

## RETHINKING ASSEMBLY ORDINANCES: THREE CONSIDERATIONS CITIES SHOULD MAKE TO AVOID ANOTHER FERGUSON OR BALTIMORE-TYPE RIOT

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# Ohio Northern University Law Review

## Lead Articles

### **Rethinking Assembly Ordinances: Three Considerations Cities Should Make To Avoid Another Ferguson Or Baltimore-Type Riot**

CHRISTOPHER W. BLOOMER\*

#### INTRODUCTION

It is never fun footing someone else's bill. However, cost-covering and redistribution happens with practically all illegal and destructive riots and protests that occur in the United States.<sup>1</sup> For example, repairs from the lawless demonstrations siphoned off more than \$5.7 million of local funds during the 2014 Ferguson, Missouri Riots.<sup>2</sup> How about the 2015 Baltimore riots? The riots cost Baltimore more than \$20 million, and even though the mayor refused to stop the rioting, the city requested payment assistance from the federal government to cover the tab.<sup>3</sup> Not typically known as a site of unrest, North Dakota spent more than \$38 million policing the 2016 Keystone Pipeline protests, with the Federal Emergency Management

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1. See HG Legal Resources, *After a Riot, Who Pays for the Damage?*, HG.ORG, <http://www.hg.org/article.asp?id=35437> (last visited Nov. 8, 2015) (explaining that insurance premiums are raised for everyone, and private businesses pay for non-insured losses, effectively redistributing costs).

2. Jessica Chasmar, *Ferguson Unrest Costs Taxpayers \$5.7M and Counting: Report*, THE WASH. TIMES (Oct. 20, 2014), <http://www.washingtontimes.com/news/2014/oct/20/ferguson-unrest-costs-taxpayers-57m-and-counting-r/>.

3. Yvonne Wenger, *Unrest will Cost City \$20 Million, Officials Estimate*, THE BALT. SUN (May 26, 2015, 7:11PM), <http://www.baltimoresun.com/news/maryland/baltimore-city/bs-md-ci-unrest-cost-20150526-story.html>.

Agency (“FEMA”) denying federal cost assistance to the state.<sup>4</sup> After these events, national insurance companies are usually able to step in and help businesses that have suffered at the hands of unruly protestors; however, the claims that are paid out are then effectively redistributed to all Americans who pay through rate increases.<sup>5</sup>

Much has been written in academia over the last few decades in response to judicial decisions that approve governmental regulation of speech and assembly.<sup>6</sup> The majority of these scholarly works frown upon governmental regulation of speech, largely relying on the historical underpinnings of our nation’s founding, escape from oppressive rule, and early bans on free speech when admonishing recent decisions that recognize the government’s power to regulate it.<sup>7</sup> Mysteriously void from these academic analyses, however, is a legitimate mention of the frequency with which destruction and chaos are now taking place during demonstrations, as well as a good-faith effort to fully articulate all of the societal costs associated with these often violent and destructive events.<sup>8</sup>

While practically all learned observers agree that constitutional protection for free speech and assembly is fundamental to our liberty, few make an effort to seriously consider protecting the interests of the majority of Americans who do not partake in destructive demonstrations. Yet, these Americans are forced to pay the price for demonstrations gone-awry.<sup>9</sup> Instead, the interests of these innocent, non-participating Americans have largely played second fiddle to the interests and protection of a few protestors who break the law, cause social and economic unrest, and whose actions actually doom the future of the very cities they live in and advocate for.<sup>10</sup>

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4. *North Dakota Still Seeking to Recoup Pipeline Protest Costs*, FOX BUS. (Aug. 01, 2017), <http://www.foxbusiness.com/markets/2017/08/01/north-dakota-still-seeking-to-recoup-pipeline-protest-costs.html>.

5. See HG Legal Resources, *supra* note 1 (explaining insurance may pay for losses, but premiums are then raised for everyone because private businesses will pay the uninsured losses, but then redistribute the costs through higher prices for goods and services).

6. See, e.g., Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. REV. 543 (2009).

7. See Eric Neisser, *Charging for Free Speech: User Fees and Insurance in the Marketplace of Ideas*, 74 GEO. L. J. 257, 292 (1985) (discussing advanced suppression of expression, as witnessed historically in the English licensing system); see also El-Haj, *supra* note 6; see also *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 320 (2002) (explaining a brief history surrounding the Printing Act of 1662).

8. See generally El-Haj, *supra* note 6 (lacking a legitimate mention of how often these destructive protests are occurring and the costs that are associated with them).

9. See HG Legal Resources, *supra* note 1 (noting that insurance pays for losses, but everyone else pays higher premiums).

10. See Tim Jones & Toluse Olorunnipa, *Ferguson Seeks Rapid Repairs to Avoid Fate of Riot-Torn Cities*, BLOOMBERG (Nov. 27, 2015, 12:00 AM), <http://www.bloomberg.com/news/articles/2014-11-26/ferguson-seeks-rapid-repairs-to-avoid-fate-of-riot-torn-cities> (noting that those affected are anxious as to how and when they will rebuild their ravaged cities).

This note posits that both the interests of demonstrators *and* society are important, and it aims to balance society's safety, security, and predictability on the one hand, with the needs of the demonstrators on the other.<sup>11</sup> To achieve these ends, this note develops an assembly permit structure and considerations to serve as "best practices," modeled after several communities across the country.<sup>12</sup> Additionally, recent events, as well as behavioral research analyzing the interaction between individuals and groups, should guide policymakers as they create or reform assembly permit ordinances.<sup>13</sup>

Part I of this note analyzes recent protests that became violent, and quantifies the immediate and long-term physical and economic damage that resulted.<sup>14</sup> Part II turns to the scientific community for human behavioral research to explain why protests have become so destructive and violent.<sup>15</sup> Part III surveys permit ordinances in Ferguson, Baltimore, and abroad, to illustrate the current state of disarray and lack of uniformity between localities when it comes to regulating demonstrators.<sup>16</sup> It also highlights a couple of cities that have very defined processes and requirements for demonstrators, which could serve as useful models for other localities.<sup>17</sup> In Part IV, this note evaluates modern court precedent upholding or striking down local ordinances and demonstrator permit requirements.<sup>18</sup> This lays the foundation for Part V, which merges court precedent with scientific findings to formulate a new standard for demonstrator permits that should be adopted in any locality that wants to protect its citizenry and economy.<sup>19</sup>

As a best practice approach, this note argues that the following considerations should be made in every assembly ordinance: (1) lower the group size that triggers the need for a demonstrator permit to twenty or more individuals; (2) require that the group's permit application be turned in to the governing body at least twenty-eight days before the event is to take place; and (3) require specific information and action from the demonstrating group, including, among others, requiring the group to pay for additional police and safety costs associated with their event, requiring insurance for the event, requiring a description of public facilities to be

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11. *See infra* Conclusion.

12. *See infra* Part V.

13. *See infra* Part II.

14. *See infra* Part I.

15. *See infra* Part II.

16. *See infra* Part III.

17. *See infra* Part III.

18. *See infra* Part IV.

19. *See infra* Part V.

provided for demonstrators, providing a clearly defined demonstration route with a detailed security plan, and the demonstrator's cleanup plans.<sup>20</sup>

## I. THE UGLINESS OF RECENT PROTESTS

### A. Property Damage

Municipalities and citizens should not shrug off the damage caused by violent demonstrations, as most of these events cause massive amounts of property damage and injury.<sup>21</sup> In 2013 dollars, the Los Angeles riots in 1992 resulted in \$1.3 billion in damages, and the Miami riots in 1980 caused \$184 million in damages.<sup>22</sup> More recently, the city of Ferguson suffered \$5 million worth of damage in just one night.<sup>23</sup> Some businesses in these cities, many of them minority-owned, did not have insurance and were forced to pay for the damage caused by rowdy demonstrators on their own.<sup>24</sup> While insurance coverage plans typically pay for business and personal property damages, most policies will not cover compensation losses for workers who cannot work due to property damage inflicted by demonstrators or losses due to the closure of an employee's business out of fear of additional violence or damage.<sup>25</sup>

### B. Violence and Death

Many demonstrators, emboldened by the lack of executive action to break up their assemblies, have gone so far as to openly condone injury to innocent citizens and public servants.<sup>26</sup> For example, in the early stages of the Occupy Sacramento movement, masked youth burned American flags and then proceeded to pelt local police officers with bottles, pipes, rocks,

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20. See *infra* Part V.

21. See Insurance Information Institute, *The 10 Most-Costly Riots in the U.S.*, CHI. TRIB. (Nov. 26, 2014, 3:16 PM), <http://www.chicagotribune.com/chi-insurance-civil-unrest-riots-bix-gfx-20141126-htmlstory.html> (giving dollar amounts for each specific demonstration).

22. *Id.*

23. See Chasmar, *supra* note 2.

24. See Holly Yan & Janet DiGiacomo, *Baltimore Riots: Emails Between City Leaders Show Chaos, Confusion*, CNN (July 29, 2015, 2:44 PM), <http://www.cnn.com/2015/07/28/us/baltimore-riots-city-documents/> (noting that many minority business owners lacked insurance and ended up losing their livelihoods).

25. Erika Gonzalez, *Who Pays for Riot Damage?*, NBC WASH. (Apr. 28, 2015), [http://www.nbcwashington.com/news/local/Who-Pays-for-Riot-Damage\\_\\_Washington-DC-301616731.html](http://www.nbcwashington.com/news/local/Who-Pays-for-Riot-Damage__Washington-DC-301616731.html).

26. See *Video Shows NYC Protesters Chanting for "Dead Cops"*, NBC N.Y. (Dec. 15, 2014, 7:27 AM), <http://www.nbcnewyork.com/news/local/Eric-Garner-Manhattan-Dead-Cops-Video-Millions-March-Protest-285805731.html> (condoning injury to police) [hereinafter *Dead Cops*].

and even improvised explosive devices.<sup>27</sup> In New York, rhetoric espoused by demonstrators in 2015 included the disgusting chant: “What do we want? Dead cops. When do we want it? Now.”<sup>28</sup> A short time later, several New York demonstrators were caught on camera forcing two NYPD lieutenants to the ground, where they proceeded to kick and elbow them.<sup>29</sup>

Protestors in the Baltimore riots injured more than 110 police officers.<sup>30</sup> One demonstrator, angered by the death of Michael Brown, drove from Baltimore to New York, where he ambushed and killed two officers as they sat in their patrol car.<sup>31</sup> Speaking on the matter, New York Police Commissioner Bratton remarked, “[t]he officers] were, quite simply, assassinated—targeted for their uniform and for the responsibility they embraced to keep the people of this city safe.”<sup>32</sup>

After Donald Trump defeated Hilary Clinton in the 2016 presidential election, scores of protests broke out across the country.<sup>33</sup> In Portland, Oregon, police arrested twenty-nine people in one night after ““extensive criminal and dangerous behavior,”” such as protestors attacking motorists, protesting with bats, and committing various acts of vandalism.<sup>34</sup> These stories are just a few examples of the pain inflicted on innocent members of society by out-of-control protestors and their sympathizers.

