several constitutional principles: that there was no

\textsuperscript{198} MACE, supra note 161, at 188-89.
\textsuperscript{199} 323 Parl. Deb., H.C. (3d ser.) 1433 (Mar. 16, 1888); MACE, supra note 161,
at 189.
\textsuperscript{200} Warren asked the Home Office to approve a standing body of 20,000 special
constables for duty on Sunday mornings, see RICHTER, supra note 59, at 151, and a few
thousand were deputed to the Square on Sunday, November 20. On November 16,
however, the Radical clubs agreed not to mount another assault on Trafalgar Square but
rather to rely on legal action to secure the Square as a site of public meetings. See
Bailey, supra note 66, at 113.
\textsuperscript{201} See Bailey, supra note 66, at 114, 123 n.89.
\textsuperscript{202} TRAFALGAR SQUARE REGULATIONS, supra note 193.
\textsuperscript{203} Police firmness and economic recovery prevented further demonstrations of the
magnitude of Bloody Sunday. See RICHTER, supra note 59, at 158. However, attacks
on the Square continued sporadically for the next several years, and the ban remained
a rallying cry for the Radicals.
\textsuperscript{204} Bailey, supra note 66, at 114.
right to meet in Trafalgar Square or indeed any highway; that Beatty's ruling on the lawfulness of assemblies was confined to processions; and that indefinite prior bans on meetings were valid under the obstruction provisions of the Metropolitan Police Act. Thus hoping to secure at least a façade of legality, the Crown charged Cunninghame Graham and Burns with riot, unlawful assembly, and assault for their actions on "Bloody Sunday." The two defendants equally viewed the prosecutions as a test case on the right of public meeting in the streets.205

On January 16, 1888, R. v. Cunninghame Graham and Burns206 was tried at the Old Bailey. Both the Solicitor General, Sir Edward Clarke—who had defended the Salvation Army in Beatty207—and the Attorney General, Sir Richard Webster, appeared for the Crown. Burns appeared pro se, and Cunninghame Graham was defended by his friend H.H. Asquith, an M.P. and future Prime Minister, who would later represent the Salvationists in their troubles at Torquay and Eastbourne. Obstruction of the highway, though not specifically charged, was an important factor in the case inasmuch as the arguments and decision dealt with the right to passage on the highway and the scope of police powers to prevent obstruction under the Metropolitan Police Act. Webster, who would also support the Salvationist cause at Eastbourne, argued that Warren's proclamation was valid because the police had a duty under the Act to maintain a clear passage in the thoroughfare of Trafalgar Square. He pointed to the traditionally wide definition of obstruction in cases involving stationary gatherings, arguing that there was no right to hold a public meeting in the street. Asquith, relying on Beatty, countered that the demonstration was a lawful assembly, that the disorder had been precipitated by police efforts to prevent the meeting, and that the prior restraint was invalid. In an attempt to underscore the government's overreaching, he acknowledged that the meeting would have been indictable as a common law obstruction or punishable under

205. As Burns told the House of Commons a few years later, the Trafalgar Square "riot" consisted merely of Cunninghame Graham and himself walking from the corner of the Grand Hotel into Trafalgar Square. "They thought they had a legal right, and they put the legal right to the test . . . . They were told by the Law Courts that they had no right to go there, and, therefore, they were punished." 18 PARL. DEB., H.C. (4th ser.) 896 (Nov. 14, 1893).
207. 314 PARL. DEB., H.C. (3d ser.) 1751 (May 12, 1887).
the Highways Act 1835. This did not, however, make the meeting an unlawful assembly.208

The government was partially successful in its quest for validation. On the issue of the unlawfulness of street meetings, the court unequivocally supported the Crown. Mr. Justice Charles charged the jury that, pursuant to the Trafalgar Square Act 1844, the Square was a thoroughfare for purposes of the Metropolitan Police Act and held the same status as any other street.209 Although it had undoubtedly been used for public assemblies,210 there was no right of public meeting either in the Square or in any other public thoroughfare. “So far as I know the law of England,” he proclaimed, “the use of public thoroughfares is for people to pass and repass along them . . . 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.”211 In contrast to Beatty’s ruling on processions, Cunninghame Graham affirmed that street meetings, even those located in the customary forum of Trafalgar Square, were unlawful infringements of the right to passag e.212

On the question of prior restraints under the Metropolitan Police Act, however, the government was less pleased with the judicial response. The judge was ambiguous on the legality of the police order, somewhat cryptically charging the jury that Warren’s notices did not in and of themselves make the meeting unlawful but were simply a “warning” that the public peace was in danger.213 He further instructed the jury that “whatever may be your view of the necessity for the two notices issued

208. Cunninghame Graham, 16 Cox C.C. at 425 (a fuller report of the arguments of counsel is provided in 4 T.L.R. 212).
209. 16 Cox C.C. at 429. The court observed that prior to the Trafalgar Square Act the Square had been the “private possession” of the Crown. Id. at 428-29.
210. The judge specifically referred to Charles Bradlaugh’s testimony that for the past thirty years he had held meetings there for political purposes. Id. at 429.
211. Id. at 429-30. In less than an hour the jury convicted the defendants of one count of unlawful assembly but acquitted them of the more serious charges of riot and assault. Burns and Graham were sentenced to six weeks’ imprisonment without hard labor. THE ANNUAL REGISTER FOR THE YEAR 1888, at 7 (1889). With remission for good conduct, they served four and a half weeks, most of it spent picking oakum. WATTS & DAVIES, supra note 196, at 73.
212. The court also expressed the usual concern that obstructive crowds would attract idlers and ruffians. In all large gatherings, the judge stated, there were “persons meaning mischief,” Cunninghame Graham, 16 Cox C.C. at 430, and the larger portion of the persons assembled in Trafalgar Square were “rough and disorderly persons,” id. at 432. The Attorney General later remarked that although the organizers were well intentioned, “what charm have the summoners of a meeting got that they can keep away the roughs and the criminal classes, who have been watched in the Square day by day?” 323 PARL. DEB., H.C. (3d ser.) 56 (Mar. 2, 1888).
213. Cunninghame Graham, 16 Cox C.C. at 431.
by Sir Charles Warren," they did not justify riotous conduct.\textsuperscript{214} In refusing to uphold unequivocally the legality of the ban, the judge was possibly influenced not only by the language but also the history of the Metropolitan Police Act, which had never previously been used to impose a permanent ban on public meetings under the theory of preventing obstruction.\textsuperscript{215} 

Later that year opponents of government policy countered with a test case of their own. In \textit{Ex parte Lewis},\textsuperscript{216} a solicitor challenged the November 18 notice by suing the Home Secretary and the Police Commissioner for a variety of offenses, including committing a "nuisance at common law, stopping the processions, preventing by force the lawful use of the thoroughfare, and the enjoyment of public rights and privileges."\textsuperscript{217} Although he argued pro se for nearly three hours that the notices of November 8, 12 and 18 were illegal, the court gave short shrift to his contentions. Mr. Justice Wills pointed out that a supposed right to assemble on the highway was "in its nature irreconcilable with the right of free passage, and there is, so far as we have been able to ascertain, no authority whatever in favour of it."\textsuperscript{218} The Trafalgar Square Act, the judge asserted, conferred public rights of passage but not a right of "public meeting."\textsuperscript{219} 

The two test cases thus forcefully declared the illegality of street meetings but did not expressly uphold the validity of a permanent ban under the Act. Indeed, most of the language helpful to the government was arguably dicta.\textsuperscript{220} The government's own lawyers remained

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\item \textsuperscript{214} \textit{Id.} at 432.
\item \textsuperscript{215} Charles Bradlaugh later insisted that the Metropolitan Police Act only imposed a duty on the police to regulate traffic, and that until Warren's proclamation it had "never entered into human imagination" that anyone could ban meetings under the section. 333 \textit{Parl. Deb.}, H.C. (3d ser.) 1044 (Mar. 5, 1889).
\item \textsuperscript{216} 21 Q.B.D. 191 (1888).
\item \textsuperscript{217} \textit{Id.} at 193. When the Bow Street magistrate rejected his application for summonses against Warren and Matthews, Lewis sought an order of mandamus from the Divisional Court to compel the magistrate to issue them. The court upheld the magistrate's exercise of his discretion.
\item \textsuperscript{218} \textit{Id.} at 197.
\item \textsuperscript{219} \textit{Id.} at 198. Apparently the "public rights of passage" were conferred in this case by a parliamentary statute, the Trafalgar Square Act, rather than by means of a common law easement. \textit{Id.}
\item \textsuperscript{220} Arguably, \textit{Cunninghame Graham} adjudicated only whether one particular assembly was an unlawful assembly, see 333 \textit{Parl. Deb.}, H.C. (3d ser.) 1004 (Mar. 5, 1889), and \textit{Lewis} technically decided only that the court could not review a magistrate's
\end{itemize}
skeptical about the legality of the November 18 notice, the Treasury Solicitor informing Matthews in September 1888 that the notice probably did not justify the indefinite closure of the Square because it referred to conditions specific to the previous November. Matthews himself later conceded that the notice strained the law "to the utmost," and Warren's successor as Police Chief, James Monro, entertained similar doubts as to its legality. Monro believed that applying the Metropolitan Police Act to peaceful political meetings was probably not defensible, and he pressed for clarifying legislation. Despite abundant evidence that the ban was unlawful—the language of section 52, the absence of any historical or legal precedent for such action, the opinions of the judges, the skepticism of the government attorneys, and the uncertainty of a Police Commissioner—the government adamantly adhered to its policy. Regardless of other considerations, it was willing to stretch the law as far as necessary to restrain socialist meetings.

Although the government held private reservations, it staunchly defended the November 18 ban in public. It resisted pressure to promulgate explicit new regulations, which it considered politically inexpedient, and it weathered determined assaults from Radicals, and eventually Liberals, who took up the Trafalgar Square notice as a discretion in refusing to issue summonses to government officials. With respect to whether there were any public rights other than passage in the Square, Mr. Justice Wills in Lewis abstained "from pronouncing a judgment upon that which we think it is not under the circumstances for us to decide," although Lewis had failed to convince him that a right to hold meetings was among them. 21 Q.B.D. at 198; see, e.g., 333 PARL. DEB., H.C. (3d ser.) 1035-37, 1043 (Mar. 5, 1889) (Lewis and Cunningham Graham did not decide the issue of the right of meeting on its merits); B.L. Mosely, Trafalgar Square, 13 L. MAG. & L. REV. 260, 262 (1888) (ruling in Cunningham Graham was dictum).

221. Bailey, supra note 66, at 115. The law officers advised the Home Office to resolve the matter by framing explicit regulations under the Trafalgar Square Act. Id. at 115-16.
222. Richter, supra note 59, at 159.
223. See Bailey, supra note 66, at 116.
224. See Bailey, supra note 66, at 117.
225. Victor Bailey has pointed out that the government was more divided, cautious, and legalistic in dealing with the unemployed than has generally been assumed. See Bailey, supra note 66, at 117-18. It is equally important, however, not to underestimate the unlawful lengths to which it was sometimes willing to go. Although the government would undoubtedly have preferred judicial ratification of its actions, it considered the Trafalgar Square situation sufficiently urgent to follow for years a course of action the legality of which was seriously questioned both inside and outside the government.
226. The government thought that permitting meetings on a regulated basis would be perceived as a concession to the Liberals and Radicals, whereas new regulations banning meetings would imply that the police had previously acted unlawfully. Bailey, supra note 66, at 115, 117.
rallying cry.\textsuperscript{226} In March 1888 and again in March 1889 lengthy debates in the House of Commons scrutinized the actions of the police and the government on "Bloody Sunday." One Radical member even threatened that if the administration did not permit meetings in the Square, "violence and bloodshed" might ensue and a "terrible responsibility will rest upon the Government."\textsuperscript{227} Nonetheless, the government relied on the law as established in the cases of\textit{Cunninghame Graham} and\textit{Lewis}. The judges had "distinctly laid it down," Matthews instructed the House in 1889, "that there was no right of public meeting in Trafalgar Square."\textsuperscript{228} Magistrates as well treated the matter as judicially settled, upholding the ban and refusing to certify any legal issues for appellate review.\textsuperscript{229} Despite the probable illegality of its policy, the Conservative government continued the prohibition in place throughout its five remaining years in office.\textsuperscript{230}

\begin{itemize}
  \item \textsuperscript{226} The Liberals did not immediately support the Radical challenge to the ban, as Gladstone preferred to wait until the courts had ruled on its legality. Pressure by the Radicals finally induced the Liberals to join them in directly attacking the notice in a debate in March 1888. \textit{Mace, supra} note 161, at 195. The Radicals, relying on\textit{Beatty}, pressed the government to safeguard the "long-acclimated popular right" of public meeting in Trafalgar Square by submitting proposals to regulate the right. \textit{333 Parl. Deb., H.C. (3d ser.)} 996-97 (Mar. 5, 1889). They pointed out that for nearly forty years prior to Bloody Sunday, Trafalgar Square had been used for purposes of public meeting, \textit{id.} at 995, and insisted that at the time section 52 was enacted no one had dreamed that it would be used for the purpose of suppressing meetings. \textit{id.} at 1046. James Stuart, M.P. for Shoreditch, and five other East London M.P.s drafted a bill to authorize public meetings in the Square. Their proposal was careful to respect the right of passage, providing that no public address "shall be delivered where the assemblage of persons to hear the same causes obstruction to the use of any road or walk by the public outside of the boundaries herein mentioned, and no such obstruction shall be wilfully caused by any person forming part of any assemblage which may have met to hear any such address." \textit{Brit. Parl. Papers, A Bill for the Regulation of Meetings in Trafalgar Square, H.C.}, 1888. The second reading was put off ten times and finally abandoned, and a similar bill introduced by Cunninghame Graham suffered the same fate. \textit{Mace, supra} note 161, at 197. Reform had to await the return of the Liberal Party to power in 1892. \textit{id.} at 198.
  \item \textsuperscript{227} \textit{333 Parl. Deb., H.C. (3d ser.)} 999 (Mar. 5, 1889).
  \item \textsuperscript{228} \textit{id.} at 1010.
  \item \textsuperscript{229} Both the government and the Radicals claimed to be frustrated at the inability to obtain a High Court judgment pronouncing unequivocally on the validity of the ban. \textit{See} \textit{333 Parl. Deb., H.C. (3d ser.)} 993-95, 1010 (Mar. 5, 1889); \textit{Bailey, Metropolitan Police, supra} note 66, at 115 (throughout 1888 the courts deflected all attempts to challenge the notice of November 18).
  \item \textsuperscript{230} \textit{See} Bailey,\textit{ Metropolitan Police, supra} note 66, at 117.
\end{itemize}
The issue was finally resolved with economic improvement and the return of the Liberals to power in 1892. Gladstone appointed Asquith, the Salvationists’ defender at Torquay and Eastbourne as well as Cunninghame Graham’s defender at Trafalgar Square, to be Home Secretary in his new administration. Asquith now moderated his libertarian posture and withdrew his endorsement of an absolute right to meet in the Square. He offered the Radicals an acceptable compromise, however, agreeing to allow public meetings on a limited basis. He abrogated the November 18 ban and promulgated restrictive regulations under the Trafalgar Square Act permitting daylight meetings and processions on weekends and holidays conditional on the police receiving advance notice and approving the routes. A right to meet on this particular highway was thus conferred by regulation and, however constricted, it was a more substantial right to public meeting than existed in any other street. In contrast to processions, which after the 1880s could only be prevented by special regulation, meetings could only be permitted on the same basis. The unusual situation of Trafalgar Square aside—the exception proving the rule—by the end of the decade it was indisputably the law that street meetings unlawfully interfered with the right of passage.

C. The Doctrinal Resolution of the 1880s

The decade of the 1880s was the first critical period when the government used nuisance law systematically as a public order device, and the respective fates of the Salvationists and the socialists suggest two primary conclusions. First, “obstruction” in its various forms was a potent discretionary tool against street assemblies, bestowing many advantages that traditional public order doctrines lacked: it extended to most street activities, reliably brought convictions, presented the appearance of impartiality, held demonstrators responsible for the conduct of their audiences, and in regulatory form permitted reasonable prior restraints.

231. Within two days of Asquith’s taking office, the press began to discuss the issue of the Trafalgar Square notice and the Metropolitan Radical Federation pressured him to act. At a meeting at the Home Office in October 1892, a deputation of the Federation accepted his compromise, a modification of Stuart’s proposed regulations of 1889. See MACE, supra note 161, at 198.

232. See 18 PARL. DEB., H.C. (4th ser.) 884 (Nov. 14, 1893); RICHTER, supra note 59, at 160; E.R.H. Ivamy, The Right of Public Meeting, 2 CURRENT LEGAL PROB. 183, 190-91 (1949). Of course, the restrictions evaporated on certain occasions, as when large crowds filled the Square to celebrate Queen Victoria’s Diamond Jubilee or the relief of Mafeking in 1900. See MACE, supra note 161, at 204.
Second, the political applications of the law in this period shaped the legal doctrine, sharpening and crystallizing the distinction between stationary meetings and moving processions. The contemporaneous challenges to governmental authority posed by the Salvationists and the socialists solidified the inchoate distinction that had existed prior to the 1880s but remained unrefined by the courts and untested by political and social conflict. Although the two movements had much in common—creating public disturbances, seeking working-class recruits, and defying governmental authority—the differences between them were critical for the evolution of legal theory. The Salvation Army processions, affecting primarily local authorities in peripheral areas, were a distressing but ultimately insubstantial threat to general public order. Indeed, the Salvationists commanded considerable sympathy from the public, the courts, and the central government for the abuse inflicted on them by the Skeletons and provincial officials. In contrast, the meetings of the unemployed in the heart of London were part of a radical political campaign that, while perhaps not perceived as revolutionary, nonetheless generated pervasive and acute public alarm. Differing social threats, differing public pressures, and differing governmental responses accentuated and entrenched the conceptual bifurcation in legal doctrine. The distinction between meetings and processions invalidated the major organizational tool of the socialists at the acceptable cost of legitimating the primary tactic of the Army.

Formal constraints inherent in the concept of passage—the fact that processions, unlike meetings, moved along the street—doubtless played a role in this development. They cannot, however, provide a full explanation, because the "right to passage" was neither logically nor factually determinate. Arguably the religious processions of the Salvation Army, conducted for purposes of publicity and recruitment, constituted "legitimate travel" no more than had the actions of Harrison and Maisey in passing along the road to accomplish their own ulterior objectives. Further, the courts could easily have differentiated concerted from individual passage, treating the former as an unreasonable use of the road. A New Zealand judge in 1886 indeed offered such an analysis, observing in *McGill v. Garbutt* that passing in procession through the streets was entirely different from the "individual right of passage of

the same persons as private citizens without preconcerted arrangement and mutual understanding.\textsuperscript{234} In his view, a compact body moving along a thoroughfare, especially if "attended by the rabble which is frequently attracted," had an obvious tendency to obstruct traffic and become a nuisance.\textsuperscript{235} The English courts, however, rejected this approach, forging a doctrine that conformed to prevailing social policy judgments and enabled the Salvation Army to march.

The favorable treatment of processions served the additional purpose of preserving the lawfulness of such customary and "respectable" civic processions as the Lord Mayor's parade, military pageants, the judges' processions, and other community spectacles. These traditional marches, predating the nineteenth-century phenomenon of public meetings, might have become ensnared in obstruction law if Salvation Army processions were treated as unlawful. Richard Carlile, after all, had argued plausibly as early as 1834 that civic processions were as obstructive of the highway as political demonstrations.\textsuperscript{236}

Equally important, recognition of the doctrinal distinction between the two types of assembly enhanced the credibility of the government in its effort to suppress socialist meetings. The fact that even disruptive and "preposterous" processions remained lawful demonstrated the objectivity and fairness of the legal regime. Validating the Salvationist marches confirmed that formal legal rules, not practical politics, dictated the government's prohibition of radical meetings. The legitimacy that the distinction conferred on the harsh treatment of meetings was especially useful when, as at Trafalgar Square, the government strained and twisted the law to accomplish patently political objectives.

Indeed, at every possible opportunity the government justified its actions against the socialists by reliance on "the law" and its fundamental and "objective" premise that meetings were unlawful. In 1888 the Attorney General informed the House of Commons that there was "not from beginning to end of the books, one single dictum or judgment justifying or supporting the proposition" that there was a right of public meeting in a thoroughfare set aside for passage.\textsuperscript{237} Conversely, the

\textsuperscript{234} Id. at 75.
\textsuperscript{235} Id. at 75-76.
\textsuperscript{237} 323 PARL. DEB., H.C. (3d ser.) 47 (Mar. 2, 1888). Commenting on Dicey's statement that people may assemble "for a lawful purpose and in a lawful manner," he asked: "Does any lawyer in this House pretend that a lawful purpose is to go into a

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government readily acknowledged the legitimacy of processions, recognizing that public opinion supported the distinction. When the Police Commissioner considered banning a friendly societies' march in 1890, Matthews objected that "[t]hese men are the pick of the working classes":

Processions are not necessarily illegal. . . . I am quite aware how troublesome to the police these demonstrations are, but it will not do to go beyond the law in dealing with them. In the case of Trafalgar Square the law was strained to the utmost; but public safety and public opinion supported the action of the Police. That would not be so in this instance.23

Thus, although the dichotomy between meetings and processions accorded with formal notions of "passage," the historical contingencies of divergent political pressures and changing social values, not logic or language, ultimately determined its contours. Allowing the Salvation Army to march was a reasonable price to pay to protect customary civic processions and legitimize the suppression of socialist meetings.

