



RIGHT TO ASSEMBLE AND PROTEST IN THE UNITED STATES OF AMERICA

A Compilation

U.S. Embassy Moscow, Russia

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2ND UPDATED, ENLARGED VERSION

FRONT COVER:

Immigrant rights supporters fill the intersection outside the Arizona State Capitol, as advocates for limiting immigration stood with signs in the background, during a peaceful demonstration, Monday, Sept. 4, 2006, in Phoenix. (AP Photo/Roy Dabner)

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GENERAL INFORMATION

ENCYCLOPEDIA OF EVERYDAY LAW: ASSEMBLY

Background

The First Amendment of the *BILL OF RIGHTS* provides that "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble."

This provision applies to state government entities through the Due Process Clause of the Fourteenth Amendment. Though neither the federal Constitution nor any state constitution specifically protects rights of association, the United States Supreme Court and other courts have extended assembly rights to include rights of association.

Rights to free speech and assembly are not absolute under the relevant jurisprudence. Government entities may restrict many types of speech without violating First Amendment protections. Many of the Supreme Court's First Amendment cases focus on two main questions: first, whether the restriction on speech was based on the content of the speech; and second, whether the speech was given in a traditional public forum or elsewhere. Some questions focus exclusively on the actual speech, rather than on aspects of the right to assembly. Other questions contain aspects of both the right to free speech and the right to assemble peacefully. Cases addressing free speech plus some conduct in the exercise of assembly rights often pose complex questions, since either the speech rights or the assembly rights may not protect the parties in these types of cases.

Since the courts take into consideration such a variety of factors when determining whether a particular speech or whether a particular assemblage is protected by the First Amendment, it is difficult to provide a concise definition of rights of assembly. Even in areas where a government entity may restrict speech or assembly rights, courts are more likely to find a violation of the First Amendment if speech or assembly is banned completely. Some restrictions merely involve the application for a permit or license to assemble, such as obtaining a license to hold a parade in a public street. Other time, place, and/or manner restrictions may also apply.

Content-Based vs. Content-Neutral Restrictions on Free Speech

The outcome of a First Amendment case may very well hinge on whether the restriction of speech is based on the content of the speech. If the restriction is content-based, courts scrutinize the restriction under a heightened standard compared with restrictions that are content-neutral. When courts apply this heightened scrutiny, they are more likely to find a First Amendment violation. Courts also recognize that content-neutral restrictions may cause as much or more harm than content-based restrictions. For example, a ban on all parades on public streets is much more intrusive than a ban on only some parades. If a restriction is content-neutral, a court will employ an intermediate standard of scrutiny.

Determining whether a restriction is content-neutral or content-based may be more difficult in the context of assembly rights than in the context of speech rights. For example, if a city requires that all groups obtain a permit to hold a parade, the restriction is more likely, at least on its face, to be

content-neutral. However, if the city, through official or unofficial action, only issues permits to certain groups and restricts issuing permits to other groups, the restriction in its application is content-based, not content neutral.

Public vs. Private Speech

In addition to determining whether a restriction is content-based or content-neutral, courts also consider whether the speech or assembly is given or held in a public or private forum. Government property that has traditionally been used by the public for the purpose of assembly and to disseminate ideas is considered a traditional public forum. Content-based regulations in a traditional public forum are the most likely forms of speech to be found in violation of the First Amendment. Some content-neutral restrictions on the time, place, and manner of the speech are permitted, however, even in the traditional public forum.

Public-owned facilities that have never been designated for the general use of the public to express ideas are considered nonforums. Government may reasonably restrict speech, including some content-based speech, in these nonforums. This does not mean that all speech may be restricted on such property, but it does mean that speech can be restricted to achieve a reasonable government purpose and is not intended to suppress the viewpoint of a particular speaker.

Some public property that is not a traditional public forum may become a designated or limited public forum if it is opened to the use of the general public to express ideas. Examples include a senior center that has been opened for the general public to express ideas or a state-operated television station used for political debates. Courts will strictly scrutinize content-based restrictions in a designated or limited public forum when the restriction on speech is related to the designated public use of the property.

Reasonable Time, Place, and Manner Restrictions

Government entities may make reasonable content-neutral restrictions on the time, place, and manner of a speech or assemblage, even in a traditional public forum. This action directly affects the rights of assembly, since a government entity may restrict the time and place where an assembly may take place, as well as the manner in which the assembly occurs. The restrictions must be reasonable and narrowly tailored to meet a significant government purpose. The government entity must also leave open ample channels for communication that interested parties wish to communicate.

Overbreadth and Vagueness

Statutes and ordinances are often found to infringe on First Amendment rights because they are unconstitutionally vague or the breadth of the STATUTE or ORDINANCE extends so far that it infringes on protected speech. For example, some statutes and ordinances prohibiting loitering on public property have been found to be unconstitutional on the grounds of overbreadth since some people could be prosecuted for exercising their protected First Amendment rights. Similarly, statutes and ordinances restricting speech may be so vague that a person of ordinary intelligence could not determine what speech was restricted based on a reading of the law.

Permissible and Impermissible Restrictions on Rights of Assembly

It is difficult to make general statements about when assembly rights are guaranteed and when they are not. Whether assembly is or is not guaranteed depends largely on where and when the assembly takes place, as well as the specific restrictions that were placed on this right by government entities.

Speech and Assembly in Public Streets and Parks

Public streets, sidewalks, and parks are generally considered public forums, and content-based restrictions on these will be strictly scrutinized by the courts. However, reasonable time, place, and manner restrictions are permitted if they are neutral regarding the content of the speech.

The use of public streets, sidewalks, and parks may not always be considered use of public forums, which often causes confusion in this area. For example, in the 1990 case of *United States v. Kokinda*, the Supreme Court held that a regulation restricting use of a sidewalk in front of a post office was valid because, in part, that particular sidewalk was not a public forum. Similar results have been reached with respect to some public parks.

Parade Permits and Other Restrictions

The right to assemble and hold parades on public streets is one of the more important rights of assembly. However, these rights must be balanced with the interests of government entities to maintain peace and order. The Supreme Court in the 1992 case of *Forsyth County v. Nationalist Movement*, held that a government entity may require permits for those wishing to hold a parade, march, or rally on public streets or other public forums. Local officials may not be given overly broad discretion to issue such permits.

Speech and Assembly in Libraries and Theaters

The Supreme Court has held that a publicly owned theatre is a public forum. Thus, government may not make content-based restrictions on speech or assembly in these theaters. However, government entities may make reasonable time, place, and manner restrictions in publicly-owned theaters. Libraries, on the other hand, are not considered public forums and may be regulated "in a reasonable and nondiscriminatory manner, equally applicable to all and administered with equality to all."

Speech and Assembly in Airports and Other Public Transportation Centers

The Supreme Court has held that airports are not traditional public forums, so government may make certain reasonable restrictions on assembly and speech rights in these areas. Courts have reached different conclusions with respect to other centers of public transportation, such as bus terminals, railway stations, and ports.

Picketing and Other Demonstrations

The act of picketing is unquestionably intertwined with the First Amendment right to peaceful assembly. Courts have often recognized the right to picket and hold other peaceful demonstrations

particularly in public forums. The right to picket, however, is limited and depends on the specific activities of the participants and the location of the demonstration. For example, if a demonstration breaches the peace or involves other criminal activity, law enforcement may ordinarily end the demonstration in a reasonable manner. Similarly, a government entity may reasonably restrict demonstrations on public streets in residential areas.

Loitering and Vagrancy Statutes

State and local governments have often sought to eliminate undesirable behavior by enacting statutes and ordinances that make loitering a crime. Many of these statutes have been held to be constitutional, even those that prohibit being in a public place and hindering or obstructing the free passage of people. Such rulings have a significant effect on the rights of assembly, since these crimes involve a person's presence in a certain place, in addition to suspicious behavior.

A number of courts have held that specific antiloitering statutes and ordinances have been unconstitutional. Some of these decisions are hinged on First Amendment rights, while others hinge on other rights, such as Fourth Amendment protections against unreasonable searches and seizures. Several of these statutes have been struck down on grounds of vagueness or overbreadth. Similarly, courts have struck down statutes and ordinances outlawing VAGRANCY on the grounds of vagueness or overbreadth.

Speech and Assembly on Private Property

The general rule is that owners of private property can restrict speech in a manner that the owner deems appropriate. Some older cases have held that private property, such as a privately owned shopping center, could be treated as the equivalent of public property. However, modern cases have held otherwise, finding that private property was not subject to the same analysis regarding First Amendment rights as public property.

State Laws Affecting Rights of Assembly

Some municipalities in every state require interested individuals to file for a permit to hold a parade or other gathering on public property. These ordinances are often the subject of litigation regarding alleged infringement on First Amendment rights of peaceful assembly. Antiloitering statutes are also commonplace, though several of these have been challenged on First Amendment grounds as well. Whether a specific ordinance, statute, or official action constitutes a violation of the First Amendment depends largely on the specific facts of the case or the specific language of the statute or ordinance.

ALABAMA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights. The state's criminal laws prohibit loitering, including begging and criminal solicitation.

ARIZONA: Several municipalities require that interested parties file for a permit to hold a parade in public

streets. The state's criminal laws prohibit loitering, including begging and criminal solicitation.

ARKANSAS: Several municipalities require that interested parties file for a permit to hold a parade in public streets. Some of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights. The state's criminal laws prohibit loitering.

CALIFORNIA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights. The state's criminal laws prohibit loitering, and these laws have generally been upheld in First Amendment challenges.

COLORADO: Several municipalities require that interested parties file for a permit to hold a parade in public streets. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights. The state requires a permit for parties to use the state capitol building grounds. The state's criminal laws prohibit loitering, including begging and criminal solicitation. The Colorado Supreme Court held that the state's loitering statute was unconstitutional; this statute was subsequently modified.

DELAWARE: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit loitering, including begging, criminal solicitation, and loitering on public school grounds.

FLORIDA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws regarding loitering have been the subject of several lawsuits. These laws make it a crime to loiter or prowl in a place, at a time or in a manner not usual for a law-abiding individual.

GEORGIA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights. The state's criminal laws regarding loitering have been the subject of several lawsuits. These laws make it a crime to loiter or prowl in a place, at a time, or in a manner not usual for a law-abiding individual.

HAWAII: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit loitering for solicitation of prostitution.

IDAHO: Several municipalities require that interested parties file for a permit to hold a parade in public streets.

ILLINOIS: Several municipalities require that interested parties file for a permit to hold a parade in public streets or public assembly. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment

rights. The state statutes permit municipalities to prohibit vagrancy, and loitering is prohibited in the state by criminal statute.

INDIANA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. Criminal gang activity is a separate offense under state criminal laws.

IOWA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state provides specific laws prohibiting loitering and other congregation on election days near polling places.

KANSAS: Several municipalities require that interested parties file for a permit to hold a parade in public streets.

KENTUCKY: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit loitering for the purpose of engaging in criminal activity.

LOUISIANA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit vagrancy and loitering, though these statutes have been attacked on First Amendment grounds several times.

MAINE: Several municipalities require that interested parties file for a permit to hold a parade in public streets.

MARYLAND: Several municipalities require that interested parties file for a permit to hold a parade or other public assembly in public streets or areas. The state's criminal laws prohibits loitering or loafing around a business establishment licensed to sell alcohol.

MASSACHUSETTS: Several municipalities require that interested parties file for a permit to hold a parade in public streets, though a number of these ordinances have been the subject to challenges on First Amendment grounds. The state's criminal laws prohibit loitering in some specific venues, such as railway centers.

MICHIGAN: Several municipalities require that interested parties file for a permit to hold a parade in public streets. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights.

MINNESOTA: Several municipalities require that interested parties file for a permit to hold a parade, march, or other form of procession on public streets and other areas. The state's criminal laws prohibit vagrancy, including some instances of loitering.

MISSISSIPPI: Several municipalities require that interested parties file for a permit to hold a parade in public streets. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights.

MISSOURI: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit vagrancy, including some instances of loitering.

MONTANA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit vagrancy and loitering around public markets.

NEBRASKA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit loitering in specified venues.

NEVADA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit loitering around schools and other areas where children congregate. The state permits municipalities to enact ordinances to prohibit loitering.

NEW HAMPSHIRE: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit loitering and prowling in specified circumstances.

NEW JERSEY: Several municipalities require that interested parties file for a permit to hold a parade in public streets. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights. The state's criminal laws prohibit loitering for the purpose of soliciting criminal activity or in public transportation terminals.

NEW YORK: Several municipalities require that interested parties file for a permit to hold a parade in public streets. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights. The state has enacted a number of laws prohibiting loitering, including loitering for the purpose of soliciting passengers for transportation, loitering for the purpose of criminal solicitation, and loitering in public transportation centers. The statute permits municipalities to enact ordinances prohibiting loitering. Several of the antiloitering laws have been the subject of litigation attacking the laws on First Amendment grounds.

NORTH DAKOTA: Several municipalities require that interested parties file for a permit to hold a parade or other processions in public streets.

OHIO: Several municipalities require that interested parties file for a permit to hold a parade or engage in the solicitation of business. The state's criminal laws prohibit loitering in public transportation centers and in polling centers during elections.

OKLAHOMA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit loitering for the purpose of engaging in specified criminal acts.

OREGON: Several municipalities require that interested parties file for a permit to hold a parade in public streets. Some municipalities also require a noise permit when playing amplified noise in a public place.

PENNSYLVANIA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. A number of these ordinances have been attacked on First Amendment grounds, and some ordinances have been found to be in violation of First Amendment rights. The state's criminal laws prohibit loitering for the purpose of engaging in specified criminal acts.

RHODE ISLAND: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's criminal laws prohibit loitering for indecent purposes, loitering in public transportation centers, and loitering at or near schools.

SOUTH CAROLINA: Several municipalities require that interested parties file for a permit to hold a parade in public streets. The state's laws prohibit loitering in public transportation centers.

TENNESSEE: Several municipalities require that interested parties file for a permit to hold a parade on public streets. The state's criminal laws prohibit loitering for the purpose of engaging in specified criminal acts.

TEXAS: Several municipalities require that interested parties file for a permit to hold a parade on public streets. The state's laws prohibit loitering in polling centers during elections.

UTAH: Several municipalities require that interested parties file for a permit to hold a parade on public streets.

VERMONT: The state's laws prohibit loitering in public transportation centers and other public property.

WASHINGTON: Several municipalities require that interested parties file for a permit to hold a parade or march on public streets. The state's laws prohibit loitering in public transportation centers.

WEST VIRGINIA: Several municipalities require that interested parties file for a permit to hold a parade on public streets. The state's laws prohibit loitering at or near school property.

WISCONSIN: Several municipalities require that interested parties file for a permit to hold a parade on public streets. The state's laws prohibit loitering in public transportation centers.

Additional Resources

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The First Amendment: A Reader. Garvey, John H., and Frederick Schaver, West Publishing Co., 1992.

Freedom of Association. Gutman, Amy, Princeton University Press, 1998.

Law and the Company We Keep. Soifer, Aviam, Harvard University Press, 1995.

The Right of Assembly and Association, Second Revised Edition. 2nd rev. ed., Abernathy, M. Glenn, University of South Carolina Press, 1981.

Organizations

American Civil Liberties Union (ACLU)

125 Broad Street, 18th Floor
New York, NY 10004 USA
Phone: (212) 344-3005
URL: <http://www.aclu.org/>

National Coalition Against Censorship (NCAC)

275 Seventh Avenue
New York, NY 10001 USA Phone: (212) 807-6222 Fax: (212) 807-6245
E-Mail: ncac@ncac.org
URL: <http://www.ncac.org/>

National Freedom of Information Center (NFOIC)

400 S. Record Street, Suite 240 Dallas, TX 75202 USA
Phone: (214) 977-6658

Fax: (214) 977-6666
E-Mail: nfoic@reporters.net
URL: <http://www.nfoic.org/>

The Thomas Jefferson Center for the Protection of Free Expression

400 Peter Jefferson Place
Charlottesville, VA 22911-8691 USA
Phone: (804) 295-4784 Fax: (804) 296-3621
E-Mail: freespeech@tjcenter.org
URL: <http://www.tjcenter.org>
Primary Contact: Robert M. O'Neill, Director

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CRS Report for Congress

Burning Crosses, Hangman's Nooses, and the Like: State Statutes That Proscribe the Use of Symbols of Fear and Violence with the Intent to Threaten

October 5, 2007

Kathleen Ann Ruane
Law Clerk
American Law Division

Charles Doyle
Senior Specialist
American Law Division



**Prepared for Members and
Committees of Congress**

Burning Crosses, Hangman's Nooses, and the Like: State Statutes That Proscribe the Use of Symbols of Fear and Violence with the Intent to Threaten

Summary

Almost half of the states outlaw cross burning with the intent to threaten as such. A few of these statutes cover the display of hangman's nooses and other symbols of intimidation as well. Moreover, the same misconduct also frequently falls under more general state prohibitions on coercion, terroristic threats, harassment, or hate crimes. Some of these laws feature a hate crime element without which conviction is not possible; others do not. In either case, there are obvious first amendment implications.

The Supreme Court has explained that not all speech, particular expressive conduct, is protected by the First Amendment. However, in *R.A.V. v. St. Paul*, it held cross burning with the intent to annoy was protected and did not come within the "fighting words" category of unprotected speech. Shortly thereafter, in *Black v. Virginia*, the Court held that cross burning with the intent to convey a true threat was not protected. Some of the Justices noted another difference between the two cases: the ordinance in *R.A.V.* had a hate crime element — the offense had to be motivated by racial or some other discriminatory animus; the statute in *Black* had no such element.