### C. Long-Term Economic Ramifications

Apart from the immediate effects of dangerous demonstrations and gatherings, economic fallout tends to strangle local and regional economies long after the demonstration cleanup is over.<sup>35</sup> Businesses in the immediate

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27. *Occupy Oakland: 400 arrested after violent protest*, NBC NEWS (Jan 30 2012, 1:44 AM), [http://usnews.nbcnews.com/\\_news/2012/01/30/10268080-occupy-oakland-400-arrested-after-violent-protest](http://usnews.nbcnews.com/_news/2012/01/30/10268080-occupy-oakland-400-arrested-after-violent-protest) [<http://perma.cc/92M5-ACE7>].

28. See *Dead Cops*, *supra* note 26.

29. Rocco Parascandola & Barry Paddock, *Police Protests Have Cost City \$22.9M in Overtime for NYPD, Bill Bratton Says*, N.Y. DAILY NEWS (Dec. 16, 2014, 2:52 AM), <http://www.nydailynews.com/new-york/police-protests-cost-city-22-9m-overtime-nypd-article-1.2046696>.

30. Yan & DiGiacomo, *supra* note 24.

31. Benjamin Mueller & Al Baker, *2 N.Y.P.D. Officers Killed in Brooklyn Ambush; Suspect Commits Suicide*, N.Y. TIMES (Dec. 20, 2014), [http://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html?\\_r=0](http://www.nytimes.com/2014/12/21/nyregion/two-police-officers-shot-in-their-patrol-car-in-brooklyn.html?_r=0).

32. *Id.*

33. Christopher Mele, *2nd Night of Trump Protests Brings 29 Arrests in Oregon*, N.Y. TIMES (Nov. 11, 2016), <https://www.nytimes.com/2016/11/12/us/trump-protests-election-portland.html>.

34. *Id.*

35. See Susie Poppick, *Can Ferguson Recover? The Lasting Economic Impact of Violent Unrest*, TIME EVERYDAY MONEY (Nov. 25, 2014), <http://time.com/money/3145128/ferguson-riots-recovery-economic-impact-unrest/> (for example, during the ten years following the LA riots, Los Angeles lost approximately \$4 billion in taxable sales).

vicinity of the demonstration will see a reduction in output.<sup>36</sup> Many businesses will move, and those which remain will likely experience reduced sales.<sup>37</sup> For example, the violent demonstrators-turned-rioters had a massive impact on the city of Baltimore in 2015.<sup>38</sup> Rioters destroyed two hundred Baltimore businesses in the April 27th riots.<sup>39</sup> They looted stores, started sixty-one structural fires in just two days, and set fire to more than 144 vehicles.<sup>40</sup> Experts estimate that long-term damage to Baltimore could add up to billions in lost taxable revenue – mostly based upon bad image borne as a result of the riots.<sup>41</sup> Ferguson, Missouri has a similar image issue because many people now associate Ferguson with lawlessness.<sup>42</sup> Considering the mounting number of unruly protests happening across the country, it is important to understand why protestors are becoming violent and destructive in the first place.

## II. WHY LEGISLATORS SHOULD BE MINDFUL OF HUMAN BEHAVIORAL RESEARCH WHEN CRAFTING DEMONSTRATOR REGULATIONS

### *A. Demonstrating groups, without regulation, are susceptible to the negative effects of Groupthink and Herd Theory*

#### *1. Groupthink*

Groupthink is “[a] mode of thinking that people engage in when they are deeply involved in a cohesive in-group, when the members’ strivings for unanimity override their motivation to realistically appraise alternative courses of action.”<sup>43</sup> Members of a group suffering from groupthink “suppress personal doubts, silence dissenters, and follow the group leader’s suggestions.”<sup>44</sup> Demonstrators and protesting groups tend to meet the typical “group” definition within the study of groupthink, which recognizes that many groups fail to encourage discussion and dissent by minorities or

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36. See Jones & Olorunnipa, *supra* note 10 (noting that districts in Newark, Detroit, and Washington were hampered by decades of economic stagnation as a result of civil unrest).

37. Poppick, *supra* note 35.

38. See Yan & DiGiacomo, *supra* note 24 (noting that the Baltimore Aquarium lost nearly \$500 thousand dollars in revenue the week after the riots).

39. *Id.*

40. John Clarke & Ian Simpson, *Baltimore Rioting Damage Estimate at \$9 Million: U.S. Government*, REUTERS (May 13, 2015, 5:48 PM), <http://www.reuters.com/article/2015/05/13/us-usa-police-baltimore-idUSKBN0NY2EF20150513>.

41. Sara Blumberg, *Economic Impact from Baltimore Riots Could be Longterm, in the Billions*, ABC NEWS (May 2, 2015, 12:00 PM), <http://www.abc2news.com/news/region/baltimore-city/economic-impact-from-baltimore-riots-could-be-longterm-in-the-billions> [<http://perma.cc/A5G6-M8B3>].

42. See Jones & Olorunnipa, *supra* note 10 (noting that a volunteer group, STL Forward, recognized the danger of inaction and started to promote commerce).

43. Paul’t Hart, *Irving L. Janis’ Victims of Groupthink*, 12 POL. PSYCHOL. 247, 256 (1991).

44. *Id.* at 247; see also Dave Huitema et al., *The Nature of the Beast: Are Citizens’ Juries Deliberative or Pluralist?*, 40 POL’Y SCI. 287, 304-05 (2007).

individual members.<sup>45</sup> Also alarming, is the acknowledgement that many groups possess group polarization, where membership in each group leads “to a deliberate contrasting away from other groups. . . .”<sup>46</sup> Groups, specifically assemblies of demonstrators and protestors, “tend to stress the importance of consensus and joint action,” leading to groupthink.<sup>47</sup> Those engaged in groupthink inherently believe in the morality of their group, and have an evil view of the group’s opponents.<sup>48</sup> An example of this was on display during the Ferguson riots in 2014, where many anti-police protestors held a negative view of police officers, and individual members were not stopped by other group members when they destroyed police and city property, and repeatedly looted and set ablaze small businesses.<sup>49</sup> On their face, characteristics such as togetherness and cohesion seem beneficial for groups; however, there comes a certain tipping point, when harmonious cooperation can become a liability.<sup>50</sup> Members of groups need not be close or strongly connected for groupthink to take place; in fact, “low-status members [can] anticipate thoughts, wishes or commands from leader figures, and adapt their own thinking and action accordingly.”<sup>51</sup>

It is doubtful that demonstrators communicated to each other that their actions may have negative ramifications for their fellow Americans before they rioted in Ferguson, Sacramento, Baltimore, several cities in North Dakota, and elsewhere. Instead of some members taking on a devil’s advocate role, who could serve to challenge the group’s illegal and dangerous thoughts and behaviors,<sup>52</sup> these cities received disregard for law and order.<sup>53</sup> As a result, many feel that rioters and dangerous demonstrators are “an epidemic,” with a single event, such as a citizen being shot by a law enforcement officer – even if police action was justified – “serving as the precipitating cause for an outbreak of violence . . . in the same way that

45. See Hart, *supra* note 43, at 257 (establishing that chart “B-1” is exemplary of the command structure of demonstrators).

46. Laurens Rook, *An Economic Psychological Approach to Herd Behavior*, 40 J. ECON. ISSUES 75, 84 (2006) (citing Michael A. Hogg & John C. Turner, *Social Identity and Conformity: A Theory of Referent Information Influence*, 2 CURRENT ISSUES EUR. SOC. PSYCHOL., 139 (1987)).

47. Hart, *supra* note 43, at 252-53.

48. *Id.* at 247.

49. See, e.g., Alan Taylor, *Violent Protests in Ferguson, Missouri*, THE ATLANTIC (Nov. 25, 2014, 5:47 PM), <http://www.theatlantic.com/photo/2014/11/violent-protests-in-ferguson-missouri/100860> (describing the damage caused by the rioters); Dead Cops, *supra* note 26 (determining the demonstrators held an evil perception of their opponents when no one intervened in repugnant behavior and speech).

50. Hart, *supra* note 43, at 253-54.

51. *Id.* at 262.

52. See Ronald R. Sims, *Linking Groupthink to Unethical Behavior in Organizations*, 11 J. BUS. ETHICS 651, 659-60 (1992) (discussing benefits of each group having a devil’s advocate to “challenge the views of its members”).

53. See Chasmar, *supra* note 2 (noting millions of dollars in damage as a result of the civil unrest).



poor sanitation, overcrowding, and contaminated water set the stage for cholera.”<sup>54</sup> In short, communal and groupthink-motivated violence is sparked during many protests, and creates an “‘emotional contagion’ that ripples throughout a crowd driving them toward (often violent) action,” with no one to stop the onslaught of violence and destruction that is likely to ensue.<sup>55</sup>

## 2. Herd Theory

Herd Theory should also be evaluated with respect to demonstrating crowds, since it helps to explain why group members typically act similarly to those who are causing destruction.<sup>56</sup> Human decisions are often influenced by analyzing how others act.<sup>57</sup> These decisions can be as basic as fads or fashions, or as simple as a crowd of people instinctively following a wagon full of playing musicians; a real example of observed human behavior, which gave rise to the original understanding of herd behavior, the “Bandwagon” phenomenon.<sup>58</sup> The bottom line is that many individual choices can be predicted by observing how others act, and understanding that bystanders tend to instinctively follow decisions made by others.<sup>59</sup> A quick scan of news articles and online videos from recent protests produces countless accounts of individuals looting and destroying property for no readily apparent reason, other than they saw others do it.<sup>60</sup> Scientists have posited that:

in ambiguous situations people turned to other people that served as a reference group in order to come up with a solution that made sense in that particular context. In such situations, people would not follow others due to exchange of information. People would rather join a crowd as a result of the observation that people that were part of their reference group had already adopted it.<sup>61</sup>

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54. Gary Slutkin, *Rioting is a Disease Spread From Person to Person –The Key is to Stop The Infection*, THE GUARDIAN 2 (Aug. 13, 2011, 9:12 PM), <http://www.theguardian.com/uk/2011/aug/14/rioting-disease-spread-from-person-to-person>.