In permitting the Salvation Army to march, the resolution of the 1880s enabled all other demonstrators to march as well. Traditionally a means of protecting the convenience of the public in moving along the street—and as such invoked by the government in its prosecutions of stationary meetings—after the 1880s the "right to passage" could also be asserted by political and religious marchers as a right to use the highways for purposes essentially unrelated to ordinary travel. The legitimacy of Salvation Army processions, settling into the law, came to have broad application as all types of marchers equally claimed a "right to passage." In the case of marchers, therefore, "reasonableness" was defined to include obstructing the road and causing considerable annoyance to passers-by. Society and the courts, in balancing the passage rights of the larger community against those of participants in processions, had determined that the marchers' rights could supersede the right to convenience of the travelling public.

highway and make a speech? Why, it has been decided over and over again by the Courts of this country that a man may not go into a public place and make a speech so as to attract a crowd. It has been decided that a man may not put pictures in his window so as to attract a crowd. It has been decided that a man may not even preach on his private property if people gathered in the street to listen to him. It is an indictable offence so to obstruct a public place." Id. at 48.

238. RICHTER, supra note 59, at 159.
The doctrinal framework constructed in the 1880s solidly and irrevocably embedded the distinction between meetings and processions in the law. *Lowdens v. Keaveney,* an Irish case decided in the early twentieth century, was the first High Court decision to address obstruction law in the specific context of political processions, and it formalized the resolution of the 1880s. Whereas *Beatty* had dealt only with processions, and *Cunninghame Graham* and *Lewis* only with meetings, *Lowdens* directly compared the two forms of assembly and affirmed the prima facie legitimacy of the former in contrast to the inherent unlawfulness of the latter.

Early on a rainy Easter morning in 1901, a band playing sectarian tunes and accompanied by a few hundred persons marched down a Belfast Street. The magistrates convicted the drummer and eighteen others of wilfully interrupting the free passage of persons and carriages. Characterizing the case as one of “very considerable importance,” the High Court reversed the conviction because the magistrates had failed to respect the “marked distinction” between a stationary assembly and a moving crowd. Unlike meetings, the court explained, processions used the streets for passage and were therefore prima facie legitimate. The funeral of an illustrious soldier or statesman, a Lord Mayor’s show, or the judges’ procession to St. Paul’s might all occasion “substantial obstruction to free passage,” but they were not wrongful if they did not “unreasonably encroach on the rights of others.”

The court’s application of a reasonableness standard was traditional, but the opinion was unusual in developing it at some length and imbuing it with greater flexibility. In the view of the court, “reasonableness” was a common-sense notion based on ordinary experience, one that considered such circumstances as the “occasion, duration of the uses, place and hour” as well as whether the obstruction was “trivial, casual, temporary and without wrongful intent.” It inevitably involved

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239. [1903] 2 Ir. R. 82 (K.B.).
240. Id. at 82. They were convicted of violating the Summary Jurisdiction Act (Ireland), 1851, 14 & 15 Vict., ch. 92, § 13, a statute imposing criminal penalties on a person who wilfully prevented or interrupted the free passage of any person or carriage in the street. Id. at 86.
241. [1903] 2 Ir. R. at 85.
242. Id. at 89, 92.
243. Id. at 89-90. The magistrates had erred, the judge declared, in basing their judgment on the mere fact of an obstruction without considering whether the use of the street by a moving body was unreasonable. Id. at 88. The magistrates also had not considered whether the statutory requirement of “wilfulness” was satisfied, and it was unlikely that “excessive uses of a right” could be a guilty obstruction. Id. at 94.
244. Id. at 90-91.
some degree of balancing: "There must be give and take. In estimating a nuisance some regard must be had to the incidents of everyday life." \textsuperscript{245} \textit{Lowdens} was a specific articulation in the public order context of a comprehensive factual approach that judges would later increasingly adopt in applying obstruction law to street activity. More important, the case treated processions, even those of a political character, as mere "incidents of everyday life." The opinion made clear that marches were reasonable despite the fact that they were substantial obstructions that encroached significantly on the right to travel of the general public.

Despite the court's endorsement of the prima facie lawfulness of processions and a flexible approach to "reasonableness," it did not decide whether the procession at issue was in fact reasonable. The positing of funerals, pageants, and judges' processions as examples of reasonable processions\textsuperscript{246} however, indicated that the presumptive lawfulness of marches would serve to protect traditional processions from the force of obstruction law. An ad hoc, factually oriented "reasonableness" standard would permit magistrates to validate social policy judgments in favor of customary marches while leaving objectionable processions open to obstruction charges.\textsuperscript{247} The court found

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245. \textit{Id.} at 90. This flexible approach was also evident in a 1913 Scottish case, \textit{M'ara v. Magistrates}, [1913] Sess. Cas. (J.) 1059, where the Lord President stated: "The whole thing is a question of degree and nothing else, and it is a question of degree which the Magistrates are the proper persons to consider in each case . . ." \textit{Id.} at 1073. As in \textit{Lowdens}, this broad approach nonetheless precluded legitimacy for street meetings. The judge continued: "I wish most distinctly to state it as my opinion that the primary and overruling object for which streets exist is passage. The streets are public, but they are public for passage, and there is no such thing as a right in the public to hold meetings as such in the streets." \textit{Id.}

246. As an example of an unreasonable procession, Mr. Justice Gibson mentioned \textit{R. v. Long}, 59 L.T.R. (n.s.) 33 (Q.B. 1888), where several young men had walked arm-in-arm up and down the sidewalk and driven others off the path. He remarked that neither individuals nor processions could escape responsibility for such conduct "on the pretext that they kept in motion." \textit{Lowdens}, [1903] 2 Ir. R. at 90.

247. The court's affirmation of the right to march in this case also corresponded to parliamentary intent. In 1850 Parliament enacted the Party Processions Act to dampen religious strife in Ireland by prohibiting processions of both Protestant and Catholic groups. An Orange leader, Johnston of Ballykilbeg, was imprisoned for violating the Act in 1868 and soon thereafter was elected to a Belfast seat in Parliament. He moved to repeal the Act and accomplished this in 1872 with bipartisan support from Catholic and Protestant M.P.s. \textit{E.R. Norman, The Catholic Church and Ireland in the Age of Rebellion} 346, 407-08 (1965). The court in \textit{Lowdens} was concerned that the obstruction charges at issue might have been a device to circumvent the repeal of the
stationary assemblies, in contrast, to be unreasonable per se. It construed *Carlile* as a “meetings” case and considered the decision an inapposite precedent, standing only for the proposition that it was unreasonable to collect a stationary crowd in the street.\textsuperscript{248} The limitation of *Carlile* to meetings demonstrated that its tentative distinction between stationary and moving crowds had now reached maturity.

\textbf{D. Congruence of Policy and Doctrine: The Suffragette Campaign}

Events soon confirmed the political utility of the doctrinal resolution permitting processions but invalidating meetings. In the years preceding the First World War, the second critical period in the political history of obstruction law, the refined doctrine assisted the government in meeting a new and exceedingly intractable challenge to its authority.

The decade prior to World War I was a period of sustained civil unrest,\textsuperscript{249} and the suffragette campaign for the franchise contributed considerably to the turmoil. Evoking the Salvationists with their abrasive marches and the socialists with their homeless encampments, the suffragettes similarly aroused antipathy by their single-minded dedication and calculated use of provocative tactics.\textsuperscript{250} They focused their efforts on embarrassing the Liberal government that had severely disappointed their expectations for franchise reform, and they embraced such controversial strategies as heckling speakers at Liberal meetings, vandalizing government property, and engaging in hunger strikes.\textsuperscript{251}
They also held street meetings and picketed public offices, thereby creating a new opportunity for the application of obstruction law.

Writing from Holloway Prison in 1906, the suffragette Teresa Billington recounted the first militant incident of the suffragette movement. The previous year in Manchester two leading members of the Women’s Social and Political Union (WSPU), Christabel Pankhurst and Annie Kenney, had been ejected from a Liberal meeting at the Free Trade Hall for heckling Sir Edward Grey, who was speaking in support of Winston Churchill’s Liberal candidacy for a parliamentary seat. When the women proceeded to organize their own meeting outside the hall, the police arrested them on what Billington termed the “technical charge” of obstruction. Refusing to be fined, the women were sentenced respectively to three and seven days’ imprisonment. Numerous arrests and prosecutions for obstruction followed in subsequent years.


252. Kenney and Pankhurst attempted to ask Grey a question relating to women’s suffrage. When he refused to answer, they stood up and cried “Votes for Women,” and were thereupon ejected. RAYMOND POSTGATE, THE LIFE OF GEORGE LANSBURY 121 (1951).


254. MARION RAMELSON, THE PETICOAT REBELLION: A CENTURY OF STRUGGLE FOR WOMEN’S RIGHTS 133 (1967). The suffragettes welcomed imprisonment to publicize their cause, following the example of the Salvationists in rejecting lighter options such as paying a fine or entering into a recognizance for good behavior. Their consistent refusal to cooperate eventually forced the authorities to institute formal prosecutions rather than relying on binding-over powers. See 160 PARL. DEB., H.C. (4th ser.) 331 (July 6, 1906); 193 PARL. DEB., H.L. (4th ser.) 1429-30 (July 29, 1908); WILLIAMS, supra note 3, at 98. In 1913 George Lansbury was bound over after giving a speech in Bow to supporters of the WSPU. He unsuccessfully challenged the order on the ground that “[w]e have the right to use the streets, the people have the right to jeer in the streets, and there is no reason why the authorities down here should attempt to use their power to coerce us into submission.” Lansbury v. Riley, 109 L.T.R. 546, 547 (K.B. 1913).

255. Billington claimed that 173 women willingly suffered imprisonment for “technical” breaches of the law in 1905-06. BILLINGTON-GREIG, supra note 253, at 111. For example, in June 1906 the police again arrested Billington and other women for obstruction in Manchester, 159 PARL. DEB., H.C. (4th ser.) 648 (June 25, 1906), and in 1908 two suffragettes were charged with obstruction of the highway for distributing leaflets in Regent Street. On the latter occasion a member of Parliament objected that the police court evidence had substantiated neither the presence of a crowd nor obstruction of traffic; the offense in fact was “perfectly trivial.” 195 PARL. DEB., H.C. (4th ser.) 1207-08 (Nov. 4, 1908); see id. at 1194; 165 PARL. DEB., H.C. (4th ser.) 969
The novelty of the suffragette agitation in the history of obstruction law lay in the women's adoption of a particular form of stationary street protest. A major tactic of the WSPU was to picket the House of Commons and other government buildings in an effort to deliver suffrage petitions to the Prime Minister. After 1906 that office was occupied by none other than H.H. Asquith, who at this point in his career was neither the defender of religious and political radicals nor an astute compromiser but rather an ardent opponent of the demonstrators. Inveterately hostile to women's suffrage, he avoided the delegations and forced them to spend hours and even days awaiting him on the pavements outside Parliament or Whitehall. During their extended stationary vigils, the women carried banners, distributed leaflets, and sought the support of passers-by. The government and the courts treated the picketing—even if conducted by only one or two persons—as functionally equivalent to a street meeting.

Their chosen tactic of picketing the entrances to Parliament and other government buildings rendered the women especially vulnerable to obstruction charges under a Sessional Order enacted annually by the House of Commons. Issued pursuant to the Metropolitan Police Act, the Order directed the police to prevent obstruction in the highways near Parliament in order to facilitate the passage of members to and from the House. Its legality derived from section 52 of the Act, the same section

(Nov. 22, 1906); Postgate, supra note 252, at 121-22.


257. See Roy Jenkins, Asquith 57 (1964); Koss, supra note 250, at 102, 131. Asquith stated in his memoirs that the "resources of the law were severely taxed by the fact that the outrage-mongers were for the most part women intoxicated by a genuine fanaticism." He claimed that "the campaign developed into a species of vendetta of personal violence," and that "[e]ven our children had to be vigilantly protected against the menace of abduction." Herbert Henry Asquith, Fifty Years of British Parliament 141 (1926).

258. The only reported prior use of obstruction against non-industrial picketing occurred in M'Giveran v. Auld, 21 R. (J.) 69 (1894), where shopkeepers in Greenock, Scotland had disagreed on whether to introduce a half holiday on Wednesdays. Id. at 70. A tailor and three others who supported the proposal obstructed the premises of opponents by parading up and down with boards and placards. A magistrate sentenced them to a fine of £1 or seven days' imprisonment for violating a local act by walking back and forth "to the obstruction and annoyance of the residents and passengers in Dalrymple Street." Id. (italics omitted). On appeal, Lord Young expressed his displeasure at the lightness of the sentence. "[T]here was an obstruction of the street of a serious character," he remarked, "wilfully and purposefully got up in a particular locality for a most indefensible and illegal purpose, and for this, if it had been tried at common law, and the accused convicted, I should have expected a sentence of a lengthened imprisonment with hard labour." Id. at 73. Lord Traynor concurred, remarking that "I do not think that his Lordship has overstated the very serious and aggravated character of the offence . . . ." Id. at 74.
at issue in the Trafalgar Square demonstrations.\textsuperscript{259} The police frequently utilized the Order to arrest members of suffragette deputations on obstruction charges, especially in 1909 when the suffragettes escalated their picketing efforts. In February, when a number of suffragettes awaiting the Prime Minister were convicted of obstruction of the highway, the government as usual claimed that the issue was simply that the women had "caused the collection of a crowd" and that "the approaches to the House had become obstructed."\textsuperscript{260} The following month, a member of the Women's Freedom League was imprisoned for demonstrating outside 10 Downing Street; according to the Home Secretary, the evidence "clearly proved the charge of obstruction."\textsuperscript{261}

Two additional picketing episodes later that year led to unsuccessful attempts by the suffragettes to challenge the Order's legality. \textit{Pankhurst v. Jarvis}\textsuperscript{262} concerned events on the evening of June 29, 1909, when a "Women's Parliament" in Caxton Hall delegated eight members of the WPSU to picket on the public footpath outside St. Stephen's entrance to the House of Commons. The picketing attracted a crowd of fifty or sixty spectators, but it did not prevent M.P.s or other persons having business at Westminster from entering or leaving the Houses of Parliament. Two members of the deputation, Emmeline Pankhurst and Evelina Haverfield, were convicted under the Sessional Order for obstructing access to Parliament and disobeying a police order to disperse.\textsuperscript{263}

\textsuperscript{259} Section 52 of the Metropolitan Police Act authorized the Police Commissioner 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 [and other locations] . . . ." 2 & 3 Vict., ch. 47, § 52. The Sessional Order of the House of Commons directed the Police Commissioner to "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. . . ." 7 PARL. DEB., H.C. (5th ser.) 393 (June 30, 1909). The Speaker of the House stated in 1909 that an identical Sessional Order had been passed annually for nearly seventy years. 7 PARL. DEB., H.C. (5th ser.) 610 (July 1, 1909).

\textsuperscript{260} 2 PARL. DEB., H.C. (5th ser.) 508 (Mar. 11, 1909). Another M.P. observed that in fact the only obstruction had been caused by the police cordon drawn up to deter the demonstrators. \textit{Id.}

\textsuperscript{261} 1 PARL. DEB., H.C. (5th ser.) 1719 (Mar. 4, 1909).

\textsuperscript{262} 26 T.L.R. 118 (K.B. 1909).

\textsuperscript{263} The women were convicted of "wilful obstruction of the police in the execution of their duty" under the Prevention of Crimes Amendment Act, 1885, 48 & 49 Vict., ch. 75, § 2. This was a broad summary offense committed by anyone
In their appeal to the Divisional Court the women presented two arguments: first, that the "obstruction" was only caused by denial of their right to petition the Prime Minister; and second, that police implementation of the Order deprived them of their right to passage. The court rejected both propositions. On the claim of a right to petition, Lord Alverstone concluded that although the women had such a right—and, in his view, Asquith would undoubtedly have received a petition that was properly presented—they did not have a right to deliver the petition by means of a personal deputation. In response to the argument that the police had unlawfully used the Order to prevent the women and others from passing along the highway, the court observed that the House of Commons unquestionably had the authority to issue a Sessional Order to prevent obstructions at the approaches to Parliament. Although the judges might have reached a different result had the police applied the Order in a manner that interfered with public passage on the highway, fortunately that question did not arise: "They need not consider what would have happened if a constable, under colour of the above orders, had stopped these ladies [processing] in the street." The court thus characterized the women's conduct as a violation of the public's right to passage rather than as an exercise of any right of their own, and in contrast to Cunninghame Graham it took pains to emphasize that the police had not unlawfully strained the applicable provision of the Metropolitan Police Act.

A few weeks later, in Despard v. Wilcox, the Divisional Court took the opportunity to reaffirm its holding in Pankhurst. On the afternoon of August 18, 1909, members of the Women's Freedom League picketed in groups of two, three, and four on the pavements interfering with an act undertaken by a constable in accordance with a common law or statutory "duty." In this case, the women admitted that they were on the highway, but they argued that because of their rights to petition and pass, the police had no "duty" to order them to disperse. The position of the government, upheld by the court, was that the police had a duty to clear the streets of obstruction. The fact that the offense of obstructing a constable in the execution of his duty was predicated on the anterior offense of highway obstruction is obvious from the opinion but not from the formal charge, suggesting that the use of obstruction was much wider than the formal record indicates. The police frequently charged obstruction of a constable when a person obstructed the highway and refused to move after a police request to do so. See, e.g., Sherr, supra note 18, at 125 n.1; Thornton, supra note 4, at 93. The use of binding-over powers could similarly conceal an underlying obstruction offense.

264. That this was in fact the women's argument is indicated clearly from the court's comments in Despard v. Wilcox, 102 L.T.R. 103, 107 (Q.B. 1910).
265. Pankhurst, 26 T.L.R. at 121. In fact, the police escorted the deputation from Caxton Hall to the House of Commons, indicating their reluctance to arrest the women for obstruction while they were actually passing along the streets. Id. at 119.
266. 102 L.T.R. 103.
outside 10 Downing Street. Their presence as usual attracted a number of spectators to the streets, and by the following afternoon the police had lost patience and arrested some of the suffragettes for violating the Order. Despard reiterated the court's view that picketing constituted an unlawful stationary assembly. Lord Alverstone, relying on Pankhurst, again suggested that the police might have acted questionably if they had employed the Order to prevent persons from passing along the highway, but in this case they had used their powers only to prevent stationary obstructions. The right of an individual to pass along the street differed from conduct that would unquestionably lead to obstruction of the thoroughfares. According to Mr. Justice Bucknill, a reasonable use of the highway that happened to draw an obstructive crowd was not an offense, but in this case the magistrate had found that the women were using the highway improperly and unreasonably.

On the doctrinal level, the suffragette opinions illustrated four persistent and interrelated themes. First, following Lowdens, the two cases contrasted meetings with processions, confirming that the dichotomy had become a settled feature of the law. Whereas Lowdens had found a procession to be prima facie lawful, Pankhurst and Despard reaffirmed the unlawfulness of street meetings. Second, the cases extended the definition of "meeting" to encompass stationary picketing.

267. Id. at 104-05. Although the case directly concerned picketing only on these two days, the picketing apparently had gone on for a much longer period. When at noon on August 19 Asquith emerged from a cab at 10 Downing Street, one of the appellants, Lily Boileu, said to him, "Mr. Asquith, we have been waiting here six weeks with this. Will you take it?" The Prime Minister replied, "No; don't be silly; go away!" whereupon she unsuccessfully tried to throw the petition at him. Id. at 104. In July 1909 an M.P. asked Asquith if he was aware that over one hundred members of the Women's Freedom League had during the past three weeks stood outside the House of Commons for an aggregate of over three thousand hours to gain an interview. Asquith replied that he did not think that any public interest would be served by receiving another deputation. 8 PARL. DEB., H.C. (5th ser.) 846-47 (July 26, 1909). The magistrate concluded that the picketing was unreasonable and that the police had a duty to maintain a clear passage for M.P.s by arresting persons who defied a police order to disperse. Despard, 102 L.T.R. at 106.

268. Despard, 102 L.T.R. at 107. Lord Alverstone noted that collecting a crowd was the natural consequence of presenting the petition in person: "As we know from experience of such conduct, crowds of idle people, and perhaps people who are occupied too, are interested in this, and they assemble in considerable numbers and hope there will be something in the nature of a disturbance, and they rather rejoice to see these unfortunate ladies being taken off to prison." Id.

269. Id.

270. Id. at 108.
conducted by as few as two persons, indicating the malleability of obstruction law to meet diverse threats to public order. Third, the opinions reflected the continuing formal application of a “reasonableness” test, although, as the cases demonstrated, it was in fact predetermined that political meetings were an inherently unreasonable use of the streets. Finally, passage again emerged as an important right whose vindication was claimed by both sides in the dispute. The government and the courts justified the prosecutions by the need to maintain the streets free from obstruction, while the suffragettes asserted that the authorities were undermining their own passage rights. Although the women’s argument was unsuccessful, the court took special care to ascertain that the application of the Sessional Order did not impermissibly violate the Metropolitan Police Act or interfere with their “right of passage.” Picketing simply did not qualify as a proper exercise of that right.

The use of obstruction against the suffragettes demonstrated the continuing serviceability and utility of highways law. Accused by franchise proponents of harassing the women, the government again marshalled the standard defenses that prosecutions were instituted only to prevent obstructions and were in any event the responsibility of the local police. The Home Office declared that it had issued only a “general instruction” to the police to secure the passage of members; beyond that, the “police had done their duty, and no doubt would continue to do it.” The government proclaimed itself loathe as a policy matter to interfere with the discretionary powers of magistrates and enforcement officials. “The procedure to be adopted is a matter for the discretion of the police authorities,” declared the Home Secretary, “and I see no reason for any interference on my part.” Obstruction

271. Members of Parliament frequently complained that the police arrested the suffragettes only for “technical” offenses. See, e.g., 160 PARL. DEB., H.C. (4th ser.) 331-32 (July 6, 1906) (charging that the women were suffering “from a vindictive prosecution”); 1 PARL. DEB., H.C. (5th ser.) 1405 (Mar. 3, 1909), 1721 (Mar. 5, 1909).