In years since *Black* was announced, the lower courts have continued to recognize true threats as unprotected, but have also continued to analyze challenges to threat statutes under the First Amendment's overbreadth doctrine and the vagueness doctrine of the Fifth and Fourteenth Amendments' due process clauses. These laws have generally survived such challenges, although an imprecisely worded statute has fallen victim to a vagueness attack upon occasion.

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Burning Crosses, Hangman's Nooses, and the Like: State Statutes That Proscribe the Use of Symbols of Fear and Violence with the Intent to Threaten

Introduction

Burning crosses, exhibitions of hangman's nooses and similar displays are the subjects of criminal statutes in virtually every state in the Union. The coverage of those statutes varies a great deal. The Supreme Court's decision in *Black v. Virginia*¹ serves as a reminder that efforts to enlarge their scope raise serious, but not insurmountable, First Amendment implications.

Cross Burning

Legislatures in almost half of the states have enacted statutes that explicitly outlaw cross burning in one form or another.² The most common variety simply states, "It shall be unlawful for any person, with the intent of intimidating any person or group of persons to burn, or cause to be burned, a cross on the property of another, a highway, or other public place."³ In other places, a specific cross burning

¹ 538 U.S. 343 (2003).

² ALA.CODE §13A-6-28; ARIZ.REV.STAT.ANN. §13-1707; CAL. PENAL CODE §11411; CONN.GEN.STAT.ANN. §46a-58; DEL.CODE ANN. tit.11 §805; FLA.STAT. ANN. §876.17; GA.CODE §16-11-37; IDAHO CODE §18-7902; ILL.COMP.LAWS ANN. ch.720 ¶5, §12-7.6; LA. REV.STAT.ANN. §14:40.4; MD. CODE ANN., CRIM. LAW §10-304; MO. ANN. STAT. §565.095; MONT.CODE ANN. §45-5-221; N.H.REV. STAT.ANN. §631:4; N.J.STAT.ANN. §2C:33-10; N.C.GEN.STAT. §14-12.13; OKLA.STAT.ANN. tit.21 §1174; S.C. CODE ANN. §16-7-120; S.D.COD.LAWS ANN. §22-19B-1; VT.STAT.ANN. tit.13 §1456; VA. CODE ANN. §18.2-423; WASH.REV.CODE ANN.

³ LA.REV.STAT.ANN. §14:40.4[A.]. Given the individual complexities of state sentencing and correctional structures, a discussion of the sanctions that follow as a consequence of violation of the statutes examined here is beyond the scope of this report.

proscription has been affixed to the state’s civil rights law,⁴ its threat statute,⁵ or its harassment provision.⁶

Without more, these proscriptions do not ordinarily reach beyond burning crosses to hangman’s nooses or other such harbingers of violence. In response several jurisdictions have resorted to generic condemnation of symbols or exhibitions calculated to intimidate or threaten. One such example states briefly,

It shall be unlawful for any person or persons to place, or cause to be placed, anywhere in the state any exhibit of any kind whatsoever with the intention of intimidating any person or persons, to prevent them from doing any act which is lawful, or to cause them to do any act which is unlawful. FLA.STAT.ANN. §876.19.⁷

⁴ *E.g.*, “(a) It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability....

“(c) Any person who places a burning cross or a simulation thereof on any public property, or on any private property without the written consent of the owner, shall be in violation of subsection (a) of this section.” CONN.GEN.STAT.ANN. §46a-58. As noted below, several states include a hate crime element within their coercion, terroristic threat, or harassment statutes.

⁵ *E.g.*, “(a) A person commits the offense of a terroristic threat when he or she threatens to commit any crime of violence, to release any hazardous substance, as such term is defined in Code Section 12-8-92, or to burn or damage property with the purpose of terrorizing another or of causing the evacuation of a building, place of assembly, or facility of public transportation or otherwise causing serious public inconvenience or in reckless disregard of the risk of causing such terror or inconvenience. No person shall be convicted under this subsection on the uncorroborated testimony of the party to whom the threat is communicated.

“(b) A person commits the offense of a terroristic act when: (1) He or she uses a burning or flaming cross or other burning or flaming symbol or flambeau with the intent to terrorize another or another’s household; ...” GA.CODE §16-11-37(a), (b)(1).

⁶ “No person may maliciously and with the specific intent to intimidate or harass another person because of that person’s race, color, religion, ancestry or national origin: (1) causes physical injury to another person; or (2) Deface any real or personal property of another person; or (3) Damage or destroy any real or personal property of another person; or (4) Threaten by word or act, to do the acts prohibited if there is reasonable cause to believe that any of the acts prohibited in subdivision (1), (2), or (3) of this section will occur,” S.D.COD. LAWS ANN. §22-19B-1.

“For purposes of this chapter, the term ‘deface,’ includes cross-burnings, or the placing of any word or symbol commonly associated with racial, religious, or ethnic terrorism on the property of another person without that person’s permission,” S.D.COD.LAWS ANN. §22-19B-2.

⁷ *See also*, N.C.GEN.STAT. §14-12.13 (“It shall be unlawful for any person or persons to place or cause to be placed anywhere in this State any exhibit of any kind whatsoever, while masked or unmasked, with the intention of intimidating any person or persons, or of preventing them from doing any act which is lawful, or of causing them to do any act which is unlawful.”); and CAL. PENAL CODE §11411; N.H.REV. STAT.ANN. §631:4; N.J.STAT.ANN.

General Prohibitions

Both the states that have explicit cross burning statutes, as well as those that do not, often have coercion, terroristic threat, harassment or civil rights statutes of sufficient breadth to prosecute misconduct that might otherwise be tried under a cross burning statute.

Coercion.

Coercion is a crime that dates from the Nineteenth Century Field Code (1865). It is a crime reminiscent of extortion but without the extraction of property required of that offense.⁸ In those states in which it is found, it is essentially the same. It prohibits efforts to compel another through the use of threats to do or refrain from doing something the victim is legally entitled to do:

A person commits the crime of criminal coercion if, without legal authority, he threatens to confine, restrain or to cause physical injury to the threatened person or another, or to damage the property or reputation of the threatened person or another with intent thereby to induce the threatened person or another against his will to do an unlawful act or refrain from doing a lawful act.⁹

A few states characterize as the crime of intimidation the crime known elsewhere as coercion.¹⁰ In either case, the proscription would apply where a cross burning or other symbolic threat is designed to discourage another from exercising or refraining from exercising a particular lawful prerogative.

Terroristic Threats.

State terroristic threat statutes are diverse. At one time, such statutes encompassed only threats to commit a serious crime against person or property. Today those elements have been replaced and augmented with an array of provisions relating to hoaxes and false alarms of catastrophic consequences.¹¹ In those states

§2C:33-10; S.D.COD.LAWS ANN. §22-19B-1.

⁸ *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393, 405 (2003) (“Eliminating the requirement that property must be obtained to constitute extortion ... would eliminate the recognized distinction between extortion and the separate crime of coercion....”).

⁹ ALA.CODE §13A-6-25(a); *see also*, ALASKA STAT. §11.41.530; ARK.CODE ANN. §5-13-208; CONN. GEN.STAT.ANN. §53a-192; DEL.CODE ANN. tit.11 §791; KY.REV.STAT.ANN. §509.080; NEV.REV.STAT. §207.190; NEW YORK PENAL LAW §§135.60, 135.65; N.D.CENT.CODE §12.1-17-06; OHIO REV.CODE ANN. §2905.12; ORE.REV.STAT. §163.275; PA.STAT.ANN. tit. 18 §2906; WASH.REV.CODE ANN. §9A.36.070.

¹⁰ MONT.CODE ANN. §45-5-203; IND.CODE ANN. §35-45-2-1.

¹¹ *E.g.*, WYO.STAT.ANN. §6-2-505(a) (“A person is guilty of a terroristic threat if he threatens to commit any violent felony with the intent to cause evacuation of a building, place of assembly or facility of public transportation, or otherwise to cause serious inconvenience, or in reckless disregard of the risk of causing such inconvenience”); NEB.REV.STAT. (“(1) A person commits terroristic threats if he or she threatens to commit

where one of the elements of the crime is either the fear of imminent serious injury or property destruction¹² or of a threat directed against the general population,¹³ prosecution of intimidation by symbolic threats may be difficult if not impossible under most circumstances. On the other hand, in those states where the terroristic threats statute proscribes threats of death, serious injury or property destruction,¹⁴ particularly where the statute has a hate crime element,¹⁵ the circumstances surrounding a cross burning or similar display may present all the elements for a prosecution.

any crime of violence: (a) With the intent to terrorize another; (b) With the intent of causing the evacuation of a building, place of assembly, or facility of public transportation; or (c) In reckless disregard of the risk of causing such terror or evacuation.”).

¹² *E.g.*, TEX.PENAL CODE ANN. §22.07; UTAH CODE ANN. §76-5-107.

¹³ *E.g.*, LA.REV.STAT.ANN. §14:40.1[A](“Terrorizing is the intentional communication of information that the commission of a crime of violence is imminent or in progress or that a circumstance dangerous to human life exists or is about to exist, with the intent of causing members of the general public to be in sustained fear for their safety; or causing evacuation of a building, a public structure, or a facility of transportation; or causing other serious disruption to the general public.”); VA. CODE ANN. §18.2-46.4, 18.2-46.5.

¹⁴ DEL.CODE ANN. tit.11 §621(a)(“A person is guilty of terroristic threatening when he or she commits any of the following: (1) the person threatens to commit any crime likely to result in death or in serious injury to person or property... “); *see also*, ALA.CODE §13A-10-15; ALASKA STAT. §§11.56.807, 810; ARIZ.REV.STAT.ANN. §13-1202; ARK.CODE ANN. §§5-13-301, 5-54-203; HAWAII REV.STAT. §707-715; KY.REV. STAT. ANN. §508.080; MINN.STAT.ANN. §609.713; NEB.REV.STAT. §28-311.01; N.H.REV. STAT.ANN. §631:4; N.J.STAT.ANN. §2C:12-3; NEW YORK PENAL LAW §490.20; N.D.CENT.CODE §12.1-17-04; OHIO REV.CODE ANN. §2909.23; PA.STAT. ANN. tit. 18 §2706.

¹⁵ *E.g.*, OKLA.STAT.ANN. tit.21 §850[A](“No person shall maliciously and with the specific intent to intimidate or harass another person because of that person’s race, color, religion, ancestry, national origin or disability: 1.Assault or batter another person; 2. Damage, destroy, vandalize or deface any real or personal property of another person; or 3. Threaten by word or act, to do any act prohibited by paragraph 1 or 2 of this subsection if there is reasonable cause to believe that such act will occur.”), *see also*, CONN.GEN.STAT.ANN. §53a-181k(a); MICH.COMP.LAWS ANN. §750.147b. As discussed below, the Supreme Court’s decision in *Black* may cast a shadow over the true threat statutes that feature a hate crime element.

Harassment.

Most states have a harassment statute. In various configurations, they cover repetitious annoyances;¹⁶ threats specifically conveyed, orally, electronically, or by telephone or mail;¹⁷ and conduct likely to stimulate an immediate violent response.¹⁸ Most are unlikely to reach symbolic threats and intimidation such as cross burning, hangman's nooses or their ilk. A few, however, may qualify, especially those that resemble terroristic threat statutes. The Nevada statute, for example, states in relevant part:

A person is guilty of harassment if: (a) Without lawful authority, the person knowingly threatens: (1) To cause bodily injury in the future to the person threatened or to any other person ... and (b) The person by words or conduct places the person receiving the threat in reasonable fear that the threat will be carried out. NEV.REV.STAT. §200.571[1].¹⁹

Here too, constitutional anxieties aside, coverage is most apparent in those statutes that feature a hate crime element.²⁰

¹⁶ *E.g.*, KY.REV.STAT.ANN. §525.070(1)(e) (“A person is guilty of harassment when with intent to harass, annoy or alarm another person he ... (e) Engages in a course of conduct or repeatedly commits acts which alarm or seriously annoy such other person and which serve no legitimate purpose.”); ARK.CODE ANN. §5-17-208; COLO.REV.STAT. §18-9-111; MASS.GEN.LAWS ANN. ch.265 §43A; NEB.REV.STAT. §28-311.02; N.MEX.STAT.ANN. §30-3A-2; S.C. CODE ANN. §16-3-1700.

¹⁷ *E.g.*, ARIZ.REV.STAT.ANN. §13-2921 [A] (“A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, the person: 1. Anonymously or otherwise communicates or causes a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses. 2. Continues to follow another person in or about a public place for no legitimate purpose after being asked to desist 3. Repeatedly commits an act or acts that harass another person. 4. Surveils or causes another person to surveil a person for no legitimate purpose. 5. On more than one occasion makes a false report to a law enforcement, credit or social service agency. 6. Interferes with the delivery of any public or regulated utility to a person.”); CONN.GEN.STAT.ANN. §§53-182b, 53a-183; IND.CODE ANN. §35-45-2-2; IOWA CODE ANN. §708.7; 18-7903; KAN.STAT.ANN. §21-4113; MO.ANN.STAT. §565.090; N.D.CENT.CODE §12.1-17-07; OKLA.STAT.ANN. tit.21 §1172; TENN.CODE ANN. §39-17-308; TEX.PENAL CODE ANN. §42.07; UTAH CODE ANN. §76-5-106.

¹⁸ *E.g.*, ALA.CODE §13A-11-8(a)(1) (“A person commits the crime of harassment if, with intent to harass, annoy, or alarm another person, he or she either: a. Strikes, shoves, kicks, or otherwise touches a person or subjects him or her to physical contact. b. Directs abusive or obscene language or makes an obscene gesture towards another person.”); ALASKA STAT. §11.61.122; NEW YORK PENAL LAW §240.25; ORE.REV.STAT. §166.065; PA.STAT.ANN. tit. 18 §2709.

¹⁹ *See also*, DEL.CODE ANN. tit.11 §1311, 1312; MINN.STAT.ANN. §609.749; OKLA.STAT.ANN. tit.21 §850; WASH.REV.CODE ANN. §9A.46.020; WIS.STAT.ANN. §947.013.

²⁰ *E.g.*, ORE.REV.STAT. §166.155(1) (“A person commits the crime of intimidation in the second degree if the person:...(c) Intentionally, because of the person’s perception of race, color, religion, national origin or sexual orientation of another or of a member of the other’s family, subjects such other person to alarm by threatening: (A) To inflict serious physical

Civil Rights.

Most jurisdictions have hate crime sentencing statutes that enhance the penalties imposed for commission of other criminal offense when the defendant was motivated by racial, religious or some other discriminatory animus.²¹ As already noted, the presence of such animus is an element in several of the cross burning, harassment and threat statutes. Apart from these, a handful of states also have statutes that criminalize the deprivation of civil rights generally:

(B) If any person does by force or threat of force, willfully injure, intimidate or interfere with, or attempt to injure, intimidate or interfere with, or oppress or threaten any other person in the free exercise or enjoyment of any right or privilege secured to him or her by the Constitution or laws of the State of West Virginia or by the Constitution or laws of the United States, because of such other person's race, color, religion, ancestry, national origin, political affiliation or sex, he or she shall be guilty of a felony.... W.VA.CODE ANN. §61-6-21(B).²²

First Amendment Considerations

No cross burning statute or law of similar comportment can be assessed without considerations of its First Amendment implications. Generally, these statutes will pass constitutional muster so long as they can be read only to proscribe expressive conduct that falls outside of the protection of the First Amendment. The First Amendment provides that "Congress shall make no law ... abridging the freedom of speech."²³ The Fourteenth Amendment's due process clause imposes the same restriction upon the states,²⁴ many of whose constitutions house a comparable limitation on state legislative action.²⁵

injury upon or to commit a felony affecting such other person, or a member of the person's family; or (B) To cause substantial damage to the property of the other person or of a member of the other person's family.").

²¹ ALA.CODE §13A-5-13; ARIZ.REV.STAT.ANN. §13-702; CAL. PENAL CODE §422.75; CONN.GEN.STAT.ANN. §53a-40a; DEL.CODE ANN. tit.11 §1304; FLA.STAT.ANN. §775.085; HAWAII REV.STAT. §706-662; ILL.COMP.LAWS ANN. ch.720 ¶5, §12-7.1; IOWA CODE §729A.2; KAN.STAT.ANN. §21-4716; KY.REV.STAT.ANN. §532.031; LA.REV.STAT.ANN. §14:40.4; ME.REV.STAT.ANN. tit.17-A, §1151; MINN.STAT.ANN. §244 App.II.D.2; MO. ANN.STAT. §557.035; MONT.CODE ANN.§45-5-222; NEV.REV.STAT. §207.185; N.H.REV. STAT.ANN. §651:6; N.J.STAT.ANN. §2C:16-1; N.Y. PENAL LAW §485.05; N.C.GEN.STAT. §14-3; OHIO REV. CODE ANN. §2927.12; PA.STAT.ANN. tit.18 §2710; R.I.GEN.LAWS §12-19-38; TENN.CODE ANN. §40-35-114; TEX.PENAL CODE §12.47; UTAH CODE ANN. §76-3-203.3; VT.STAT.ANN. tit.13 §1456; W.VA. CODE §61-6-21(d); WIS.STAT.ANN. §939.645.