55. *Id.*

56. See generally Abhijit V. Banerjee, *A Simple Model of Herd Behavior*, 107 Q. J. ECON. 797 (1992) (discussing people’s tendencies to mimic others’ actions).

57. *Id.* at 798-99.

58. Rook, *supra* note 46, at 76.

59. Banerjee, *supra* note 56, at 797-98.

60. See, e.g., Erin Burnett, *Police: Rioters Looting at Baltimore Mall*, CNN (Apr. 27, 2015, 6:43PM), <http://www.cnn.com/videos/us/2015/04/27/erin-bpr-rioters-looting-baltimore-mall.cnn> (showing individuals spontaneously setting fires and looting local business, and since there is no indication this was planned and so many ran in upon seeing others do it, this behavior supports Herd Theory).

61. Rook, *supra* note 46, at 78.

Thus, even though a destructive choice may not be the best option for the individual or society, people under the influence of herd theory still have a tendency to join a crowd, using it as a reference group—supplementing their own decision-making models for those of the group.<sup>62</sup>

*B. Without mandatory cool-down periods, groups typically skip on cognitive reflection, and, as a result, end up with poor decision-making processes*

### *1. Quality deliberation*

In human thought, to arrive at an optimal decision, there must be “quality . . . deliberations preceding the actual choice.”<sup>63</sup> Examples of critical tasks that must be completed before high quality decision-making can occur include: (1) reviewing a wide range of available options; (2) looking at the range of options and the values that are implicated in each choice; (3) weighing of risks, costs, and benefits for each option; (4) searching for new information to further explore each option; (5) acquiring and seriously considering new information, even if it is critical of the initial surveyed options; (6) re-evaluating all consequences to all known alternatives; and (7) making alternative options, should the initial option later produce unforeseen risks.<sup>64</sup> Major league sports associations have long recognized the benefits of deliberative thought, and put the brakes on those seeking to act out of passion.<sup>65</sup> For example, the NBA requires all players not on the floor to remain on the bench in the event of an altercation, or be subject to suspension and a fine of up to \$50,000.<sup>66</sup>

There is little chance that quickly formed groups, who do not have to submit an assembly permit in advance of their event, go through even a few of the aforementioned steps.<sup>67</sup> Instead, the quality of the decision-making process used by sporadic demonstrators for alternative evaluation is poor, which results in negative outcomes for the demonstrating group, and ultimately, members of society, who must shoulder the costs of the group’s actions when they turn destructive.<sup>68</sup>

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62. Banerjee, *supra* note 56, at 798-99; *see also* Rook, *supra* note 46, at 86.

63. Hart, *supra* note 43, at 268.

64. *Id.* at 268.

65. 2013-2014 NATIONAL BASKETBALL ASSOCIATION OFFICIAL RULES §§ 5(a), 7(c), at 40, 43, <http://www.nba.com/media/dleague/1314-nba-rule-book.pdf> [hereinafter NBA RULES] *see also* 2013-2017 USA HOCKEY RULE BOOK, § 629(a) at 77, <http://www.dvhl.org/USAH-Rulebook.pdf> (“[A] penalty shall be assessed to any player who leaves the players’ bench . . . during an altercation.”).

66. NBA RULES, *supra* note 65.

67. *See* Hart, *supra* note 43, at 268 (examining the seven “critical tasks”).

68. *See* HG Legal Resources, *supra* note 1 (explaining that society’s overall insurance premiums rose and private businesses effectively redistributed costs by paying for non-insured losses).

## 2. Dual process theory

Significant scientific research has taken place over the last few decades in the study of dual process theory, which evaluates heuristics and shortcuts used by individuals when they exercise personal judgment and make decisions.<sup>69</sup> Well-known in the field of dual process theory is Nobel Economics prize winner, Daniel Kahneman.<sup>70</sup> In his work, Kahneman discovered that the brain's first impulses when making a decision, termed "System 1" reasoning, tends to be based on heuristics, and are more emotional than logical.<sup>71</sup> Conversely, deliberative decisions, made well in advance of an individual taking action, are termed "System 2" reasoning, and end up being more optimal for the participant.<sup>72</sup> Kahneman found that System 1 reasoning is "typically fast, automatic, effortless, implicit, and emotional," and can lead to costly errors.<sup>73</sup> By contrast, System 2 reasoning is "slower, conscious, effortful, explicit, and logical."<sup>74</sup> Which is better for groups of individuals seeking to assemble, air grievances, and advocate for meaningful and lasting change? Level-headed and well-reasoned approaches are undeniably the best fit, because successful protesting requires the use of proper crowd control, compliance with local permit requirements, noise control, and recruitment of outside organizations for endorsements long before the event, all of which requires the demonstrator's time and effort, or in other words, System 2 reasoning, to effectuate.<sup>75</sup>

Considering the dangerous and costly side effects of large groups of protestors and demonstrators who fall prey to groupthink and poor judgment and decision-making, it is important to determine how legislatures are currently regulating these groups, to see how those processes can be improved upon.

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69. Jim Holt, *Sunday Book Review: Two Brains Running*, N.Y. TIMES (Nov. 25, 2011), [http://www.nytimes.com/2011/11/27/books/review/thinking-fast-and-slow-by-daniel-kahneman-book-review.html?\\_r=0](http://www.nytimes.com/2011/11/27/books/review/thinking-fast-and-slow-by-daniel-kahneman-book-review.html?_r=0) (reviewing DANIEL KAHNEMAN, THINKING FAST AND SLOW (2011)).

70. *Id.*

71. Katherine L. Milkman et al, *How Can Decision Making Be Improved?*, 4 PERSP. ON PSYCHOL. SCI. 379, 380, 382 (2009).

72. *Id.* at 380-82.

73. *Id.* at 380.

74. *Id.*

75. *How to Organize Effective Demonstrations*, NAT'L CTR. FOR PUB. POL'Y RES. <https://web.archive.org/web/20170602140550/http://www.nationalcenter.org:80/man2.htm> (last visited Oct. 10, 2017).

### III. THE CURRENT SCHEMA: A DISORDERLY ARRAY OF PERMIT REQUIREMENTS

Assembly permit requirements are typically local ordinances that are created by legislators in cities, counties, and towns.<sup>76</sup> Frequently termed “parade” permits, these permits require aspiring groups to receive approval from the local government before assembling on public roadways, streets, highways, or alleys.<sup>77</sup> There are also park demonstration permits, which, as their name implies, typically only regulate gatherings on local park property.<sup>78</sup> Some governments have opted to consolidate all permit types into one form, which this note terms generally as “assembly permits.”<sup>79</sup> This note will analyze all three permit types: parade, park demonstration, and general assembly, asking initially, why do most legislators fall short of helping demonstrators and society in their permit applications?<sup>80</sup> For starters, some locales have no permit requirements at all.<sup>81</sup> Surprisingly, others require almost nothing from a demonstrating group before it is allowed to take to the streets.<sup>82</sup>

*A. Communities vary widely on: (1) the number of demonstrators that triggers the need for a permit; (2) wait times for permit approval or denial; and (3) permit specifics*

Some localities require everyone to obtain a permit when using public amenities and spaces.<sup>83</sup> Others begin regulating assembling groups once

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76. See generally Neisser, *supra* note 7.

77. See, e.g., BALT., MD., CTY. CODE, art. 21, tit. 14, §§ 101-102 (2004).

78. See, e.g., CITY OF BALT., MD., DEP’T OF RECREATION AND PARKS, PARK DEMONSTRATION PERMIT APPLICATION (2016), <http://bcrp.baltimorecity.gov/sites/default/files/Demonstration%20Application%202017.pdf> [hereinafter BALT. PERMIT APP.].

79. See, e.g., FISHERS, IND., FORM CENTER: SPECIAL EVENT PERMIT APPLICATION (2016), <http://www.fishers.in.us/formcenter/administration-8/special-event-permit-application-124> [hereinafter FISHERS PERMIT APP.].

80. See *infra* Part III.B.1.

81. See, e.g., CITY OF ELWOOD, IND., PUBLIC RECORDS: CITY OF ELWOOD CODES (2016), <http://elwoodcity-in.org/government/public-records> (Elwood, Indiana, among other small Hoosier localities, does not have defined assembly permits).

82. See, e.g., E-mail from Megan Asikainen, City Clerk, Ferguson, Mo., to author (Oct. 8, 2015, 15:45 EST) (on file with author) (including both forms for assembly: special event form, and parade application; Ferguson, Missouri’s form for assembling on public roadways is just one page, and requires little more than basic information from the demonstrating group).

83. See, e.g., CITY OF NOBLESVILLE, IND., 2016 CITY OF NOBLESVILLE PARKS AND RECREATION APPLICATION, AGREEMENT AND GUIDELINES FOR SPECIAL EVENT PERMITS (2016), <http://www.cityofnoblesville.org/eGov/apps/document/center.egov?view=item;id=5590>. Noblesville, Indiana has a special events permit requirement. The permit is geared towards park facilities and does not specifically address groups of people who gather on public property in general. *Id.* All who gather on park property for an “event” must procure a permit. See also, BALT., MD., CTY. CODE, art. 21, tit. 14, §103 (2004).

they reach twenty-five individuals,<sup>84</sup> thirty individuals,<sup>85</sup> or groups of fifty or more.<sup>86</sup> Still others require nothing until a group swells to more than 250 people.<sup>87</sup> Wait times for permit review can also vary widely; times can range from the high end at sixty days,<sup>88</sup> to forty-five days,<sup>89</sup> to thirty days<sup>90</sup>, to as little as just ten days.<sup>91</sup> In some localities, there is no turnaround timeframe listed on the application.<sup>92</sup>

As for fees and insurance, some ordinances require groups to reimburse costs to the locality for additional police, emergency, and management services, while others do not mention them at all.<sup>93</sup> A few localities sampled actually go so far as to include the reimbursement calculation factors in their applications, and in their code of ordinances.<sup>94</sup> Often, calculations utilize a sliding scale for fees and costs, which represents the actual costs to the locality.<sup>95</sup> Most cities surveyed do not require demonstrators to procure liability insurance.<sup>96</sup> Also, cleanup plans, safety protocols, and sanitation details are rarely required in demonstrator permit

84. *See, e.g.*, CITY OF FORT WAYNE, IND. PUB. WORKS RIGHT OF WAY DEP'T, APPLICATION PERMIT (2017), [https://www.cityoffortwayne.org/images/stories/PBA\\_Application\\_2017.pdf](https://www.cityoffortwayne.org/images/stories/PBA_Application_2017.pdf) [hereinafter FORT WAYNE APP. PERMIT].