273. 195 PARL. DEB., H.C. (4th ser.) 1195 (Nov. 4, 1908); see 1 PARL. DEB., H.C. (5th ser.) 1405 (Mar. 3, 1909); 7 PARL. DEB., H.C. (5th ser.) 394 (June 30, 1909). The day that the defendants in Despard were arrested, a member sarcastically asked Gladstone how it was “that an obstruction was caused something like 24 hours after the picketing began?” According to the Home Secretary, it was “necessary for the police on each occasion to decide according to the best of their judgment whether there is or is not obstruction.” 9 PARL. DEB., H.C. (5th ser.) 1530 (Aug. 19, 1909).
again proved to be a flexible, reliable, and ostensibly impartial means of governmental control over troublesome street activity.274

In this period, moreover, the obstruction doctrine continued to coalesce with political exigencies. Just as Lowdens served the function of protecting “reasonable” processions, so the suffragette cases enabled the government to control a new and politically combustible form of protest activity in the capital.275 The extension of “meeting” to encompass picketing was not logically compelled, as it would have made equal sense to distinguish individual from concerted activity, or acts truly

274. A certain degree of scholarly attention has focused on the pre-World War I case of Burden v. Rigler, [1911] 1 K.B. 337, involving the Public Meeting Act 1908, 8 Edw. 7, ch. 66, § 1, which made it a crime to “act in a disorderly manner” at a “lawful public meeting.” The government had rushed the act into law in eleven days after suffragettes heckled Lloyd George at a Liberal meeting in the Albert Hall in December 1908. E. SYLVIA PANKHURST, THE SUFFRAGETTE MOVEMENT: AN INTIMATE ACCOUNT OF PERSONS AND IDEALS 298 (Kraus Reprint Co. 1971) (1931). Burden, chairman of a local branch of the Tariff Reform League, organized a meeting on the highway that Rigler disrupted. The justices dismissed the information on the ground that a meeting on a highway could not be a “lawful” public meeting within the meaning of the Public Meeting Act. Burden, [1911] 1 K.B. at 339. The Divisional Court concluded that the magistrates’ ruling had gone too far in concluding that meetings in the street were not “necessarily unlawful.” Id. at 339-40. It is a stretch, however, to interpret the one-paragraph opinion as conferring a right to hold a meeting on the highway. According to Lord Alverstone, although a meeting on a highway was not necessarily unlawful, it would be so if there were an obstruction, and on that factual matter “he did not express an opinion.” Id. at 340. Moreover, the judge was apparently eager to implement a particular statute previously applied only to indoor meetings, which would have been impossible without a finding that a meeting was lawful at least for purposes of the Public Meeting Act. According to Lord Alverstone, the justices had no right to assume that simply because the meeting was on a highway, it could be interrupted notwithstanding the Public Meeting Act. Id. at 340; see A.L. Goodhart, Public Meetings and Processions, 6 CAMBRIDGE L.J. 161, 167 (1937). At most, the decision held that the lawfulness of a meeting was a factual question of obstruction, and this was already the formal law. In any event, the Public Meeting Act was soon a dead letter. See PANKHURST, supra, at 298; Note, Public Order and the Right of Assembly in England and the United States: A Comparative Study, 47 YALE L.J. 404, 419 (1938).

275. Governmental anxiety about suffragette picketing activity reached the point where officials feared an assassination of the Prime Minister. In September 1909 the Home Secretary received a police report that for the past six weeks, two members of the Women’s Freedom League had been practicing pistol shooting at a shooting range in London’s Tottenham Court Road. The Police Commissioner wrote that “there is now definite ground for fearing the possibility of the P.M.’s being fired at by one of the pickets at the entrance to the House.” ROSEN, supra note 251, at 126; see JENKINS, supra note 257, at 246. The Home Secretary worried that Asquith might be the first Prime Minister to be assassinated since Percival in 1812. See GARNER, supra note 251, at 30.
incidental to passage from acts using passage to accomplish ulterior objectives, than to place all stationary conduct in one category and all moving activity in another. However, treating picketing as a form of "meeting" allowed the doctrine to expand in a plausible if not ineluctable way to serve governmental interests. To this point the doctrinal distinction between meetings and processions was congruent with—indeed, had been significantly determined by—the government's political requirements. This congruence would unravel in the coming decades.

IV. DISSONANCE AND REORIENTATION: THE RIGHT OF PASSAGE FROM THE 1930S TO THE PRESENT

Throughout the twentieth century, obstruction law continued to afford the police an effective mechanism for regulating public order during periods of civil strife, especially in three particularly tumultuous decades—the 1930s, 1960s, and 1980s—when it was employed primarily against groups on the political left. The earlier features of obstruction doctrine persisted: unfettered discretionary enforcement by local authorities; use of obstruction charges to mask selective prosecution of targeted groups; judicial deference to ad hoc factual determinations by police and magistrates; application of a reasonableness analysis to determine the legitimacy of street activity; solicitude for adjacent private property owners; and the assumption that obstructive crowds would inevitably produce disorder and crime. However, changing political, social, and economic circumstances—world wars, depression, increasing governmental centralization, and mounting domestic violence—produced subtle yet significant alterations in these characteristics.

In particular, three developments occurred in the later twentieth century that profoundly affected the theory and practice of highways law. First, public apprehension of domestic disorder dramatically intensified as political action took increasingly militant forms and, with the advent of mass communications, became widely publicized. Second, the predicate underlying the doctrinal resolution of the 1880s, that processions were more benign than meetings, was undermined in the 1930s when tumultuous marches and countermarches emerged as the primary threat to public order. Legal theory grew discordant with political reality, and the government and the courts struggled to redress the imbalance between the two types of assembly without repudiating the established doctrinal framework. Third, there was growing acceptance of the need for preventive and centralized controls. In consequence, judges augmented the preventive common law powers of the police, and Parliament for the first time nationalized the regulation of public
assemblies. Culminating in the 1980s, these and other developments produced major functional if not formal alterations in the obstruction regime.

A. Communism and Fascism in the 1930s

The 1930s, the third critical period in obstruction law, was a decade of relentless economic distress and mounting political violence. The pattern of harsh treatment of meetings continued to conform to governmental objectives, and the authorities widely employed obstruction law to suppress gatherings by the left. However, in a period when processions, not meetings, became the dominant cause of domestic turmoil, solicitude for marches wilted and their privileged status appeared increasingly anachronistic. Politicians and judges struggled to counteract the presumptions that the resolution of the 1880s had embedded in legal doctrine, and they did so by supplementing highways law with new statutory and common law weapons of public order.

Severe depression and sweeping unemployment spawned two rival ideological movements that threatened public peace in the 1930s. The Communist-dominated National Unemployed Workers' Movement (NUWM), organized by skilled engineers to secure unemployment relief, orchestrated meetings outside labor exchanges and national "hunger marches." Its efforts provoked militant opposition from

276. The NUWM, formed by Wal Hannington in 1921, attempted to obtain either work or "full maintenance" for the unemployed. Its strength lay in the engineering centers of Glasgow, Coventry, Birmingham, and southeast Lancashire. Although closely associated with the Communist Party, it was not a revolutionary organization; the actions of the local branches primarily consisted of sending deputations to government agencies and representing the unemployed before public assistance committees. Owing to its Communist affiliations, however, the NUWM was never officially supported either by the Labour Party or the Trades Union Congress, although after 1933 there was greater cooperation between the unemployed movement and Labour rank and file to form a united front against fascism. See, e.g., Peter Kingsford, The Hunger Marchers in Britain 167-68 (1982); Jane Morgan, Conflict and Order: The Police and Labour Disputes in England and Wales 237 (1987); Ralph Hayburn, The Police and the Hunger Marchers, 17 INT'L REV. SOC. HIST. 625, 625-30 (1972).

277. The first national hunger march took place in 1922, and additional marches occurred in 1929, 1930, 1932, 1934, and 1936. Most involved about a thousand selected marchers starting off from various cities and reaching London a few weeks later for several days of demonstrations and rallies. See, e.g., Morgan, supra note 276, at 230; Hayburn, supra note 276, at 627. See generally Wal Hannington, Ten Lean Years (1940).
Fascist groups, most notably Sir Oswald Mosley's British Political Union, and clashes between the two movements erupted with growing frequency. Violence was especially endemic in the East End of London, where Fascists assaulted Jews, demonstrators of all stripes barricaded the streets, and marches and countermarches fueled widespread public panic.\(^{278}\) The heightened disorder induced the police to abandon their usual forbearance of public assemblies and to resurrect nuisance law as a device of political control.

I. The Street Meetings of the NUWM: Use and Abuse of Obstruction Law

The government was highly antagonistic toward the NUWM because of its radical ideology and Communist affiliations,\(^{279}\) and it gave increasingly centralized direction to local police forces as part of a coordinated national policy of repression.\(^{280}\) The police—who for their own reasons were largely hostile to the unemployed and relatively sympathetic to the Fascists\(^{281}\)—used obstruction law to suppress NUWM meetings outside labor exchanges, the organization's most fertile source of recruitment.\(^{282}\) The Highways Act 1835, which conferred a power of arrest without warrant, was an especially effective tool for dispersing such meetings.\(^{283}\) Referring to the statute's use for this

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278. See, e.g., DAVID WADDINGTON, CONTEMPORARY ISSUES IN PUBLIC DISORDER: A COMPARATIVE AND HISTORICAL APPROACH 32-33 (1992); Note, supra note 274, at 405.
279. The Tory government in the 1920s, the Labour government from 1929 to 1931, and the National Government after 1931 all sanctioned police severity toward the unemployed, although the government was somewhat more restrained after the rise of Hitler in 1933. See, e.g., KINGSFORD, supra note 276, at 167-68; MORGAN, supra note 276, at 232; WADDINGTON, supra note 278, at 31; Hayburn, supra note 276, at 630; Barbara Weinberger, Police Perceptions of Labour in the Inter-War Period: The Case of the Unemployed and of Miners on Strike, in LABOUR, LAW AND CRIME: AN HISTORICAL PERSPECTIVE 150, 156-63 (Francis Snyder & Douglas Hay eds., 1987).
281. Although historians disagree about the precise reasons for police antipathy to the NUWM, these undoubtedly included the disciplined nature and relative cooperativeness of the Fascists, the hostility of the police to communism, and the failure of organized labor to support the unemployed movement. See, e.g., ROBERT REINER, THE POLITICS OF THE POLICE 66 (2d ed. 1992); Hayburn, supra note 276, at 627; Weinberger, supra note 279, at 162.
282. See KINGSFORD, supra note 276, at 181; MORGAN, supra note 276, at 245.
283. On the use of obstruction against meetings of the unemployed, see 269 PARL. DEB., H.C. (5th ser.) 277 (Oct. 19, 1932); 314 PARL. DEB., H.C. (5th ser.) 1553 (July 10, 1936); KINGSFORD, supra note 276, at 156; MORGAN, supra note 276, at 250; WILLIAMS, supra note 3, at 208 (describing how protestors outside a conference on
specific objective, a contemporary observed that "[t]his venerable Statute, passed for quite another purpose, is to-day frequently used as a political weapon."284 Left-wing members of Parliament echoed this sentiment. As one M.P. complained, the police could almost always prevent a meeting on a highway by saying that it "constitute[s] an obstruction, if it be only a technical one, and in nearly every case they will be upheld."285 The government as usual responded by pointing to the exigencies of traffic control,286 the neutrality of obstruction law, and the importance of allowing the police to exercise their independent discretion in individual cases.287

leisure at the Savoy Hotel, shouting "hungry leisure is no pleasure," brought traffic to a standstill); Hayburn, supra note 276, at 629; D.G. Hitchner, Freedom of Public Meeting in England Since 1914, 36 AM. POL. SCI. REV. 516, 519 (1942). In addition to bringing formal charges, the police dispersed meetings by threatening to prosecute for obstruction. In June 1938 the Home Secretary informed the House of Commons that in the previous year there had been 29,315 summonses in London for various offenses of obstructing the highway, with an additional 4141 cases dealt with by written caution and 222,518 cases by verbal warning or advice. 337 PARL. DEB., H.C. (5th ser.) 2105 (June 30, 1938). Although it is impossible to determine how many of these related to public order offenses, they undoubtedly included some attempts by the police to disperse or prosecute political meetings.

284. Barrister, The Police and Their Powers, 12 NEW STATESMAN AND NATION 80, 81 (1936). The author further noted that the doctrine of potential obstruction enhanced the utility of highways law because it allowed prosecution merely "for causing an obstruction which might prevent the passage of somebody if they were present and wished to pass over that particular part of the thoroughfare." Id. at 80.

285. 314 PARL. DEB., H.C. (5th ser.) 1596 (July 10, 1936). For contemporary accusations of discrimination against the unemployed and in favor of the Fascists, see 290 PARL. DEB., H.C. (5th ser.) 1975-76, 1991, 1994 (June 14, 1934); 310 PARL. DEB., H.C. (5th ser.) 2424 (Apr. 6, 1936); 314 PARL. DEB., H.C. (5th ser.) 1547, 1563, 1566, 1596 (July 10, 1936); 318 PARL. DEB. H.C. (5th ser.) 1724 (Dec. 7, 1936); Barrister, supra note 284, at 81 (charging that the Home Secretary failed to use the Highways Act against Fascists when they caused disorder at outdoor meetings but prevented freedom of assembly for leftist groups by enforcing the laws against obstruction); E.C.S. Wade, The Law of Public Meeting, 2 MOD. L. REV. 177, 187 (1938); Note, supra note 274, at 404.

286. Referring to police reliance on "traffic," a Labour M.P. proclaimed that "[n]ever was there a more slipshod and more contemptible excuse," especially since fashionable weddings in Westminster daily upset the traffic of London at its busiest place. 269 PARL. DEB., H.C. (5th ser.) 273 (Oct. 19, 1932); see 273 PARL. DEB., H.C. (5th ser.) 1272 (Dec. 22, 1932) (George Lansbury complaining that although weddings and socialist crowds equally blocked the road and caused inconvenience, the police treated the events entirely differently).

287. For example, when in April 1936 members of Parliament complained that the police used obstruction to prevent socialists from selling newspapers at Mosley's meeting at Albert Hall but did not prevent Fascists from selling leaflets at a socialist meeting, the
Reminiscent of the government's action against the unemployed in Trafalgar Square, the police also resorted to a highly dubious use of the Metropolitan Police Act. Seeking a permanent ban on meetings outside labor exchanges, they again took recourse in the Act's generous obstruction provisions. Doubtless recalling the outcry that had greeted the Trafalgar Square ban, however, the police now acted with stealth. In 1931 the Metropolitan Police Commissioner, Lord Trenchard, issued an order pursuant to the Act forbidding all meetings in the vicinity of employment exchanges. 288 This was a permanent prohibition, not limited to particular occasions when the streets were "likely to be obstructed," and as such was probably not legally defensible. In consequence, the authorities enforced it covertly. The Trenchard ban was "so wrapped in obscurity and secrecy," charged a radical M.P., "that it is almost as difficult to discover what it is, as it is to discover what are the decrees of the Nazi Government." 289 Nonetheless, the Commissioner retained it in place and employed it regularly until 1936. 290

A significant prosecution involving a violation of the ban provided the Divisional Court with the occasion to reaffirm the rigorous law on street meetings. 291 In 1934 various radical organizations—the NUWM, the newly formed National Council for Civil Liberties (NCCL), 292 and the Amalgamated Engineers' Union—organized a meeting outside a Deptford unemployment center. Advertised as a rally to "[d]efend the right of free speech and public meeting," its apparent objective was to challenge the Trenchard ban. Katherine Duncan, a member of the NUWM, was about to speak to thirty people from a soapbox opposite the center when a constable—claiming to fear a repetition of distur-

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Home Secretary responded that "[a]ll these cases must be judged according to the circumstances." 310 PARL. DEB., H.C. (5th ser.) 2425 (Apr. 6, 1936); see 269 PARL. DEB., H.C. (5th ser.) 278 (Oct. 19, 1932).

288. See 314 PARL. DEB., H.C. (5th ser.) 1601 (July 10, 1936). In January 1932 the NUWM began disobeying the Trenchard ban, leading to serious clashes with the police. Wal Hannington described how "[d]ay after day the London unemployed defied the ban and faced baton charges by the police to uphold their right to free speech and peaceful assembly outside the Labour Exchanges." WAL HANNINGTON, NEVER ON OUR KNEES 248 (1967) [hereinafter NEVER ON OUR KNEES]; see HANNINGTON, supra note 277, at 36; KINGSFORD, supra note 276, at 181.

289. 314 PARL. DEB., H.C. (5th ser.) 1551 (July 10, 1936) (D.N. Pritt). He added that Lord Trenchard "had no more right to do that than I had." Id.

290. See MORGAN, supra note 276, at 245, 266; WAL HANNINGTON, UNEMPLOYED STRUGGLES 307 (1936).


292. The National Council for Civil Liberties (NCCL) was founded in 1934 to monitor police handling of the hunger marchers. NCCL, STONEHENGE 3 (1986); Weinberger, supra note 279, at 158.

bances that had occurred at the same location fourteen months earlier—directed her to move the meeting 175 yards away. "I'm going to hold it," Duncan defiantly responded, and the police arrested her. Revealingly, they avoided a test case on the legality of Trenchard's order by charging her not with violating the ban but rather with obstructing a constable in the execution of his duty by defying an order to disperse.

On such a charge, the legal issue was whether the constable had a common law or statutory "duty" to prevent the meeting. In Duncan v. Jones, the Divisional Court circumvented the question whether such a duty arose under the Metropolitan Police Act—indeed, the judges obligingly avoided mentioning the Trenchard ban altogether—and cooperatively created a new common law duty to justify the constable's action. It ruled that an arrest was warranted whenever a constable "reasonably apprehended" a breach of the peace, regardless of whether such a breach had actually been provoked or committed.

Although the issue of obstruction was not formally before it, the court may have been encouraged in its novel step by the fact that the meeting...
involved an obviously unlawful obstruction of the highway. According to the case report, there was no obstruction save that “necessarily caused by the box which was placed in the roadway and by the presence of the people surrounding it.” Under prior case law, the presence of thirty people at a meeting in the street unquestionably constituted an obstruction, and Lord Hewart’s opinion suggested that a constable's duty included preventing nuisances as well as breaches of the peace. Indeed, at Duncan’s earlier unsuccessful appeal to Quarter Sessions, the court had seemed particularly concerned with the fact that the case involved a meeting that obstructed the street. “What is the object of this appeal?” the Deputy Chairman had inquired. “Is it to establish a practice of ladies standing on boxes in public streets and addressing meetings?”

As if to answer this question, the Divisional Court gratuitously used Duncan to reaffirm that there was no right of public meeting on the highway. Although the organizers had deliberately promoted the rally as a defense of “the right of public meeting,” the judges began their opinions by denying the demonstrators’ premise. This was not, Lord Chief Justice Hewart declared, “a grave case involving what is called the right of public meeting,” and Mr. Justice Humphreys agreed that it was “a plain case” raising no question of the law of assembly. Referring to Dicey’s Law of the Constitution, Lord Hewart stressed that English law “does not recognize any special right of public meeting for political or other purposes.” The only question for the court, he maintained, was whether the particular crime of obstructing a constable had been committed.

Despite the judges’ insistence that the case raised no constitutional issues, their decision had important implications for the right of public meeting and extended legal doctrine far beyond its existing parameters.

300. SHEERR, supra note 18, at 126. Indeed, a recent treatise on constitutional law suggests that the single most important fact in Duncan was that the meeting caused an obstruction of the highway, even though the police did not rely on evidence of it. E.C.S. WADE & A.W. BRADLEY, CONSTITUTIONAL AND ADMINISTRATIVE LAW 555-56 (11th ed. 1993) (attempting to limit the scope of Duncan to obstructive meetings on the highway).
302. Id. at 222.
303. Id. at 223.
304. Id. at 222.
By allowing a constable to prevent any meeting that might potentially cause a disturbance, Duncan essentially bestowed on the police a common law power to restrain street meetings at will. Perhaps not coincidentally, shortly after the decision was announced, the Commissioner withdrew the Trenchard ban. While the police continued to rely on obstruction law to curb the demonstrations of the NUWM, they now possessed a new supplementary public order power enabling them to impose prior restraints on street meetings.

2. Processions and Nationalized Controls: The Public Order Act 1936

If the law on street meetings coalesced with the policy of quelling rallies outside labor exchanges, the preferred status of processions hardly comported with the need to resolve the greater menace posed by rival marches conducted by militant, ideologically motivated groups. In contrast to Salvation Army processions, where public opinion clearly preferred the participants to their disreputable antagonists, both Communist and Fascist marches aroused deep public outrage and alarm. Their violence precipitated a new realism about processions and growing sentiment for redressing the legal imbalance between the two types of street assembly.

Although the formal law of obstruction, as exemplified in Lowdens, restricted the mantle of protection to “reasonable” processions, by the 1930s the act of marching had in practice and public perception become almost inviolate. There was a “general belief in an absolute right to hold a procession,” a constitutional scholar observed in 1937, even...
though theoretically the right could “only be exercised reasonably.”\textsuperscript{306} The tenacity of the formal legal distinction, the longstanding official practice of favoring processions, and the widespread popular belief that marches were lawful rendered traditional obstruction prosecutions inadequate to cope with the new peril.\textsuperscript{307} In addition, the authorities’ ultimate objective was to prevent processions entirely rather than merely prosecute “unreasonable” marches after the fact.\textsuperscript{308} As in the 1880s, local officials again resorted to the nuisance and obstruction provisions of local acts and bylaws to prohibit processions or control their routes.\textsuperscript{309} Marches and countermarches placed increasing strain on the national psyche, however, and momentum developed for a centralizing statute that would supersede local regulation and put advance prohibitions on an authoritative national basis.