²² See also, CAL. PENAL CODE §422.6; ME.REV.STAT.ANN. tit.17 §2931; MASS. GEN.LAWS ANN. ch.265 §37; S.C. CODE ANN. §16-5-10; TENN.CODE ANN. §39-17-309.

²³ U.S. Const. amend. I.

²⁴ 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996); Gitlow v. New York, 268 U.S. 652, 666 (1925).

²⁵ E.g., LA. CONST. Art. I §7; MD. DECL. RTS. Art. 40; MO. CONST. Art. I §8; N.H. CONST. Pt. I, art. 22; ORE. CONST. Art. I §8; TEX. CONST. Art. I §8.

The First Amendment protects both pure speech and expressive conduct used to convey a message or embody an ideology.²⁶ However, the Supreme Court has long recognized that the First Amendment does not afford all forms of expression absolute protection, and the government constitutionally may prohibit the forms of expression that fall outside of the First Amendment’s protections.²⁷ The First Amendment permits “restrictions upon the content of speech in a few limited areas, which are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”²⁸

The proscribable categories of speech include, but are not limited to, obscenity,²⁹ “fighting words,”³⁰ and “true threats.”³¹ The Supreme Court recently decided a case analyzing the constitutionality of a cross-burning statute, categorizing the prohibited conduct as a “true threat.”

Virginia v. Black.

Virginia v. Black considered the constitutionality of a Virginia statute that banned cross-burning “with the intent to intimidate.”³² Men had been convicted under the statute in two separate cases, which the Supreme Court consolidated and heard together.³³ In the first case, Mr. Black burned a cross on the property of a fellow member of the Ku Klux Klan (“Klan”).³⁴ The property was located in full view of a public highway where neighbors and passers-by could view the ceremony and the burning cross.³⁵ In the second case, Mr. Elliot burned a cross on the front lawn of an African American family who had moved in next door.³⁶

The statute under which the men were convicted read, in pertinent part:

It shall be unlawful for any person or persons, with the intent of intimidating any person or group of persons, to burn, or cause to be burned, a cross on the

²⁶ See *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 513-14 (1969) (finding that a school ban on armbands to protest the Vietnam war was no less offensive to the Constitution than a ban on expressing that opinion verbally in class discussions).

²⁷ *Chaplinsky v. State of New Hampshire*, 315 U.S. 568, 571-72 (1942).

²⁸ *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382-83 (1992)(internal citation omitted).

²⁹ *Roth v. United States*, 354 U.S. 476, 485 (1957)(holding that obscenity is not protected by the First Amendment).

³⁰ See *Chaplinsky*, 315 U.S. at 573 (holding that certain words that would incite an average person to fight may be prohibited).

³¹ See *Virginia v. Black*, 538 U.S. 343, 363 (2003)(finding that cross-burning is a particularly virulent form of intimidation that may be punished as a “true threat”).

³² *Id.* at 343.

³³ *Id.* at 348.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 350.

property of another, a highway or other public place....
Any such burning of a cross shall be prima facie evidence of an intent to
intimidate.³⁷

After laying out the statute, the Court proceeded to trace the history of cross-burning, placing particular emphasis upon the use of the burning cross as a threat of future bodily harm by the Klan.³⁸ The Court noted that “while cross burning sometimes carries no intimidating message, at other times the intimidating message is the only message conveyed.”³⁹

Writing for the Court,⁴⁰ Justice O’Connor indicated that cross burning, if accomplished with the intent to intimidate a person or group, could be considered a “true threat” in light of the history of burning crosses.⁴¹ In endorsing the constitutionality of the statutory provision banning cross burning with the “intent to intimidate,” the Court defined a true threat.⁴²

“True threats” encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. See *Watts v. United States*, [394 U.S. 705, 708 (1969)] (“political hyperbole” is not a true threat); *R.A.V. v. City of St. Paul*, 505 U.S. at 588. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats “protects individuals from the fear of violence” and “from the disruption that fear engenders,” in addition to protecting people “from the possibility that the threatened violence will occur.” *Ibid. Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.*⁴³

Because cross burning is often intimidating, and often done with the intent of creating pervasive fear in victims that they are a target of violence, it seems to fall squarely within the type of constitutionally proscribable speech described by the Court.⁴⁴

³⁷ *Id.* at 348.

³⁸ *Id.* at 352-58.

³⁹ *Id.* at 357.

⁴⁰ Justice O’Connor’s opinion was joined by Chief Justice Rehnquist and Justices Stevens and Breyer, *id.* at 347. Justices Souter, Kennedy and Ginsburg concurred in the judgment in part and dissented in part, *id.* at 380; as did Justice Scalia in a separate opinion, *id.* at 368; Justice Thomas dissented, although he joined portions of Justice Scalia’s opinion, *id.* at 388.

⁴¹ *Id.* at 359-60.

⁴² *Id.* at 360.

⁴³ *Id.* at 359-60 (emphasis added)

⁴⁴ *Id.*

The Court also recognized that, historically, crosses have been burned for reasons that are protected by the First Amendment.⁴⁵ The act of burning crosses is common at traditional Klan meetings, not unlike the meeting Mr. Black held during which the cross was lit, and those gathered sang songs, including “Amazing Grace.”⁴⁶ However, the majority declined to find that once a law discriminates based on this type of content, the law is unconstitutional.⁴⁷ The First Amendment does not prohibit all forms of content discrimination within a proscribable area of speech.⁴⁸

Within the types of content discrimination that did not violate the First Amendment, the Court cited *R.A.V.*⁴⁹ for the proposition that “when the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable, no significant danger of idea or viewpoint discrimination exists.”⁵⁰ In this case, Virginia did not single out cross-burning with the intent to intimidate for certain reasons, such as cross-burning with the intent to intimidate due to racial prejudice, but rather banned all cross burning done with the intent to intimidate regardless of the underlying animus.⁵¹ The majority found the facts of one of the cases it was deciding illustrative.⁵² It was unclear from the record whether Mr. Elliot burned a cross on his neighbor’s lawn to express racial hatred or to express his lack of appreciation for complaints about guns Mr. Elliot fired in his back yard.⁵³ Because the Virginia statute was written to include Mr. Elliot’s conduct regardless

⁴⁵ *Id.*

⁴⁶ *Id.* at 360 (footnote 2).

⁴⁷ *Id.* at 361.

⁴⁸ *Id.*

⁴⁹ In *R.A.V.*, the Supreme Court struck down a statute which banned cross-burning similar but not identical to the statute at issue in this case. *R.A.V.*, 505 U.S. at 379. The statute in *R.A.V.* read:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

Id. at 380. The Court held that the statute criminalized speech based on protected features of otherwise proscribable speech. *Id.* at 385. In that way, it singled out for opprobrium certain specific ideas and left others untouched. *Id.* Though the ordinance had been limited only to apply to “fighting words,” it was clear from the statute that it only applied to fighting words in connection with hostility on the basis of “race, color, creed, religion or gender.” *Id.* at 391. So, for example, conduct otherwise proscribable under the statute, like burning a cross, would not be punishable if done with animus towards a person’s sexual orientation. *Id.* The Court found this to be impermissible viewpoint and content discrimination, but suggested that a statute which was not limited to certain topics would pass constitutional review. *Id.* at 396.

⁵⁰ *Id.* at 361-62 (citing *R.A.V.* 505 U.S. at 388).

⁵¹ *Id.* at 362.

⁵² *Id.* at 363.

⁵³ *Id.*

of his motivation, the statute did not discriminate against his conduct on the basis of the content of the message the cross-burning conveyed and fell within the permissible bounds of content discrimination outlined in *R.A.V.*⁵⁴

The Court acknowledged that cross burning is a particularly virulent form of intimidation.⁵⁵ As a result, the Court held that a statute which criminalizes cross-burning “with the intent to intimidate” is fully consistent with the Court’s previous holdings.⁵⁶ Likening the situation to its obscenity cases where a state may regulate only that obscenity “which is most obscene,” the Court held that a state may choose to prohibit “only those forms of intimidation that are most likely to inspire fear of bodily harm.”⁵⁷

Following the “true threat” analysis, Justices O’Connor, Rehnquist, Stevens, and Breyer went on to strike down the statute, because it contained another provision that made the act of cross burning *prima facie* evidence of the intent to intimidate.⁵⁸ The plurality found that, though it was constitutional to ban cross burning with the intent to intimidate as a “true threat,” the *prima facie* evidence provision could create an unacceptable danger that protected speech would be criminalized or chilled.⁵⁹ The issue in this portion of the opinion was a jury instruction delivered in Mr. Black’s case.⁶⁰ The instruction stated that “the act of burning a cross, by itself, is sufficient evidence to infer the required intent.”⁶¹ This interpretation of the *prima facie* evidence provision rendered the statute unconstitutional, in the plurality’s view.⁶² “The provision permits the Commonwealth to arrest, prosecute, and convict a person based solely on the fact of cross burning itself.”⁶³ In the plurality’s view, the provision stripped away “the very reason why a State may ban cross burning with intent to intimidate,” and created an unacceptable risk of the suppression of ideas.⁶⁴ On that basis, the plurality held that the statute was invalid on its face.⁶⁵ Recognizing that the Virginia Supreme Court had not passed on the meaning of the *prima facie* evidence provision, the plurality left open the possibility that Virginia’s highest court

⁵⁴ *Id.*

⁵⁵ *Id.*

⁵⁶ *Id.* at 368 (Stevens, J. concurring) (“Cross burning with an intent to intimidate unquestionably qualifies as the kind of threat that is unprotected by the First Amendment.”).

⁵⁷ *Id.* at 363.

⁵⁸ *Id.* Justice Scalia concurred in “true threat” portion of Justice O’Connor’s opinion of the Court, *id.* at 368; Justices Souter, Kennedy and Ginsburg concurred with the result reached in the opinion for the Court.

⁵⁹ *Id.*

⁶⁰ *Id.* at 364.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 365.

⁶⁴ *Id.*

⁶⁵ *Id.* at 367.

could apply a constitutional interpretation to the prima facie evidence part of the statute, or sever it from the statute completely.⁶⁶

Justices Scalia and Thomas dissented from the plurality's view that the prima facie evidence provision rendered the statute facially unconstitutional.⁶⁷ Justice Scalia, joined by Justice Thomas, argued that prima facie evidence, as interpreted by Virginia courts in the past, "cut[] off no defense nor interpose[d] any obstacle to a contest of the facts."⁶⁸ In Scalia's view, prima facie evidence "is evidence that suffices, on its own, to establish a particular fact," but that is true only to the extent that presumption remains un rebutted.⁶⁹ The act of burning a cross is sufficient only to create an issue for the trier-of-fact with respect to the intent element of the offense, not to establish an irrebuttable presumption of intent to intimidate.⁷⁰

Scalia, further, cited a decision in which the Supreme Court emphasized that "where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial* ... judged in relation to the statutes' plainly legitimate sweep."⁷¹ Justice Scalia argued that an instance in which a person would burn a cross in public view without the intent to intimidate and then refuse to present a defense would be exceedingly rare and did not rise to a level of substantiality that would render the statute unconstitutional.⁷² The class of persons the plurality was concerned could be convicted impermissibly under the prima facie evidence provision was far too insubstantial to justify striking down the statute as facially invalid.⁷³ Justice Scalia agreed, however, that the jury instruction in Mr. Black's case was improper and would have remanded the case for interpretation of the prima facie evidence provision, rather than hold the entire statute unconstitutional.⁷⁴

Justice Thomas also wrote separately in dissent. Justice Thomas argued that the prima facie evidence provision created an inference as opposed to a presumption, and should not raise concern for the Court. A presumption, Justice Thomas noted, compels the fact-finder to draw a certain conclusion or a certain inference from a given set of facts.⁷⁵ On the other hand, an inference does not compel a specific conclusion, but "*merely applies to the rational potency or probative value of an evidentiary fact to which the fact-finder may attach whatever force or weight it*

⁶⁶ *Id.*

⁶⁷ *Id.* at 374.

⁶⁸ *Id.* at 370 (Scalia, J. dissenting).

⁶⁹ *Id.*

⁷⁰ *Id.* at 374.

⁷¹ *Id.* at 375. (internal citation omitted)

⁷² *Id.*

⁷³ *Id.* at 374.

⁷⁴ *Id.*

⁷⁵ *Id.*

*deems best.*⁷⁶ Thomas observed that statutes prohibiting possession of drugs implied an intent to distribute based upon the quantity of drugs held and nothing more.⁷⁷ In Thomas’s opinion, these possession with intent statutes operated in much the same way as the statute at issue in this case.⁷⁸

Justice Thomas also dissented from the Court’s constitutional analysis of the statute. Justice Thomas argued that banning cross-burning did not implicate the First Amendment because the statute banned conduct only.⁷⁹ In tracing the history of the cross-burning statute at issue, Justice Thomas noted that the law was enacted in 1952, a time when the Virginia legislature was controlled by segregationists.⁸⁰ The legislature recognized that cross-burning was terrorizing conduct and punishable for that reason.⁸¹ It is unlikely, in Justice Thomas’s view, that a state legislature that thoroughly supported segregation and the superiority of the white race would have intended to proscribe the message of white racial superiority.⁸² Rather, the legislature considered burning a cross to be an act of terrorism and sought to forbid the conduct, not expression.⁸³ As a result, Justice Thomas saw no reason to analyze the statute under the First Amendment.⁸⁴

Justice Souter also wrote separately joined by Justices Kennedy and Ginsburg.⁸⁵ Justice Souter would have found the statute unconstitutional.⁸⁶ He disagreed with the Court’s interpretation of *R.A.V.* and the application of the “particular virulence” exception outlined in that case to cross-burnings.⁸⁷ Rather, Souter would have analyzed the Virginia statute for whether its “nature” is such “that there is no realistic possibility that official suppression of ideas is afoot.”⁸⁸

Regardless of that distinction, Justice Souter did not believe either conviction could be upheld when considering the entire statute as it was applied to the accused.⁸⁹ In Souter’s view, the primary effect of the prima facie evidence clause “is to skew jury deliberations toward conviction in cases where the evidence of intent to

⁷⁶ *Id.* at 395. (emphasis in original)

⁷⁷ *Id.* at 398.

⁷⁸ *Id.*

⁷⁹ *Id.* at 388 (Thomas, J. dissenting).

⁸⁰ *Id.* at 393-94.

⁸¹ *Id.* at 393.

⁸² *Id.* at 394.

⁸³ *Id.*

⁸⁴ *Id.* at 395.

⁸⁵ *Id.* at 380-81.

⁸⁶ *Id.* at 381.

⁸⁷ *Id.* at 382.

⁸⁸ *Id.* at 384. (citation omitted)

⁸⁹ *Id.* at 384-85.

intimidate is relatively weak and arguably consistent with a solely ideological reason for burning.”⁹⁰ In that way, Souter viewed the statute as suppressing ideas to an unacceptable degree.⁹¹

On the basis of *Black*, it would appear that without offending First Amendment precepts a law may proscribe cross burning and similar exhibits intended to convey “true threats.” Whether it may proscribe only those true threats that also include a hate crime element of the type found in the ordinance in *R.A.V.* is unclear at best.⁹²

Overbreadth and Vagueness.

Overbreadth. Lower court cases decided after *Black* continue to address overbreadth and vagueness challenges to threat, harassment and intimidation statutes.⁹³ An otherwise valid governmental regulation may be deemed unconstitutional if it “sweeps so broadly as to impinge upon activity protected by the First Amendment.”⁹⁴ Where a government proscribes both constitutionally protected speech and speech that is not protected by the First Amendment, the regulation may be struck down on grounds that it is overly broad.⁹⁵

Where a statute proscribes conduct rather than “pure speech,” the Supreme Court is less likely to invalidate the statute on overbreadth grounds. As the conduct a statute prohibits moves further from the realm of “pure speech” toward conduct that may fall within the scope of otherwise valid criminal laws, like harassment or terroristic threats, the protected speech that may be deterred “cannot, with confidence, justify invalidating the statute on its face.”⁹⁶ As Justice Scalia pointed out in *Black*, “where a statute regulates expressive conduct, the scope of the statute does not render it unconstitutional unless its overbreadth is not only real, but *substantial*

⁹⁰ *Id.*

⁹¹ *Id.* at 386.

⁹² *Id.* at 362 (internal citations and quotations omitted)(“Similarly, Virginia’s statute does not run afoul of the First Amendment insofar as it bans cross burning with intent to intimidate. Unlike the statute at issue in *R.A.V.*, the Virginia statute does not single out for opprobrium only that speech directed toward ‘one of the specified disfavor topics. It does not matter whether an individual burns a cross with intent to intimidate because of the victim’s race, gender, or religion, or because of the victim’s political affiliation, union membership, or homosexuality.”).

⁹³ *E.g.*, *United States v. Cassell*, 408 F.3d 622, 635 (9th Cir. 2005)(rejected vagueness challenge to a statute that prohibits interference with a federal land sale by intimidation); *Ward v. Utah*, 398 F.3d 1239, 1247-254 (10th Cir. 2005)(rejecting overbreadth and vagueness challenges to the state intimidation crimes enhancement statute).

⁹⁴ *Dandridge v. Williams*, 397 U.S. 471, 484 (1970).

⁹⁵ *Virginia v. Hicks*, 539 U.S. 113, 118 (2003)(citation omitted)(noting that when a law is shown to punish a substantial amount of free speech beyond the legitimate scope of the law, the statute is unconstitutional).

⁹⁶ *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973).