85. *See, e.g.*, BALT. PERMIT APP., *supra* note 78.

86. *See, e.g.*, FISHERS PERMIT APP., *supra* note 79. Fishers, Indiana requires groups of fifty or more persons to obtain a permit. *See also* GREENWOOD, IND., EVENT NOTIFICATION (2017), <https://www.greenwood.in.gov/egov/apps/action/center.egov?view=form;page=1;id=38> [hereinafter GREENWOOD NOTIFICATION].

87. *See, e.g.*, INDIANAPOLIS, IND., CODE art. I, tit. IV, § 986-101 (2011).

88. *See* FISHERS PERMIT APP., *supra* note 79 (requiring sixty days for Tier three events, which include groups of more than fifty individuals who use town-owned property).

89. *See, e.g.*, BALTIMORE, MD., CTY CODE art. 21, tit. 14, §101-03 (2004) (defining "Parades," as covering demonstrations on roadways and within the city and require that permits be secured forty-five days in advance of the event).

90. E-mail from Ashley Hopper, City Attorney, City of Anderson, to author (Oct. 14, 2015, 16:20 EST) (on file with author) (including PDF of Anderson, Indiana Police Department Application for Special Activity Permit). *See also* SAN ANTONIO, TEX. CODE ch. 19, art. XVII, § 19-636 (2007). The City allows First-Amendment events to be submitted just thirty days before the planned event, versus forty-five days for all other events. *Id.*

91. FORT WAYNE APP. PERMIT, *supra* note 84.

92. *See, e.g.*, GREENWOOD NOTIFICATION, *supra* note 86. Full details can be found in Greenwood, Indiana's Code of Ordinances, §6-170 (Parade and Special Event defined) and §6-186 -87 (Special events application). GREENWOOD, IND., CODE, ch. 6, art. 5, §§ 6-170, 6-186 (2015).

93. *Compare* E-mail from Ashley Hopper to author, *supra* note 90 (Special Activity Permit, required for any individuals or groups organizing activities and parades, and includes no consideration for City emergency management fees resulting from the event), *with* FISHERS PERMIT APP., *supra* note 79 (events must pay for "any fees or service charges as deemed necessary and appropriate by the City of Fishers.").

94. *See, e.g.*, SAN ANTONIO, TEX., CODE ch. 19, art. XVII, § 19-636.

95. *Id.*

96. *See, e.g.*, BALT., MD., CTY CODE art. 21, tit. 14, §103 (not requiring insurance). *See also* GREENWOOD NOTIFICATION, *supra* note 86. Further details can also be found under Greenwood, Indiana Code Chapter 6, Article 5, Division I, Section 6-170-190. GREENWOOD, IND., CODE, ch. 6, art. 5, §§ 170-190. *See also* FORT WAYNE APP. PERMIT, *supra* note 84 (requiring indemnification, but not insurance for use of public right of way).

applications.<sup>97</sup> However, when these plans are required, they typically only apply to very large cities that have robust permitting schemes.<sup>98</sup> They are also found in smaller localities when the event involves 1,000 or more attendees.<sup>99</sup>

*B. Highlighting a few individual cities*

*1. Ferguson, Missouri*

Due to the riots in Ferguson, Missouri, it is important to include an analysis of Ferguson's assembly permit requirements. In Ferguson, assembly permits come in two flavors: "Special Events" permits and "Parade" permits.<sup>100</sup> A "Special Event" application is four pages in length, concerns events held in city parks, and requires the application to be submitted a minimum of ninety days before the event, along with a twenty-five dollar application fee.<sup>101</sup> Safety, security procedures, and cleanup measures must be outlined, a sitemap must be submitted, and insurance must be procured.<sup>102</sup> Interestingly, recycling is mandatory during these events.<sup>103</sup>

A Ferguson "Application for parade permit" is one page in length, must be submitted fourteen days before the event, and concerns local roadway closures.<sup>104</sup> Insurance is not required in either application, and neither application has numerical limitations on the number of individuals who may assemble, meaning that any number of people assembling could be required to obtain a permit.<sup>105</sup> All permits must be submitted to the City Manager's office for review, and gathering on public property, such as on sidewalks, does not require a permit.<sup>106</sup>

*2. Fishers, Indiana*

Compared with its neighboring localities in Indiana, the City of Fishers, Indiana, has much stricter and defined requirements for those seeking to

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97. See, e.g., BALT., MD., CTY CODE art. 21, tit. 14, §103.

98. See, e.g., CITY OF ATLANTA, GA., ASSEMBLY APPLICATION (2016), <http://www.atlantaga.gov/modules/showdocument.aspx?documentid=6528>.

99. See, e.g., INDIANAPOLIS, IND., SPECIAL EVENTS PERMITS (2017), <http://www.indy.gov/egov/city/dce/permits/special/Pages/home.aspx>.

100. See E-mail from Megan Asikainen to author, *supra* note 82.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. See E-mail from Megan Asikainen to author, *supra* note 82.

106. *Id.*

assemble.<sup>107</sup> Fishers utilizes a tiered system, which helps demonstrating groups determine if they need an assembly permit, based upon several factors.<sup>108</sup> Events are evaluated individually to account for “their size, location, obstruction of traffic, and use of [city] personnel.”<sup>109</sup> Additionally, the Fishers’ permit application requires the applicant to state the objective of the event, discuss the applicant’s community outreach plan, if applicable, and evaluate the need for basic facilities including restrooms, medical plans, and parking control.<sup>110</sup> It also requires \$1 million of additional insurance to be purchased by Tier 3 and Tier 4 events in order to protect the city’s interests.<sup>111</sup>

### 3. Atlanta, Georgia

Atlanta, Georgia has a very robust and well-defined demonstrator permit scheme, and encompasses many policies this note advocates, including regulating crowd size.<sup>112</sup> It also has a wait time for permit review, and requirements for insurance, fees, and event planning.<sup>113</sup> As such, Atlanta’s model may be a nice starting point for localities looking to enact new regulations, or those which are revising existing permit requirements.

In Atlanta, assemblies of more than seventy-four individuals require the group to submit a twenty-two page assembly application, site and plan route, and fifty dollar application fee.<sup>114</sup> Assembly permits must be turned in “no later than thirty (30) days prior to the actual date of [the] event” and are submitted to the Mayor’s Office of Special Events (OSE) for review.<sup>115</sup> The application is robust, requiring, among other specifics, that the demonstrating group list traffic and parking mitigation strategies, any marketing efforts, entertainment offered, a sanitation and recycling plan, a security plan, a medical services plan, a restroom plan, a water plan, and a fire rescue plan.<sup>116</sup> There is even a requirement that the organizer submit

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107. Compare E-mail from Jon Williams, Police Lieutenant, Noblesville, Indiana, to author (Feb. 2, 2016, 10:18 EST) (on file with author) (including one page residential assembly permit, which must be turned in for review by the Chief of Police more than forty eight hours before the event), with FISHERS, IND., PLAN YOUR EVENT (2016), <http://www.fishers.in.us/Index.aspx?NID=545>.

108. FISHERS, IND., PLAN YOUR EVENT, *supra* note 107.

109. *Id.*

110. *Id.*

111. FISHERS PERMIT APP., *supra* note 79.

112. See CITY OF ATLANTA OFFICE OF SPECIAL EVENTS, DOES MY EVENT REQUIRE A PERMIT? (last visited Jan. 18, 2016), <http://www.atlantaga.gov/index.aspx?page=1126> (although, crowd size should be revised to include lower numbers of people, as the current requirements only apply to groups of seventy four or more) [hereinafter DOES MY EVENT REQUIRE A PERMIT?].

113. See CITY OF ATLANTA, ASSEMBLY APPLICATION, (last visited Jan. 18, 2016), <https://www.atlantaga.gov/home/showdocument?id=6528>.

114. See DOES MY EVENT REQUIRE A PERMIT?, *supra* note 112.

115. See CITY OF ATLANTA, *supra* note 113.

116. See *Id.*

written notification of the proposed event to the appropriate Atlanta, Georgia Neighborhood Planning Unit (NPU).<sup>117</sup>

Not all localities' permitting requirements are alike.<sup>118</sup> While some larger cities have revised their demonstrator permit applications to consider group size, and to include requirements such as fees, indemnification, and insurance, in an effort to protect non-demonstrating citizens, many localities have not.<sup>119</sup> To avoid costly riots and protests in the future, and as a way to uniformly address the hodgepodge of permitting rules for demonstrators, assembly ordinances should be more uniform, more comprehensive, and incorporate human behavioral research by following the three considerations advocated for in this note – all while staying within the constraints of the First Amendment.<sup>120</sup>

#### IV. THE CURRENT CONSTITUTIONAL FRAMEWORK

The First Amendment provides the foundation for citizens' right to free speech.<sup>121</sup> It mandates: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."<sup>122</sup> First Amendment protections are extended to the states by way of incorporation via the Fourteenth Amendment.<sup>123</sup> While federal free speech protection is held in high regard, there *are* recognized limitations to a citizen's right to speech and assembly, as the right of free speech "is not absolute at all times and under all circumstances."<sup>124</sup>

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117. See CITY OF ATLANTA OFFICE OF SPECIAL EVENTS, THE PERMITTING PROCESS, (last visited Jan. 18, 2016), <http://www.atlantaga.gov/index.aspx?page=1003>; see also CITY OF ATLANTA OFFICE OF PLANNING, NEIGHBORHOOD PLANNING UNIT (NPU) (last visited Jan. 18, 2016), <http://www.atlantaga.gov/index.aspx?page=739>. Each Atlanta NPU is comprised of a citizen advisory council who represent the areas that could be affected by the proposed event. *Id.* The NPU may voice concerns about proposed events, and can make recommendations on pending permits to the Mayor's office. *Id.*

118. Compare CITY OF FERGUSON, FERGUSON GATHERING/NEIGHBORHOOD PICNIC REQUEST/FESTIVAL PERMIT, (last visited Sept. 20, 2017), <https://www.fergusoncity.com/DocumentCenter/View/1058>, with CITY OF ATLANTA, *supra* note 113 (noting that Ferguson, Missouri's two-page permit application is undeniably less regulatory than Atlanta, Georgia's twenty-two-page assembly application).