A number of factors encouraged the campaign for new statutory controls. Police chiefs and the Home Office, stretched to the limit by the vexatious dual challenges presented by the unemployed and the Fascists, lobbied vigorously for uniform national legislation.\textsuperscript{310} In addition, the left, which ordinarily would have opposed legislation inimical to civil liberties, viewed curbing Fascist aggression as an even higher priority. Another factor was increased vehicular traffic in the twentieth century, which exacerbated the disruptions that processions caused in congested urban areas.\textsuperscript{311} Finally, the government cleverly framed the new national statutory controls not as a revolutionary break

\begin{itemize}
  \item \textsuperscript{306} Goodhart, \textit{supra} note 274, at 172 (1937). Goodhart was attempting to argue, without success, that obstruction could be used to control the marches because they would not meet the reasonableness requirement. \textit{See} Wade, \textit{supra} note 285, at 184.
  \item \textsuperscript{307} The hunger marchers themselves were apparently not charged with obstruction, and indeed many localities gave them police protection. This may have been partly due to the fact that the police in one district were only too happy to pass the marchers along to the next town. HANNINGTON, \textit{NEVER ON OUR KNEES}, \textit{supra} note 288, at 155; \textit{see} MORGAN, \textit{supra} note 276, at 243. There were, however, isolated instances of the use of obstruction against processions of the unemployed in urban areas. \textit{See}, e.g., 318 PARL. DEB. H.C. (5th ser.) 1713 (Dec. 7, 1936); KINGSFORD, \textit{supra} note 276, at 56; HANNINGTON, \textit{supra} note 290, at 87.
  \item \textsuperscript{308} \textit{See} MORGAN, \textit{supra} note 276, at 254.
  \item \textsuperscript{309} \textit{See}, e.g., 317 PARL. DEB., H.C. (5th ser.) 1211 (Nov. 12, 1936) (Sir John Simon); HANNINGTON, \textit{NEVER ON OUR KNEES}, \textit{supra} note 288, at 103, 115 (applying Sessional Order of House of Commons); HANNINGTON, \textit{supra} note 290, at 310.
  \item \textsuperscript{310} \textit{See} MORGAN, \textit{supra} note 276, at 262.
  \item \textsuperscript{311} Trenchard, for example, apparently became increasingly concerned with the general problem of street obstruction during his tenure as Police Commissioner. \textit{ANDREW BOYLE, TRENCHEARD} 671 (1962). In 1932 Trenchard wrote to the Home Secretary that to allow “all and sundry” to pass through central London was an anachronism apart from the question of disorder, and he advocated prohibiting all weekday processions in the central area. \textit{See} MORGAN, \textit{supra} note 276, at 254.
\end{itemize}
with the past but simply as a codification of existing local regulation.312

On November 9, 1936, the day after a national demonstration by hunger marchers, the government introduced its Public Order Bill. It was largely directed against quasi-military Fascist organizations,313 but section 3 specifically addressed the problem of processions and authorized both limiting conditions and bans. Under subsection 3(1), a chief of police could impose restrictions on a procession if he had reasonable grounds for apprehending "serious public disorder."314 This provision was relatively noncontroversial because it only generalized powers that the police already exercised in many parts of the country.315 The general ban authorized by subsection 3(2), however, was a greater departure. If a police chief was "of opinion" that imposing conditions would be insufficient to prevent serious disorder, he could apply to the local council for a ban on all public processions, or any specified class of processions, in a particular area for a period of up to three months.316 The bill left meetings, however, free from prior

312. See 318 PARL. DEB., H.C. (5th ser.) 1728 (Dec. 7, 1936); 1 HOME AFFAIRS COMMITTEE, FIFTH REPORT: THE LAW RELATING TO PUBLIC ORDER, 1979-80, H.C. 756-I & II, ¶ 11 [hereinafter HOME AFFAIRS COMMITTEE REPORT].

313. The first two sections, for example, prohibited the wearing of political uniforms and the formation of quasi-military organizations. Public Order Act, 1936, 1 Edw. 8 & 1 Geo. 6, ch. 6, §§ 1, 2. The Public Order Act also extended to the whole country the offense under the Metropolitan Police Act 1839 of using "threatening, abusive, or insulting words or behaviour" whereby a breach of the peace may be occasioned, 2 & 3 Vict., ch. 47, § 54(13); Public Order Act, 1936, § 5, and gave the police additional powers to control indoor meetings, Public Order Act, 1936, § 6.

314. Some M.P.s were apparently concerned that "serious disorder"3 would encompass even obstructions to traffic. Aneurin Bevin found relevant his own recent experience: "If the original route laid down by Scotland Yard for our last demonstration to Hyde Park had been followed, our East End contingent would have reached the Park at half-past eight at night. They would have led us all round the most tortuous by-ways of the City in order, they said, that we should not enter on the main roads because of the traffic. I suspect that there was little involved in respect of traffic on a Sunday afternoon, but unless we had resisted them most robustly they would have been able, under existing powers, by raising the question of traffic, to have frustrated the demonstration." 318 PARL. DEB., H.C. (5th ser.) 1713 (Dec. 7, 1936).

315. Sir John Simon, the Home Secretary, described the provision in the House of Commons as being largely "the present power to control the route that a procession takes." 317 PARL. DEB., H.C. (5th ser.) 1359 (Nov. 16, 1936); see 318 PARL. DEB., H.C. (5th ser.) 1728 (Dec. 7, 1936) (D.M. Foot conceding that section 3(1) essentially put into statutory form the powers that the police already possessed).

316. The local council could approve or modify such an order with the consent of the Home Secretary. In London the Metropolitan Police Commissioner could issue such
restraints. This exemption was because processions were the immediate focus of public concern and meetings could in any event be easily controlled through existing obstruction law and the new common law powers established in Duncan. The point of section 3 was precisely to reach activity that arguably constituted "passage," and it significantly countered the favored position that processions enjoyed under obstruction doctrine.

Responding with expedition, Parliament enacted the bill within weeks—the first major piece of public order legislation since the early nineteenth century—and the police almost immediately took advantage of their new powers. The Metropolitan Police Commissioner banned all political marches in the East End for six weeks and renewed the restriction at intervals thereafter. There was, in fact, an almost continuous ban on processions in London from 1937 until after World War II. As a result of the Act, paramilitary marches soon disappeared from English life.

The 1930s thus witnessed restrictive developments in the law governing street assemblies. Reacting to the magnitude of the turmoil, the authorities introduced new public order devices that complemented and augmented highways law in the case of meetings and counteracted it in the case of processions. Duncan conferred on the police a broad common law power to disperse meetings in advance, while the Public Order Act granted them new statutory authority to regulate processions. Both the courts and Parliament had revealed their willingness to intervene forcefully when legal doctrine became discordant with political reality.

B. The 1960s: Revitalizing the Resolution of the 1880s

The conceptual framework of the nineteenth century, wobbling and in need of external support in the 1930s, again proved adequate to cope
with new social challenges in the 1960s. In this fourth major period of exceptional turbulence, public attention returned to meetings, which now appeared in the provocative form of the "sit-down" demonstration. As a result, the strict rules against meetings tightened even further, while processions returned to their preferred status. The doctrinal resolution of the 1880s, again coalescing with governmental interests, enjoyed a further decade of stability before it would disappear, functionally if not formally, in the late 1970s and 1980s.

In the 1960s the political climate changed markedly from the preceding two decades of relative social quiescence. 319 "Direct action" occurred in a variety of forms, including student "sit-ins," militant industrial strikes, terrorism in Northern Ireland, confrontational antinuclear protests, and strident mobilizations against the Vietnam war. 320 To obtain media coverage, demonstrators adopted dramatic and newsworthy tactics, often provoking brutality on the part of the police. The Committee on Nuclear Disarmament (CND), a left-wing peace organization founded in 1958, was singlehandedly responsible for much disruptive street activity. 321 As in the 1930s, political activity on the left was matched by a resurgence of fascism on the right. The early 1960s witnessed renewed activism in the form of Sir Oswald Mosley's Union Movement, Colin Jordan's National Socialist Movement, and John Bean's British National Party. 322 Clashes at street meetings between ideologically opposed groups again became prominent features

319. The period from the outbreak of World War II to the end of the 1950s was one of relative tranquility, and meetings that constituted technical obstructions were generally left undisturbed. Even in the 1950s, however, obstruction doctrine was used to curb the expression of minority views. As an academic noted in 1954, "the obstruction cases indicate ground for suspicion that the extent of the obstruction quite probably varies inversely with the popularity of the doctrines expounded." Abernathy, supra note 63, at 398; see Northey, supra note 159, at 13.


of the English political landscape. In the face of this growing discord, the government revived obstruction law as a means of regulating protest activity and applied it particularly against the demonstrations of the left.

1. New Left Meetings: Strengthened Controls

The authorities primarily employed four forms of obstruction doctrine against leftist political meetings, two statutory and two common law: the Highways Act, the Metropolitan Police Act, Duncan powers, and common law nuisance prosecutions. Whereas the statutory forms of obstruction had been widely used since the late-nineteenth century, the common law offenses were either new or reinvented in the 1960s.

The Highways Act, long a potent force against stationary assemblies, was frequently invoked in this decade against left-wing demonstrators such as "Hands Off Cuba" protestors, hawkers of socialist newspapers, Communist Party street speakers, and participants in anti-Vietnam war rallies. In 1963 the Act was strengthened and clarified in Arrowsmith v. Jenkins, a decision upholding a decidedly technical prosecution of an antinuclear organizer and explicitly rejecting any plausible defenses to the statutory charge. Pat Arrowsmith, a well-known peace activist, addressed a small crowd in Nelson Street, Bootle, for twenty minutes during the middle of the day. Nelson Street was a traditional "Speakers' Corner" for the local dock workers, and numerous rallies had previously taken place with police sanction and even assistance. Arrowsmith did everything in her power to ensure the

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323. Id. at 155-56. In the early 1960s "Hands Off Cuba" demonstrators were a particular target of the police. For example, over 70 persons were fined £2 each for obstructing the highway at a sit-down demonstration outside Liverpool Town Hall; 80 sit-down demonstrators were similarly fined at Bristol; 15 students at Leeds University were fined for obstructing newspaper vans outside The Yorkshire Post; and demonstrators in Albert Square, Manchester, were charged with obstructing the footpath. Stationary obstruction was also used against such diverse protestors as a Communist Party official in 1963 for holding a "soapbox" meeting outside an employment exchange, residents of Putney Vale who engaged in a sit-down demonstration in 1961 to secure a pedestrian subway, and Camden residents who participated in a road safety demonstration in 1966. See Williams, supra note 3, at 208-09. The police often charged obstruction against leafleters and sellers of left-wing publications such as The Daily Worker and Peace News. See, e.g., Stuart Bowes, The Police and Civil Liberties 73-75 (1966); Williams, supra note 3, at 211. On March 17, 1968, 246 anti-American demonstrators in Grosvenor Square were charged with offenses that included obstructing the highway and footway, see 767 Parl. Deb., H.C. (5th ser.) 892-93 (Apr. 8, 1968), and in November a civil rights protestor who lay down in front of Enoch Powell's car was fined for wilfully obstructing the free passage of the highway. Obstructed Mr. Powell's Car, Times (London), Nov. 6, 1968, at 4.


325. Id. at 562; see Bowes, supra note 323, at 75-76.
lawnfulness of the meeting, including giving the police advance notice and cooperating with them to permit the passage of vehicles. The police nonetheless arrested her because the crowd blocked the street entirely for five minutes and partially for fifteen, and she was convicted under the Highways Act for “wilful obstruction of the highway without lawful authority or excuse.”

Arrowsmith presented two arguments in her appeal to the Divisional Court. First, she denied that she was guilty of “wilfulness” because she had genuinely and reasonably believed that her actions were lawful. Second, she asserted that she had “lawful authority” for the obstruction because the police had previously condoned the use of Nelson Street for open-air meetings. Validating the standard interpretative practice of magistrates and police, the court summarily rejected her “wilfulness” argument, equating the term with mere intentionality. The statute, it ruled, required only that an obstructive act occur “intentionally as opposed to accidentally, that is, by an exercise of his or her free will.” Eviscerating the mens rea requirement, the court thus confirmed that the statutory element of “wilfulness” added nothing to common law requirements.

Even more significant, the court expressly announced that police sufferance of similar meetings did not confer “lawful authority” on Arrowsmith’s actions. Echoing R. v. Carlile, decided more than a century earlier, Lord Parker dismissed the defendant’s contention that customary nonenforcement authorized her use of the street:

I think that the defendant feels that she is under a grievance because—and one may put it this way—she says: “Why pick on me? There have been many meetings held in this street from time to time. The police, as on this occasion, have attended those meetings and assisted to make a free passage, and there is no evidence that anybody else has ever been prosecuted. Why pick on me?”

326. Quarter Sessions convicted her because it considered itself bound by Homer v. Cadman, the 1886 case holding that an obstruction was committed whenever a large number of persons collected on the roadway and rendered it “less convenient and commodious to the public.” See supra notes 83-85 and accompanying text.


328. The court characterized Arrowsmith’s argument as based on a “genuine belief” in lawful authority. Id. at 567. In fact, Arrowsmith had argued that her belief was “reasonable” as well as bona fide, id. at 566, but the court simply sidestepped the “reasonableness” issue.

329. Id. at 566.
Lord Parker was unsympathetic, concluding that even if the claim of customary nonenforcement were true, it was wholly irrelevant. “That, of course, has nothing to do with this court,” he declared. “The sole question here is whether the defendant has contravened section 121(1) of the Highway Act, 1959.”

It was hardly surprising that the court refused to treat selective prosecution as a legally cognizable defense. The police necessarily underenforced obstruction law, the utility of which lay precisely in its universal availability as a plausible basis for prosecution. Arrowsmith, however, was the only modern decision explicitly to consider and then reject the defense of discriminatory prosecution, and it ratified police discretion to apply highways law selectively against particular groups.

Whereas the Highways Act supplied a basis for “on-the-spot” arrests or subsequent prosecutions, another act, the Metropolitan Police Act, enabled the police to take preventive action against obstruction. As in every other period of disorder, the police in the 1960s turned to its wide obstruction provisions to support prior restraints on street activity. In one notable episode in 1966, the Police Commissioner invoked the Sessional Order of the House of Commons—the same Order at issue in

330. *Id.* In another failed claim of discrimination the same year, a magistrate fined four Oxford students for obstructing the pavement by selling copies of *Peace News* in Commarket Street; the magistrate’s court rejected the argument that other vendors had sold newspapers at the same spot without harassment. See WILLIAMS, *supra* note 3, at 211-12.

331. Arrowsmith again ran afoul of the obstruction doctrine in 1968 when she was convicted of the offense during a sit-down demonstration in London outside the firm of Elliott-Automation, which was supplying equipment to American forces for use in Vietnam. Refusing to pay the £50 fine or be bound over, she was sentenced to six months’ imprisonment. See *Goal After Protest*, *TIMES* (London), Nov. 5, 1968, at 2.

332. Throughout the decade the police arrested anti-nuclear protestors who violated regulations promulgated under the Act. For example, in September 1961, 48 sit-down demonstrators attempting to march to the American embassy to protest the resumption of nuclear testing were charged with violating an order against obstruction. The magistrate stated that although their reasons for sitting in the road might be “most admirable,” they did not interest him. *Fines on Nuclear Demonstrators*, *TIMES*, Sept. 8, 1961, at 17. In 1962 the police charged obstruction against 1172 supporters of the Committee of 100 during a sit-down action in Parliament Square in March, against demonstrators outside the American embassy in April, and against protestors in Whitehall, Trafalgar Square and Grosvenor Square in October. See WILLIAMS, *supra* note 3, at 68; Williams, *supra* note 322, at 152. The Commissioner also issued regulations on the occasion of the closing stages of the Aldermaston march and the Greek Royal visit in 1963. WILLIAMS, *supra* note 3, at 68-69. He used the Act as well to disperse student demonstrations outside Rhodesia House after the Unilateral Declaration of Independence in 1965. See *id.* at 128.
the suffragette cases—to implement a wide ban on public assemblies. His directions were substantially more extensive than in the pre-World War I period, when the Commissioner had merely circulated the parliamentary Order to the police and left it to their discretion to arrest violators who resisted instructions to disperse. In this instance, the Police Commissioner issued a formal notice banning in advance all “assemblies or processions” over a wide area in central London.

Despite the breadth of the ban, the Divisional Court upheld it with a slightly limiting construction in Papworth v. Coventry. The case involved members of the Committee of 100, a splinter group of the CND that advocated civil disobedience. Andrew Papworth and six others held a vigil against the Vietnam War from noon to 1:00 p.m. at the junction of Whitehall and Downing Street, where they spaced themselves without moving along the pavement. Notwithstanding the apparent triviality of the offense—the defendants did not actually obstruct the passage of anyone in or out of government buildings—a magistrate convicted Papworth and his co-defendants for violating the police ban. Appealing to the Divisional Court, the defendants argued that the Commissioner’s notice was ultra vires section 52 of the Metropolitan Police Act because it prohibited all assemblies, processions, and obstructions of whatever nature over an extensive geographical area. The court upheld the police notice as construed not to exceed the scope of the section, interpreting “assemblies and processions” to mean only those “capable of causing” either disorder, annoyance, or “consequential obstruction to the free passage of members.” Concluding that the magistrate might have convicted the defendants regardless of

333. The Order instructed the police to maintain the passages in the vicinity of Parliament free of obstruction while Parliament was in session. See supra note 259 and accompanying text.
335. It was founded by a group of writers, actors, and artists in 1960 to engage in non-violent civil disobedience. See, e.g., HINTON, supra note 320, at 168-69.
336. The magistrate, perhaps mindful of comments protective of passage in the suffragette cases, specifically noted that the defendants were not engaging in a procession but rather a stationary demonstration. See Papworth, [1967] 1 W.L.R. at 668.
337. The court found that the Sessional Order itself did not support the Commissioner’s direction because it had no force outside the immediate precincts of Parliament. It therefore considered the police notice in light of the general powers conferred on the police by section 52 of the Act to prevent obstruction in the vicinity of Parliament. Id. at 670-71.
338. Id. at 671.
whether the assembly was capable of causing obstruction, the court remitted the case for further factfinding. Papworth was subsequently acquitted.

*Papworth* elicited a favorable response from liberal constitutional scholars, who viewed it as narrowing the reach of the Metropolitan Police Act. Admittedly, the rare acquittal on an obstruction charge, as well as language in the decision expressing concern for the "rights and liberties of subjects," provided some support for this position. From a civil liberties perspective, however, the decision contained many disturbing features. It was the first instance in which the Divisional Court expressly upheld an extensive prior ban under the Metropolitan Police Act that specifically targeted "processions and assemblies." The limitation of the police order to demonstrations "capable of causing obstruction" did not, given the breadth of obstruction law, provide much comfort to demonstrators; in fact, the ruling perpetuated the restrictive view that actual obstruction was not a requirement of the offense. Moreover, one of the judges explicitly endorsed the use of preventive bans against street assemblies, observing that "the best way to put out a fire is to prevent it before it occurs." Although the magistrate eventually determined that the vigil was not "capable of causing obstruction," her conclusion was aberrational in light of the precedents and exerted no influence on subsequent cases. *Papworth* arguably represented in the main an expansion rather than constriction of the government's statutory obstruction powers.

The most notable strengthening of obstruction law against meetings occurred, however, with regard to its common law rather than statutory forms. First, the courts extended *Duncan* to cover situations where a constable anticipated mere highway obstruction unrelated to any breach of the peace, thereby providing the police with an exceptionally broad

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339. See, e.g., SHERR, supra note 18, at 83 (arguing that an important right to protest near Parliament was safeguarded and could not simply be banned by police order); SUPPERSTONE, supra note 3, at 60 (claiming that without this construction of the police orders, any gathering regardless of whether it caused an obstruction could have been prohibited over a large area in central London); HARRY STREET, FREEDOM, THE INDIVIDUAL, AND THE LAW 67-68 (5th ed. 1982) (declaring that the police were no longer able to impose a total ban on peaceful demonstrations merely because Parliament was sitting).


341. *Id.* at 673. It was useful, Mr. Justice Winn remarked, to "prevent the coming into existence of causes from which consequentially, and on a reasonable view potentially, such mischief may well arise." *Id.*

342. The magistrate may in fact have been influenced by Mr. Justice Winn's observation that the defendants had acted in a "very proper manner" and were "good mannered, restrained and gentlemanly." *Id.* at 668.
preventive power that was invoked with particular effect against labor picketers. Second, prosecutors revived the long-dormant common law offense of public nuisance by obstructing the highway. This corresponded to a broader disinterment of seemingly moribund common law crimes such as affray, riot, unlawful assembly, incitement, and conspiracy. Unlike summary charges under the Highways Act or other statutes, common law offenses enhanced deterrence by subjecting the accused to lengthy proceedings and potentially severe penalties. Moreover, the common law charge of "incitement" to commit a public nuisance allowed prosecutors to muzzle organizers in advance of planned events. This resuscitation of common law measures reflected the fact that in the 1960s the authorities perceived a threat to public order on an unprecedented scale.