... judged in relation to the statute’s plainly legitimate sweep.”⁹⁷ As a result, statutes that ban conduct, which may otherwise be expressive, likely must create a danger of deterring a substantial amount of protected speech in order to be declared facially overbroad.

Statutes banning expressive conduct that may be considered “true threats” are not immune, however, to a facial overbreadth challenge. Faced with the problem of potential unconstitutionality, state courts, by and large, have used the canons of statutory construction to limit the reach of statutes to proscribe only “true threats” as defined by the Court in *Black*.⁹⁸ Accepted rules of statutory construction instruct courts to, when feasible, construe the regulatory effects of statutes challenged under the First Amendment to punish only expression which falls outside the Amendment’s protection.⁹⁹ Using this general principle, courts have read statutes to prohibit only those constitutionally proscribable forms of expression, taking care to avoid applying the statute to protected speech.¹⁰⁰ As the Supreme Court held in *Black*, statutes such as those addressed in this report, if interpreted by state courts only to prohibit conduct that amounts to intimidation or expressions meant to communicate a serious threat of harm, would likely pass constitutional muster.

Vagueness. “Even if an enactment does not reach a substantial amount of constitutionally protected conduct, it may be impermissibly vague because it fails to establish standards for the police and public that are sufficient to protect against the

⁹⁷ *Black*, 538 U.S. at 375 (Scalia, J. concurring in part, concurring in the judgment in part, and dissenting in part)(citing *Osborne v. Ohio*, 495 U.S. 103, 112 (1990)).

⁹⁸ See e.g., *Washington v. Johnston*, 127 P.3d 707, 709 (Wash. 2006)(finding that a Washington statute must be construed to prohibit only true threats to avoid invalidation on overbreadth grounds), *Wise v. Commonwealth*, 641 S.E.2d 134, 138 (Va. Ct. App. 2007)(holding that a Virginia statute that prohibited threats constitutional because it encompassed only “threats of bodily harm” and that threatening the life of an officer, even in the heat of the moment, was a “true threat”).

⁹⁹ *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973)(noting that an overbroad statute may not be given effect unless and until “a limiting instruction or partial invalidation so limits it as to remove” the threat of deterring protected expression).

¹⁰⁰ See e.g., *Washington v. Johnston*, 127 P.3d at 709, *Citizen Publishing Co. v. Arizona*, 115 P.3d 107, 114 (Ariz. 2005)(holding that a statute which prohibited “threatening” or “intimidating” did not apply to a letter to the editor published in a newspaper, because the letter could not be considered a “true threat”), *Michigan v. Osantowski*, 736 N.W.2d 289, 296-99 (Mich. Ct. App. 2007)(holding that a statute which prohibited acts of terrorism only prohibited “true threats” and that commenting repeatedly in an internet chat room about killing school classmates constituted a “true threat”), *Wise v. Commonwealth of Va*, 641 S.E.2d at 138 (holding a Virginia statute that prohibited threats constitutional because it encompassed only “threats of bodily harm” and that threatening the life of an officer, even in the heat of the moment, was a true “threat”), *Dunham v. Roer*, 708 N.W.2d 552, 566 (Minn. Ct. App. 2006)(upholding the constitutionality of a statute where the focus was to prohibit unwanted acts, words, or gestures and its application to the appellant where the appellant had repeatedly called the respondent derogatory names and used offensive gestures to communicate her anger).

arbitrary deprivation of liberty interests.”¹⁰¹ Yet, there is nothing inherently vague about statutes that outlaw the use, with the intent to threaten, of burning crosses or other harbingers of violence, although as with any type of statute they may be imprecisely drawn upon occasion.¹⁰²

Fighting Words.

Cross burning and comparable exhibits may provoke anger as well as fear. Laws that condemn threats have sometimes been defended on the ground “fighting words” lie beyond the pale of the First Amendment’s protection. This category of unprotected speech is of somewhat uncertain dimensions. *R.A.V.* is a “fighting words” case, yet the Court in *Black* opted for a “true threat” mode of analysis instead. On the other hand, in *Black* it elected to distinguish rather than reject or ignore *R.A.V.*

The “fighting words” doctrine begins in *Chaplinsky v. New Hampshire*, where the Court held that fighting words, by their very utterance inflict injury or tend to incite an immediate breach of the peace and may be punished consistent with the First Amendment.¹⁰³ In *Chaplinsky*, the Court upheld a statute which prohibited a person from addressing “any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place,” calling “him by any offensive or derisive name,” or making “any noise or exclamation in his presence and hearing with the intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.”¹⁰⁴ The state court construed the statute as forbidding only those expressions “as have a direct tendency to cause acts of

¹⁰¹ *Chicago v. Morales*, 525 U.S. 41, 52 ((1999)(citing *Kolender v. Lawson*, 461 U.S. 352, 358 (1983)).

¹⁰² *Lansdell v. State*, ___ So.2d ___, ___, 2007 WL 2811969, (Ala.Crim.App. Sept. 28, 2007)(“Finally, we note that Alabama is not alone in criminalizing conduct by which an individual terrorizes others by threatening violence or damage to property. Indeed, numerous other states have criminalized such conduct. Moreover, those statutes have withstood constitutional challenges based on overbreadth and vagueness. See *Allen v. State*, 759 P.2d 541, 545 (Ak.Ct.App.1988); *In re Ryan A.*, 202 Ariz. 19, 39 P.3d 543 (Ariz.Ct.App.2002); *People v. Maciel*, 113 Cal.App. 4th 679, 685, 6 Cal.Rptr.3d 628, 634 (2003); *State v. Crudup*, 81 Conn.App. 248, 263, 838 A.2d 1053, 1064 (2004); *Saidi v. State*, 845 So.2d 1022, 1026 (Fla.Dist.Ct.App.2003); *Reilly v. State*, 847 F.Supp. 951, 958 (M.D.Fla.1994); *Lanthrip v. State*, 235 Ga. 10, 218 S.E.2d 771 (1975); *Masson v. Slaton*, 320 F.Supp. 669, 672-73 (N.D.Ga.1970); *State v. Chung*, 75 Haw. 398, 862 P.2d 1063 (1993); *Thomas v. Commonwealth*, 574 S.W.2d 903, 909 (Ky.Ct.App.1978); *Sykes v. State*, 578 N.W.2d 807 (Minn.Ct.App.1998); *State v. Schmailzl*, 243 Neb. 734, 740-41, 502 N.W.2d 463, 467-68 (1993); *Commonwealth v. Bunting*, 284 Pa.Super. 444, 455, 426 A.2d 130, 136 (1981); *State v. Lanier*, 81 S.W.3d 776 (Tenn.Crim.App.2000).”). Examples of imprecision include, *Botts v. State*, 604 S.E.2d 512 (Ga. 2004)(finding unconstitutionally vague a hate crime penalty statute that enhanced the penalties for crimes motivated by “bias” and “prejudice” but failed to distinguish between invidious bias or prejudice and lawful bias or prejudice); *State v. Williams*, 26 P.3d 890 (Wash. 2001)(finding unconstitutionally vague a statute that outlawed threats to “mental health” without defining “mental health”).

¹⁰³ *Chaplinsky*, 315 U.S. at 572.

¹⁰⁴ *Id.* at 569.

violence by the person to whom, individually, the remark [was] addressed.”¹⁰⁵ Given the limited scope of application, the Supreme Court held that the statute at issue did not proscribe protected expression.¹⁰⁶

This category of proscribable speech appears to be more difficult to define within the bounds of the Constitution and requires the threat of an immediate breach of peace in order to be punishable. In *Cohen v. California*, the Supreme Court held that words on a t-shirt that contained an expletive were not directed at a person in particular and could not be said to incite an immediate breach of the peace.¹⁰⁷ For that reason, profane words that are not accompanied by any evidence of violence or public disturbance are not “fighting words.”¹⁰⁸ The Court went on to describe the value of expression in communicating emotion.¹⁰⁹ In the Court’s view, certain words, including expletives, which could in other contexts be construed as fighting words, may be indispensable in effectively communicating emotion, a form of expression protected by the First Amendment.¹¹⁰ In *Brandenburg v. Ohio*, the Supreme Court struck down an Ohio statute that criminalized advocating violent means to bring about social and economic change.¹¹¹ The Court found that the statute failed to distinguish between advocacy, which is protected by the First Amendment, and incitements to “imminent lawless action,” which are not protected.¹¹² These cases illustrate that “fighting words” require an immediate risk of a breach of peace in order to be proscribable. What speech is proscribable, therefore, appears highly dependent upon the context in which it arises.¹¹³ Moreover, it can hardly escape notice that *R.A.V.* involved a law that outlawed cross burning with the intent to annoy, while *Black* involved a law that outlawed cross burning with the intent to threaten. The first the Court found impermissible. The second it said offended only because an attendant provision effectively read the intent to threaten out of the proscription.

¹⁰⁵ *Id.* at 572.

¹⁰⁶ *Id.*

¹⁰⁷ 403 U.S. 15, 20 (1971).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 26.

¹¹⁰ *Id.*

¹¹¹ 395 U.S. 444, 446 (1969)(*per curiam*).

¹¹² *Id.* at 448.

¹¹³ See *Odem v. Mississippi*, 881 So.2d 940, 948 (Miss. Ct. App. 2004)(finding that complaints and shouts of profanity from the defendant rose to the level of “fighting words” where the officer to whom he spoke did not initiate the conversation nor did the officer have the opportunity to walk away); see also *Washington v. King*, 145 P.3d 1224 (Wash. Ct. App. 2006)(noting that “it is context that makes a threat “true” or serious), *Commonwealth v. Pike*, 756 N.E.2d 1157, 1158-60 (Mass. App. Ct. 2001)(upholding the conviction of a woman for violation of her neighbor’s civil rights where she posted signs in her yard accusing homosexuals of molesting young children and yelled insulting names as well as invitations to a physical fight because the words and conduct constituted “fighting words”).

Conclusion.

To the extent that statutes of the types identified in this report ban expressive conduct that falls outside the protection of the First Amendment, the laws generally pass constitutional muster. When the laws can be read to encompass expressive conduct that is normally protected by the United States Constitution as well as traditionally criminal conduct, the statute likely must chill a substantial amount of protected conduct in order to be deemed facially invalid. Courts may limit their interpretations of statutes that appear to sweep too broadly on their faces to encompass only those forms of expression that are constitutionally proscribable.

STATES CRIMINALIZING PUBLIC MASK-WEARING (14)

ALABAMA

Code of Ala. § 13A-11-9. Loitering

(a) A person commits the crime of loitering if he:

(4) Being masked, loiters, remains or congregates in a public place; or

(b) A person does not commit a crime under subdivision (a)(4) of this section if he is going to or from or staying at a masquerade party, or is participating in a public parade or presentation of an educational, religious, or historical character or in an event as defined in subdivision (1) of Section 13A-11-140.

(e) Loitering is a violation.

HISTORY: Acts 1977, No. 77-607.

CONNECTICUT

Conn. Gen. Stat. § 53-37a. Deprivation of a person's civil rights by person wearing mask or hood: Class D felony.

Any person who, with the intent to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of religion, national origin, alienage, color, race, sex, blindness or physical disability, violates the provisions of section 46a-58 while wearing a mask, hood or other device designed to conceal the identity of such person shall be guilty of a class D felony.

History: (P.A. 82-14, S. 1, 2.)

DISTRICT OF COLUMBIA

D.C. Code § 22-3312.03 Wearing hoods or masks [Formerly § 22-3112.3]

(a) No person or persons over 16 years of age, while wearing any mask, hood, or device whereby any portion of the face is hidden, concealed, or covered as to conceal the identity of the wearer, shall:

(1) Enter upon, be, or appear upon any lane, walk, alley, street, road highway, or other public way in the District of Columbia;

(2) Enter upon, be, or appear upon or within the public property of the District of Columbia; or

(3) Hold any manner of meeting or demonstration.

(b) The provisions of subsection (a) of this section apply only if the person was wearing the hood, mask, or other device:

(1) With the intent to deprive any person or class of persons of equal protection of the law or of equal privileges and immunities under the law, or for the purpose of preventing or hindering the constituted authorities of the United States or the District of Columbia from giving or securing for all persons within the District of Columbia equal protection of the law;

(2) With the intent, by force or threat of force, to injure, intimidate, or interfere with any person because of his or her exercise of any right secured by federal or District of Columbia laws, or to intimidate any person or any class of persons from exercising any right secured by federal or District of Columbia laws;

(3) With the intent to intimidate, threaten, abuse, or harass any other person;

- (4) With the intent to cause another person to fear for his or her personal safety, or, where it is probable that reasonable persons will be put in fear for their personal safety by the defendant's actions, with reckless disregard for that probability; or
- (5) While engaged in conduct prohibited by civil or criminal law, with the intent of avoiding identification.

HISTORY: 1981 Ed., § 22-3112.3; Mar. 10, 1983, D.C. Law 4-203, § 4, 30 DCR 180.

DELAWARE

11 Del. C. § 1301. Disorderly conduct; unclassified misdemeanor

A person is guilty of disorderly conduct when:

(1) The person intentionally causes public inconvenience, annoyance or alarm to any other person, or creates a risk thereof by:

- g. Congregating with other persons in a public place while wearing masks, hoods or other garments rendering their faces unrecognizable, for the purpose of and in a manner likely to imminently subject any person to the deprivation of any rights, privileges or immunities secured by the Constitution or laws of the United States of America

(2) The person engages with at least 1 other person in a course of disorderly conduct as defined in subdivision (1) of this section which is likely to cause substantial harm or serious inconvenience, annoyance or alarm, and refuses or knowingly fails to obey an order to disperse made by a peace officer to the participants. Disorderly conduct is an unclassified misdemeanor.

HISTORY: 11 Del. C. 1953, § 1301; 58 Del. Laws, c. 497, § 1; 59 Del. Laws, c. 203, §§ 23, 24; 63 Del. Laws, c. 305, § 1; 67 Del. Laws, c. 130, § 8; 70 Del. Laws, c. 186, § 1.

FLORIDA

Fla. Stat. § 876.13 Wearing mask, hood, or other device on public property

No person or persons shall in this state, while wearing any mask, hood, or device whereby any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer, enter upon, or be, or appear upon or within the public property of any municipality or county of the state.

GEORGIA

O.C.G.A. § 16-11-38. Wearing mask, hood, or device which conceals identity of wearer

(a) A person is guilty of a misdemeanor when he wears a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer and is upon any public way or public property or upon the private property of another without the written permission of the owner or occupier of the property to do so.

HISTORY: Ga. L. 1951, p. 9, §§ 3, 7; Code 1933, § 26-2913, enacted by Ga. L. 1968, p. 1249, § 1. NOTES: LAW REVIEWS. --For note, "Klan, Cloth and Constitution: Anti-mask Laws and the First Amendment," see 25 Ga. L. Rev. 819 (1991).

OHIO

ORC Ann. 3761.12

No person shall unite with two or more others to commit a misdemeanor while wearing white caps, masks, or other disguise.

OKLAHOMA

21 Okl. St. § 1301

It shall be unlawful for any person in this state to wear a mask, hood or covering, which conceals the identity of the wearer.

SOUTH CAROLINA

S.C. Code Ann. § 16-7-110

No person over sixteen years of age shall appear or enter upon any lane, walk, alley, street, road, public way or highway of this State or upon the public property of the State or of any municipality or county in this State while wearing a mask or other device which conceals his identity. Nor shall any such person demand entrance or admission to or enter upon the premises or into the enclosure or house of any other person while wearing a mask or device which conceals his identity. Nor shall any such person, while wearing a mask or device which conceals his identity, participate in any meeting or demonstration upon the private property of another unless he shall have first obtained the written permission of the owner and the occupant of such property.

History: 1962 Code § 16-114; 1952 Code § 16-114; 1951 (47) 132.

VIRGINIA

Va. Code Ann. § 18.2-422

It shall be unlawful for any person over sixteen years of age while wearing any mask, hood or other device whereby a substantial portion of the face is hidden or covered so as to conceal the identity of the wearer, to be or appear in any public place, or upon any private property in this Commonwealth without first having obtained from the owner or tenant thereof consent to do so in writing. However, the provisions of this section shall not apply to persons

(i) wearing traditional holiday costumes;

(ii) engaged in professions, trades, employment or other activities and wearing protective masks which are deemed necessary for the physical safety of the wearer or other persons;

(iii) engaged in any bona fide theatrical production or masquerade ball; or

(iv) wearing a mask, hood or other device for bona fide medical reasons upon the advice of a licensed physician or osteopath and carrying on his person an affidavit from the physician or osteopath specifying the medical necessity for wearing the device and the date on which the wearing of the device will no longer be necessary and providing a brief description of the device.

The violation of any provisions of this section shall constitute a Class 6 felony.

History: Code 1950, §§ 18.1-364, 18.1-367; 1960, c. 358; 1975, cc. 14, 15; 1986, c. 19.

WEST VIRGINIA

W. Va. Code § 61-6-22

a) Except as otherwise provided in this section, no person, whether in a motor vehicle or otherwise, while wearing any mask, hood or device whereby any portion of the face is so covered as to conceal the identity of the wearer, may:

(1) Come into or appear upon any walk, alley, street, road, highway or other thoroughfare dedicated to public use;

- (2) Come into or appear in any trading area, concourse, waiting room, lobby or foyer open to, used by or frequented by the general public;
 - (3) Come into or appear upon or within any of the grounds or buildings owned, leased, maintained or operated by the state or any political subdivision thereof;
 - (4) Ask, request, or demand entrance or admission to the premises, enclosure, dwelling or place of business of any other person within this state; or
 - (5) Attend or participate in any meeting upon private property of another unless written permission for such meeting has first been obtained from the owner or occupant thereof.
- (c) Any person who violates any provision of this section is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not more than five hundred dollars or imprisoned in the county jail not more than one year, or both fined and imprisoned.