119. Compare CITY OF FERGUSON, *supra* note 118, with CITY OF ATLANTA, *supra* note 113 (again, noting that Ferguson, Missouri's two-page permit application is undeniably less regulatory than Atlanta, Georgia's twenty-two-page assembly application).

120. See *infra* Part IV.B-C.

121. U.S. CONST. amend. I.

122. *Id.*

123. See, e.g., *Watters v. Otter*, 981 F. Supp. 2d 912, 920 (Dist. Court D. Idaho 2013) (quoting *Edwards v. S.C.*, 372 U.S. 229, 235 (1963)).

124. *Chaplinsky v. State of N.H.*, 315 U.S. 568, 571 (1942).



*A. Foundational federal cases addressing protestors' right to free speech and assembly*

Public forums, including sidewalks and public parks, have historically been the preferred venue for citizens wishing to air grievances and voice their opinions, and as such, are subject to the highest protections offered by the First Amendment.<sup>125</sup> Blanket prohibitions on speech in these forums are not constitutional, and content-based exclusions are only permissible when they are “necessary to serve a compelling state interest.”<sup>126</sup> Many groups who challenge demonstrator permit requirements do not claim that a blanket prohibition has taken place, but instead, argue that the government permitting procedure or requirements stifle speech and expression, and in their *application*, these requirements amount to unconstitutional restrictions under the First Amendment.<sup>127</sup>

Even though the government typically may not altogether ban speech, and rarely may restrict speech based on content, the government *does* have the power to regulate speech and assembly via the time, place, and manner restrictions that were articulated by the Supreme Court of the United States in *Cox v. New Hampshire*.<sup>128</sup> In *Cox*, the Court explicitly acknowledged the benefits of requiring assembling individuals to secure a demonstration permit, which included “giving the public authorities notice in advance so as to afford [the] opportunity for proper policing.”<sup>129</sup> Because the regulating government body in *Cox* did not base permit decisions on the identity or views of the demonstrators, such as the group’s message or values, but instead, evaluated the permit application in light of the impact of demonstrator’s expression on the community, the permit requirement was constitutional.<sup>130</sup>

Post-*Cox*, localities continue to regulate speech and assembly in public places using time, place, and manner restrictions.<sup>131</sup> Such regulations are concerned with individual’s speech based upon when individuals may act (time), where they can act (place), and in what way they can act (manner), and were considered in the United States Supreme Court’s decision in *Ward v. Rock Against Racism*.<sup>132</sup> The Court, in an opinion written by Justice

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125. See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

126. *ACLU of Nev. v. City of Las Vegas*, 333 F.3d 1092, 1098 (9th Cir. 2003).

127. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 792 (1989); see also *Forsyth Cty., Georgia v. Nationalist Movement*, 505 U.S. 123, 130 (1992).

128. 312 U.S. 569, 576 (1941).

129. *Id.* at 576.

130. *Cox*, 312 U.S. at 577.

131. Andrew M. Winston, *Right to Peaceful Assembly: United States*, LIBR. OF CONGRESS, (Aug. 24, 2016), [https://www.loc.gov/law/help/peaceful-assembly/us.php#\\_ftn8](https://www.loc.gov/law/help/peaceful-assembly/us.php#_ftn8).

132. *Ward*, 491 U.S. at 791.

Kennedy, held that a governing body looking to regulate speech using time, place, and manner restrictions, must show that its regulation is: (1) content-neutral; (2) narrowly tailored; and (3) leaves open ample alternative channels of communication.<sup>133</sup> If it does, the speech restriction is constitutional.<sup>134</sup>

Content-neutrality focuses on the government's purpose for the regulation, and inquires whether the government "has adopted a regulation of speech because of disagreement with the message it conveys."<sup>135</sup> If so, the regulation is unconstitutional.<sup>136</sup> Next, being narrowly tailored does not mean that the government must choose the least invasive means for regulation.<sup>137</sup> Rather, so long as the means chosen are "not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."<sup>138</sup> Last, as for leaving open ample alternative channels of communication, so long as some channels of communication are left open, even governmental limitations that are shown to reduce speech can still be constitutional.<sup>139</sup>

Having analyzed foundational court cases spanning the past few decades, attention now turns to cases that address aspects of assembly permits this note advocates for: control over smaller groups, amount of time that local governments have to review submitted permits for assembly, and insurance, fees, and event specifics required on assembly permit applications.<sup>140</sup>

*B. Cases that address assembly permits which are triggered based upon crowd size*

Many localities require an assembly permit based upon the number of demonstrators attending the event.<sup>141</sup> This is intuitive because without a large crowd, there is generally no need for the government to interfere with individual communication or activity.<sup>142</sup> The Supreme Court has consistently recognized that the government may require permits based

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133. *Id.* (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

134. *Id.* at 789.

135. *Id.* at 791 (citing *Clark*, 468 U.S. at 295).

136. *Id.* (citing *Clark*, 468 U.S. at 293).

137. *Ward*, 491 U.S. at 797 (quoting *Regan v. Time, Inc.*, 468 U.S. 641, 657 (1984)).

138. *Id.* at 800.

139. *Id.* at 802.

140. *See infra*, Part IV.B-C.

141. *Winston*, *supra* note 131.

142. *See, e.g., Occupy Fresno v. Cty. of Fresno*, 835 F. Supp. 2d 849, 860 (Dist. Court E.D. Cal. 2011).

upon group size, and recently did so in *Thomas v. Chicago Park Dist.*<sup>143</sup> In *Thomas*, a unanimous Supreme Court held that the government can regulate events based upon the number of people in attendance.<sup>144</sup> In *Thomas*, it was gatherings of fifty or more people that triggered the need for a permit.<sup>145</sup> The city official who approved or denied the permit was also required to have limited discretion in doing so for the ordinance to pass constitutional muster.<sup>146</sup> The permit regulation in *Thomas* passed that test, as the government official who denied the permit could only do so using thirteen specified grounds, and was required to explain to the denied applicant, in writing, why their permit application had been denied.<sup>147</sup>

*Occupy Fresno v. County of Fresno*,<sup>148</sup> explores the opposite end of this spectrum; can the government deny a permit when the protesting group is made up of only a handful of protesters?<sup>149</sup> In *Occupy Fresno*, the court used the size of the park in question as the main thrust of its reasoning in determining that the government should have no issue regulating competing uses of the thirteen acre park when just ten people are assembling.<sup>150</sup>

### C. Wait times for permit review, fees, and insurance

#### 1. Wait times and fees

This note posits that wait times should be incorporated into all permit applications.<sup>151</sup> The Supreme Court has held that twenty-eight day permit review periods are constitutional.<sup>152</sup> As for fees, demonstrator permit fees are a beneficial means by which cities and towns are able to recoup expenses incurred for providing traffic control and cleanup for demonstrator events.<sup>153</sup> *Cox* is a seminal case regarding assembly fees imposed by governmental bodies, wherein the Court held that such fees are acceptable for expressive permits, especially when the fees will be used to promote public order and enable authorities to prepare for a disruption to the public's

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143. See 534 U.S. 316, 323 (2002) (where the group was challenging the ordinance requiring a permit for more than a fifty-person event).

144. *Id.* at 322.

145. *Id.* at 318.

146. See *id.* at 324 (noting that the official could only deny a permit for specific purposes).

147. *Id.* at 318-19.

148. *Occupy Fresno*, 835 F. Supp. 2d at 858.

149. *Id.* at 859.

150. *Id.* at 859-62.

151. See *infra* Conclusion.

152. *Thomas*, 534 U.S. at 324; see also *Collin v. Smith*, 447 F. Supp. 676, 685 (N.D. Ill. 1978) *aff'd*, 578 F.2d 1199 (7th Cir. 1978) (some thirty-day timeframes have *not* been challenged in federal appellate court decisions).

153. See HG Legal Resources, *supra* note 1 (insurance premiums are raised for everyone, and private businesses pay for non-insured losses, effectively redistributing costs).

use of the streets.<sup>154</sup> The Court in *Cox* allowed fees of up to three hundred dollars per event, depending on the public expense incurred by the demonstrating group.<sup>155</sup> By doing so, the fee was constitutional because it was specifically targeted “to meet the expense incident to the administration of the [event].”<sup>156</sup>

Sometimes the method of fee calculation can raise concerns of constitutionality, as was asserted by demonstrators who brought suit in *Int’l. Women’s Day March Planning Comm. v. City of San Antonio*.<sup>157</sup> Demonstrators argued that the San Antonio permit process provided the city council and police department excessive discretion in setting fees; it amounted to what demonstrators argued was essentially a content-based restriction on their right to free speech and assembly.<sup>158</sup> The court disagreed, finding the fee setting scheme constitutional because the San Antonio Police Department was required by a city ordinance to rely on several factors when making their fee determinations, including: the number of anticipated attendees and vehicles at a demonstration, length of route, barricades needed, date and time of event, and volume of traffic typical on the proposed route.<sup>159</sup> Even though there was a measure of discretion for police department officials to calculate safety fees, the court found that discretion acceptable under the circumstances.<sup>160</sup> In fact, a bit of discretion was actually necessary to ensure that the imposition of fees remained constitutional.<sup>161</sup> The discretion ensured that speech was not overly-burdened, as would occur in the event of a single fee system, which would end up stifling smaller events that had shallow pockets and fewer resources.<sup>162</sup> Fee evaluations similar to those found in *City of San Antonio* are common, with event fees being used to offset city expenses ranging from several hundred dollars, to several thousand, depending on the size and character of the event.<sup>163</sup>

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154. *Cox*, 312 U.S. at 577.

155. *Id.* at 576-77.