The police employed the common law crime of public nuisance particularly against sit-down demonstrations, a form of protest that was exceedingly popular among left-wing protesters and exceptionally frustrating to the police. A sit-down action naturally invited obstruction charges because blocking the road was not an incidental byproduct of a bona fide meeting but rather the precise object of the demonstration. The Committee of 100, which frequently organized sit-down protests, predictably became a major target of prosecution. In fact, the first use by the authorities of a charge of "incitement to obstruct" involved a sit-down demonstration that the Committee planned for September 17, 1961. Five days before the scheduled action, the


345. Common law crimes were punishable at the discretion of the court. See Supperstone, supra note 3, at 77; see also supra note 39.

346. See Williams, Offences, supra note 320, at 638; Williams, Protest, supra note 320, at 106 ("Obstruction is an obvious offence to turn to in response to sit-down demonstrations.").

police arrested thirty-six members, including the eighty-nine year old
Bertrand Russell, on charges of inciting various “persons unknown
unlawfully to obstruct the highway” in the vicinity of Parliament
Square. At their hearings before a magistrate, thirty-two of the
defendants, among them Lord and Lady Russell, refused to be bound
over and received terms of imprisonment ranging from seven days to
two months. The incitement charges thus succeeded in preventing
almost a third of the Committee from participating in the demonstra-
tion.

In 1963 came the first appellate decisions adjudicating the lawfulness
of applying the common law nuisance of obstruction to sit-down
demonstrations on the highway. The cases confirmed that several
persons sitting on the sidewalk constituted a “meeting” and that the
doctrinal framework treating stationary political activity as an inherently
unreasonable use of the road still retained its vitality. The prosecutions
were initiated in response to a series of demonstrations against tyranny
in Greece arising out of a visit of the Greek royal family in July
1963. In R. v. Moule, the Secretary of the Committee of 100
was convicted of committing, and inciting others to commit, a public
nuisance by obstructing the highway. Moule had led some followers
around Trafalgar Square and into Whitehall, where he directed a few
persons to sit on the sidewalk; this act, unfortunately for his legal
position, transformed the procession into a meeting. Moule appealed his
conviction on the ground that the trial judge had not adequately
explained to the jury the circumstances in which an obstruction might be
a reasonable use of the highway. The Court of Criminal Appeal was
unimpressed. In its view, sitting down in the highway was prima facie

348. See WILLIAMS, supra note 3, at 101; Grunis, supra note 120, at 30.
The smallest sentences were given to Lord and Lady Russell. Lord Russell was
originally sentenced to a two months' term, but cries of “shame” induced the Bow Street
magistrate to reduce the sentence to seven days, still long enough to keep him away
from the demonstration. Id.
350. See, e.g., HINTON, supra note 320, at 168-69 (1989); WADDINGTON, supra note
278, at 33-34. Despite a police order prohibiting any obstruction of Trafalgar Square,
Parliament Square, or the surrounding streets—with the exception of an RAF procession
to commemorate the Battle of Britain, Nuclear Protesters Will Ignore Police Ban on
Meetings, TIMES (London), Sept. 16, 1961, at 5—the demonstration took place on
September 17 and resulted in the arrest of 1314 of the 12,000 participants. See 1,314
Arrests in Trafalgar Square Disorders, TIMES (London), Sept. 18, 1961, at 10. The
police made further use of the incitement charge in connection with demonstrations in
Grosvenor and Parliament Square in 1962. See WILLIAMS, supra note 3, at 207;
Williams, supra note 322, at 157.
351. See SHEER, supra note 18, at 31.
352. [1964] Crim. L.R. 303 (Crim. App.).
"not only an obstruction but an unreasonable obstruction." A few weeks later, the court reached a similar result in *R. v. Adler*, where the defendant had directed some protestors to remain at Buckingham Palace by uttering the fatal words, "sit down here, please." The court reaffirmed that sitting in the street was an unlawful obstruction amounting to a public nuisance.

Throughout the 1960s, therefore, the law on political street meetings continued in the same restrictive pattern that had evolved in the nineteenth century. This was true despite the fact that in 1965 the Divisional Court introduced a more flexible approach to "reasonableness" in the commercial context. *Nagy v. Weston*, using language reminiscent of *Lowdens*, held that whether an obstruction was an unreasonable use of the highway was a factual question that depended on "all the circumstances." In the 1960s, however, the courts still found no circumstances that could conceivably render stationary protest

353. Id. at 303. The court also noted that Moule's explanation that he had given the instruction simply to calm the crowd had been rejected by the jury as a factual matter. *Id.* Richard Chandler, convicted separately on the same charges, was sentenced on three counts to nine months', three months', and three months' concurrent sentences. *R. v. Chandler*, [1964] 2 Q.B. 322, 331 (Crim. App.).


355. Id. at 304.

356. *Id.* Clark had previously been sentenced to nine months' imprisonment for incitement to public nuisance for a "ban the bomb" incident in September 1961, when he directed a procession to sit at the junction of Park and Brook streets. The conviction was quashed because the court had improperly excluded the testimony of a witness. *See R. v. Clark*, [1962] 1 All E.R. 428 (Crim. App.).


358. *Id.* at 284. In *Nagy*, Lord Parker provided an authoritative interpretation of section 121 of the Highways Act, thereby supplying the general standard for all obstruction offenses. He indicated that obstruction required three elements. First, there must be an obstruction, which he defined loosely as "any occupation of part of a road thus interfering with people having the use of the whole of the road." *Id.* Second, the defendant's act must be wilful, that is, purposeful or deliberate. Third, the obstruction must be without lawful authority or excuse. Lawful excuse was the same as reasonableness, and whether an obstruction was an unreasonable use of the highway was a question of fact: "It depends upon all the circumstances, including the length of time the obstruction continues, the place where it occurs, the purpose for which it is done, and of course whether it does in fact cause an actual obstruction as opposed to a potential obstruction." *Id.* Despite the flexibility of this test and the apparent absence of any significant obstruction in the case itself—the defendant, a mobile hot dog vendor, had parked his van in the road for five minutes on a Tuesday night in Oxford—Lord Parker deferred to the magistrates' finding that the defendant was using the highway unreasonably. Indeed, he found it difficult to see how "they could conceivably arrive at any other conclusion." *Id.*
activity a lawful use of the street. The manual *Police Law* accurately described the state of the law on meetings:

There is no right to hold meetings in any public place, as such places are for people to pass along. Every unauthorised obstruction of the highway is illegal as being either an offence by some statute or bye-law or indictable as a common nuisance. Streets are for passage, and passage is superior to everything else, and nothing short of absolute necessity will justify a person in obstructing a highway.\textsuperscript{359}

The result of an obstruction prosecution was such a foregone conclusion that, as a commentator observed in 1967, the crucial decision was "not whether the defendant is guilty or innocent but whether or not to prosecute at all."\textsuperscript{360}

2. *Processions in the 1960s: Continuing Forbearance*

The contrasting situation of processions was strikingly illustrated by the fate of another CND member who protested the Greek royal visit in 1963. *R. v. Clark (No. 2)*\textsuperscript{361} stood in dramatic juxtaposition to *Moule* and *Adler* decided the same year. George Clark, the field secretary of the CND, was arrested for inciting persons to commit public nuisance by obstructing the highway at several central London locations. Two detectives testified at his trial that he had led a march of 500 to 2000 persons through various parts of the city, and upon conviction the County of London Sessions sentenced him to an extraordinary eighteen months' imprisonment.\textsuperscript{362} Clark contended on appeal that the procession was prima facie lawful and that the question of reasonableness should have been left to the jury.\textsuperscript{363} The Court of Criminal Appeal agreed. Expressly relying on *Lowdens*, it reversed his conviction on the ground that the trial court had not instructed the jury on reasonableness but had simply directed that any physical obstruction would constitute

\textsuperscript{359} C. MORIARTY, POLICE LAW, *quoted in Bowes*, supra note 323, at 72.
\textsuperscript{360} *See* WILLIAMS, *supra* note 3, at 211. He added that anyone who addressed a public meeting or participated in a demonstration on the highway "truly does so at his peril." *Id.*; *see* STREET, *supra* note 339, at 63 (stating that the right of public meeting was dependent almost entirely on the police exercising their discretion in a reasonable manner).
\textsuperscript{361} *[1964] 2 Q.B. 315* (Crim. App.).
\textsuperscript{362} *Id.* at 315-16. The case suggested both the advantages and pitfalls of bringing a common law prosecution for obstruction. The prosecutors obtained an extremely harsh penalty, but ultimately the strategy may have backfired. The widespread public outcry against the severity of the sentence, *see* CHRISTOPHER DRIVER, THE DISARMERS 163 (1964), was reminiscent of the furor created by the prosecution of the Salvationists in *Beatty*, and it may have influenced the appellate court to quash the conviction.
\textsuperscript{363} Clark, *[1964] 2 Q.B.* at 317.
a nuisance.\textsuperscript{364} The virtually identical argument had failed in\textit{Adler} and\textit{Moule}.\textsuperscript{365}

George Clark succeeded, however, only because the jury had not considered the issue of reasonableness. The court provided no guidance as to what constituted a "reasonable" procession, and there was no guarantee that a magistrate or jury would find a procession to be reasonable in fact. Indeed, the court observed that "it may well be that on a proper direction this defendant would, all the same, have been convicted."\textsuperscript{366} In addition to facing a "reasonableness" test, processions, unlike meetings, were potentially subject to the controls of the Public Order Act and to various prohibitions contained in local acts and bylaws. Nonetheless, owing to a variety of factors—the force of custom, cultural consensus, the continuing mythology of the "right to pass," the improving image of marches after the 1930s, the preoccupation with stationary activity, and the desire to protect customary marches—\textsuperscript{367} in the 1960s processions regained their favored status in both legal theory and practice.\textsuperscript{368} Now that the threat of quasi-militaristic marches had

\begin{itemize}
\item \textsuperscript{364} Id. at 321.
\item \textsuperscript{365} A comment on the case noted that a procession was perfectly lawful if conducted reasonably even though persons were obstructing the road. "If this were not true, then thousands of persons would be guilty of obstructing a highway whenever they were engaged in attempting to cross Oxford Street during the rush hours." Note,\textit{supra} note 347, at 155. The author noted that this was in stark contrast to a sit-down demonstration, where "the obvious intention would be to cause an obstruction by sitting down, which is not a reasonable user [sic] of the highway." \textit{Id.} at 156.
\item \textsuperscript{366} \textit{Clark}, [1964] 2 Q.B. at 321.
\item \textsuperscript{367} During major demonstrations organized by the Vietnam Solidarity Committee in 1968, the Police Commissioner and the Home Secretary, James Callaghan, decided against imposing any bans under the Public Order Act. When a member protested that his constituents wished to spend a quiet Sunday in their homes, Callaghan replied, "I think that it is a consequence of all processions—whether they be the Lord Mayor's Show in the City or the Durham Miners' Gala, both of which are great national traditional processions—that the peace of those living on the routes is disturbed. That is a natural result of processions." \textit{770 PARL. DEB., H.C. (5th ser.)} 1601 (Oct. 24, 1968). This confirmed that part of the underlying motivation for validating marches was to extend the mantle of protection over customary processions.
\item \textsuperscript{368} Picketers tried unsuccessfully in the 1960s to exploit the doctrinal distinction between meetings and processions. For example, during a student demonstration against Hugh Gaitskell outside a Leeds hotel in 1960, the protesters walked in a circle with the cry, "If we keep walking, they can't get us." See\textit{Williams},\textit{supra} note 3, at 215. Similarly, when craftsmen struck the English Electric Company in Liverpool in 1965, the pickets in the public highway outside the factory gates moved in a circle to avoid the rules regarding stationary demonstrations.\textit{Tynan v. Chief Constable of Liverpool}, [1965] 3 All E.R. 99, \textit{aff'd sub nom.} Tynan v. Balmer, [1967] 1 Q.B. 91. However, the
receded, the local authorities generally declined to invoke the Public Order Act, and processions reverted to the preferred position that was deeply ingrained in both formal obstruction law and the national political culture. Standard police procedure in the 1960s was to afford marches as much protection as necessary, and the legacy of Beatty continued remarkably intact.

C. The Triumph of Functionalism: From Red Lion Square to the Public Order Act 1986

The final period of substantial disorder, from the late 1970s through the 1980s, brought significant developments. The concept of a “right to protest” appeared more prominently in political discourse, and some judges began expressly to treat such a right as a relevant factor in determining the legitimacy of meetings. At the same time, however, new public order legislation enhanced the restrictions on processions and subjected meetings for the first time to national regulation. These developments, in further equalizing the status of meetings and processions, ultimately augmented the ability of the police to discriminate between acceptable and objectionable assemblies without regard to their
relation to passage. The "right to passage" was reconceived almost exclusively as the right of the broader public to convenience, and, as a corollary, marchers lost the special protection that it had afforded their processions. By the end of the 1980s, participants in both processions and meetings asserted a "right to demonstrate" that was subordinate to the predominant right of the public to proceed along the street without inconvenience. The formal categories persisted but ceased to have much practical significance. A new functional test—one implicit in the judicial decisions, government reports, and parliamentary enactments of the period—had subtly but profoundly altered the doctrinal resolution of the 1880s.


The seminal ideas governing the reconceptualization of the "right to passage" first appeared in the mid-1970s. The catalyst for the intellectual reassessment was the riot in Red Lion Square in 1974, which inaugurated a new troubling new period of "aggressive street politics" in Britain. The Red Lion Square incident, the decade's worst episode of public violence, resulted from the predilection of socialist and right-wing groups for scheduling simultaneous demonstrations at the same location. In June 1974 the Fascist National Front marched through London to Red Lion Square to protest the government's decision to grant amnesty to illegal immigrants. An opposition march by left-wing opponents, in particular the London Area Council of Liberation and the International Marxist Group, culminated in a riot in which one person died and numerous demonstrators and police officers were injured.

371. 1 HOME AFFAIRS COMMITTEE REPORT, supra note 312, ¶ 1. Sir David McKnee, the Police Commissioner, testified before the Committee that the increase in disorder in the 1970s was "substantial and disturbing." 2 id. at 75.

372. EWING & GEARTY, supra note 370, at 84.

373. David G. Barnum, Freedom of Assembly and the Hostile Audience in Anglo-American Law, 29 AM. J. COMP. L. 59, 61 (1981). The marches had not been banned, reflecting the continuing police practice of noninterference with processions. Police chiefs resisted bans even in the worst periods of the 1970s. See Bevan, supra note 142, at 167-68; Williams, supra note 370, at 174. The Home Secretary, William Whitelaw, reported to the House of Commons that in the entire decade of the 1970s there were only seven banning orders: three in 1974, one in 1977, and three in 1978. 6 PARL.
In the incident’s aftermath the government asked Lord Scarman to review the adequacy of legal mechanisms for securing public order. His influential and widely circulated report⁷⁴ refreshing advocated a place in the legal regime for “rights of peaceful assembly and public protest,”⁷⁵ and it encouraged a developing movement in favor of de jure recognition of a right to demonstrate.⁷⁶ Equally notably, though attracting less attention, the report emphasized the priority of passage, a right that Lord Scarman viewed as antithetical and superior to the right of protest. The report laid out the fundamental dilemma:

There is a conflict of interest between those who seek to use the streets for the purpose of passage and those who seek to use them for the purpose of demonstration. English law recognizes as paramount the right of passage: a demonstration which obstructs passage along the highway is unlawful.⁷⁷

In this formulation, the protesting marcher was not using the streets for the “purpose of passage” but rather for the “purpose of demonstration.” While supporting the right to protest, the analysis wholly transferred the protection of passage from the marcher to the public domain. In Lord Scarman’s view the priority of passage, thus redefined, was sound. “Free movement between place and place and access to premises may

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⁷⁴. REPORT OF INQUIRY BY THE RT. HON. LORD JUSTICE SCARMAN INTO THE RED LION SQUARE DISORDERS OF 15 JUNE 1974, 1975, Cmd. 5919 [hereinafter SCARMAN REPORT].
⁷⁵. Id. ¶ 5.
⁷⁷. SCARMAN REPORT, supra note 374, ¶ 122. He thought that enactment of a positive right to demonstrate was unnecessary. “The right of course exists, subject only to limits required by the need for good order and the passage of traffic.” Id. ¶ 134(6).
seem workaday matters when compared with such rights as those of demonstration and protest,” he observed, “but society could grind to a halt if the law adopted any other priority.” It was necessary to accommodate protest, but only in a framework that would “allow non-protesting citizens to go about their business or pleasure without obstruction or inconvenience.” Lord Scarman in effect recast “reasonable use” of the highway as a test balancing rights of protest against rights of passage, and although he gave new recognition to “rights of protest,” he also firmly weighted the scales against them.

On the specific question of meetings and processions, the report articulated a traditional approach toward the former but subtly reoriented the law on the latter. It was “open to question,” Lord Scarman declared, “whether a public meeting held on a highway could ever be lawful, for it is not in any way incidental to the exercise of the right of passage.” This was wholly unexceptionable as a statement of highways law, though somewhat peculiar in a document purporting to support a right to demonstrate. His view of processions, however, was slightly novel, as he required that they “allow room for others to go on their way” without obstruction or inconvenience. Again, this framework treated “passage” only as the right of the public rather than also that of the marcher, who lost the right to cause obstruction or inconvenience. It thus departed significantly from the view prevalent for almost a century that a procession, though inevitably obstructive and inconve-

378. *Id.* ¶ 123.
379. *Id.* ¶ 5. The streets were not the appropriate place for the discussion necessary for democratic government, though demonstrations were permissible “provided public order and the right of passage are not endangered.” *Id.* ¶ 155.
380. Lord Scarman approved the existing balance that the law struck between freedom, public order, and the right of passage, and he did not recommend any fundamental reform. *Id.* ¶ 124. His main recommendations were to amend the Race Relations Act and give the senior police officer on the spot the power to route processions. *Id.* ¶¶ 182, 184. He also preferred voluntary cooperation between demonstrators and police to changes in the statutory law:

It cannot be said too often that our law assumes that people will be tolerant, self-disciplined, and willing to cooperate with the police. The assumption is still sound: that is why the police go unarmed, and also why, with no legal requirement of notice, the police are in fact notified in at least 80 per cent of the cases.

*Id.* ¶ 129. On that ground, he did not think that a formal notice requirement was necessary. *Id.*
381. *Id.* ¶ 122.
382. *Id.* ¶¶ 5, 34.
nient, was nonetheless a reasonable use of the street.\textsuperscript{383} Despite obeisance to "freedom of assembly," under Lord Scarman's analysis the stationary demonstrator still unlawfully interfered with the "right to passage," and the marcher no longer enjoyed its protection as an independently assertable legal right.

Shortly after release of the report, Lord Scarman's approach was endorsed, albeit in dictum and in dissent, in a Court of Appeal decision involving the public nuisance of obstructing the highway. \textit{Hubbard v. Pitt}\textsuperscript{384} arose out of a protest launched by a group of social workers against the "gentrification" of the Islington district in London. In 1974 the Islington Tenants' Campaign picketed a real estate firm allegedly pressuring poor families to leave their homes. After enduring a few weeks of Saturday morning picketing, the company sued in private nuisance to restrain the protestors from assembling on the sidewalk outside its premises. The trial court granted an interlocutory injunction, Mr. Justice Forbes holding that picketing on the highway was inconsistent with the right of passage and constituted a common law public nuisance.\textsuperscript{385} Referring to both \textit{Lowdens} and \textit{Lewis}, he drew a distinction between a march or procession, which was lawful if conducted reasonably, and a stationary picket, which was necessarily an illegitimate use of the highway.\textsuperscript{386} He thus continued the tradition introduced in the suffragette cases of treating a handful of picketers as an unlawful stationary meeting. The decision adopted a narrow but, in light of the precedents, hardly surprising view of the legality of a stationary demonstration on the highway.

The Court of Appeal upheld the injunction on a different theory,\textsuperscript{387}

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\item \textsuperscript{383} For example, only a few years earlier the Home Secretary had stated that the "natural result" of all processions was that "the peace of others would be disturbed." 770 \textsc{Parl. Deb.}, H.C. (5th ser.) 1601 (Oct. 24, 1968) (James Callaghan).
\item \textsuperscript{384} [1976] 1 \textsc{Q.B.} 142 (C.A.).
\item \textsuperscript{385} The defendants relied on an immunity for picketing contained in the Trade Disputes Act 1906 and subsequent labor legislation, but Mr. Justice Forbes concluded that these statutes were inapplicable to consumer picketing and the case was thus governed by the common law. The right to picket at common law had been the subject of two earlier conflicting decisions of the Court of Appeal. \textit{Lyons v. Wilkins}, [1899] 1 Ch. 255 (C.A.), held that picketing was automatically wrongful and a common law nuisance, but a later case, \textit{Ward, Lock v. Operative Printers' Assistants' Soc'y}, 22 T.L.R. 327 (C.A. 1906), found that picketing was only a nuisance if combined with "independently unlawful" conduct. Forbes, relying on \textit{Lyons}, held that picketing was an unreasonable use of the highway and a nuisance. See, e.g., Comment, 1975 \textsc{Cambridge L.J.} 191, 191-92.
\item \textsuperscript{386} \textit{Hubbard}, [1976] 1 \textsc{Q.B.} at 156-57.
\item \textsuperscript{387} The Court of Appeal affirmed on the ground that the defendants might be committing a private nuisance and the equities lay with the plaintiff. The majority decision primarily addressed the principles governing interlocutory injunctions rather than the merits of the nuisance claim, although it disapproved Forbes' analysis of the
\end{itemize}
but the case is primarily noteworthy for the strong dissent by Lord Denning, Master of the Rolls, who vigorously rejected the trial court’s conclusions on the merits of the nuisance claim. Relying on both the Scarman Report and *Nagy v. Weston*, Lord Denning explicitly advocated a positive right to freedom of assembly. He concluded that “reasonable use” of the highway included a right “to protest on matters of public concern.” The limited picketing at issue, moreover, was neither an unreasonable use of the street nor a common law nuisance. It was time, Lord Denning proposed, that the courts recognize a positive right to demonstrate. This supposedly strong affirmation of civil liberties, however, exhibited the same limitations as the Scarman Report. Lord Denning followed Lord Scarman in insisting that the “right to demonstrate” was secondary to the “need for good order and the passage of traffic,” and he too construed “passage” as an activity inconsistent with protest. This analytical perspective—ostensibly embracing a right to protest but subordinating it to the “right to passage,” redefined as a general public right antithetical to that of the marching demonstrator—would become dominant in the coming decade.