History: 1988, c. 38.

Source: http://www.adl.org/learn/hate_crimes_laws/state_level_anti_klan_statutes.pdf

**TIME, PLACE, AND MANNER: CONTROLLING THE RIGHT TO PROTEST
BY Martin J. King, J.D.
FBI Law Enforcement Bulletin, May 2007. Volume 76 Number 5**

Time, Place, and Manner Controlling the Right to Protest

By MARTIN J. KING, J.D.



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In towns it is impossible to prevent men from assembling, getting excited together and forming sudden passionate resolves. Towns are like great meeting houses with all the inhabitants as members. In them the people wield immense influence over their magistrates and often carry their desires into execution without intermediaries.

—Alexis de Tocqueville

These words, published in 1835 by Alexis de Tocqueville in the book *American Democracy*, were intended as an observation on the importance of the right of assembly to a citizen's ability to directly influence the political process.¹ However, the ability to "carry their desires into execution" has a potentially ominous connotation in a post-September 11 environment where a concern for security and public safety is paramount. If, for example, the desire to be carried into execution is to "affect the conduct of a government by

mass destruction," then it qualifies as an act of terrorism that law enforcement is charged with preventing.² An event, activity, or meeting having political, ideological, or social significance might hold an equal attraction to a peaceful protestor as it would to a potential terrorist or anarchist. Thus, the dilemma, long faced by law enforcement but now exacerbated by the omnipresent threat of terrorism, is how to effectively exercise control over such events, which often involve large gatherings of people, in the interest of preserving public order and safety

without trammeling the First Amendment rights of protesters. This article examines how courts have recently reconciled security-based restrictions with the right to protest.

The Right of Public Protest

Freedom of speech and the right of the people peaceably to assemble are specifically guaranteed by the First Amendment to the U.S. Constitution.³ Protest activity falls squarely within the First Amendment's guarantees of freedom of speech and assembly.⁴ The right to protest is most highly protected when assembly for purposes of expression takes place on property that, by law or tradition, has been given the status of a public forum, such as public streets, sidewalks, and parks, rather than on property that has been limited to some other governmental use.⁵ Nevertheless, it is well settled that the First Amendment does not guarantee unlimited access to government property for expressive purposes. Because expressive conduct occurring in public places, by its very nature, may conflict with other pursuits of the general population within that space, the need to balance competing interests in this area has long been recognized.⁶ The U.S. Supreme Court itself has noted that "courts have for years grappled with the claims of the right to disseminate

ideas in public places as against claims of an effective power in government to keep the peace and protect other interests of a civilized community."⁷

Accordingly, although protest activity in public places is protected by the Constitution as free speech, it is afforded less protection than other forms of expression that do not involve conduct.⁸ Individuals who communicate ideas by conduct, such as participating in a protest march, have less protection than those who communicate ideas by "pure speech," such as speaking or publishing. Indeed, the terms *speech plus* and *expressive conduct* are used to describe public demonstrations that involve the communication of political, economic, or social viewpoints by means of picketing, marching, distributing leaflets, addressing publicly assembled audiences, soliciting

door-to-door, or other forms of protest.⁹ The expression of ideas in a manner that neither threatens public safety nor undermines respect for the rule of law is afforded comprehensive protection under the First Amendment. When speech does not involve aggressive disruptive action or group demonstrations, it is almost always protected from government regulation.¹⁰ Conduct, however, is subject to reasonable regulation by the government even though intertwined with expression and association.¹¹ Demonstration routes, for instance, sometimes must be altered to account for the requirements of traffic or pedestrian flow.¹² People have a constitutional right to march in a protest but not with noisy bull horns at 4 a.m. in a residential neighborhood.¹³ In regulating expressive conduct, the government is not permitted

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Reasonable restrictions as to the time, place, and manner of speech in a public forum are permissible provided those restrictions are justified....

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Special Agent King is a legal instructor at the FBI Academy.

to completely close all avenues for public protest or to restrict access to public forums based on considerations of the content of the message or viewpoint of the speaker.¹⁴

Government restriction of expressive activity imposed in advance of its occurrence raises the specter of a prohibited form of content or viewpoint discrimination known as a “prior restraint” on speech.¹⁵ Concerns over prior restraints relate primarily to government restrictions on speech that result in censorship.¹⁶ Although the U.S. Supreme Court has indicated that “any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity,” it has consistently refused to characterize government restriction of protest activity as a prior restraint.¹⁷ Restrictions imposed on expressive conduct must not operate as a form of censorship. Therefore, when imposing restrictions on protest activity, the government is not permitted to discriminate based on the content or viewpoint of the demonstrators and must allow for adequate alternative means of expression. A complete ban on protest activity that effectively silenced dissent in a public forum would be a presumptively unconstitutional prior restraint on speech and, accordingly, is rarely encountered in

actual practice.¹⁸ Much more commonly presented are government efforts to regulate protest activity through a permitting or licensing process whereby officials are put on notice of the planned activity and then seek to impose an alternative date or time or a different location or route than that requested by the organizers of the protest.¹⁹

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Protest activity falls squarely within the First Amendment’s guarantees of freedom of speech and assembly.

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Time, Place, and Manner Restrictions

Where government restrictions are not based on censorship of the viewpoint of the protestors, courts employ the First Amendment doctrine of time, place, and manner to balance the right to protest against competing governmental interests served by the enforcement of content-neutral restrictions.²⁰ In differentiating between content-based and content-neutral restrictions on the right to public protest, the U.S. Supreme Court has held that “[t]he principal inquiry in determining content

neutrality, in speech cases generally and in time place or manner cases in particular is whether the government has adopted a regulation of speech because of disagreement with the message it conveys.”²¹ A fundamental principle behind content analysis is that “government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views.”²² Even given that protest activity is expressive conduct, courts take a categorical approach to the question of conduct versus content regulation. In assessing whether a government restriction is content neutral, courts look at the literal language of the restriction, rather than delving into questions of any hidden motive to suppress speech; stated another way, “whether a statute is content neutral or content based is something that can be determined on the face of it; if the statute describes speech by content then it is content based.”²³

Time, place, and manner restrictions do not target speech based on content, and, to stand up in court, they must be applied in a content-neutral manner. The U.S. Supreme Court has developed a four-part test to determine the constitutional validity of time, place, and manner regulation of expressive conduct in a public forum.

- 1) The regulation must serve an important government interest (e.g., public safety).
- 2) The government interest served by the regulation must be unrelated to the suppression of a particular message (i.e., content neutral).
- 3) The regulation must be narrowly tailored to serve the government's interest.
- 4) The regulation must leave open ample alternative means for communicating the message.²⁴

All four of these requirements must be satisfied to survive a constitutional challenge, and failure to satisfy even one will render the restriction invalid. The third and fourth criteria are closely aligned. Narrow tailoring means that the restriction imposed is not substantially broader than necessary to achieve the government's interest. However, "the regulation will not be invalid simply because a court concluded that the government's interest could be adequately served by some less speech-restrictive alternative."²⁵ In other words, a narrowly tailored restriction does not require the government to impose the least intrusive restriction possible. The case of *Hill v. Colorado* illustrates the straightforward approach taken by the U.S. Supreme Court when applying

this test to government-imposed restrictions on protest activity.²⁶ In *Hill*, antiabortion protestors challenged the constitutionality of a Colorado statute that made it unlawful for "any person to 'knowingly approach' within eight feet of any person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education or counseling with such



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other person," within 100 feet of the entrance to any health care facility.²⁷ In declaring the statute a valid time, place, and manner restriction, the Court held:

The Colorado Statute passes that test for three independent reasons. First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the

message it conveys." This conclusion is supported not just by the Colorado court's interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Third, the state's interest in protecting access and privacy, and providing police with clear guidelines, are unrelated to the content of the demonstrator's speech. As we have repeatedly explained, government regulation of expressive activity is "content neutral" if it is justified without reference to the content of regulated speech.²⁸

The Court also held that the statute was narrowly tailored and left open ample alternatives for communication, observing that it only restricted the location where communication could take place, and noted that no limitations were placed on the number, size, or content of text or images portrayed on protestors' signs.²⁹ "Under this statute, absolutely no channel of communication is foreclosed. No speaker is silenced. And no message is prohibited."³⁰

Content-neutral regulation of speech means the restrictions

are placed on speech regardless of what the speaker has to say. Such content-neutral regulations that interfere with what otherwise would be First Amendment protected expression are examined under a balancing test, comparing the state's interest in prohibiting the activity in question to the level of interference with the speaker which is often determined by looking at available avenues of communication.

Demonstration Zones

The undeniable and very serious concerns about safety and security at public venues that attract large-scale protest activity have been described by one court as follows: "We have come to a point where it may be anticipated at...national security events, that some significant portion of demonstrators among those who want the closest proximity to...participants, consider assault, even battery, part of the arsenal of expression. And as a consequence, those responsible for safety must plan for violence."³¹ Where it can be reasonably anticipated that an event likely will attract threats from persons seeking to carry out criminal acts to disrupt the proceedings and bring attention to extremist political causes, law enforcement preparations commonly include the proactive imposition of demonstration zones or security zones

as a means of providing some measure of physical security to the event.

Both free-speech zones that designate restricted areas within which protest activity may take place and speech-free zones that prohibit protest activity from taking place within designated areas have been employed and often in conjunction with each other.³² An analysis of the relatively few cases concerning the legality of demonstration

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Restrictions imposed on expressive conduct must not operate as a form of censorship.

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zones reflects that the challenged security measures were indisputably content neutral and that there was no doubt as to the importance of the government interest in maintaining security at special events, such as political conventions.³³ Accordingly, the decisions turn predominantly on the resolution of whether the array of security precautions were narrowly tailored to meet the security interest at stake and whether those precautions left open ample alternative avenues of communication.

In response to events surrounding the 1999 World Trade Organization (WTO) conference in Seattle, a restricted zone was implemented by the city in response to actual physical obstruction of the conference venue, property damage, and other violent acts committed by protestors.³⁴ Under the city's emergency order, protestors were completely barred from entering a designated restricted zone—in First Amendment terms, a no-speech zone—that covered the convention site and hotels where the WTO delegates were staying.³⁵

The U.S. Court of Appeals for the Ninth Circuit found that the restricted zone “was not a regulation of speech content, but rather was ‘a regulation of the places where some speech may occur.’”³⁶ In reaching that conclusion, the court applied the traditional time, place, and manner analysis, finding both that 1) the order itself made no reference to the content of speech and 2) the fact that the order “predominantly affected protestors with anti-WTO views did not render it content based.”³⁷ The court next determined that the measure was narrowly tailored to serve the government's interest in maintaining public order. “In the face of a violent riot, the City had a duty to restore order and to ensure the safety of WTO delegates and the residents of Seattle. The

City also had an interest in seeing that the WTO delegates had the opportunity to conduct their business at the chosen venue for the conference; a city that failed to achieve this interest would not soon have the chance to host another important international meeting.”³⁸

The court noted that “a municipality is required to provide tangible evidence that speech-restrictive regulations are necessary to advance the proffered interest in public safety.”³⁹ Although the city was not required to choose the least restrictive alternative, the court indicated that an assessment of alternatives still can bear on the reasonableness of the tailoring of the restriction and whether it is narrowly tailored as required. “We have said that ‘if there are numerous and obvious less-burdensome alternatives to the restriction on [protected] speech, that is certainly a relevant consideration.’”⁴⁰

Finally, the court resolved what it described as a very difficult question, in holding that ample alternative channels of communication were available to the demonstrators outside the restricted zone.⁴¹ On the one hand, the protestors were not permitted to protest directly in the presence of the delegates they presumably sought to influence. On the other hand, the protestors were able to demonstrate and express their

views immediately outside the restricted zone, including areas directly across the street from WTO venues. Ultimately, the court concluded that the protestors could reasonably expect their protest to be visible and audible to delegates even if not as proximate as the protestors might have liked. Citing the U.S. Supreme Court’s holding in *Hill*, the court concluded, “Appellants argue that they were prevented from communicating with the WTO delegates

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at close range, but there is no authority suggesting that protestors have an absolute right to protest at any time and at any place, or in any manner of their choosing.”⁴²

While the WTO case concerned a reactive response to actual civil disorder, the government interest in maintaining security and order can be adequately supported through observation and analysis of past occurrences to identify tactics

that might be used by violent demonstrators at future events. In engaging in security preparation and planning, any proactive restrictions imposed on protest activity must be narrowly tailored to meet the anticipated threat and also must leave open adequate alternative means for expression. In *Service Employee International Union 660 v. City of Los Angeles*, the court considered—nearly a month in advance of the event—proposed security restrictions surrounding the 2000 Democratic National Convention in Los Angeles.⁴³

The Los Angeles police, in conjunction with the U.S. Secret Service and other agencies, imposed a very large secured zone that encompassed the convention facility and involved the closing of several public streets. No protest activity would be permitted within the secured zone. Outside the secured zone, a designated demonstration zone was set up about 260 yards from the entrance to the convention facility, where a platform, a sound system, and portable toilets were provided to facilitate protest activity.⁴⁴ In justifying the security and demonstration zones, the government did not suggest that the protestor’s speech itself created a safety issue. Rather, the government sought to safeguard against risks generally associated with 1) the presence of prominent people at the event, 2) the fact

that the convention was a real and symbolic target for terrorist activity, and 3) the fact that a large media concentration could encourage groups to become violent to attract attention to their causes.⁴⁵

The court found that the proposed security zone was not narrowly tailored because it burdened more speech than was necessary.⁴⁶ The principal problem with the secured area was its size—it covered approximately 185 acres of land—combined with its configuration that prevented anyone with any message from getting within several hundred feet of the entrance to the venue where delegates would arrive and depart. The court concluded that while there was no dispute that a narrowly tailored zone is constitutionally permissible to ensure that delegates can enter and exit the venue safely, the secured zone covered much more area than necessary to serve that interest.⁴⁷

The court also found that the demonstration zone was not an adequate alternative for speech, rejecting, in part, the city's claim that there would be a sight line to the convention facility, concluding, instead, that the "distance ensure[d] that only those delegates with the sharpest of eyesight and most acute hearing have any chance of getting the message, that is, assuming that the 'sight line' is

not blocked during the convention."⁴⁸ The court noted that whether a sight line existed at all was a "questionable assumption" because a 10,000-person media area would lie directly between the demonstration zone and the convention center entrance.⁴⁹

In *United for Peace and Justice v. City of New York*, a group opposing the war in Iraq applied, 3 weeks in advance, for a permit to authorize a parade of up to 10,000 people to march

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...the restrictions imposed were not substantially broader than necessary to achieve the city's interest in public, participant, and officer safety.

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in front of the United Nations (UN) headquarters in New York City.⁵⁰ The city refused to allow the demonstrators to march in front of the UN as requested because the police determined that they could not provide adequate security for the event, even though the road where the march would take place was six lanes wide and there would be almost 40 feet between the marchers and the outer fence protecting the UN.⁵¹ The city,

however, did permit the marchers to conduct a large stationary demonstration confined to Dag Hammarskjöld Plaza, where the demonstrators had intended to begin the parade.⁵²

The U.S. District Court upheld the denial of the permit distinguishing the requested event from other large-scale parades commonplace in New York City.⁵³ Important to the court's decision was testimony from the police that detailed the rather disorganized nature of the proposed march, with widely varying estimates of the number of participants and no reliable contact information regarding the various participating organizations. According to the police, past approved parade permits typically involved regularly recurring events where applications were submitted well in advance and contained specific details about the number of participants. Further, in approved parades, there were opportunities for meetings between the police and the organizers to jointly discuss issues, such as the manner of protest, means of formation, and spacing of demonstrators along the route.