156. *Id.* at 577.

157. 619 F.3d 346, 350 (5th Cir. 2010).

158. *Id.* at 355.

159. *Id.* at 366-67.

160. *Id.* at 367 (citing *Forsyth Cty.*, 505 U.S. at 131).

161. *Id.* (citing *Thomas*, 534 U.S. at 325).

162. *Int’l Women’s Day March Planning Comm.*, 619 F.3d at 367.

163. *Compare Cent. Fla. Nuclear Freeze Campaign v. Walsh*, 774 F.2d 1515, 1529 (11th Cir. 1985) (fees incident to anti-nuclear parade and rally totaled \$1,435.74, primarily for police protection for event participants, which included bringing in twenty-one unscheduled officers to work the events. The Court eventually disagreed with the fee, reading narrowly the Supreme Court decision in *Cox*, which allowed fees, holding that the current fees charged to defendant were not “nominal” within the meaning set forth in *Cox*) with *Stonewall Union v. City of Columbus*, 931 F.2d 1130, 1136-37 (6th Cir. 1991) (fees for gay rights event were \$672.50 for “necessary traffic control devices,” including five extra

## 2. Insurance

Some local assembly ordinances require proof of liability insurance before a permit application will be approved; however, a number of cities differ as to whether insurance is in fact required.<sup>164</sup> When insurance is required, such provisions are typically treated with hostility by groups looking to organize.<sup>165</sup> In *Long Beach Area Peace Network v. City of Long Beach*, the Ninth Circuit held that an insurance requirement does not per se violate the Constitution.<sup>166</sup> While this case was ultimately decided in favor of the plaintiffs on other grounds, the insurance provision was explicitly upheld.<sup>167</sup> The City of Long Beach required that permittees “procure and maintain [an insurance policy] in full force and effect during the term of the permit.”<sup>168</sup> If organizers were not able to secure insurance the city offered a second option, which included a waiver for the insurance requirement, so long as the organizers indemnified the city.<sup>169</sup> A third option provided that organizers could obviate the insurance requirement altogether if they worked with the city to reorganize their event, where necessary, to help reduce risks and hazards to public health.<sup>170</sup>

If an assembly application does not have provisions providing extra options like those found in *City of Long Beach*, and instead sets insurance requirements at a minimum level for all events, constitutional problems can ensue.<sup>171</sup> In *iMatter Utah v. Njord*, the Tenth Circuit found Utah’s parade insurance requirement unconstitutional.<sup>172</sup> While the parade insurance requirement was content neutral, it was not narrowly tailored because the state did not show how the insurance requirements (of \$1 million per

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police officers to work the event. The fee was upheld, with Court finding error in *Fla. Nuclear Freeze Campaign’s* reading of *Cox’s* “nominal” requirement for fees).

164. Compare *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011,1026 (9th Cir. 2009) (requiring the group to obtain insurance), and *Neisser*, *supra* note 7, at 258 (noting that Berkeley, California and Skokie, Illinois also require insurance), with *BALT., MD., CTY CODE*, art. 21, tit. 14, §103 (under Baltimore, Maryland’s parade code, there is no insurance requirement). See also *GREENWOOD NOTIFICATION*, *supra* note 86. Further details can also be found under *Greenwood*, Indiana Code Chapter 6, Article 5, Division I, Section 6-170-190, *GREENWOOD, IND., CODE*, ch. 6, art. 5, §§ 170-190 (in *Greenwood*, Indiana indemnification is required, but there are no insurance requirements). See also *FORT WAYNE APP. PERMIT*, *supra* note 84 (in *Fort Wayne*, Indiana, insurance for use of public right of way is not required – but indemnification is).

165. E.g., *Long Beach Area Peace Network*, 574 F.3d at 1031.

166. *Id.*

167. *Id.* at 1016.

168. *Id.* at 1030 (alteration in original) (quoting *LONG BEACH, CA., CODE*, tit. 5, § 5.60.080(B), (the insurance provision for demonstrators)).

169. *Id.*

170. *Long Beach Area Peace Network*, 574 F.3d at 1030-31.

171. Compare *id.* at 1030-31 (where the ordinance was upheld) with *iMatter Utah v. Njord*, 774 F.3d 1258, 1269 (10th Cir. 2014) (where the ordinance was constitutional only to the extent that the fees represented “actual administrative expenses.”).

172. *iMatter Utah*, 774 F.3d at 1270.

occurrence, and \$2 million in aggregate, per event) were justified, and why some lesser amount would not have worked.<sup>173</sup> There were also no additional options providing the group the ability to forego the insurance requirement, such as those found in the ordinance at issue in *City of Long Beach*.<sup>174</sup>

#### V. HOW SCIENCE AND CASE LAW COMBINE TO SUPPORT ENHANCED GROUP REGULATION

*A. Due to the effects of Groupthink and Herd Theory, and in response to court holdings relative to group regulation, groups as small as twenty individuals who gather on any public property should trigger the need for an assembly permit*

Quickly-formed demonstrating crowds resemble the groups analyzed in Groupthink research who silence dissenters, and discourage conflicting ideas.<sup>175</sup> Because these groups tend to stick together and make decisions based upon what others do, and with larger groups exhibiting more of Groupthink's negative effects, regulating them based upon the size of the group is appropriate.<sup>176</sup> This regulation should occur anytime demonstrators gather, including in public roadways, parks, and even on sidewalks. Sidewalk regulation is absent in many current permit requirements.<sup>177</sup> However, removing the arbitrary distinction between assemblies that are in roadways and those that are on sidewalks, either of which is a location that can fall prey to groups seeking to cause violence and destruction, will ensure that the laws can properly regulate groups that are large enough to pose a serious risk to members of society.<sup>178</sup>

The *Thomas* court found that the regulation of fifty individuals who assembled into a group was an acceptable figure.<sup>179</sup> However, *Occupy Fresno* that regulating groups comprised of ten assembling individuals was inappropriate due to the nature of the event location itself.<sup>180</sup> Courts tend to utilize a sliding scale approach, finding that regulations for groups as small as ten people strike the court as "arbitrary and nonsensical," whereas permit

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173. *Id.* at 1266, 1269-70.

174. *Id.* at 1261; *see also Long Beach Area Peace Network*, 574 F.3d at 1030-31.

175. Hart, *supra* note 43, at 247.

176. Banerjee, *supra* note 56, at 797.

177. *See, e.g.*, E-mail from Megan Asikainen to author, *supra* note 82.

178. *See Occupy Fresno*, 835 F. Supp. 2d at 860 (holding that sufficiently large groups can pose threats to the public, warranting governmental regulation).

179. *Thomas*, 534 U.S. at 323-25.

180. *Occupy Fresno*, 835 F. Supp. 2d at 861.

requirements for larger groups appear to be more narrowly tailored, and thus appropriate.<sup>181</sup>

To be sure, there is no study depicting the exact number of persons required for Groupthink or herd behavior to materialize; psychologists have found that the need for consensus is what causes the conformity pressure found in both phenomena - *not* a set number of participants.<sup>182</sup> Especially in stressful situations, “groups exhibit a ‘cognitive need for closure,’” which is a desire for any answer on a specific topic, “as opposed to confusion and ambiguity.”<sup>183</sup> An assembling group’s desire for uniformity works to silence and ostracize dissenters, regardless of group size, so long as there is a bona-fide need for consensus within the group.<sup>184</sup> In short, the number of protestors does not influence the creation of Groupthink or Herd Behavior as much as whether the group is highly cohesive and seeks unanimous action.<sup>185</sup> Undoubtedly, groups that are protesting newsworthy events (such as the protests in Ferguson in 2014, Baltimore in 2015, and North Dakota in 2016) are unified in protesting a certain event or perceived injustice.<sup>186</sup>

As the size of the group does not relate to whether Groupthink or Herd Behavior will be exhibited by the group, permit requirements should regulate as small of groups as the Constitution allows.<sup>187</sup> Courts have found that groups of fifty are large enough, but groups of ten are too small.<sup>188</sup> Thus, the Constitutional “floor” likely lies between eleven and forty-nine individuals.<sup>189</sup> Groups as small as twenty people should be subject to permit requirements due to their ability to cause significant violence and economic damage.<sup>190</sup> First, these groups are nearing what courts have

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181. *Id.* at 860-61.

182. *See generally* Rook, *supra* note 46.

183. *Id.* at 87 (quoting ARIE W. KRUGLANSKI, LAY EPISTEMICS AND HUMAN KNOWLEDGE: COGNITIVE AND MOTIVATIONAL BASES 14 (1989)).

184. *Id.*

185. *Id.* at 76.

186. Alex Altman, *Ferguson Community Sees a Double Injustice*, TIME (Aug. 18, 2014), <http://time.com/3132504/ferguson-community-sees-a-double-injustice/>; *see also* *Reclaim Freddie Gray*, BALT. SUN (Apr. 27, 2015), <http://www.baltimoresun.com/news/opinion/editorial/bs-ed-freddie-gray-20150427-story.html>; Marlena Baldacci et al., *Dakota Access Pipeline: Police Remove Protesters; Scores Arrested*, CNN (Oct. 27, 2016), <http://www.cnn.com/2016/10/27/us/dakota-access-pipeline-protests/index.html>.

187. *See generally* Rook, *supra* note 46 (examining unanimity of the group).

188. *Occupy Fresno*, 835 F. Supp. 2d at 859-60 (discussing Santa Monica Food Not Bombs v. City of Santa Monica, 450 F.3d 1022, 1042 (9th Cir. 2006)).

189. *See id.* (discussing *Santa Monica*, 450 F.3d at 1042) (noting that permit requirements for groups under ten people are unconstitutional).