2. The 1980s: Reconceiving the Resolution of the 1880s

The intellectual reassessment of the right to passage formulated by Lords Scarman and Denning became widespread in the 1980s, reflecting the new wave of violence that threatened to engulf English society. Although in the late 1970s there were further episodes of domestic tumult, especially involving industrial picketing and clashes between
fascist and socialist groups, they paled in contrast to the turmoil of the succeeding decade. In the 1980s, indeed, the level of civil violence more closely resembled that of the 1930s than any previous period. Racial strife and inner-city riots were ominous new features of the urban landscape. The decade began with serious disturbances in the St. Paul's District of Bristol and continued the following year with riots in Brixton, Southall, Liverpool, Manchester, Birmingham, and other cities. The middle years of the decade saw additional urban uprisings, acrimonious labor disputes including the miners' strike of 1984-85, and confrontational protest activity by antinuclear activists. Conflict...
between left and right-wing groups gave way to direct clashes between demonstrators and police, and the latter resorted to increasingly aggressive and militaristic tactics.\(^9\) Widespread anxiety about economic, social, and cultural change contributed to a popular obsession, fully encouraged and exploited by the Thatcher government, with “law and order.”\(^9\)

As in the four earlier periods of severe turbulence, anxiety about accelerating domestic discord had important repercussions for obstruction law, which again adapted to meet changing historical circumstances. In the 1980s the proliferation of different types of disorder fostered a recognition that blanket distinctions between meetings and marches were not the most appropriate framework for dealing with the myriad forms that disturbances could take. Although the doctrinal distinction remained theoretically intact—it was far too deeply ingrained to be discarded—the law evolved to permit more refined discriminations between acceptable and unacceptable assemblies regardless of their formal connection to passage. Judges began to treat meetings as potentially “reasonable,” applying the Nagy “all the circumstances” analysis and following Lords Scarman and Denning in considering a “right to demonstrate” as part of the calculus of “reasonableness.” At the same time, the courts began to implement more rigorously the rule against “unreasonable” processions. Although these developments appeared to represent divergent trends—a more liberal attitude to meetings and a more restrictive posture toward processions—they were in fact complementary. Together they equalized the status of meetings and processions, undermined the importance of passage, and introduced a new functional approach into the application of obstruction law.

\(^9\) See EWING & GEARTY, supra note 370, at 84; John Benyon, Policing in the Limelight, in THE POLICE: POWERS, PROCEDURES AND PROPERTIES 3, 24-25 (John Benyon & Colin Bourn eds., 1986) (In the later 1970s and 1980s police equipment for crowd control began to include shields, helmets, CS gas, plastic bullets, and water canons.); Conor Gearty, Freedom of Assembly and Public Order, in INDIVIDUAL RIGHTS AND THE LAW IN BRITAIN 39, 57-58 (Christopher McCrudden & Gerald Chambers eds., 1994). Disruptions continued into the 1990s. For example, a protest at Trafalgar Square in March 1990 against the poll tax, a new form of personal taxation, injured 300 police officers—the worst violence since 1985. REINER, supra note 281, at 88-89.

\(^9\) Reiner & Cross, supra note 393, at 1.
a. The New Reasonableness of Meetings

For the most part judges and magistrates continued to apply the traditional rule that meetings were unreasonable per se, and highways law remained a useful weapon against such groups as antinuclear activists, student protestors, anti-apartheid demonstrators, and Greenpeace supporters. However, in the 1980s a more flexible stance toward meetings was evident in judicial interpretations of both “obstruction” and “reasonable use.”

The Court of Appeal displayed an unusual approach to “obstruction” in *Hipperson v. Newbury District Electoral Registration Officer*, a case involving the “Greenham Common women,” seven antinuclear activists who in 1981 began to live on an encampment outside the RAF base at Fulbeck Airfield. In 1984, using the peace camp as their address, they sued to have their names placed on the electoral register.

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400. Although most obstruction actions involved criminal proceedings, civil tort actions, as in *Hubbard*, were occasionally of value to private owners in restraining picketing or sit-down tactics. For example, in *United Kingdom NIREX, Ltd. v. Barton*, see *INDEPENDENT*, Oct. 14, 1986, at 10, two local antinuclear groups, LAND (Lincolnshire and Nottinghamshire Against Nuclear Dumping) and HAND (Humberside Against Nuclear Dumping) opposed NIREX’s search for a site suitable for the land disposal of low level radioactive waste. When the government attempted to explore two sites at Fulham and Killingholme, local residents barricaded the area from the highway and repulsed all attempts by the contractors to enter. After three weeks NIREX took legal action, successfully suing for an interim injunction to obtain entry. In October the court granted permanent individual injunctions against defendants who had committed the torts of obstruction or trespass, warning that anyone who violated the injunction by committing an obstruction, whether a party to the litigation or not, would be subject to contempt charges.

401. For example, in November 1987, 26 Greenpeace supporters were arrested outside a London conference on North Sea pollution for obstruction of the highway. See *Ewing & Grady, supra* note 370, at 116. Obstruction of the highway was also charged against 171 anti-apartheid picketers outside South Africa House, see *Perry v. Markovitch*, *LEGAL ACTION*, Sept. 1987, at 15 (Magis. Ct. 1987), against a student protesting a visit of the Home Secretary to Manchester University, Thorpe v. Chief Constable, *1989* 2 All E.R. 827 (C.A.), against poll tax demonstrators, see *72 in Court on Protest Charges*, *TIMES* (London), Apr. 3, 1990 (NEXIS), and against an anti-smoking protestor who regularly picketed Tory and Labour Party conferences, see *No Smoking*, 141 NEW L.J. 191 (1991). According to Home Office figures, in 1985 a total of 8973 persons were found guilty of obstruction of the highway other than by a vehicle, and 9864 were found guilty of assault on or obstruction of a constable. *Sherr, supra* note 18, at 125 & n.1 (noting that, as of 1989, the two offenses most commonly used against demonstrators were obstruction of the highway and the related offense of obstruction of a constable).


403. *See Hinton, supra* note 320, at 183. The Greenham Common peace camp became a site of international pilgrimage and was probably as important as large demonstrations in publicizing opposition to cruise missiles. *Id.*
Although the county court judge found that the women had violated the Highways Act because part of their encampment was on a highway, he concluded that the unlawfulness of their residence did not disqualify them from voting. The Court of Appeal agreed per curiam that the lawfulness or otherwise of the women’s residence was irrelevant to their qualifications for the franchise. In an intriguing dictum, Sir Donald Donaldson, Master of the Rolls, observed that the women had not necessarily violated the Highways Act. “The offence,” he remarked, “consists of obstructing free passage along a highway, and not of living on highway land.” Applying the Nagy “all the circumstances” test, he concluded that the existence of an obstruction was a complex factual question requiring more than mere proof of “a tent on highway land.” The statement that “living on highway land” might not necessarily obstruct the highway was a substantial departure from the precedents, and it seems explicable only as a result of sympathy for the particular defendants; the dictum did not in any event significantly influence future applications of the rule on “obstruction.” The importance of the case for obstruction law lay rather in its more tolerant

405. Id.
406. It was also inconsistent with cases involving gypsy encampments near the highway. See infra note 421 and accompanying text.
407. Indeed, a few years later the Divisional Court hewed to the traditional line on “obstruction” in Abdel-Rahim v. D.P.P., Crown Office List CO/1796/87 (Q.B. 1989) available in LEXIS, Enggen Library, Cases File, a case arising out of demonstrations at the Royal Air Force Station at Molesworth. In 1986 about a dozen people conducted a sit-down action in a line across Cockbrook Lane, a private roadway near the base. When Abdel-Rahim refused to comply with a constable’s request to move, she was arrested for obstruction under the Highways Act. Her defense was that the Act did not apply to Cockbrook Lane, a private road owned by the Secretary of State for Defense. The government, however, luckily discovered that in 1979 the Defense Secretary had apparently dedicated a ten-foot portion of the road for use as a public bridleway. It argued that Cockburn Lane included a “highway”—that is, the bridlepath—and that even if the sit-down action did not occur on the bridlepath itself, the defendant had committed obstruction by acting in concert with others to obstruct the whole roadway of which the bridlepath was a part. Technical as this theory was, the government persuaded the court of its merit. After years of litigation, in 1989 the Divisional Court finally concluded that the government had indeed created a public bridleway somewhere within the private road. The fact that the prosecution could not identify its precise location was not “of significance or relevance.” The court thus sanctioned a broad interpretation of both “highway” and “obstruction,” finding the presence of a highway based on a technicality and extending the notion of obstruction to encompass the surrounding private land. The definition of “obstruction” thus for the most part continued along its conventional path.
stance toward protest activity and its explicit endorsement in the political context of the *Nagy* test—a more refined and discriminating standard that could circumvent inflexible rules about stationary and moving assemblies.

The major reinterpretation of the law on street meetings related not to "obstruction" but rather to "reasonableness." Prior to the 1980s the only assertion in a judicial opinion that a stationary meeting might be reasonable was that of Lord Denning in *Hubbard v. Pitt*. In a groundbreaking decision in 1987, *Hirst and Agu v. Chief Constable of West Yorkshire,* the Divisional Court directly applied the Denning-Scarman approach to a political meeting on the highway. Lorraine Agu and Malcolm Hirst, animal rights activists in Bradford, were convicted by the magistrates of violating the Highways Act 1980 by picketing a fur store in a spacious pedestrian precinct. The Crown Court affirmed, considering itself bound by *Waite v. Taylor,* a narrow decision of the Divisional Court two years earlier that had found a solitary juggler in a pedestrian mall to have unreasonably obstructed the highway. On further appeal, the Divisional Court reversed on the ground that the court below had not considered whether the protestors had a "lawful excuse," that is, whether their conduct was reasonable, thereby rejecting the view that meetings were unreasonable *per se.* According to Lord Justice Glidewell, the *Nagy* test enabled magistrates to find activities unrelated to passage to be reasonable, and in his view a stationary demonstration or picket could conceivably be a "reasonable use" of the street. He relied not only on *Nagy,* approved in both *Hipperson* and the *Hubbard* dissent, but also on *Lowdens,* thus for the first time formally aligning the test for processions with that of meetings. Mr. Justice Otton, echoing Lord Denning's plea that courts should balance the right to demonstrate against the need for good order, further supported Lord Glidewell's effort to give freedom of protest "the 408. 85 Crim. App. R. 143 (Q.B. 1987).
409. 149 J.P. 551 (Q.B. 1985).
410. The court understandably concluded that standing on the highway distributing leaflets and holding banners was no less an obstruction to passage than solitary juggling. *Hirst and Agu,* 83 Crim. App. R. at 146.
411. The decision disapproved *Waite,* decided by another panel of the same court. Lord Justice Lloyd stated that in his judgment, *Nagy v. Weston* was the leading modern authority and it did "not apply so rigid a test" as that found in *Waite v. Taylor.* *Id.* at 150. He noted that the sale of hot dogs could not possibly be considered incidental to the right to pass, and yet the court in *Nagy* had taken the view that it was open to the magistrates to consider whether it was reasonable or not. *Id.* This statement was slightly disingenuous, however, because Lord Parker in *Nagy* had indicated that the magistrates could not conceivably find the actions of the hot dog vendor to be reasonable.
recognition it deserves."  

Hirst was unusual in explicitly grappling with constitutional issues, in equating the test for meetings and processions, and in suggesting that "reasonable use" of the highway could include stationary political activities not only unrelated to passage but patently obstructive of it.

That it took almost a century for the courts even to consider the possibility that a street meeting might be reasonable testified to the enduring power of the doctrinal distinction between meetings and processions. Moreover, the ground covered in the evolution of "reasonableness" from Carlile to Hirst should not be overstated. Under Hirst, just as under Nagy and Lowdens, the judges left the determination of "reasonableness" to the magistrates as a matter of fact, and magistrates were as a general matter not disposed to acquit political protestors.  

It was also not encouraging that the Divisional Court's application of Nagy in the commercial context had for the most part led to highly restrictive results.  

Further, even the most expansive

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412. Id. at 152.

413. See David G. Barnum, The Constitutional Status of Public Protest Activity in Britain and the United States, 1977 Pub. L. 310, 339. The occasional appellate cases that overturned a conviction generally involved simply a failure of the factfinder to consider a critical term—"obstruction" (Papworth) or "reasonableness" (Hirst, Lowdens, Clark)—rather than finding the decision below to be substantively in error. Until 1960, moreover, there was no appeal from the decisions of the Divisional Court to the House of Lords. See STREET, supra note 339, at 59.

414. There were many restrictive commercial decisions in the 1960s, both before and after Nagy, and some were announced by the author of Nagy, Lord Parker himself. See, e.g., Seekings v. Clarke, 59 L.G.R. 268 (Q.B. 1961) (Lord Parker) (holding a sun blind on a shop projecting two and a half feet over a pavement 16 feet wide to be an unlawful obstruction); Wolverton U.D.C. v. Willis, 126 J.P. 84 (Q.B. 1962) (Lord Parker) (holding a display of vegetables projecting 11 inches beyond the line of a greengrocer's shop to be unlawful because any encroachment was deemed to obstruct and incommode passage); Pitcher v. Lockett, [1966] Crim. L.R. 283 (Q.B.) (Lord Parker) (upholding the conviction of a mobile hot dog vendor in Bournemouth under the Highways Act for parking along the curb with other cars); Scarfe v. Wood, [1969] Crim. L.R. 265 (Q.B.) (Lord Parker) (reiterating that a potential obstruction was sufficient to convict where youths stood on the pavement and forced people to walk around them); see also London Borough of Redbridge v. Jaques, [1970] 1 W.L.R. 1604 (Q.B.) (upholding a trader's conviction for selling vegetables from a van with the local council's approval because it temporarily prevented free passage of the public over every part of the road); Cambridgeshire C.C. v. Rust, [1972] 2 Q.B. 426 (holding that a trader could be convicted under the Highways Act even though local officials condoned his vegetable stall); Cooper v. M.P.C., 82 Cr. App. R. 238 (Q.B. 1986) (upholding the conviction of "club tout" under the Highways Act for stopping pedestrians for one minute to advertise a nearby club); Dixon v. Atfield, [1975] 1 W.L.R. 1171 (Q.B.)
interpretation of the "all the circumstances" test—one that included the "right to protest" as a factor in the calibration of reasonableness—would on the analysis of Lords Scarman and Denning yield priority to public passage. No case held and few even suggested that a demonstration was in fact a "reasonable use" of the highway. The doctrinal significance of *Hirst* resided less in its apparent support for civil liberties than in its alignment of the test for meetings and processions, subjecting both to a malleable standard that could circumvent a rigid dichotomy based on a marcher's "right" to pass along the road.

**b. The New Unreasonableness of Processions**

A departure from the traditional framework was also evident in greater judicial readiness to define "legitimate passage" to exclude certain processions. In *Samuelson v. Bagnall*, for example, the court upheld a conviction under the Highways Act by rejecting a political marcher's assertion of a "right to passage." The prosecution was prompted by a series of "Stop the City" protest demonstrations in 1983 and 1984 aimed at bringing the City of London to a halt by a variety of disruptive activities. In one incident a large group broke through a police cordon and proceeded down Cornwall Street. The police attempted to defuse (finding it unreasonable for an antique dealer to erect a metal pole three inches in diameter on the sidewalk to prevent heavy vehicles from damaging his 400-year-old store); Durham C.C. v. Scott, [1990] Crim. L.R. 726 (Q.B.) (holding it unreasonable for a livestock dealer to put a gate across a bridlepath to prevent his livestock from wandering onto the road). One particularly narrow case, *Devon County Council v. Gateway Foodmarket, Ltd.*, 154 J.P. 551 (Q.B. 1990), applying both *Nagy* and *Hirst*, found that three parallel rows of shopping trolleys located in a pedestrian shopping precinct for 11 years constituted a highway obstruction. In the view of the court, the magistrates had placed too much emphasis on the service to shoppers that the trolleys provided and the absence of any complaints. The court interpreted *Hirst* not to require an actual obstruction and noted that the trolleys denied the public free access over the whole of the highway. It remanded the case with a direction to convict. *Id.* at 564-65. As evidence of the strictness of the Divisional Court's approach, in *Seekings, Wolverton, Rust, Dixon, and Scott*, as well as in *Gateway*, it actually reversed dismissals of charges by the magistrates.

the protest by segregating part of the procession and directing it back along another street, but the defendant stopped and informed a constable that she wished to rejoin the main body of the march. The Divisional Court considered whether she had violated the Act by attempting to pass in one direction while a police officer was directing her to move in the opposite direction. Samuelson's position was that the police had violated her right to pass along the highway. The court, however, applying the analysis in *Nagy*, found that although the "ordinary citizen" had the right to pass along a thoroughfare, the constable was correct in obliging her to go the opposite way to protect persons and property. Assertion of the right to pass by a protestor thus no longer carried the presumptive reasonableness extended to the Salvation Army in the 1880s, nor did the *Nagy* test necessarily dictate a result in favor of freedom to march.

A similar reorientation of the "right to passage," eliding the right of a demonstrator to march and focusing almost exclusively on the larger right of the public to convenient travel, was also evident in the government's treatment of certain vehicular processions. Beginning in the 1970s "New Age travellers" began journeying annually in convoy to Stonehenge to celebrate the summer solstice. By 1985 their numbers had swelled to 30,000, and in that year the local authorities, vigorously resisting the travellers' claim of a right to move along the highway, used obstruction law to repel their passage. The Wiltshire Council closed the highway around Stonehenge between mid-May and mid-July, and when a convoy of 140 vehicles nonetheless tried to reach the monument, the council prosecuted over 500 travellers for various offenses including obstruction of the highway. The following year, on the day before the solstice, the police arrested 230 travellers at

\[417. \text{Lord Justice May revealed his antipathy to the demonstrators when he observed that the facts of the case "are unfortunately becoming more common nowadays . . . . Anyone who has had the misfortune to be in a crowd which is other than wholly disciplined knows how terrifying it can be." *Id*.}

\[418. \text{The first free festival at Stonehenge was held in 1974, and it thereafter became an annual event leading to frequent confrontations with the Wiltshire police. See EwIng & GeArTy, *supra* note 370, at 125. The usual practice was for travellers to live in their vehicles in Stonehenge and then proceed in convoy to the next free festival. NCCL, *supra* note 292, at 4.}

\[419. \text{Trapped between two police road blocks, the convoy moved into an adjacent field and engaged the police in what became known as the "Battle of the Beanfield." NCCL, *supra* note 292, at 4-5.} \]
Hanging Langford for obstruction, even though NCCL observers reported that there was no actual blockage of the highway. The police detained the travellers without a hearing for eighteen hours to ensure that they remained in custody over the period of the solstice. Local councils displayed the same attitude to travelling gypsies, whose claim of a right to free movement was invariably rejected by the courts. The fate of the gypsies and New Age travellers demonstrated that the courts could easily dismiss the claims of vulnerable groups to freedom of movement on the theory that the broader public’s passage rights were infringed.

The reconceptualization of the “right to passage” was apparent not just in obstruction law but in the implementation of public order legislation as well. Reflecting the intense domestic unease of the decade, the number of banning orders issued under the Public Order Act 1936 dramatically increased after 1980. While the entire decade of the 1970s had witnessed only eleven banning orders, there were seventy-five in the four-year period from 1981-84 alone.

420. See id. at 26-28. That same year, when the peace convoy traveled the country and caused obstruction to traffic in Dorset and Hampshire, the local authorities ordered it to move off the road. See 98 PARL. DEB., H.C. (6th ser.) 733 (June 3, 1986). In addition, the Salisbury District Council issued an order under section 21 of the Town Police Clauses Act 1847 banning hippies from the city center for two specified days to prevent a protest march. See NCCL, supra note 292, at 25; THORNTON, supra note 4, at 93. Commenting on the use of obstruction charges against members of the hippie convoy, the Home Secretary observed that the law on highway obstruction was “wide” and gave “substantial powers to the police.” 98 PARL. DEB., H.C. (6th ser.) 736-37 (June 3, 1986).

421. The gypsies complained of constant police harassment under successive Highways Acts from 1835 to 1980. County councils employed the statute to interfere with the gypsies’ roving life style by evicting them from camp grounds on or near the highway. For example, in R. v. Avon County Council, 58 P. & C.R. 356 (Q.B. 1988), the court upheld the eviction of a gypsy encampment on the ground that the council had a duty under the Highways Act 1980 to prevent obstruction and protect the rights of the public to use and enjoy the highway. Similarly, in R. v. Essex County Council, 24 H.L.R. 90 (Q.B. 1990), the court validated the council’s determination that the gypsies’ occupation of a layby on the highway constituted an obstruction of the highway and a nuisance to adjoining owners and occupiers. See Philip Thomas, Housing Gypsies, 142 NEW L.J. 1714 (1992).