The district court found that the restrictions imposed were not substantially broader than necessary to achieve the city's interest in public, participant, and officer safety.⁵⁴ The Second Circuit Court of Appeals affirmed, finding that "short

notice, lack of detail, administrative convenience, and costs are always relevant considerations in the fact-specific inquiry required in all cases of this sort.”⁵⁵ The court cautioned that “these factors are not talismanic justifications for the denial of parade permits” and “[l]ikewise, simply offering an alternative of stationary demonstration does not end the analysis.”⁵⁶

In *Staubert v. City of New York*, the court considered, *inter alia*, a challenge to the New York City Police Department’s practice of using barricades or “pens” to contain and control demonstration activity.⁵⁷ The pens, in this instance, were “metal interlocking barricades...in which demonstrators were required [by police] to assemble” and from which they were not permitted to leave, even to go to the bathroom.⁵⁸ The court, finding that the pens policy violated the First Amendment because it was not narrowly tailored, issued a preliminary injunction against “unreasonably restricting access to and participation in demonstrations through the use of pens.”⁵⁹ Although the city had a legitimate interest in regulating the demonstrators to prevent violence, the court held that completely enclosing demonstrators within the pens and preventing their movement was not a sufficiently narrowly tailored speech regulation.⁶⁰

Staubert contained an extensive factual record concerning how the pens actually were used to essentially herd and very restrictively confine persons who wanted to exercise their right to protest throughout the duration of the protest. It should be noted, however, with a different factual record before it, a court has observed that a “barricaded enclosure for demonstrators... is a practical device used by the police to protect those actively exercising their rights from those who would prevent its exercise,” such as counterdemonstrators.⁶¹



The legality of a demonstration zone imposed at the 2004 Democratic National Convention was upheld by the U.S. Court of Appeals for the First Circuit in *Bl(a)ck Tea Society v. City of Boston*.⁶² This event was the first national political convention to be held following the September 11, 2001, terrorist attacks on New York’s World

Trade Center that were launched from Boston’s Logan Airport and was designated as a national special security event, thereby placing the Secret Service directly in charge of security.⁶³ The Boston Police Department acted in conjunction with the Secret Service to enforce two different restrictive zones in the vicinity of the FleetCenter convention venue located in downtown Boston. A so-called “hard security zone” encompassed an area immediately surrounding the FleetCenter, and a so-called “soft security zone” encompassed certain public streets adjacent to the hard zone. The Secret Service restricted access within the hard security zone to convention business only and no protestors were permitted within that zone. The soft zone was controlled by the city and remained open to the general public, including demonstrators who were subject to certain permit and crowd-control measures.⁶⁴ Among these was the creation of a designated demonstration zone, the major issue of contention in the case.⁶⁵

The demonstration zone was described by a U.S. District Court judge as follows based on an actual visit to the site:

The “designated demonstration zone” [DZ] is located in the soft zone...[and] is a roughly rectangular space of approximately 26,000 to 28,000 square feet—very

approximately 300 feet by 90 feet.... A written description cannot begin to convey the ambiance of the DZ site as experienced during the view. Most—at least two thirds of the DZ lies under unused Green Line tracks [elevated train tracks].... It is a grim, mean, and oppressive space whose ominous roof is supported by a forest of girders that obstruct sight lines throughout as the tracks slope downward towards the southern end.... The City is providing a sound system and will allocate access to the stage itself through a permitting system.... During the view, I observed that a person of normal height could not carry a sign underneath it without lowering it to head level or lower. If that were done, no one on the other side of the girders would be able to see it once it was raised again beneath the tracks.... The DZ is surrounded by two rows of concrete jersey barriers. Atop each of the jersey barriers is an eight foot high chain link fence. A tightly woven mesh fabric, designed to prevent liquids and objects from being thrown through the fence, covers the outer fence, limiting but not eliminating visibility. From the top of the outer fence to the train tracks overhead, at an angle

of approximately forty-five degrees to horizontal is a looser mesh netting, designed to prevent objects from being thrown at the delegates.”⁶⁶

Even though the district court found that the overall impression created by the demonstration zone was “that of an internment camp,” it concluded that the design of the demonstration zone was narrowly tailored “given the constraints of time, geography,

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In justifying the security and demonstration zones, the government did not suggest that the protestor’s speech itself created a safety issue.

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and safety.”⁶⁷ In reaching this conclusion, the court noted that the demonstration zone was placed at a location suggested by the American Civil Liberties Union and the National Lawyers Guild, counsel for the groups that challenged the restrictions, and was the only available location providing a “direct interface between demonstrators and the area where

delegates will enter and leave the FleetCenter.”⁶⁸ As it happened, this location included some unfortunate geographic and structural constraints, such as the sight-obstructing girders and low clearance presented by the overhead tracks, that were not susceptible to timely modification by the government.

With respect to those features that were subject to modification, such as the barriers, multiple layers of fencing, mesh, and netting, the court determined that each of these were adequately supported, reasonable security precautions. The court’s conclusion was based on testimony from various law enforcement personnel’s past experience at comparable events, including the 2000 Democratic National Convention in Los Angeles.

The double fence is reasonable in light of past experience in which demonstrators have pushed over a single fence. A second fence may prevent this altogether, or at least give police officers more time to respond and protect the delegates. The liquid dispersion fabric is reasonable in light of past experience in which demonstrators have squirted liquids such as bleach or urine at delegates or police. The overhead netting is reasonable in light of past experience in which demonstrators have thrown objects over

fences. The razor wire atop the Green Line tracks...is reasonable in light of the possibility of demonstrators climbing upon the tracks and using them as an access point to breach the hard zone perimeter and/or rain objects on delegates, media, or law enforcement personnel from above.⁶⁹

In short, given the unique circumstances presented, there was “no way to ‘tweak’ the DZ to improve the plaintiffs’ free speech opportunities without increasing a safety hazard.”⁷⁰

On appeal, the First Circuit affirmed the decision of the district court. While noting that the security measures at the convention “dramatically limited the possibilities for communicative intercourse between the demonstrators and the delegates...[and] imposed a substantial burden on free expression,” the court found that past experiences with large demonstrations created a “quantum of ‘threat’ evidence...sufficient to allow the trier to weigh it in the balance.”⁷¹ The court indicated that the question was not whether the government can make use of past experience to justify security measures—it most assuredly can—but the degree to which inferences drawn from past experiences are plausible.

While a government agency charged with public safety responsibilities ought not to turn a blind eye to past

experience, it likewise ought not to impose harsh burdens on the basis of isolated past events. And, in striking this balance, trial courts should remember that heavier burdens on speech must, in general, be justified by more cogent evidentiary predicates.⁷²

The court said that unfounded speculation about potential violence cannot justify an insufficiently tailored restriction on expression. On the other

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hand, law enforcement officials may draw upon experiences of other cities or entities that have hosted comparable events when assessing the type of security measures necessary to police an upcoming event. The reality that some demonstrators at other recent large political events had engaged in acts, such as pushing over fences and throwing objects over barricades, was deemed to be clearly relevant to the safety risk posed

to delegates at the 2004 Democratic National Convention. Nevertheless, while not requiring a showing of event-specific intelligence, the court found the lack of specific information in the record about a risk of violence specific to the event “troubling in light of the particularly stringent restrictions that were imposed.”⁷³

The court also found that viable alternative means existed to enable protestors to communicate their messages. The demonstration zone did provide an opportunity for expression within the sight and sound of the delegates, “albeit an imperfect one.” Two other considerations were deemed to be pertinent to the analysis and were described as follows:

First, although the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrator’s ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access. Second, we think that the appellants’ argument greatly underestimates the nature of modern communications. At a high profile event, such as the convention, messages expressed beyond the first-hand sight and sound of the delegates nonetheless has

the propensity to reach the delegates through television, radio, the press, the Internet and other outlets.⁷⁴

Thus, on balance, the importance of providing demonstrators with some measure of physical connection to an event venue, such as relatively proximate line-of-sight access, may be lessened where there are other available outlets for effective communication.

Conclusion

It has been said that “the greater the importance of safeguarding the community from incitements to the overthrow of institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for political discussion, to the end that that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means.”⁷⁵ Freedom of expression, especially the expression of political views, ranks near the top of the hierarchy of constitutional rights.⁷⁶ Despite the importance of that right, the protections of the First Amendment are not without limits. Reasonable restrictions as to the time, place, and manner of speech in a public forum are permissible provided those restrictions are justified without reference to

content, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels for communication of the protestors’ message.

No one can seriously dispute that the government has a significant interest in maintaining public order; indeed, this is a core duty that the government owes its citizens. Security measures may inevitably require the imposition of restrictions on large numbers

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...unfounded speculation about potential violence cannot justify an insufficiently tailored restriction on expression.

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of peaceful protestors to effectively address the threat posed by a violent few among them. Courts have recognized this inherent dilemma and that the public interest cuts both ways. Freedom of expression is vital to the health of democracy but making public safety a reality and ensuring that important political and social events are able to proceed normally also are valuable.⁷⁷ While a case-by-case determination must be made in consideration of the unique

geographic, logistical, and security challenges posed by an actual event, a safety net is cast too broadly if it restricts protest activity unduly in too large of an area and, thus, is not narrowly tailored. However, courts generally will not strike down government action for failure to leave open ample channels of communication unless the government action will foreclose an entire medium of public expression across the landscape of a particular community or setting. A time, place, or manner restriction does not violate the First Amendment simply because there is some imaginable alternative that might have been less burdensome on speech. The U.S. Supreme Court has instructed that the First Amendment does not require that individuals retain the most effective means of communication, only that individuals retain the ability to communicate effectively.⁷⁸ ♦

Endnotes

¹ Quotation retrieved from <http://www.tocqueville.org>.

² See, e.g. 18 U.S.C.A. §2331(1)(B) (iii); 18 U.S.C. § 2332b(f), (g). Annex II of National Security Presidential Directive (NSPD) 46 and Homeland Security Presidential Directive (HSPD) 15 designate the FBI as the lead federal agency for counterterrorism.

³ The First Amendment to the U.S. Constitution provides “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or 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.” The question of whether state action deprives a person of the “liberty of expression” guaranteed by the First Amendment is analyzed under the Due Process Clause of the Fourteenth Amendment. *See, e.g. Gitlow v. New York*, 268 U.S. 652 (1925).

⁴ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969) (describing the privilege of citizens to assemble, parade, and discuss public questions in streets and parks while striking down a parade ordinance that gave the government complete discretion to prohibit any “‘parade,’ ‘procession’ or ‘demonstration’ on the city’s streets or public ways”).

⁵ The three types of forums on government property are 1) traditional public forum (e.g., streets, sidewalks, and parks); 2) designated or limited public forums (e.g., state university meeting facility, municipal theater, school board meeting rooms, or other place opened to the public as a place for certain forms of expressive activity); 3) nonpublic forums (e.g., government offices, jailhouses, military bases, polling places, or other place operated by the government as a proprietor and not made accessible to the public for expressive activity). *See International Society for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992) (Holding that an airport concourse was not a public forum, “The government need not permit all forms of speech on property that its owns or controls. Where the government is acting as proprietor, managing its internal operations, rather than acting as a lawmaker with the power to regulate or license, its actions will not be subject to the heightened review to which its actions as lawmaker may be subject.”).

⁶ *See Cox v. New Hampshire*, 312 U.S. 569, 576 (1941) (“If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination to time, place and manner, in relation to other proper uses of the streets.”).

⁷ *Niemotko v. Maryland*, 340 U.S. 268, 273 (1952) (J. Frankfurter, concurring).

⁸ The U.S. Supreme Court found that picketing and marching in public were protected as free speech in *Thornhill v. Alabama*, 310 U.S. 88 (1940). In subsequent rulings, the Court established that regulations affecting time, place, and manner of demonstrations were lawful but that government discrimination based on the content or viewpoint of speech was prohibited by the First Amendment. *See, e.g., Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (“The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.”); *Cox v. Louisiana*, 379 U.S. 559, 563 (1965) (“The conduct which is the subject of this statute—picketing and parading—is subject to regulation even though intertwined with expression and association.”); *Adderly v. Florida*, 385 U.S. 39, 48 (1966) (Persons who want to “propagandize protests or views” do not have “a constitutional right to do so whenever and however, and wherever they please.”).

⁹ *See, e.g. U.S. v. Grace*, 461 U.S. 171, 177 (1983) (“It is also true that ‘public places’ historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be ‘public forums.’ In such places, the government’s ability to permissibly restrict *expressive conduct* is very limited: the government may enforce reasonable time, place and manner regulations....”) (emphasis added, internal citations omitted).

¹⁰ *See, e.g., Tinker v. Des Moines Independent School District*, 393 U.S. 503, 508 (1969).

¹¹ *See Cox v. Louisiana*, 379 U.S. at 563.

¹² *Cox v. New Hampshire*, 312 U.S. at 574 (“Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unconstrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding

the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need.”).

¹³ This example retrieved from <http://www.firstamendmentcenter.org>.

¹⁴ *See Forsythe County, Ga. v. Nationalist Movement*, 505 U.S. 123 (1992) (A county ordinance permitting a government administrator to vary the fee for assembling or parading to reflect the estimated cost of maintaining public order was facially unconstitutional due to the absence of narrowly drawn, reasonable, and definite standards to guide the fee determination and because it required the administrator to examine the content of messages to estimate the public response and cost of public service necessitated by the parade or assembly.).

¹⁵ The use of designated demonstration zones or security zones in which no protest activity is permitted has been the subject of substantial commentary suggesting that the practice should be viewed as a form of content discrimination or as a “prior restraint” on speech. Courts have generally not been receptive to that suggested interpretation. *See, e.g., “Capturing the Dialogue: Free Speech Zones and the ‘Caging’ of First Amendment Rights*,” 54 Drake L. Rev. 99 (2006); “Speech and Spatial Tactics,” 84 Tex. L. Rev. 581 (2006).

¹⁶ The “prior restraints” doctrine encompasses a wide range of activity but is chiefly concerned with government suppression of speech by enjoining publication. *See, e.g., “Prior Restraints*,” 883 PLI/Pat 7 (November 2006) (contains a comprehensive digest of cases on the topic).

¹⁷ *New York Times Co. v. U.S.*, 403 U.S. 713, 714 (1971) (internal quotations and citations omitted); *See Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 764, FN 2. (1994) (“Not all injunctions that may incidentally affect expression, however, are ‘prior restraints’.... Here petitioners are not prevented from expressing their message in any one of several ways...moreover, the injunction was not issued because of the content of petitioner’s expression....”); *Schenck v. Pro-Choice Network*

of *Western N.Y.*, 519 U.S. 357, 374, FN 6. (1997) (“As in *Madsen*, alternative channels of communication were left open to the protestors....”).

¹⁸ See “Balancing the Right to Protest in the Aftermath of September 11,” 40 *Harv. C.R.-C.L. Rev.* 327, 330 (2005).

¹⁹ *Id.*

²⁰ See *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (“[T]he government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech....”).

²¹ *Id.*

²² *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 48-49 (1986) (internal quotation marks and citation omitted).

²³ *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 448 (2002) (J. Kennedy, concurring).

²⁴ See *Ward*, 491 U.S. at 799-800. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984). *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

²⁵ *Coalition to Protest the Democratic Nat’l Conv. v. Boston*, 327 F. Supp. 2d 61, 70 (D. Mass. 2004) (quoting *Ward*, 491 U.S. at 800).

²⁶ 530 U.S. 703 (2000).

²⁷ *Id.* at 707.

²⁸ *Id.* at 719-720.

²⁹ *Id.* at 734.

³⁰ *Id.*

³¹ *Coalition to Protest*, 327 F. Supp. 2d at 77.

³² The case law reflects that crowd-control measures intended to control protest activity have involved various forms and degrees of restriction deemed necessary by government officials to accommodate the safety and security requirements posed by the unique physical environments of specific venues. At least one commentator, who has expressed concern that demonstration zones can be used to impose content or viewpoint censorship, described such activity as the use of “spatial tactics.” See “Speech and Spatial Tactics,” 84 *Tex. L. Rev.* 581 (2006).

³³ The FBI defines a special event as a “significant domestic or international

event, occurrence, circumstance, contest, activity, or meeting which by virtue of its profile and/or status represents an attractive target for a terrorist attack.” Manual of Investigative Operations and Guidelines (MIOG) 300-1(2). This definition is not limited to threats of international terrorism, but, rather, includes threats posed by domestic anarchist groups whose members may commit violent acts at demonstrations. See *A Review of the FBI’s Investigative Activities Concerning Potential Protestors at the Democratic and Republican National Political Conventions*, U.S. Department of Justice, Office of the Inspector General, (April 27, 2006), 10. In addition to the FBI’s responsibilities concerning special events, the U.S. Secret Service is statutorily authorized to provide security to protected officials at national special security events designated by the secretary of the Department of Homeland Security. See 18 U.S.C. 3056(e)(1).

³⁴ See *Menotti v. City of Seattle*, 409 F.3d 1113 (9th Cir. 2005).

³⁵ *Id.* at 1125.

³⁶ *Id.* at 1129.

³⁷ *Id.*

³⁸ *Id.* at 1131-1132.

³⁹ *Id.* at 1131.

⁴⁰ *Id.* at 1131, FN41.

⁴¹ *Id.* at 1138.

⁴² *Id.* at 1138-1139.

⁴³ 114 F. Supp. 2d 966 (C.D. Cal. 2000).

⁴⁴ *Id.* at 966.

⁴⁵ *Id.* at 971, FN2.

⁴⁶ *Id.* at 971.

⁴⁷ *Id.* at 971.

⁴⁸ *Id.* at 972.

⁴⁹ *Id.*

⁵⁰ 243 F. Supp. 2d 19 (S.D. N. Y. 2003).

⁵¹ *Id.* at 24 (Since the terrorist attacks at the World Trade Center on September 11, 2001, the city had banned all demonstrations, parades, or other public events in front of the United Nations and U.S. Mission. The court applied the narrowly tailored test to this total ban in light of the security concerns posed by the requested march.)

⁵² *Id.* at 20.

⁵³ *Id.* at 25-28.

⁵⁴ *Id.* at 20-31.

⁵⁵ 323 F.3d 175, 178 (2nd Cir. 2003).

⁵⁶ *Id.*

⁵⁷ 2004 WL 1593870 (S.D.N.Y. 2004).

⁵⁸ *Id.* at 28.

⁵⁹ *Id.* at 2,6,34.

⁶⁰ *Id.* at 29.

⁶¹ *Oliveri v. Ward*, 801 F.2d 602, 607 (2nd Cir. 1986).

⁶² 378 F.3d 8 (1st Cir. 2004).

⁶³ A comprehensive statement of the facts surrounding this litigation is contained in the district court opinion. See *Coalition to Protest*, 327 F. Supp. 2d 61 (D. Mass. 2004).