190. *See, e.g., Small Group of Protesters Cause Damage in St. Paul*, KARE 11 (July 8, 2016), <http://www.kare11.com/news/small-group-of-protesters-cause-damage-in-st-paul/267795531> (a group of fifteen participants caused substantial damage during a St. Paul protest).

explicitly held to be constitutional in the past.<sup>191</sup> Second, reference groups of recent demonstrators urge strong consensus among members.<sup>192</sup>

As for the physical locations that governing bodies seek to regulate via assembly permits, localities should be sure to raise the baseline number to more than twenty individuals if doing so is necessary given the size of the public space.<sup>193</sup> Thus, if a group intends to congregate in a large area which has the ability to accommodate many demonstrators along with other competing groups using the same space, then the number of individuals in a group or demonstration triggering the need for a permit should be raised. Recent demonstrations that have become violent are generally not taking place in wide open parks and are instead taking place in urban areas like city centers, malls, and roadways, each of which has multiple competing uses, including traffic flow, business use, and school zones, among others. Thus, requiring groups as small as twenty individuals seems both constitutional and necessary, considering the recent trends of demonstrator violence and accompanying economic consequences.<sup>194</sup>

*B. Cognitive reflection benefits decision-making. Thus, all localities should mandate permit applications be turned in at least twenty-eight days before the event*

There is little chance that sporadically-formed groups seriously debate costs, benefits, and alternatives which aid in better decision making.<sup>195</sup> That is because individuals in a quickly formed group cannot exercise proper System 2 reasoning without first conducting serious deliberation and alternative-seeking, and they have little time to do so based on the hasty nature of the action.<sup>196</sup> Initial thought, termed System 1 reasoning, is riddled with automated responses, using fast, implicit, and emotional heuristics, which produces errors.<sup>197</sup> Research has indicated that a viable method for moving individuals from the error-producing System 1 reasoning to beneficial System 2 reasoning, is to replace intuition with formal analytical processes, including asking a genuine outsider his or her view on a decision, or by taking an outsider's perspective "to reduce

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191. See, e.g., *Thomas v. Chicago Park Dist.*, 534 U.S. 316, 323 (2002).

192. See generally Rook, *supra* note 46.

193. *Occupy Fresno*, 835 F. Supp. 2d at 860-61.

194. See HG Legal Resources, *supra* note 1; see also Chasmar, *supra* note 2; Wenger, *supra* note 3; *North Dakota Still Seeking to Recoup Pipeline Protest Costs*, *supra* note 4.

195. See, e.g., Nate Schweber, *Penn State Students Clash with Police in Unrest After Announcement*, N.Y. TIMES (Nov. 10, 2011), <http://www.nytimes.com/2011/11/11/sports/ncaafootball/penn-state-students-in-clashes-after-joe-paterno-is-ousted.html> (where Penn State students caused mass amounts of destruction).

196. Milkman et al., *supra* note 71, at 380.

197. *Id.*



decision makers' overconfidence about their knowledge.”<sup>198</sup> However, these techniques cannot be implemented in the context of demonstrators unless demonstration groups are slowed down and required to wait a reasonable amount of time before obtaining a demonstration permit, thereby allowing them to leverage their System 2 selves, and make proper decisions for their group, and society.<sup>199</sup>

A unanimous Supreme Court held that a twenty-eight day review period for a group seeking to exercise its First Amendment right to speech and assembly was constitutional.<sup>200</sup> Because methodical System 2 reasoning produces better results for individuals when making decisions, and because twenty-eight days and similar timeframes have been upheld as a valid waiting period for a demonstration permit to be approved or denied, local legislators should specify in their ordinances that permit approval will occur within twenty-eight days, so that the demonstrating group is encouraged to utilize System 2 reasoning in their decision-making.<sup>201</sup>

To ensure speech is not hindered when it could be most effective, such as after recent events that would typically prompt a demonstration, legislators should also allow for a speedy appeals process, so that demonstrators may appeal permit denials quickly, to determine if there's been governmental abuse in the review process, or even just a simple error in the application itself.<sup>202</sup>

### *C. Assembly permits should require fees, insurance, and specifics*

#### *1. Fees*

Demonstrator permit fees hold the organizing group responsible for costs they would otherwise defer to society at-large, and have been held constitutional by the Supreme Court.<sup>203</sup> So long as fees are proportional to the size of the group, and serve to offset the actual costs the group will force onto the locality, the fee is likely reasonable, and will likely be upheld during a constitutional challenge.<sup>204</sup> *Cox* held that \$300 was a reasonable fee in 1941, so if you take inflation into account, a fee of around \$5,000 is

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198. *Id.* at 381.

199. *Id.* at 380.

200. *Thomas*, 534 U.S. at 324.

201. *Id.* See also Milkman et al., *supra* note 71, at 380.

202. See, e.g., FORT WAYNE, IND., CODE, tit. IX, ch. 101, §§ 101.01-101.99 (2015) (factors are listed for approval of permit. The Director of Public Safety and Director of Public Works shall notify applicant of permit approval or denial at least forty-eight hours before event per Section 101.09, and appeal is allowed within 5 days of decision, as is last resort appeal, to “a court of competent jurisdiction.”) (emphasis added).

203. See, e.g., *Cox*, 312 U.S. at 577 (where there is nothing contrary to the Constitution in the charge of a fee limited to the purpose stated).

204. *Int'l Women's Day March Planning Comm.*, 619 F.3d at 367.

likely reasonable today.<sup>205</sup> San Antonio's ordinance at issue in *Int'l Women's Day March Planning Comm.* is illustrative, and should be mirrored for localities seeking to tie fees to permit requirements going forward.<sup>206</sup> The San Antonio ordinance required the police department to consider the following factors when calculating permit fees:

- (1) The route and the identification of roadways that cross through or feed into the street of the proposed route;
- (2) The number of anticipated participants and vehicles in the event;
- (3) Identification of other roadways, or public transportation and emergency vehicle routes that may be affected by the event;
- (4) Length of the route and the identification of the number of intersections along the route that will require barricades or traffic control personnel;
- (5) Whether intersections must be individually barricaded or whether officers can be assigned to move along with the event;
- (6) The date and time of the event;
- (7) Volume of vehicular and pedestrian traffic typical on and along the route for the time of day, day of the week and time of year for the proposed route.<sup>207</sup>

Using these factors, the City then calculated the fee to be charged based upon the City's collective bargaining agreement, and third-party barricade vendor pricing.<sup>208</sup>

San Antonio's method for calculating fees should be replicated in new assembly permit regulations. It is fair to both demonstrators and society, because it levies the costs borne from the event directly to those who are receiving the benefit thereof. Thus, it is appropriate to charge demonstrators for the cost of policing their event, costs of shutting down and re-routing traffic from major roadways they utilize, and for other security and safety costs necessitated by their event.

## 2. Insurance

A figureless group with no defined hierarchy cannot adequately direct its members to act lawfully.<sup>209</sup> Many commentators argued this against the

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205. *Value of \$300.00 in 1941*, SAVING.ORG, <http://www.saving.org/inflation/inflation.php?amount=300&year=1941>.

206. *Int'l Women's Day March Planning Comm.*, 619 F.3d at 365-66.

207. *Id.*

208. *Id.* at 366.

209. See Rick Hampson, 'Occupy' Movement Faces Challenge from Violent Fringe, USA TODAY, (Nov. 14, 2011) <https://usatoday30.usatoday.com/news/nation/story/2011-11-13/occupy-movement->

Occupy Movement.<sup>210</sup> Because Occupy is not forced to define its ranks, and by its very tenants is anti-establishment, there is little likelihood that the group can or would keep its violent factions in check during demonstrations.<sup>211</sup> A small sampling of cases, such as *Cox*, *City of San Antonio*, *City of Long Beach*, and *iMatter*, serve as proof that insurance is a hotly contested issue when it comes to its mandatory inclusion on assembly permit applications.<sup>212</sup> In *City of Long Beach*, the city provided a safety valve exception for groups who were not able to acquire insurance, which included two viable alternatives: the indemnification of the city, or an agreement for the demonstrators to work with the city to cure the elements of the demonstration plan that were dangerous.<sup>213</sup>

Insurance has never been held per se invalid for demonstration permits, and considering that many insurance requirement cases turn on limits which are too high or requirements that demand coverage for all groups regardless of group size or event type, the middle of the road approach taken in *City of Long Beach* is preferable.<sup>214</sup> This three-option approach protects the interests of demonstrators by encouraging a flexible insurance requirement, avoiding a one-size-fits all mandate for all events, which could end up being overly broad.<sup>215</sup> It also allows smaller groups, like the National Socialist Party of America in *Collin v. Smith*, who are not able to acquire insurance due to their small stature and limited means, two alternative options, one of which—working with local officials to ensure the event is designed safely—costs the group practically nothing.<sup>216</sup>

### 3. Cleanup and safety plans

When facing the unknown or a challenging situation, reflecting on earlier life experiences and using past assumptions and knowledge to deal with the issue-at-hand helps prepare a group for unexpected complications.<sup>217</sup> Similarly, demonstrators should be required to articulate

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violent-fringe/51188258/1 (noting that Occupy Oakland's protesters argued or fought within their own group).

210. *Id.*

211. *See id.* (noting that Terry Madonna, a polling expert, stated that violence undercuts public sympathy for the protester's cause).

212. *See, e.g., Cox*, 312 U.S. at 571; *Int'l Women's Day March Planning Comm.*, 619 F.3d at 350; *Long Beach Area Peace Network*, 574 F.3d at 1018; *iMatter Utah*, 774 F.3d at 1261.

213. *Long Beach Area Peace Network*, 574 F.3d at 1031.

214. *See id.* at 1030 (noting that the ordinance "authorizes the City Manager to waive the insurance requirement if he determines that the planned event does not present a 'substantial or significant public liability or property damage exposure for the city or its officers.'").

215. *Id.*

216. 447 F. Supp. at 685.

217. *See* Todd Rogers et al., *Beyond Good Intentions: Prompting People to Make Plans Improves Follow-Through on Important Tasks* 2 BEHAV. SCI. AND POL'Y 33, 37 (2017), (noting that plan-making facilitates increased follow-through for two reasons: (1) plan making encourages people to develop

their plans in advance of receiving a permit to demonstrate. By requiring groups to describe and guarantee basic facilities to be provided at the event, including bathroom services, security and lighting, paved pathways, and other particulars, similar to the well-defined requirements in Atlanta, Georgia's application for assembly, legislators help ensure groups not only take care of their fellow demonstrators during the event, but also reduce local economic strain, pollution, and nuisance on the locality during the event.<sup>218</sup>

#### VI. NOT EVERYONE WILL AGREE ON HEIGHTENED DEMONSTRATOR REGULATION

##### *A. Speech should never be infringed by fees or insurance requirements*

Undoubtedly, some believe speech and assembly should not be infringed by the imposition of fees or a requirement of insurance.<sup>219</sup> However, the grant of fundamental civil liberties, such as free speech and assembly, "impl[ies] the existence of an organized society *maintaining public order* without which liberty itself would be lost in the excesses of unrestrained abuses."<sup>220</sup> Fees and insurance serve to maintain this public order, and preserve our republic.