422. The police also used road blocks to interfere with freedom of passage along the road. They employed the road blocks to limit protestors’ access to military bases during the CND campaign of the 1980s, especially at R.A.F. Molesworth in 1985; to prevent the movement of pickets during the miners’ strike; and to block the movement of New Age travellers. See EWING & GEARTY, supra note 370, at 98-99, 111-12, 125. Despite complaints of interference with passage, the legality of road blocks was not judicially tested. See id. at 98-99.

That the courts applied minimal scrutiny in reviewing the validity of these orders was demonstrated by *Kent v. Metropolitan Police Commissioner*, which considered a banning order issued shortly after the Brixton riots in April 1981. Sir David McNee, the Police Commissioner, imposed the ban to prevent a CND march protesting police conduct during the riots. Inasmuch as the Act did not permit him to single out an individual march, he obtained the Home Secretary’s consent for a twenty-eight-day prohibition on all public processions within the Metropolitan Police District, an area covering 786 square miles.

The NCCL, representing the CND, argued that the ban was ultra vires the Public Order Act because it encompassed an excessively wide area and affected too many different organizations and events.

The Court of Appeal judges unanimously rejected the claim. Quoting from his *Hubbard* opinion, Lord Denning declared that the passage rights of the wider public, combined with the possibility of violence, justified restrictions on freedom of assembly. Again conceiving the right of passage as antithetical to the right to march, he noted that even at common law a procession was unlawful if it produced “undue disturbance of the traffic” or prevented ordinary citizens from “going up or down the roads.”

This statement did not represent a formal departure from the law—an unreasonable procession had always been unlawful frequently than in the early 1980s. Examples included bans on marches by Protestants and Catholics in Manchester in 1987, 176 PARL. DEB., H.C. (6th ser.) 204w (July 11, 1990), a nine-day ban on marches in Dewsbury, West Yorkshire, provoked by controversy over Salman Rushdie’s *Satanic Verses*, see Gearty, supra note 398, at 55, and a ban against all processions within a four-mile radius of Stonehenge in 1989, see EWING & GEARTY, supra note 370, at 127.


425. Id.

426. Id. He acknowledged that the ban would catch in its net a fair at Chiselhurst, a carnival at Fulham, a student procession against cuts in student aid, and marches of jobless people to see their M.P.s. But he found that recent instances of violence created a sufficient risk of public disorder, even from a peaceful demonstration attacked by hooligans, to justify a ban. Lord Justice Ackner similarly observed that although the right to demonstrate was important, the police had discretion to suspend it temporarily to prevent bloodshed. Sounding the familiar refrain that crowds invariably attracted criminal elements, he also commented that the ban was an attempt to control “hooligans, not the members of the peaceful march.” Id. The references to “hooligans” indicated that the court was willing to depart from Beatty’s “hostile audience” ruling: although the danger came not from marchers but from hooligans and others who might attack the police, the judges upheld the ban nonetheless.
ful—but it reflected a much more stringent definition of "reason-
ableness." Previously the cultural consensus that balanced individual freedom and societal convenience had largely treated the "right to passage" of the marcher as an acceptable obstruction of the public. Under Lord Denning's analysis, however, it was difficult to imagine a procession that would not interfere with citizens "going up and down the roads." In addition, the judges displayed considerable readiness to defer to the Police Commissioner's judgment, underscored by the fact that McNee submitted only minimal evidence in support of the banning decision. Sir Denys Buckley, another of the judges, acknowledged that the evidence was "meagre" but nonetheless concluded that "this is a matter for the Commissioner to decide in his discretion." By the 1980s the government had shed its reluctance to use the banning power against processions and, as *Kent* revealed, had no reason to fear interference by the courts.428

**c. Legislative Functionalism: The Public Order Act 1986**

Beginning in 1980 rising public alarm at the seemingly uncontrollable tide of domestic violence prompted several official inquiries into the effectiveness of existing public order controls. Collectively, the various reports affirmed the importance of passage and—as did all formal expositions of the law, whether cases, treatises, reports, or legislation—persisted in treating meetings and processions as different conceptual categories. Nonetheless, the tone of these reports, their recommendations, and even their very internal inconsistencies, suggested a growing realization that the doctrinal resolution of the 1880s had outlived its usefulness.

In 1980 the Conservative Government presented its preliminary proposals in a Green Paper429 that in terms of overall approach relied heavily on the Scarman Report. "The review has as its starting point," it proclaimed, "the need to safeguard certain fundamental human rights—the rights of peaceful assembly and public protest and the right to public order and tranquillity."430 Reviewing the existing law, it noted that "to be lawful, the use of the highway must be a use for the

427. Id.
428. See J.A. GRIFFITH, THE POLITICS OF THE JUDICIARY 163 (4th ed. 1991) (stating that the courts consistently lent support to the police over the individual); Bevan, supra note 142, at 168 (claiming that the Home Secretary rubber stamped the decisions of the police chiefs).
429. REVIEW OF PUBLIC ORDER ACT 1936, supra note 370.
430. Id. ¶ 12 (quoting SCARMAN REPORT, supra note 374, ¶ 5).
purposes of passage along the highway.”

While respecting the legal convention of differentiating between meetings and processions, it acknowledged that there were many different types of assembly and that individual instances of each could be more or less disorderly. Marches on occasion could cause “serious traffic congestion, disruption to business and inconvenience to those who wish to go about their business or pleasure without obstruction,” but the great majority did not cause serious problems. In fact, much recent disorder had arisen in relation to meetings, and thus some restrictions on stationary assemblies might be necessary. While making few concrete proposals, the report implied that general distinctions between stationary and moving demonstrations were no longer adequate to resolve complex problems of public order, and it also exhibited a new emphasis on protecting the public from mere “inconvenience” as well as breaches of the peace.

Shortly thereafter, the House of Commons Select Committee on Home Affairs released its own series of recommendations. Its second

431. Id. ¶ 17. It echoed the traditional wisdom with respect to the legality of public assemblies, that there was no specific right to demonstrate but a person was free to do so provided that the law was not contravened. Id. ¶ 24. It rejected recognition of a statutory right:

    It is sometimes said that the law gives undue prominence to the right of passage along the highway, and that it should also recognise a right to stand in the highway provided the rights of passage of others are not thereby infringed. A statutory right to demonstrate might help in this . . . [but] would be a novel and uncharted step.

Id. ¶¶ 25-26.

432. Id. ¶ 39.

433. Id. ¶ 35.

434. Id. ¶ 75. The report referred specifically to demonstrations against National Front meetings in Birmingham in August 1977 and February 1978 and at Southall in April 1979. Id. It also noted that stationary demonstrations could take many different forms and be arranged for a variety of purposes, including rallies outside embassies, demonstrations in support of industrial pickets, and nonpolitical gatherings such as street carnivals, pop festivals, and sporting events. Some had a major impact on the community, while others caused no disruption. Id. ¶ 77. New legislation should therefore “be directed to particular problems.” Id. ¶ 78.

435. REVIEW OF PUBLIC ORDER ACT 1936, supra note 370, ¶¶ 75-76.

436. A Public Order Act was still necessary, it maintained, because disorder continued to occur on a scale that “prevents other people from pursuing their own activities.” Id. ¶ 30.

437. HOME AFFAIRS COMMITTEE REPORT, supra note 312. The first sentence of the report explicitly dispensed with the need to pronounce on the “right” to demonstrate in a public highway, because in English law such “freedoms” were no more and no less
paragraph, quoting from the Scarman Report, issued a reminder that English law recognized the right of passage as paramount. Reflecting a renewed anxiety about processions, the report noted that there had been a very substantial increase in recent years of "demonstrations by processing in the highway" that had disturbed normal residential and business activity. This formulation again characterized processions not as exercises of the right to pass but as "demonstrations by processing" that interfered with "normal life." As for meetings, they "could pose just as great a threat to public order as those that seek to make their point while processing along the highway." Again, the report acknowledged that individual instances of both types of assembly could create unacceptable public burdens. Indeed, the evidence before the Committee suggested that the demarcation between the two categories was elusive, and Sir David McKnee, the Police Commissioner, advocated recognition of the fact that "groups of people often gather in a manner and behave in a way covered by none of these concepts." While respecting the formal distinction between meetings and processions, the Committee Report advocated a seventy-two-hour advance notice requirement for both types of demonstrations. Interestingly, it maintained that an identical notice provision would have different legal consequences for meetings and processions. In the case of a procession, a notice requirement would effectively recognize a
limited "right to march." However, in the case of a "static demonstration," such a requirement "would not confer any statutory 'right' to cause an obstruction on the highway, but would merely recognise certain current practices and seek to regulate them in a consistent manner in the interest of the public as a whole." This contorted statement reflected the report's effort to respect traditional doctrine affirming the legitimacy of processions and the illegality of meetings while in fact offering recommendations that treated them as functionally equivalent.

In 1985 the government finally issued a White Paper presenting and justifying the specific legislative proposals that it intended to introduce into Parliament. Following the earlier reports, it considered the situation of meetings and marches in separate sections while minimizing the significance of general doctrinal categories in favor of focusing on the specific characteristics of particular demonstrations. The White Paper noted, for example, that "[s]tatic demonstrations may be thought in general to be less disruptive than marches, but on occasion they can  

445. Id. ¶ 36. The Report stated: "The NCCL pressed upon us the need for a statutory right to march, assemble and demonstrate. No case has been made out for such a wide measure, but we realise that a statutory notice requirement would in effect recognise a limited right to march. In other words, legal standing is confirmed for a march by the requirement and acceptance of notice." Id.

446. Id. ¶ 72.

447. It supported authorizing the police to impose limiting conditions on both types of assemblies to prevent "serious disruption to the normal life of the community." Id. ¶ 26. This broader standard was necessary because "the public are entitled to a criterion which takes into account their 'human right' to a normal life . . . ." Id. The test for a ban on processions would remain "reasonable apprehension of serious public disorder." Id. ¶ 41. In the case of both meetings and processions, the Committee hoped that enhanced coercive powers would facilitate informal arrangements: "In our view, problems of public order are much more likely to be resolved by the greatest possible degree of consultation and cooperation between demonstrators and the police . . . ." Id. ¶ 100.

448. REVIEW OF PUBLIC ORDER LAW, supra note 423. The White Paper also drew on earlier reports. In 1981 Lord Scarman conducted an inquiry into the Brixton riots. THE BRIXTON DISORDERS: REPORT OF AN INQUIRY BY THE RT. HON. THE LORD SCARMAN, 1981, Cmnd. 8427. He supported amending the Public Order Act to require advance notice of an intended procession, id. ¶ 7.45—a change of mind from the Red Lion Square Report, see SCARMAN REPORT, supra note 374, ¶ 128—as well as a less stringent test for triggering restrictions, THE BRIXTON DISORDERS, supra, ¶ 7.46. Two years later the Law Commission issued a report recommending a codification of the common law offenses, but it did not deal with the crimes of public nuisance or willful obstruction of the highway. LAW COMMISSION, REPORT NO. 123, CRIMINAL LAW—OFFENSES RELATING TO PUBLIC ORDER, 1983, H.C. 85.
deliberately or inadvertently result in serious disruption. . ."449 It therefore advocated police authority to subject meetings as well as processions to limiting conditions. It rejected bans on meetings, however, presumably because existing law was more stringent in relation to meetings and such a step would have radically departed from previous practice.450 Echoing the new judicial attitude toward meetings, the government observed that they were "a more important means of exercising freedom of speech than are marches."451 In a significant change from the 1936 Act, it proposed adding the criterion of "serious disruption to the life of the community" to the existing standard of "serious public disorder" as a basis for imposing conditions on both meetings and marches.452 As the examples set forth in the White Paper made clear, such "serious disruption" could include relatively ordinary traffic congestion and similar interferences with passage.453 The "convenience" rationale of obstruction doctrine had thus come to invade the law of public order itself.

The Public Order Act 1986 substantially followed these lines. Its most significant features were the authorization to impose restrictions on meetings as well as processions454 and its inclusion of "serious disruption to the life of the community" as a basis for so doing.455 In a

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449. REVIEW OF PUBLIC ORDER LAW, supra note 423, ¶ 5.9; see id. ¶ 5.1. The government was referring in particular to picketing activity, especially the exceptionally violent miners' strike of 1984-85. See SARAH MCCABE & PETER WALLINGTON, THE POLICE, PUBLIC ORDER AND CIVIL LIBERTIES 116-17 (1988); Gearty, supra note 398, at 62.

450. REVIEW OF PUBLIC ORDER LAW, supra note 423, ¶ 5.3.

451. Id. ¶ 5.3. This was presumably because meetings were theoretically a forum for discussing ideas, and a power to ban was viewed as a "major infringement on freedom of speech." Id. The White Paper also rejected a notice requirement for meetings while proposing one for processions, suggesting that in the former case a requirement would "inundate the police with notifications of perfectly peaceful meetings." Id. ¶ 5.4 The government might also have been concerned, however, that a notice requirement would confer some type of legal recognition on the right to meet.

452. Id. ¶ 5.5.

453. It suggested that serious disruption might include traffic congestion due to marches held in shopping centers on Saturdays or in city centers in rush hour. Id. ¶ 4.22. "The proposed test would enable the police to re-route a march if they believed it was likely to be seriously disruptive to the traffic, the shops or the shoppers." Id.

454. Public Order Act, 1986, ch. 64, §§ 12, 14. The police could impose whatever restrictions appeared necessary on processions. Id. § 12(1). However, in the case of assemblies, defined as "twenty or more persons in a public place which is wholly or partly open to the air," id. § 16, they could impose only conditions relating to place, duration, and number. Id. § 14(1).

455. The other criteria were serious public disorder, serious damage to property, and, in an obvious reference to mass picketing by trade unions, where the purpose of the protest was intimidation of others. Id. § 12.
telling statement in the House of Lords, Lord Denning explained why he supported the phrase “serious disruption to the life of the community”:

I can illustrate the point by referring to the sometimes long and tedious processions which obstruct the traffic and life of the community. A little while ago I hired a cab to take me from Lincoln’s Inn to Victoria Station and allowed 25 minutes for the purpose. But, lo and behold, when we got towards Whitehall there was going along a procession of indefinite length, and I missed my train. Surely that is, “serious disruption to the life of the community.”

The new test thus shifted the standard for regulating assemblies away from the criminal law test of violence or disorder and toward the nuisance standard of convenience. Opposing this development, Lord Scarman warned the House of Lords:

[M]any, particularly those who are as well-dressed as the noble Lords and noble Baronesses of this House, will say that the life of the community is the ability to walk down the street unmolested, go quietly into the supermarket, watch your husband or your wife buy what you then have to pay for, and then come out and go home. That is part of the life of the community but it is not all of it.

In response, the Home Secretary, Douglas Hurd, agreed to issue a circular reminding the police to consider the rights of the people to assemble and demonstrate peacefully. This hardly assuaged liberal concerns. As some critics objected, the provision threatened to permit only demonstrations that were so convenient that they became invisible.

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456. 480 PARL. DEB., H.L. (6th ser.) 10-11 (October 6, 1986). Lord Hutchinson responded that he would have missed his train equally had there been a royal procession or a visiting head of government on that day. Id. at 11.


458. 476 PARL. DEB., H.L. (6th ser.) 540 (June 13, 1986). He also noted: “The blocking of a pavement, the snarl-up of traffic, the shouting of slogans, the vigil outside premises—all these may disrupt some part of a community’s life, the shoppers or the inhabitants. The judgment is purely subjective.” He believed that the policy “very seriously erodes the freedom of the citizen to meet or to march.” Id. at 526.

459. 96 PARL. DEB., H.C. (6th ser.) 1065 (Apr. 30, 1986). Hurd insisted that if there were a formal right to demonstrate or to march, the “presumption that the law gives other rights”—presumably passage—would be undermined. 89 PARL. DEB., H.C. (6th ser.) 860 (Jan. 13, 1986).

460. Two professors at the University of Leicester warned that the test of “serious disruption of the life of the community” dangerously enhanced police powers because some degree of nuisance was an almost inevitable consequence of any protest of
Obstruction concepts had thus come to permeate the law of public order, yet had themselves been transformed in the process. The "right of passage" was now largely the public's right to move conveniently down the street in pursuit of "normal life," and it seemingly could no longer be asserted by a marching demonstrator who was literally passing along the highway. Although the marcher had secured the protection of the "right to passage" in the 1880s owing to historical contingency rather than logical necessity, the concept had held the law in its tenacious grasp for over a century. In the 1980s the Conservative government, supported by public and judicial opinion, wrenched the "right of passage" from its century-old meaning, recasting it almost exclusively as the right to public convenience, and imprinted this nuisance concept directly onto public order law.

Although critics despaired that the "breathtaking" assault launched against civil liberties in the 1980s "strikes at the very heart of legitimate protest," Public Order Act restrictions were entirely discretionary, and the police in any event already possessed extensive powers to control street activity. For purposes of the right to passage, the conceptual significance of the Act was that in augmenting the range of available controls and in reorienting concepts of passage, it allowed the police to treat assemblies on an individualized basis regardless of whether they were moving or stationary. Ostensibly respecting the dichotomy between meetings and processions, the Act went far toward equalizing their status, thus oddly complementing the expanded judicial concept of "reasonableness" in the context of meetings. Both developments, restrictive and expansive, maximized the discretion of magistrates.

significant size, and freedom of assembly was now dependent on the wise exercise of discretion by the police with virtually no effective external control. David Bonner & Richard Stone, The Public Order Act 1986: Steps in the Wrong Direction?, 1987 PUB. L. 202, 213, 226; see, e.g., ST. JOHN ROBILLIARD & JENNY MEWAN, POLICE POWERS AND THE INDIVIDUAL 239-50 (1986) (commenting that the new Act was no longer linked with preservation of the peace and that a right that could be exercised only when it did not inconvenience the majority was not worth having); PETER THORNTON, DECADE OF DECLINE 36 (1989) (explaining that the test meant that the police could accept the fears of local shopkeepers that pavements would be crowded and of local motorists that streets would be blocked); Phil Scraton, 'If You Want a Riot, Change the Law': The Implications of the 1985 White Paper on Public Order, 12 J. LAW & SOC'Y 385, 387 (1985).

461. See THORNTON, supra note 460, at 1, 35-36. Thornton, as others, was concerned that the imposition of conditions could be as effective as an outright ban. See, e.g., Bonner & Stone, supra note 460, at 222; Gearty, supra note 398, at 52. In addition to extending police controls over processions and creating new statutory controls over open-air meetings, the Act created new public order offenses such as violent conduct and criminal trespass, codified the common law crimes of riot, rout, and unlawful assembly, and extended the "threatening, abuse and insulting" provision of the Public Order Act 1936. See, e.g., Smith, supra note 423, at 156.
and police to discriminate between what they perceived as benign and objectionable assemblies. By thus reconceiving the “right to passage,” the government and the courts undermined the functional significance of formal doctrine. The new pragmatic approach to public assemblies may have benefitted meetings—though this was dubious given the primacy of passage in the “reasonableness” analysis—but it certainly eroded the importance of passage as a protestor’s tool. The marcher was now, as the stationary demonstrator had always been, subservient to the convenience of the public.

V. HIGHWAY OBSTRUCTION AND FREEDOM OF ASSEMBLY

In focusing on the use of obstruction law against particular groups in critical periods of disorder, the previous sections have not conveyed the full story. The larger picture, extending beyond the statutes, regulations, law reports, and other formal documents of the law, was one of widespread police toleration of “technical” obstructions. This dominant police practice of nonenforcement had significant implications for evolving concepts of freedom of assembly.

In both the nineteenth and twentieth centuries, the police possessed unparalleled discretion in deciding whether to tolerate, constrain, disperse, arrest, or prosecute street activity. One chief constable proclaimed that, in the vast majority of cases, the police “exercise their own discretion, unsupervised, in the enforcement or non-enforcement of the law.”

According to another student of police behavior, the

462. JOHN ALDERSON, LAW AND DISORDER 68 (1984). Alderson, who was Chief Constable of Down and Cornwall, noted that the police decided not only whether or not to report an offense but in over ninety percent of criminal cases whether to prosecute. Id. at 61; see, e.g., Emsley, supra note 65, at 139; Griffith, supra note 428, at 158. The disinclination of the courts to review police discretion was revealed in R. v. Chief Constable of the Devon and Cornwall Constabulary, [1981] 3 All E.R. 826 (C.A.), a case involving Alderson. Although the Court of Appeal declared criminal the protestors’ conduct in obstructing the Central Electricity Generating Board’s efforts to survey land for the construction of power stations in Cornwall, it nonetheless refused to issue an order of mandamus against Alderson that would require him to remove the protestors. Alderson had refused to arrest the demonstrators because he did not apprehend a breach of the peace. Lord Denning stated that although he did not share this view—and if he were wrong every passive resister in the land would have license “to cock a snook at the law” and hold up works of national importance—he would not issue an order because it was “of the first importance that the police should decide on their own responsibility what action should be taken in a particular situation.” Id. at 833; see ALDERSON, supra, at 181-89.
police in England “are subject to fewer constitutional, legal and political restraints than in virtually any other Western democracy.”463 This discretion was particularly evident in the area of obstruction, as the police could always choose to ignore political gatherings or “move people along” without instituting formal arrests and prosecutions.464 The magnitude of the constables’ discretion was underscored by the fact that even the “centralized” restrictions on civil liberties contained in the Public Order Acts of 1936 and 1986 only enhanced the potential controls available to local law enforcement officials.465 In the 1980s, as a century earlier, the regime of public order was dominated by police discretion.