⁶⁴ *Id.* at 71-72 (The court noted that the city provided “nuanced, reticulated options for many different types of expression within the soft zone.... Inside it, plaintiffs may conduct small demonstrations with no permits whatsoever, and may conduct 21-50 person stationary demonstrations on an expedited permitting basis. Anyone may distribute leaflets or hold signs.”)

⁶⁵ *Id.* at 66-67.

⁶⁶ *Id.*

⁶⁷ *Id.* at 74-75.

⁶⁸ *Id.* at 75.

⁶⁹ *Id.*

⁷⁰ *Id.* at 76.

⁷¹ 378 F.3d at 13-14.

⁷² *Id.* at 14.

⁷³ *Id.* at 17 (Lipez, Circuit Judge, concurring).

⁷⁴ *Id.* at 14.

⁷⁵ *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937).

⁷⁶ See 378 F.3d at 11-12.

⁷⁷ *Id.* at 15.

⁷⁸ 409 F.3d at 1138, FN 48 (citing *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 812 (1984)).

Law enforcement officers of other than federal jurisdiction who are interested in this article should consult their legal advisors. Some police procedures ruled permissible under federal constitutional law are of questionable legality under state law or are not permitted at all.

**FREEDOM OF SPEECH AND PRESS: EXCEPTIONS TO THE FIRST
AMENDMENT**

**Henry Cohen, Legislative Attorney, American Law Division
Congressional Research Service, Updated March 17, 2008**

CRS Report for Congress

Freedom of Speech and Press: Exceptions to the First Amendment

Updated March 17, 2008

Henry Cohen
Legislative Attorney
American Law Division



Prepared for Members and
Committees of Congress

Freedom of Speech and Press: Exceptions to the First Amendment

Summary

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech, or of the press....” This language restricts government both more and less than it would if it were applied literally. It restricts government more in that it applies not only to Congress, but to all branches of the federal government, and to all branches of state and local government. It restricts government less in that it provides no protection to some types of speech and only limited protection to others.

This report provides an overview of the major exceptions to the First Amendment — of the ways that the Supreme Court has interpreted the guarantee of freedom of speech and press to provide no protection or only limited protection for some types of speech. For example, the Court has decided that the First Amendment provides no protection to obscenity, child pornography, or speech that constitutes “advocacy of the use of force or of law violation ... where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

The Court has also decided that the First Amendment provides less than full protection to commercial speech, defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television, and public employees’ speech. Even speech that enjoys the most extensive First Amendment protection may be subject to “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” And, even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes “strict scrutiny,” i.e., if the government shows that the restriction serves “to promote a compelling interest” and is “the least restrictive means to further the articulated interest.”

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Freedom of Speech and Press: Exceptions to the First Amendment

Introduction

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech, or of the press....” This language restricts government both more and less than it would if it were applied literally. It restricts government more in that it applies not only to Congress, but to all branches of the federal government, and to all branches of state and local government.¹ It restricts government less in that it provides no protection to some types of speech and only limited protection to others.

This report provides an overview of the major exceptions to the First Amendment — of the ways that the Supreme Court has interpreted the guarantee of freedom of speech and press to provide no protection or only limited protection for some types of speech.² For example, the Court has decided that the First Amendment provides no protection to obscenity, child pornography, or speech that constitutes “advocacy of the use of force or of law violation ... where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”

The Court has also decided that the First Amendment provides less than full protection to commercial speech, defamation (libel and slander), speech that may be harmful to children, speech broadcast on radio and television, and public employees’ speech. Even speech that enjoys the most extensive First Amendment protection may be subject to “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.” And, even speech that enjoys the most extensive First Amendment protection may be restricted on the basis of its content if the restriction passes “strict scrutiny,” i.e., if the government shows that the restriction serves “to promote a compelling interest” and is “the least restrictive means to further the articulated interest.”

¹ *Herbert v. Lando*, 441 U.S. 153, 168 n.16 (1979).

² Supreme Court cases supporting all the prohibitions and restrictions on speech noted in this and the next paragraph are cited in footnotes accompanying the subsequent discussion of these prohibitions and restrictions.

Obscenity³

Obscenity apparently is unique in being the only type of speech to which the Supreme Court has denied First Amendment protection without regard to whether it is harmful to individuals. According to the Court, there is evidence that, at the time of the adoption of the First Amendment, obscenity “was outside the protection intended for speech and press.”⁴ Consequently, obscenity may be banned simply because a legislature concludes that banning it protects “the social interest in order and morality.”⁵ No actual harm, let alone compelling governmental interest, need be shown in order to ban it.

What is obscenity? It is not synonymous with pornography, as most pornography is not legally obscene; i.e., most pornography is protected by the First Amendment. To be obscene, pornography must, at a minimum, “depict or describe patently offensive ‘hard core’ sexual conduct.”⁶ The Supreme Court has created a three-part test, known as the *Miller* test, to determine whether a work is obscene. The *Miller* test asks:

- (a) whether the “average person applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁷

The Supreme Court has clarified that only “the first and second prongs of the *Miller* test — appeal to prurient interest and patent offensiveness — are issues of fact for the jury to determine applying contemporary community standards.”⁸ As for the third prong, “[t]he proper inquiry is not whether an ordinary member of any given

³ For additional information, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen.

⁴ *Roth v. United States*, 354 U.S. 476, 483 (1957). However, Justice Douglas, dissenting, wrote: “[T]here is no special historical evidence that literature dealing with sex was intended to be treated in a special manner by those who drafted the First Amendment.” *Id.* at 514.

⁵ *Id.* at 485.

⁶ *Miller v. California*, 413 U.S. 15, 27 (1973).

⁷ *Id.* at 24 (citation omitted).

⁸ *Pope v. Illinois*, 481 U.S. 497, 500 (1987). In *Hamling v. United States*, 418 U.S. 87, 105 (1974), the Court noted that a “community” was not any “precise geographic area,” and suggested that it might be less than an entire state. In *Ashcroft v. American Civil Liberties Union*, 535 U.S. 564, 577 (2002), the Supreme Court recognized that “Web publishers currently lack the ability to limit access to their sites on a geographic basis,” and that therefore the use of community standards to define “obscenity” “would effectively force all speakers on the Web to abide by the ‘most puritan’ community’s standards.” Nevertheless, the Court found that use of community standards “does not *by itself* render” a statute unconstitutional.” *Id.* at 585 (emphasis in original).

community would find serious literary, artistic, political, or scientific value in allegedly obscene material, but whether a reasonable person would find such value in the material, taken as a whole.”⁹

The Supreme Court has allowed one exception to the rule that obscenity is not protected by the First Amendment: one has a constitutional right to possess obscene material “in the privacy of his own home.”¹⁰ However, there is no constitutional right to provide obscene material for private use¹¹ or even to acquire it for private use.¹²

Child Pornography¹³

Child pornography is material that visually depicts sexual conduct by children.¹⁴ It is unprotected by the First Amendment even when it is not obscene; i.e., child pornography need not meet the *Miller* test to be banned. Because of the legislative interest in destroying the market for the exploitative use of children, there is no constitutional right to possess child pornography even in the privacy of one’s own home.¹⁵

In 1996, Congress enacted the Child Pornography Protection Act (CPPA), which defined “child pornography” to include visual depictions that *appear* to be of a minor, even if no minor is actually used. The Supreme Court, however, declared the CPPA unconstitutional to the extent that it prohibited pictures that are produced without actual minors.¹⁶ Pornography that uses actual children may be banned because laws against it target “[t]he production of the work, not its content”; the CPPA, by contrast, targeted the content, not the production.¹⁷ The government “may not prohibit speech because it increases the chance an unlawful act will be committed ‘at some indefinite future time.’”¹⁸ In 2003, Congress responded by enacting Title V of the PROTECT Act, P.L. 108-21, which prohibits any “digital image, computer

⁹ *Pope v. Illinois*, 481 U.S. at 500-501.

¹⁰ *Stanley v. Georgia*, 394 U.S. 557, 568 (1969).

¹¹ *United States v. Reidel*, 402 U.S. 351 (1971).

¹² *United States v. 12 200-Ft. Reels of Film*, 413 U.S. 123 (1973).

¹³ For additional information, see CRS Report 95-406, *Child Pornography: Constitutional Principles and Federal Statutes*, by Henry Cohen.

¹⁴ *New York v. Ferber*, 458 U.S. 747, 764 (1982). The definition of “sexually explicit conduct” in the federal child pornography statute includes “lascivious exhibition of the genitals or pubic area of any person [under 18], and “is not limited to nude exhibitions or exhibitions in which the outlines of those areas [are] discernible through clothing.” 18 U.S.C. §§ 2256(2)(A)(v), 2252 note.

¹⁵ *Osborne v. Ohio*, 495 U.S. 103 (1990).

¹⁶ *Ashcroft v. Free Speech Coalition*, 435 U.S. 234 (2002).

¹⁷ *Id.* at 249; see also, *id.* at 242.

¹⁸ *Id.* at 253.

image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in sexually explicit conduct.” It also prohibits “a visual depiction of any kind, including a drawing, cartoon, sculpture, or painting, that ... depicts a minor engaging in sexually explicit conduct,” and is obscene or lacks serious literary, artistic, political, or scientific value.

Content-Based Restrictions

Justice Holmes, in one of his most famous opinions, wrote:

The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing a panic.... The question in every case is whether the words used ... create a clear and present danger....¹⁹

In its current formulation of this principle, the Supreme Court held that “advocacy of the use of force or of law violation” is protected unless “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”²⁰ Similarly, the Court held that a statute prohibiting threats against the life of the President could be applied only against speech that constitutes a “true threat,” and not against mere “political hyperbole.”²¹

In cases of content-based restrictions of speech other than advocacy or threats, the Supreme Court generally applies “strict scrutiny,” which means that it will uphold a content-based restriction only if it is necessary “to promote a compelling interest,” and is “the least restrictive means to further the articulated interest.”²²

Thus, it is ordinarily unconstitutional for a state to proscribe a newspaper from publishing the name of a rape victim, lawfully obtained.²³ This is because there

¹⁹ Schenck v. United States, 249 U.S. 47, 52 (1919).

²⁰ Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). See also, Stewart v. McCoy, 537 U.S. 993 (2002) (Justice Stevens’ statement accompanying denial of certiorari).

²¹ Watts v. United States, 394 U.S. 705, 708 (1969). See also, NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982); Planned Parenthood v. American Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002) (en banc), *cert. denied*, 539 U.S. 958 (2003) (the “Nuremberg Files” case); Virginia v. Black, 538 U.S. 343, 360 (2003) (“Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.”).

²² Sable Communications of California, Inc. v. Federal Communications Commission, 492 U.S. 115, 126 (1989). The Court does not apply strict scrutiny to another type of content-based restrictions — restrictions on commercial speech, which is discussed below.

²³ The Florida Star v. B.J.F., 491 U.S. 524 (1989). The Court left open the question “whether, in cases where information has been acquired *unlawfully* by a newspaper or by a source, the government may ever punish not only the unlawful acquisition, but the ensuing publication as well.” *Id.* at 535 n.8 (emphasis in original). In *Bartnicki v. Vopper*, 532 U.S. 514 (2001), the Court held that a content-neutral statute prohibiting the publication of

(continued...)

ordinarily is no compelling governmental interest in protecting a rape victim’s privacy.²⁴ By contrast, “[n]o one would question but that a government might prevent actual obstruction to its recruiting service or the publication of the sailing dates of transports or the number and location of troops.”²⁵ Similarly, the government may proscribe “‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”²⁶ Here the Court was referring to utterances that constitute “epithets or personal abuse” that “are no essential part of any exposition of ideas,” as opposed to, for example, flag burning, which is discussed below, under “Symbolic Speech.”

Non-Content-Based Restrictions

If the government limits speech, but its purpose in doing so is not based on the content of the speech, then the limitation on speech may still violate the First Amendment, but it is less likely than a content-based restriction to do so. This is because the Supreme Court applies less than “strict scrutiny” to non-content-based restrictions. With respect to non-content-based restrictions, the Court requires that the governmental interest be “significant” or “substantial” or “important,” but not necessarily, as with content-based restrictions, “compelling.” And, in the case of non-content-based restrictions, the Court requires that the restriction be narrowly tailored, but not, as with content-based restrictions, that it be the least restrictive means to advance the governmental interest.

Two types of speech restrictions that receive this “intermediate” scrutiny are (1) time, place, or manner restrictions, and (2) incidental restrictions, which are restrictions aimed at conduct other than speech, but that incidentally restrict speech. This report includes separate sections on these two types of restrictions. In addition, restrictions on commercial speech, though content-based, are subject to similar intermediate scrutiny; this report also includes a separate section on commercial speech. Finally, bans on nude dancing and zoning restrictions on pornographic theaters and bookstores, although discriminating on the basis of the content of speech, receive intermediate scrutiny because, according to the Supreme Court, they

²³ (...continued)

illegally intercepted communications (in this case a cell phone conversation) violates free speech where the person who publishes the material did not participate in the interception, and the communication concerns a public issue.

²⁴ However, the Court did “not rule out the possibility that, in a proper case, imposing civil sanctions for publication of the name of a rape victim might be ... overwhelmingly necessary to advance” a compelling state interest. *Id.* at 537.

²⁵ *Near v. Minnesota*, 283 U.S. 697, 716 (1931).

²⁶ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). Campus “hate speech” prohibitions at public colleges (the First Amendment does not apply to private colleges) are apparently unconstitutional, even as applied to fighting words, if they cover only certain types of hate speech, such as speech based on racial hatred. This conclusion is based on the cross-burning case, *R.A.V. v. City of St. Paul*, *infra* note 138.

are aimed at combating “secondary effects,” such as crime, and not at the content of speech.²⁷

Prior Restraint

There are two ways in which the government may attempt to restrict speech. The more common way is to make a particular category of speech, such as obscenity or defamation, subject to criminal prosecution or civil suit, and then, if someone engages in the proscribed category of speech, to hold a trial and impose sanctions if appropriate. The second way is by prior restraint, which may occur in two ways. First, a statute may require that a person submit the speech that he wishes to disseminate — a movie, for example — to a governmental body for a license to disseminate it — e.g., to show the movie. Second, a court may issue a temporary restraining order or an injunction against engaging in particular speech — publishing the Pentagon Papers, for example.

With respect to both these types of prior restraint, the Supreme Court has written that “[a]ny system of prior restraint of expression comes to this Court bearing a heavy presumption against its constitutional validity.”²⁸ Prior restraints, it has held,

are the most serious and least tolerable infringement on First Amendment rights. ... A prior restraint, ... by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication “chills” speech, prior restraint “freezes” it at least for the time. The damage can be particularly great when the prior restraint falls upon the communication of news and commentary on current events.²⁹

The Supreme Court has written that “[t]he special vice of a prior restraint is that communication will be suppressed ... before an adequate determination that it is unprotected by the First Amendment.”³⁰ The prohibition on prior restraint, thus, is

²⁷ For additional information on this subject, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen.

²⁸ *Freedman v. Maryland*, 380 U.S. 51, 57, 58 (1965) (“a noncriminal process which requires the prior submission of a film to a censor avoids constitutional infirmity only if it takes place under procedural safeguards”); *New York Times Co. v. United States*, 403 U.S. 713, 714 (1971) (injunction sought by United States against publication of the Pentagon Papers denied).

²⁹ *Nebraska Press Association v. Stuart*, 427 U.S. 539, 559 (1976) (striking down a court order restraining the publication or broadcast of accounts of confessions or admissions made by the defendant at a criminal trial). Injunctions that are designed to restrict merely the time, place, or manner of a particular expression are subject to a less stringent application of First Amendment principles; see, “Time, Place, and Manner Restrictions,” below.

³⁰ *Pittsburgh Press Co. v. Pittsburgh Commission on Human Relations Commission*, 413 U.S. 376, 390 (1973); see also, *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-316 (1980) (“the burden of supporting an injunction against a future exhibition [of allegedly obscene motion pictures] is even heavier than the burden of justifying the imposition of a
(continued...)”).

essentially a limitation on restraints until a final judicial determination that the restricted speech is not protected by the First Amendment. It is a limitation, for example, against temporary restraining orders and preliminary injunctions pending final judgment, not against permanent injunctions after a final judgment is made that the restricted speech is not protected by the First Amendment.³¹

In the case of a statute that imposes prior restraint, “a prescreening arrangement can pass constitutional muster if it includes adequate procedural safeguards.”³² These procedural safeguards, the Court wrote, include that “the burden of proving that the film is unprotected expression must rest on the censor,” and “that the censor will, within a specified brief period, either issue a license or go to court to restrain showing the film.”³³ In the case of time, place, or manner restrictions (and presumably other forms of speech that do not receive full First Amendment protection), lesser procedural safeguards are adequate.³⁴

Prior restraints are permitted in some circumstances. The Supreme Court has written, in dictum, “that traditional prior restraint doctrine may not apply to [commercial speech],”³⁵ and the Court has not ruled whether it does. “The vast majority of [federal] circuits ... do not apply the doctrine of prior restraint to commercial speech.”³⁶ “Some circuits [however] have explicitly indicated that the requirement of procedural safeguards in the context of a prior restraint indeed applies to commercial speech.”³⁷

Furthermore, “*only* content-based injunctions are subject to prior restraint analysis.”³⁸ In addition, prior restraint is generally permitted, even in the form of

³⁰ (...continued)
criminal sanction for a past communication”).

³¹ See, Mark A. Lemley and Eugene Volohk, *Freedom of Speech and Injunctions in Intellectual Property Cases*, 48 Duke Law Journal 147, 169-171 (1998).