The Court has held assembly permit fees are constitutional, and that they serve to counter the expense burdened by the demonstrating group.<sup>221</sup> While courts have typically held flat fees to be unconstitutional, as they could be unfair to different sized groups, there is no specific test for what exact monetary amount is constitutional or unconstitutional.<sup>222</sup> Rather, the Court has evaluated fee schemes based on the facts of each particular case, and requires the fee not be arbitrary, tax-like, or punitive; rather, the fee must simply be the embodiment of public expense resulting from the event, which the demonstrating group should bear.<sup>223</sup>

As for insurance, many believe that insurance is generally unobtainable or unduly burdensome for demonstrators, due to its high acquisition cost, rendering a requirement thereof an unconstitutional blockade to free speech

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strategies for overcoming logistical obstacles, and (2) helps people both to remember their goals and to activate pre-determined strategies for overcoming challenges they anticipate).

218. See, e.g., CITY OF ATLANTA, *supra* note 113.

219. See *Neisser*, *supra* note 7, at 294, 297-98 (criticizing fees and restrictions on speech); see also *El-Haj*, *supra* note 6 (same).

220. *Cox*, 312 U.S. at 574 (emphasis added).

221. *Id.* at 577.

222. See *id.* (finding it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as construed by the state court contravened any constitutional right).

223. *Id.*; see also *Int'l Women's Day March Planning Comm.*, 619 F.3d at 365-68 (both holding that there should be flexibility in calculating fees).

and assembly.<sup>224</sup> Importantly, many courts, including the First and Sixth Circuits do not *mandate* an indigency exception to an otherwise valid permit scheme requiring liability insurance.<sup>225</sup> Also, that there are alternatives that could be less intrusive does not automatically render a permit requirement or legislative provision unconstitutional, which would include an insurance requirement.<sup>226</sup> To be sure, some courts *have* held insurance should not be mandatory if there is no perceived or identifiable threat.<sup>227</sup> However, with the influx in violent and costly demonstrations that have occurred after many of these cases were decided, the court would likely not bear the same opinion today. As a best practice, however unpopular, insurance is the best bet for organizers, as it will shift the potential costs of damage and destruction to the party seeking to express itself through assembly.<sup>228</sup> However, at the same time, reasonable alternatives should be offered to ensure that groups are not alienated or silenced by their minority status or their lack of ability to pay for liability insurance.<sup>229</sup> Thus, *Long Beach's* scheme provides a nice second and third option for demonstrators who may not be able to afford or acquire insurance, which balances society's needs with the rights of the demonstrating group.<sup>230</sup>

### B. *Breaking news exceptions*

Courts have held that permit exceptions for spontaneous events, including requiring as little as twenty-four hours' notice of the group's assembly, is "not categorically unconstitutional," but that the ordinance language must include a proper definition of a spontaneous event, as well as offer alternative means of expression for the group.<sup>231</sup> It is not uncommon for breaking news exceptions like these to find their way into city ordinances and permit regulations, even in smaller cities in Middle America.<sup>232</sup>

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224. Patricia Dugin, *Conditioning Access to the Public Forum on the Purchase of Insurance*, 17 GA. L. REV. 815, 839-840 (1983).

225. See, e.g., *iMatter Utah*, 774 F.3d at 1265 (citing *Sullivan v. City of Augusta*, 511 F.3d 16, 41 (1st Cir. 2007)). See also *Stonewall Union*, 931 F.2d at 1137.

226. *Ward*, 491 U.S. at 798-800.

227. *Collin*, 447 F. Supp. at 685.

228. See *Neisser*, *supra* note 7, at 299-300 (arguing that any financial requirement for express activity in public requires careful economic analysis).

229. See *Dugin*, *supra* note 224, at 845-46 (noting that the ordinances could expressly exempt indigent applicants).

230. *Long Beach Area Peace Network*, 574 F.3d at 1030-31.

231. *Id.* at 1037.

232. See, e.g., FORT WAYNE, IND., CODE, tit. IX, ch. 101, § 101.03(D) ("Spontaneous events occasioned by news or affairs coming into public knowledge within three days of such public assembly, provided that the organizer thereof gives written notice to the city at least 24 hours prior to such public assembly, parade, neighborhood association parade or block party.").

While courts have held that the government must provide some alternative for demonstrations concerning recent events, an alternative should not come in the form of removing the time period for application review. If that were the applied solution, modern group organizers would simply assemble hordes of individuals whenever a situation, no matter how slight, arose, with little forethought into messaging or cohesiveness of the group, likely resulting in another Ferguson or Baltimore-type riot.

Social media can also help alleviate the need for a breaking news exception. Social media accounts are typically free to users, and are incredibly common among most Americans, where practically everyone from every racial, economic, social, and educational background has a platform to voice their concerns, and frequently does so.<sup>233</sup> Many angry and venting individuals already post comments to social media sites.<sup>234</sup> These posts can be read by other individuals, policy makers, businesses, and news outlets.<sup>235</sup> As such, as it relates to public comments on recent events, in modern America there is no need for increased expediency for assembly permit review, other than to provide the group wishing to demonstrate the opportunity to succumb to the consequences of groupthink, herd theory, and poor dual process reasoning at the expense of the American people.

The Supreme Court has posited that expedited measures should be made available when possible, so that “expression will not be lost in a maze of cumbersome and slow-moving procedures.”<sup>236</sup> Twenty-eight days for permit review is not the maze of cumbersome procedures envisioned by the Court.<sup>237</sup> In the past, the Court required prompt review of permits because speech could be seriously hindered by forcing individuals to “wait for a year or two while the administrative and judicial mills ground out a result.”<sup>238</sup> However, a permitting scheme which rests authority in an accountable

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233. See generally Kimberlee Morrison, *The Growth of Social Media: From Passing Trend to International Obsession [Infographic]*, SOC. TIMES (Jan. 27, 2014), <http://www.adweek.com/socialtimes/the-growth-of-social-media-from-trend-to-obsession-infographic/142323>, archived at [http://perma.cc/2ZRW-NUK8] (noting that Facebook has more than one billion registered users).

234. See, e.g., Teddy Wayne, *Clicking Their Way to Outrage*, N.Y. TIMES (July 3, 2014).

235. See, e.g., Catriona Pollard, *Social Media Monitoring: Is Your Business Listening?* HUFF. POST BUS. (Nov. 14, 2014 4:40AM), [http://www.huffingtonpost.com/catriona-pollard/social-media-monitoring-i\\_1\\_b\\_6149786.html](http://www.huffingtonpost.com/catriona-pollard/social-media-monitoring-i_1_b_6149786.html) (explaining that businesses must be responsive to the flood of social media contributors present in modern times to remain competitive). See also Laura Barron-Lopez, *Twitter and Facebook May be the Best Way to Get Lawmakers' Attention*, HUFF. POST POL. (Oct. 14, 2015, 2:35 PM), [http://www.huffingtonpost.com/entry/social-media-lawmakers-report\\_561e75f8e4b050c6c4a3a353](http://www.huffingtonpost.com/entry/social-media-lawmakers-report_561e75f8e4b050c6c4a3a353) (explaining that lawmakers not only pay attention to social media posts for self-interest, but also have “meaningful interaction” with constituents via social media platforms).

236. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 163 (1969).

237. *Id.*

238. *Id.*

governmental agent, who must qualify the reasons for permit denial, will not take a year or two to consider, as the Court fears.<sup>239</sup>

#### CONCLUSION

One needs only search their favorite internet browser for recent protestor activity to see that today's assemblies of dissenters are growing more bold, more violent, and more threatening to our republic than ever before. Society pays the price when protests become violent and dangerous, which in turn leads to societal animus against the demonstrating group, when nonparticipating individuals and businesses everywhere are imposed fees and taxes to cover the costs of demonstrator destruction. In light of these evolving group dynamics, local governments have the duty to protect Americans from the "substantive evils" born from dissenting crowds who have had "no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion."<sup>240</sup> While permit ordinances are not new phenomena, they have not changed rapidly enough to keep up with the mounting number of violent demonstrations that are crippling national, local, and regional economies. Local governments should be cognizant of individual and corporate mobility in the technologically-charged twenty-first century workplace, and should craft laws that protect Americans-at-large. Doing so would protect communities long-term because individuals and businesses will not want to live in, or even visit, a city that has been ravaged by violent assemblies.<sup>241</sup>

The Supreme Court has long held that local governments may enforce time, place, and manner restrictions on speech and assembly, so long as the restrictions are content-neutral, narrowly tailored, and leave alternative channels of communications open.<sup>242</sup> However, many local governments have not seized the opportunity to do so. Human behavioral research should be considered in concert with court precedent, to regulate the size of demonstrating groups, to guide officials on when review of assembly applications should take place, and to determine the imposition of fees and insurance requirements for demonstrating groups. By following the three

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239. See, e.g., FORT WAYNE, IND., CODE, tit. IX, ch. 101, § 101.07 (factors are listed for approval of permit). Director of Public Safety and Director of Public Works shall notify applicant of permit approval or denial at least forty-eight hours before the event, per Section 101.09, and an *appeal is allowed within five days of decision, as is the last resort appeal, to "a court of competent jurisdiction."* FORT WAYNE, IND., CODE, tit IX, ch. 101, §§ 101.09, 101.11(emphasis added).

240. *Thornhill v. State of Ala.*, 310 U.S. 88, 105 (1940) (holding that freedom of expression may be penalized if there's a clear danger of substantive evils).

241. See *Blumberg*, *supra* note 41 (noting that Jonathan Murray, Managing Director at UBS Financial Services, estimated in the long-term, billions in taxable revenue will be lost for the city of Baltimore, due to the city's post-riot image).

242. *Ward*, 491 U.S. at 791.

2018]

*RETHINKING ASSEMBLY ORDINANCES*

31

new best practices of: requiring groups of twenty or more individuals to obtain a permit, requiring the permit be turned in more than twenty-eight days before the scheduled event, and requiring fees and insurance from the group, local governments throughout the country can provide ample avenues of communication to those seeking to demonstrate or protest, but in ways that maintain order, keep society safe, and finally take into account the interests of everyday non-protesting Americans.