Although this systemic discretion led to considerable uncertainty for individual protestors regarding the legal consequences of any single politically expressive act in the street, the authorities generally enforced the law in predictable ways. A prosecution usually produced a conviction—invariably, of course, in the case of meetings—and in periods of domestic turmoil the police applied the law strictly against organizations whose activities they considered politically objectionable. In most periods and against most groups, however, they were broadly tolerant. The Solicitors’ Journal observed in 1867 that “it is well known that if the law of public meetings were put into force, or were morally in force, scarce a public meeting could be innocently held.”466 Twenty years later Mr. Justice Charles maintained

463. LAURENCE LUSTGARTEN, THE GOVERNANCE OF POLICE 9 (1986); see, e.g., REINER, supra note 281, at 210-11 (noting that the police inevitably have discretion in enforcement because they lack adequate resources for full enforcement and because the logically open texture of rules makes interpretive discretion inevitable).

464. David Williams commented in 1967 that in “few areas of the criminal law is the exercise of the discretion to prosecute of greater importance.” WILLIAMS, supra note 3, at 211; see, e.g., EMSLEY, supra note 65, at 139 (arrests for street offenses depended on the discretion of the individual police officer, who could always let someone off with a warning); Jennifer Davis, Prosecutions and Their Context, in POLICING AND PROSECUTION IN BRITAIN, 1750-1850, at 397, 425 (Douglas Hay & Francis Snyder eds., 1989) (the police made constant use of informal sanctions in addition to arrest and prosecution); Leslie Stein, Municipal Controls over Freedom of Assembly in Canada and the United States, 1971 PUB. L. 115, 123-24.

465. Both acts left conditions on demonstrations to the discretion of the police, and although the local council and Home Office had to approve a ban on processions, in the first instance the chief police officer had to determine that it was necessary. THORNTON, supra note 4, at 146; see Bevan, supra note 142, at 168 (local councillors and the Home Secretary deferred to the judgment of the local chiefs of police). Moreover, Parliament intended the powers to be used primarily as a police lever to achieve informal regulation by means of negotiated agreements with organizers. See supra note 447 and accompanying text.

466. 11 SOLIC. J. & REP. 891 (1867). The journal also later noted that “practically speaking,” the obstruction caused by processions and demonstrations was not generally sufficient to induce anyone to take proceedings. Note, supra note 126, at 689.
in *Cunninghame Graham* that although members of the public had no right to discuss social, political, or religious questions in the street, they often did so without objection.\textsuperscript{467} Even in the 1930s the general practice of nonenforcement of obstruction law was evident,\textsuperscript{468} a pattern that persisted in the post-war period.\textsuperscript{469} As a commentator noted in 1981, the police normally permitted all groups to hold orderly demonstrations despite the strain that the practice imposed on law enforcement: "Quite possibly, London is the site of more parades and demonstrations than any other city in the world."\textsuperscript{470}

Underenforcement was, of course, inevitable as a matter of general police practice, especially in the case of obstruction, which was an offense that most demonstrators unavoidably committed. The pattern of underenforcement, however, also enjoyed broad institutional support. The courts explicitly sanctioned the policy because they were uncomfortable enforcing technical rules against obstruction, even though they did so strictly when confronted with a given prosecution. For example, the case of *Llandudno Urban District Council v. Woods*,\textsuperscript{471} in which the

\textsuperscript{467} R. v. Cunninghame Graham & Burns, 16 Cox C.C. 420, 429-30 (Cent. Crim. Ct. 1888); see, e.g., 186 PARL. DEB., H.C. (3d ser.) 1964 (May 3, 1867) (M.P. commenting that although the police in 1864 permitted weekly meetings in Trafalgar Square, nobody who had ever talked with a lawyer "could suppose that there was any legal right to meet there"); 192 Parl. Deb., H.C. (4th ser.) 49 (July 9, 1908) (Herbert Gladstone observing that the police would generally not intervene in temperance meetings); 314 PARL. DEB., H.C. (3d ser.) 1759-60 (May 12, 1887) (Matthews insisting that meetings that did not obstruct traffic were not interfered with by the police);

\textsuperscript{468} See, e.g., Goodhardt, supra note 274, at 165 (remarking that the number of meetings "which are not technical nuisances" was very limited, but "it may not be the practice to prohibit them"); Jennings, supra note 305, at 17 (observing that the law on highway obstruction was usually not rigidly enforced, and street corner meetings were frequently permitted); Wade, supra note 297, at 180-81 (commenting that the police in the exercise of their discretion did not usually enforce the law of obstruction).

\textsuperscript{469} In 1976 Mr. Justice Forbes stated in *Hubbard v. Pitt*, [1976] 1 Q.B. 142, that stationary demonstrations on the highway were often permitted because available legal remedies were not put into operation. *Id.* at 157. According to John Dellow, the Assistant Commissioner of the Metropolitan Police, "the essential legal entitlement is to have passage of the highway," but in normal circumstances "nobody is going to take that particular nice piece of law." 2 HOME AFFAIRS COMMITTEE REPORT, *supra* note 312, at 53; see M. GLENN ABERNATHY, THE RIGHT OF ASSEMBLY AND ASSOCIATION 63 (2d ed. 1981) (pointing out that the usual practice both in the United States and England was not to take official action against meetings that constituted a technical obstruction only).

\textsuperscript{470} See *Barnum*, *supra* note 413, at 89 (estimating that one thousand parades and demonstrations occurred in London in 1979).

\textsuperscript{471} [1899] 2 Ch. 705.
local council sued an Anglican clergyman for delivering sermons on the beach, exasperated the court. Although the judges decided the case in the council's favor, as they were compelled to do under the law, one judge considered the action "wholly unnecessary, and one which ought not to have been brought."472 The audience enjoyed the defendant's speeches, he noted, and he could not understand "why they should be deprived of this innocent pleasure" when no one was obliged to listen.473 Similarly, even as Mr. Justice Wills in Ex parte Lewis pronounced the absence of a right of public meeting, he anticipated no difficulties with assemblies "when the only and legitimate object is public discussion, and no ulterior and injurious results are likely to happen." "Things are done every day," he continued, "in every part of the kingdom, without let or hindrance, which there is not and cannot be a legal right to do, and not unfrequently are submitted to with a good grace because they are in their nature incapable, by whatever amount of user, of growing into a right."474

This pattern of underenforcing obstruction violations encouraged the emergence of a popular belief in freedom of assembly despite the fact that street meetings were unquestionably impermissible under the law. The nineteenth century witnessed a burgeoning of notions of a constitutional right to assemble,475 and by the early twentieth century such
beliefs were widely held.\textsuperscript{476} In light of the absence of a positive right of public meeting and the actual illegality of assemblies under obstruction law, such a development was only possible because of widespread police condonation of obstruction offenses. That is, the norm of failing to enforce obstruction law permitted a belief in freedom of assembly as a practical political right regardless of its formal legal status.

Although there were many diverse theories of rights in popular currency,\textsuperscript{477} most proponents of a right to public meeting—certainly the leaders of popular political movements—knew full well that meetings unlawfully violated the “right to passage.” They nonetheless claimed the right to public meeting as a practical right created by customary nonenforcement of patently unlawful conduct. Regarding a proposed reform meeting in Hyde Park in 1867, John Bright stated that “although technically and legally the Government may have the right to close the Park, yet practically it has no such right in regard to the ordinary and common enjoyment of it.”\textsuperscript{478} Similarly, Cunninghame Graham insisted during the Trafalgar Square controversy that “great and undue impor-

\textsuperscript{476} The litigants in public order cases, for example, all claimed a “right of public meeting.” See, e.g., Bailey v. Williamson, 8 L.R.-Q.B. 118, 125 (1873) (claiming a right to deliver addresses in the park); De Morgan v. Metro. Bd. of Works, 5 Q.B.D. 155, 157-58 (1880) (claiming a right of public meeting on the common); Lewis, 21 Q.B.D. at 197 (claiming a right to hold public meetings in Trafalgar Square); Llandudno Urban Dist. Council, [1899] 2 Ch. at 707 (claiming a right to preach on the seashore as on an ordinary highway); Brighton Corp. v. Packham, 72 J.P. 318 (Ch. 1908) (claiming an immemorial right to hold meetings); M’ara v. Magistrates of Edinburgh, [1913] Sess. Cas. (J.) 1059, 1061 (claiming a right to hold meetings “in accordance with the constitutional law of the country”); Aldred v. Miller, [1924] J.C. 117, 119 (claiming a right to deliver political addresses in the street).

\textsuperscript{477} For example, some believed—or at least claimed to believe—that meetings were not prohibited or “unlawful,” but that a right to meet was simply not legally enforceable. The Radical Sir Charles Russell, for example, commented on the right of public meeting: “I do not assert that it is a legal right in itself in the same sense as a private legal right which is enforceable by action at law, but I do say it is a Constitution- al right on the part of the community . . . .” 333 PARL. DEB., H.C. (3d ser.) 1002 (Mar. 5, 1889); see also 323 PARL. DEB., H.C. (3d ser.) 118-19 (Mar. 2, 1888) (M.P. asserting that the right was not an enforceable legal right, but a practice that could not arbitrarily be dealt with and that approached a legal right). The argument of this Article is somewhat different, that many political leaders acknowledged the unlawfulness of meetings under highway law but considered this irrelevant in light of the customary expectations created by patterns of nonenforcement.

\textsuperscript{478} 186 PARL. DEB., H.C. (3d ser.) 1956 (May 3, 1867). He continued that “the right, if there be such a right, to close the Park absolutely any day is a right practically of no effect. It is incomplete, is not intended to be exercised and never has been exercised.” \textit{Id.}
tance has been attached to the mere legal side of the question,” and that “the popular side has been altogether forgotten.” According to another M.P., “there are many rights which possibly one could not vindicate in a Court of Law, and yet rights, properly so-called, which a Government ought not to take away, which no wise Government would ever dream of taking away.” Charles Bradlaugh effectively conceded the unlawfulness of meetings as technical obstructions when he requested “a generosity of construction with regard to what may be the right to hold public meetings,” insisting that the right “should not be tied down by exact legal technicality.” The fact that meetings were not for the most part “tied down by legal technicality” nourished a belief in a customary right to assemble premised on the expectation that the authorities would continue to tolerate violations of obstruction law. This phenomenon suggests that popular conceptions of “rights” were based more on de facto patterns of police enforcement and non-enforcement than on de jure pronouncements of legal authorities.

For its part, the government exploited the disjunction between the popular belief in freedom of assembly and its actual legal status by acknowledging the customary practice of permitting meetings while denying their formal legality. This posture allowed it both to avoid unnecessary repression and to retain the ability to constrict the practice of toleration whenever necessary. William Harcourt, the Liberal
Home Secretary, described the right to assemble as being not "technically legal" but rather a "political right" of usage, and William Ewart Gladstone similarly differentiated between a "permanent cession of a right and an occasional waiver under circumstances that would justify such an exercise of discretion on the part of the Government." The Conservatives followed the Liberals in asserting that supporters of a right of meeting claimed not a "legal right" but only "something that rests upon custom," and that therefore the government could enforce the law on passage whenever circumstances warranted. The Attorney General insisted in 1889:

The right of access for passage negatives the right to occupy the whole space for a public meeting . . . . [A]cquiescence in an unlicensed user by a certain number of the public, in contravention of the public rights, may be permitted so long as no evil consequences are likely to follow; but when the Executive find that the result is to involve any section of the public in danger, or to tend to the public inconvenience, it is the duty of the Executive to step in and put an end to that which has been previously acquiesced in.

Similarly, Matthews acknowledged that although in the "spirit of forbearance" the authorities closed their eyes to the use of Trafalgar Square for public meetings, the supposed right to meet in any thoroughfare was a right "totally unknown to the law, and cannot be established by custom, however prolonged." It was irresponsible, he continued, for popular leaders to "din into the ears of the working classes that they creates discontent and disturbance."

BRIT. PARL. PAPERS, PUBLIC MEETINGS IN METROPOLITAN OPEN SPACES: CORRESPONDENCE BETWEEN THE HOME DEPARTMENT AND THE METROPOLITAN BOARD OF WORKS, 1878-1888, H.C., 1889; see, e.g., 205 PARL. DEB., H.C. (3d ser.) 574-75 (Mar. 24, 1871) (William Gladstone stating that the preferred policy except in cases of danger to the public peace was not to interfere with expressions of opinion); 18 PARL. DEB., H.C. (4th ser.) 889-90 (Nov. 14, 1893) (Herbert Asquith claiming that meetings acted as a safety valve to principles only dangerous if suppressed). 485. 323 PARL. DEB., H.C. (3d ser.) 63-64 (Mar. 2, 1888). 486. 186 PARL. DEB., H.C. (3d ser.) 1974 (May 3, 1876). 487. 333 PARL. DEB., H.C. (3d ser.) 1048 (Mar. 5, 1889). 488. Id. at 1048-49. Webster also stated that although undoubtedly meetings were permitted at times, this was not because they were claimed as of right but only because the government, as previous governments, did not wish to interfere with such an illegal use unless it was necessary for the public interest. 323 PARL. DEB., H.C. (3d ser.) 47, 53-54 (Mar. 2, 1888). 489. 335 PARL. DEB., H.C. (3d ser.) 1008 (Mar. 5, 1889). He added that the government had "every sympathy with public meetings," but the events of 1886 and 1887 suggested that "[t]he acquiescence of which I have spoken has been twice most grossly abused." Id.
have a right of meeting in these places." The government thus took the position that in its discretion it could invoke the rules against meetings and retract the "policy of acquiescence."

A practical political corollary of the de facto right to freedom of assembly created by customary nonenforcement of obstruction law was that the prosecution of members of specific groups—predominantly those on the left—inevitably led to heated charges of discrimination. Ironically, it was precisely the norm of toleration that made episodes of enforcement so objectionable, and after World War II there was growing momentum to establish formal legal protections for freedom of assembly. It is important to recognize, however, that such proposals merely sought to superimpose positive law status on a customary right to assemble that had developed in the nineteenth century as a result of the prevalent official practice of condoning unlawful public meetings. It was precisely the perception in the twentieth century that the police were departing from the customary practice of forbearance that produced increasing pressure to bring the formal law into compliance with popular constitutionalism.

VI. CONCLUSION

This Article suggests, on the broadest level, that the history of the "right to passage" in the past two centuries is explicable only in terms of the complex interaction between formal legal doctrine on the one hand and social and political pressures on the other. Specific challenges to public order significantly shaped the evolution of legal rules, but these rules, once established, constrained official action and compelled the

490. Id. at 1007.
491. The government could also "recognize" the right while imposing conditions on it; that is, it could distinguish the abstract right from the right "to exercise it in a particular place" such as the street. As Sir George Grey stated in 1867: "There is no question now as to the legality of meetings held for the discussion of questions connected with Reform, and the only question is as to where these meetings should take place." 186 PARL. DEB., H.C. (3d ser.) 1980 (May 3, 1867). Similarly, the Attorney General, Sir Richard Webster, remarked in 1889: "This is not a question of the right of public meeting or of public discussion; it is simply a question of the place in which you are entitled to have discussion." 333 PARL. DEB., H.C. (3d ser.) 1048 (Mar. 5, 1889); see M'ara v. Magistrates, [1913] Sess. Cas. (J.) 1059, 1073 ("[T]he right of free speech is a perfectly separate thing from the question of the place where that right is to be exercised.").

authorities at critical junctures to develop countervailing strategies. This exploration confirms that neither an externalist nor internalist approach to legal history by itself adequately explains historical change and, moreover, that the relative significance of contextual and doctrinal factors at any particular point in time is itself historically contingent.

In terms of the instrumental applications of nuisance law, obstruction of the highway was an important and often underestimated device to control political street demonstrations in five major periods of public disorder. The government sought recourse in this particular doctrine primarily because it offered the advantages of reliability, malleability, and ostensible neutrality. Its reliability lay in the broad judicial construction of “obstruction” and the generally limited interpretation of “reasonableness,” which meant that virtually all street meetings and most processions were technically unlawful. Its malleability derived from the fact that it was potentially applicable to any form of activity in the street and could be appropriately modified to meet any given circumstance. Obstruction was a plausible charge in any situation, and the police doubtless relied on it to disperse political demonstrations to an extent scarcely revealed by the formal legal record.

In addition to being universally serviceable, obstruction law was also ostensibly more neutral and nonpolitical than traditional criminal offenses. Although the government in fact selectively targeted certain groups, it consistently maintained that it impartially applied the law only against perpetrators of an obvious physical offense and that enforcement decisions were appropriately left to the independent judgment of the police. The assumed connection between street obstruction and more serious criminal behavior assisted in the depoliticizing effort. It allowed the government to present technical prosecutions as a mechanism for preventing greater societal harms and to claim that enforcement actions were directed not against bona fide participants in street assemblies but only against the disreputable elements that such meetings invariably attracted.

Another critical advantage of obstruction law was that it circumvented constitutional issues of “freedom of assembly” while commanding its own rhetoric of rights. The courts transformed questions of civil liberties into seemingly uncomplicated factual issues regarding the commission of physical acts. Judges did not, however, eschew the discourse of rights. On the contrary, they asserted that they were vindicating a fundamental public right, the “right to passage.” They thus
framed what were in fact restrictions on a right of assembly as protection
for the general right of the citizenry to be free from certain types of
annoyance and inconvenience. Even when some judges claimed to
recognize a “right to protest” in the later twentieth century, they
maintained that it was subordinate to the long-established positive right
of public passage.

This Article further argues that the central concept in obstruction law
was the distinction between meetings and processions, the shifting
fortunes of which reveal the historically contingent relationship between
formal rules and political exigencies. In the early nineteenth century an
inchoate dichotomy emerged between two types of assembly that was
partially based on literal concepts of “passage” but also served to protect
customary civic processions from the impact of obstruction law. Five
periods of crisis in public order then formalized, modified, and
eventually transformed the distinction.

The doctrine crystallized in the 1880s, when it legitimized the
relatively innocuous processions of the Salvationists while invalidating
the street meetings of the socialists. The resolution achieved in the
1880s remained congruent with the political needs of the government in
the early twentieth century, when it strengthened the hand of officials in
dealing with suffragette picketing. In the 1930s, however, as marches
came to constitute the major threat to public order, Parliament intervened
through public order legislation to redress the imbalance between the two
categories of assembly. The bifurcation between meetings and
processions nonetheless again proved compatible with governmental
interests in the 1960s, when “sit-down” demonstrations moved to the
forefront of public attention.

Developments in the late 1970s and 1980s, however, compelled a
profound if subtle restructuring of the obstruction regime. Such factors
as the reappearance of disruptive processions, increasing rhetoric about
the right of public assembly, and escalating domestic disorder collective-
ly undermined the utility of the two formal categories. Parliament and
the courts both increased potential constraints and conferred potential
legitimacy on all types of demonstrations, thereby enhancing police
discretion to tolerate, regulate, or suppress street activity without
reference to considerations of passage. Meetings enjoyed more reputable
status under an expanded notion of “reasonableness,” and governmental
regulation even afforded them a certain degree of legal recognition. The
importance of passage in the calibration of “reasonableness,” however,
still meant that protest would inevitably yield priority to passage.
Concomitantly, marching demonstrators lost the protection of the “right
of passage,” which was reoriented from a right that allowed them to
obstruct the public to a generalized public right of social convenience.
The emphasis on convenience derived from classic nuisance theory, and the persistent influence of the private law origins of obstruction further exemplified the tenacity of formal legal rules and concepts. Theories of passage initially developed under the rubrics of trespass and private nuisance, legal categories oriented toward protecting the rights of private "owners" of the street from inconvenience or annoyance. Nineteenth-century trespass cases such as *Duke of Rutland* and *Hickman* remained authoritative precedents for the law on outdoor meetings because all streets in England continued to be "privately" owned. This private law legacy fostered a broad construction of "obstruction" and a narrow definition of "reasonable use," even as ownership passed to the local authority and nuisance law expanded to encompass public law applications. The conflation of public and private law concepts was further reflected in the potent precedential force of commercial decisions such as *Nagy v. Weston* in the area of public order obstructions. Theoretically, the flexibility of the *Nagy* test could benefit political protestors, but judges and magistrates adopted a restrictive approach to permissible street activity in the commercial context, which had a constricting influence on magistrates deciding street demonstration cases. The formal legacy of private law premises and doctrines consistently disposed the courts in obstruction cases to elevate convenience over considerations of "freedom of assembly." Eventually, in the Public Order Act 1986, common law nuisance concepts invaded the statutory law of public order itself.

In both its statutory and common law applications, obstruction law continuously revealed the immense and ever-broadening discretion that the English criminal justice system reposed in actors at all levels of the hierarchy. Judges had considerable discretion to interpret the law, and in some cases—by expansively defining "obstruction" and holding that meetings were per se unreasonable uses of the street—they developed relatively clear rules. Appellate decisions were infrequent, however, and for the most part judges transformed issues of public law into simple questions of fact to be resolved by magistrates. The latter, in turn, were virtually unconstrained in deciding individual cases. The "all the circumstances" tests of *Lowdens* and *Nagy*, in particular, relegated ultimate decisionmaking to magistrates whose factual determinations were rarely disturbed on appeal. As has been shown, the most significant and comprehensive discretion permeating the English criminal
justice system rested with the police, who made the fundamental decision whether or not to enforce the rules on obstruction at all. This systemic discretion, as has been suggested, was frequently exercised selectively against particular groups and, since the 1960s, has prompted growing criticism and increasing calls for formal recognition of "freedom of assembly." Given the character of much contemporary discourse about the "right to passage," however, a positive right to assemble would not necessarily supersede the powerful and tenacious right of the public to pass along the highway without obstruction. Insofar as the primacy of passage continues to have an inhibiting effect on civil liberties, the history of the "right to passage" is not simply an antiquarian inquiry but a cautionary tale for the present.