³² *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 571 n.13.

³³ *Freedman*, *supra* note 28, 380 U.S. at 58, 59.

³⁴ *Thomas v. Chicago Park District*, 534 U.S. 316, 322-323 (2002).

³⁵ *Central Hudson*, *supra* note 32, 447 U.S. at 571 n.13.

³⁶ *Bosley v. WildWetT.com*, 310 F. Supp. 2d 914, 930 (N.D. Ohio 2004).

³⁷ *New York Magazine v. Metropolitan Transportation Authority*, 136 F.3d 123, 131 (2d Cir. 1998), *cert. denied*, 525 U.S. 824 (1998); citing as examples, *Desert Outdoor Adver. v. City of Moreno Valley*, 103 F.3d 814, 818 (9th Cir. 1996); *In re Search of Kitty’s East*, 905 F.2d 1367, 1371-72 & n.4 (10th Cir. 1990).

³⁸ *DVD Copy Control Association, Inc. v. Bunner*, 75 P.3d 1, 17 (Cal. 2003) (a “prior restraint is a *content-based* restriction on speech *prior to its occurrence*” (italics in original)). For the test regarding content-neutral injunctions, see the section on “Time, Place, and Manner Restrictions,” below.

preliminary injunctions, in intellectual property cases, such as those for infringements of copyright or trademark.³⁹

Commercial Speech

“The Constitution ... affords a lesser protection to commercial speech than to other constitutionally guaranteed expression.”⁴⁰ Commercial speech is “speech that *proposes* a commercial transaction.”⁴¹ That books and films are published and sold for profit does not make them commercial speech; i.e., it does not “prevent them from being a form of expression whose liberty is safeguarded [to the maximum extent] by the First Amendment.”⁴² Commercial speech, however, may be banned if it is false or misleading, or if it advertises an illegal product or service. Even if fits in none of these categories, the government may regulate it more than it may regulate fully protected speech. In addition, the government may generally require disclosures to be included in commercial speech; see the section on “Compelled Speech,” below.

The Supreme Court has prescribed the four-prong *Central Hudson* test to determine whether a governmental regulation of commercial speech is constitutional. This test asks initially (1) whether the commercial speech at issue is protected by the First Amendment (that is, whether it concerns a lawful activity and is not misleading) and (2) whether the asserted governmental interest in restricting it is substantial. “If both inquiries yield positive answers,” then to be constitutional the restriction must (3) “directly advance[] the governmental interest asserted,” and (4) be “not more extensive than is necessary to serve that interest.”⁴³

The Supreme Court has held that, in applying the third prong of the *Central Hudson* test, the courts should consider whether the regulation, in its general

³⁹ *Bosley*, *supra* note 36, at 930; Lemley and Volokh, *supra* note 31 (arguing that intellectual property should have the same First Amendment protection from preliminary injunctions as other speech).

⁴⁰ *United States v. Edge Broadcasting Co.*, 509 U.S. 418 (1993).

⁴¹ *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 482 (1989) (emphasis in original). In *Nike, Inc. v. Kasky*, 45 P.3d 243 (2002), *cert. dismissed*, 539 U.S. 654 (2003), Nike was sued for unfair and deceptive practices for allegedly false statements it made concerning the working conditions under which its products were manufactured. The California Supreme Court ruled that the suit could proceed, and the Supreme Court granted certiorari, but then dismissed it as improvidently granted, with a concurring and two dissenting opinions. The issue left undecided was whether Nike’s statements, though they concerned a matter of public debate and appeared in press releases and letters rather than in advertisements for its products, should be deemed “‘commercial speech’ because they might affect consumers’ opinions about the business as a good corporate citizen and thereby affect their purchasing decisions.” *Id.* at 657 (Stevens, J., concurring). Nike subsequently settled the case.

⁴² *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-502 (1952).

⁴³ *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, *supra* note 32, 447 U.S. at 566 (1980).

application, directly advances the governmental interest asserted. If it does, then it need not advance the governmental interest as applied to the particular person or entity challenging it.⁴⁴ Its application to the particular person or entity challenging it is relevant in applying the fourth *Central Hudson* factor, although this factor too is to be viewed in terms of “the relation it bears to the overall problem the government seeks to correct.”⁴⁵ The fourth prong is not to be interpreted “strictly” to require the legislature to use the “least restrictive means” available to accomplish its purpose. Instead, the Court has held, legislation regulating commercial speech satisfies the fourth prong if there is a reasonable “fit” between the legislature’s ends and the means chosen to accomplish those ends.⁴⁶

The Supreme Court has applied the *Central Hudson* test in all the commercial speech cases it has decided since *Central Hudson*, and we discuss the ten most recent below, in chronological order.⁴⁷ In nine of these cases, the Court struck down the challenged speech restriction; it has not upheld a commercial speech restriction since 1993. In its most recent commercial speech case, *Thompson v. Western States Medical Center*, the Court noted that “several Members of the Court have expressed doubts about the *Central Hudson* analysis and whether it should apply in particular cases.” These justices believe that the test does not provide adequate protection to commercial speech, but the Court has found it unnecessary to consider whether to abandon the test, because it has been striking down the statutes in question anyway.

In *Cincinnati v. Discovery Network, Inc.*, the Court struck down a Cincinnati regulation that banned newsracks on public property if they distributed commercial publications, but not if they distributed news publications.⁴⁸ As for the first two prongs of the *Central Hudson* test, the Court found that the commercial publications at issue were not unlawful or misleading, and that the asserted governmental interest in safety and esthetics was substantial. As for the third and fourth prongs, although banning commercial newsracks presumably advances the asserted governmental interests, the distinction between commercial and noncommercial speech “bears no relationship *whatsoever* to the particular interests that the city has asserted.”⁴⁹ The city, therefore, did not establish “the ‘fit’ between its goals and its chosen means that is required by our opinion in *Fox*.”⁵⁰

In *Edenfield v. Fane*,⁵¹ the Court struck down a Florida ban on solicitation by certified public accountants, even though the Court had previously, in *Ohralik v.*

⁴⁴ See, *Edge Broadcasting*, *supra* note 40, 509 U.S. at 427.

⁴⁵ *Id.* at 430.

⁴⁶ *Board of Trustees of the State University of New York v. Fox*, 492 U.S. 469, 480 (1989).

⁴⁷ We do not include among the ten the three cases (discussed below, at the end of the section on “Compelled Speech”) involving assessments for government-compelled advertisements, because the Court did not apply the *Central Hudson* test in these cases.

⁴⁸ 507 U.S. 410 (1993).

⁴⁹ *Id.* at 424 (emphasis in original).

⁵⁰ *Id.* at 428.

⁵¹ 507 U.S. 761 (1993).

Ohio State Bar Association,⁵² upheld a ban on solicitation by attorneys. The Court found that the government had substantial interests in the ban, including the prevention of fraud, the protection of privacy, and the need to maintain CPA independence and to guard against conflicts of interest. However, the Court found no evidence that the ban directly advanced these interests, and noted, among other things, that, “[u]nlike a lawyer, a CPA is not ‘a professional trained in the art of persuasion,’” and “[t]he typical client of a CPA is far less susceptible to manipulation than the young accident victim in *Ohralik*.”⁵³

The Court added, more generally, that the government’s burden in justifying a restriction on commercial speech “is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.”⁵⁴

In *United States v. Edge Broadcasting Co.*, the Court upheld “federal statutes that prohibit the broadcast of lottery advertising by a broadcaster licensed to a State that does not allow lotteries, while allowing such broadcasting by a broadcaster licensed to a State that sponsors a lottery....”⁵⁵ The governmental interest in the statutes was to balance the interests of states that prohibit lotteries and states that operate lotteries. The broadcaster that challenged the statutes was licensed in North Carolina, which does not allow lotteries, but broadcasted from only three miles from the Virginia border, which does allow lotteries. The broadcaster claimed that prohibiting it from broadcasting advertisements for the Virginia lottery did not advance the governmental interest or represent a “reasonable fit” because North Carolina radio listeners in its area were already inundated with advertisements from Virginia stations advertising the Virginia lottery and because most of the broadcaster’s listeners were in Virginia. The Supreme Court upheld the statutes because, even if they did not advance the governmental interest or represent a reasonable fit as applied to the particular broadcaster, they did as applied to the overall problem the government sought to address.

In *Ibanez v. Florida Board of Accountancy*, the Court held that the Florida Board of Accountancy could not reprimand an accountant for truthfully referring to her credentials as a Certified Public Accountant and a Certified Financial Planner in her advertising and other communication with the public, such as her business cards

⁵² 436 U.S. 447 (1978).

⁵³ *Edenfield*, *supra* note 51, 507 U.S. at 775.

⁵⁴ *Id.* at 770-771.

⁵⁵ *Edge Broadcasting*, *supra* note 40, 509 U.S. at 421.

and stationery.⁵⁶ The Court wrote that it “cannot imagine how consumers can be misled by her truthful representation” that she was a CPA.”⁵⁷

In *Rubin v. Coors Brewing Co.*, the Court struck down a federal statute, 27 U.S.C. § 205(e), that prohibits beer labels from displaying alcohol content unless state law requires such disclosure.⁵⁸ The Court found sufficiently substantial to satisfy the second prong of the *Central Hudson* test the government’s interest in curbing “strength wars” by beer brewers who might seek to compete for customers on the basis of alcohol content. However, it concluded that the ban “cannot directly and materially advance” this “interest because of the overall irrationality of the Government’s regulatory scheme.”⁵⁹ This irrationality is evidenced by the fact that the ban does not apply to beer advertisements, and by the fact that the statute *requires* the disclosure of alcohol content on the labels of wines and spirits.

In *Florida Bar v. Went For It, Inc.*, the Court upheld a rule of the Florida Bar that prohibited personal injury lawyers from sending targeted direct-mail solicitations to victims and their relatives for 30 days following an accident or disaster.⁶⁰ The Bar argued “that it has a substantial interest in protecting the privacy and tranquility of personal injury victims and their loved ones against intrusive, unsolicited contact by lawyers,”⁶¹ and the Court found that “[t]he anecdotal record mustered by the Bar” to demonstrate that its rule would advance this interest in a direct and material way was “noteworthy for its breadth and detail”;⁶² it was not “mere speculation and conjecture.”⁶³ Therefore, the rule passed what the Court called the second prong of the *Central Hudson* test.⁶⁴ As for the final prong, the Court found the Bar’s rule to be “reasonably well tailored to its stated objective....”⁶⁵ In a subsequent case, the

⁵⁶ 512 U.S. 136 (1994). Curiously, the Court in *Ibanez* writes that “only false, deceptive, or misleading commercial speech may be banned” (*id.* at 142), despite its decisions upholding bans of truthful commercial speech in *Edge Broadcasting*, *supra* note 40, and other cases. Perhaps the Court meant that only false, deceptive, or misleading commercial speech may be banned without consideration of the second, third, and fourth prongs of the *Central Hudson* test.

⁵⁷ *Id.* at 144.

⁵⁸ 514 U.S. 476 (1995).

⁵⁹ *Id.* at 488.

⁶⁰ 515 U.S. 618 (1995).

⁶¹ *Id.* at 624.

⁶² *Id.* at 627.

⁶³ *Id.* at 626.

⁶⁴ The Court referred to the *Central Hudson* test as having three parts, and referred to its second, third, and fourth prongs, as, respectively, its first, second, and third. The Court did not, however, alter the substance of the test. In *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 529 (1996) (O’Connor, J., concurring), the justices returned to the traditional numbering.

⁶⁵ *Id.* at 633. In *Shapero v. Kentucky Bar Association*, 486 U.S. 466 (1988), the Court had
(continued...)

Court wrote that, in *Florida Bar v. Went For It, Inc.*, it had “upheld a 30-day prohibition against a certain form of legal solicitation largely because it left so many channels of communication open to Florida lawyers.”⁶⁶

In *44 Liquormart, Inc. v. Rhode Island*, the Court, struck down a state statute that prohibited disclosure of retail prices in advertisements for alcoholic beverages.⁶⁷ In the process, it increased the protection that the *Central Hudson* test guarantees to commercial speech by making clear that a total prohibition on “the dissemination of truthful, nonmisleading commercial messages for reasons unrelated to the preservation of a fair bargaining process” will be subject to a stricter review by the courts than a regulation designed “to protect consumers from misleading, deceptive, or aggressive sales practices.”⁶⁸

The Court added: “The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.”⁶⁹ It concluded “that the price advertising ban cannot survive the more stringent constitutional review that *Central Hudson* itself concluded was appropriate for the complete suppression of truthful, nonmisleading commercial speech.”⁷⁰

In *Greater New Orleans Broadcasting Association, Inc. v. United States*,⁷¹ the Court applied the *Central Hudson* test to strike down, as applied to advertisements of private casino gambling that are broadcast by radio or television stations located in Louisiana, where such gambling is legal, the same federal statute it had upheld in

⁶⁵ (...continued)

previously held that a state may not place a “ban on *all* direct-mail solicitations, whatever the time frame and whoever the recipient.” *Florida Bar*, 515 U.S. at 629 (emphasis in original). The Court has also held that a nonprofit organization’s solicitation by letter of prospective clients is a protected form of political expression (*In re Primus*, 436 U.S. 412 (1978)), and that a state may prohibit lawyers from soliciting prospective clients in person (*Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978)). The Aviation Disaster Family Assistance Act of 1996, 49 U.S.C. § 1136(g)(2), prohibits unsolicited communications concerning a potential action for personal injury or wrongful death before the 30th day following an accident involving an air carrier providing interstate or foreign air transportation.

⁶⁶ *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996).

⁶⁷ *Id.*

⁶⁸ *Id.* at 501. The nine justices were unanimous in striking down the law, which prohibited advertising the price of alcoholic beverages, but only parts of Justice Stevens’ opinion for the Court were joined by a majority of justices. The quotations above, for example, are from Part IV of the Court’s opinion, which was joined by only Justices Kennedy and Ginsburg besides Justice Stevens.

⁶⁹ *Id.* at 503.

⁷⁰ *Id.* at 508, citing *Central Hudson*, *supra* note 32, 447 U.S. at 566, n.9.

⁷¹ 527 U.S. 173 (1999).

United States v. Edge Broadcasting Co.,⁷² as applied to broadcast advertising of Virginia’s lottery by a radio station located in North Carolina, where no such lottery was authorized. The Court emphasized the interrelatedness of the four parts of the *Central Hudson* test; e.g., though the government has a substantial interest in reducing the social costs of gambling, the fact that the Congress has simultaneously encouraged gambling, because of its economic benefits, makes it more difficult for the government to demonstrate that its restriction on commercial speech materially advances its asserted interest and constitutes a reasonable “fit.” In this case, “[t]he operation of [18 U.S.C.] § 1304 and its attendant regulatory regime is so pierced by exemptions and inconsistencies that the Government cannot hope to exonerate it. . . . [T]he regulation distinguishes among the indistinct, permitting a variety of speech that poses the same risks the Government purports to fear, while banning messages unlikely to cause any harm at all.”⁷³

In *Lorillard Tobacco Co. v. Reilly*, the Supreme Court applied the *Central Hudson* test to strike down most of the Massachusetts Attorney General’s regulations governing the advertising and sale of cigarettes, smokeless tobacco, and cigars.⁷⁴ The Court first found the “outdoor and point-of-sale advertising regulations targeting cigarettes” to be preempted by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331-1341.⁷⁵ By its terms, however, this statute’s preemption provision applies only to cigarettes, so the Court considered the smokeless tobacco and cigar petitioners’ First Amendment challenges to the outdoor and point-of-sale advertising regulations. Further, the cigarette petitioners did not raise a preemption challenge to Massachusetts’ sales practices regulations (regulations, described below, other than outdoor and point-of-sale advertising regulations), so the Court considered the cigarette as well as the smokeless tobacco and cigar petitioners’ claim that these regulations violate the First Amendment.

The Court struck down the outdoor advertising regulations under the fourth prong of the *Central Hudson* test, finding that the prohibition of any advertising within 1,000 feet of schools or playgrounds “prohibit[ed] advertising in a substantial portion of the major metropolitan areas of Massachusetts,”⁷⁶ and that such a burden on speech did not constitute a reasonable fit between the means and ends of the regulatory scheme. “Similarly, a ban on all signs of any size seems ill suited to target the problem of highly visible billboards, as opposed to smaller signs.”⁷⁷

The Court found “that the point-of-sale advertising regulations fail both the third and fourth steps of the *Central Hudson* analysis.”⁷⁸ The prohibition on advertising “placed lower than five feet from the floor of any retail establishment which is

⁷² *Edge Broadcasting*, *supra* notes 40, 55.

⁷³ 527 U.S. at 190, 195.

⁷⁴ 533 U.S. 525 (2001).

⁷⁵ *Id.* at 551.

⁷⁶ *Id.* at 562.

⁷⁷ *Id.* at 563.

⁷⁸ *Id.* at 566.

located within a one thousand foot radius of” any school or playground did not advance the goal of preventing minors from using tobacco products because “[n]ot all children are less than 5 feet tall, and those who are certainly have the ability to look up and take in their surroundings.”⁷⁹

The Court, however, upheld the sales practices regulations that “bar the use of self-service displays and require that tobacco products be placed out of the reach of all consumers in a location accessible only to salespersons.”⁸⁰ These regulations, though they “regulate conduct that may have a communicative component,” do so “for reasons unrelated to the communications of ideas.”⁸¹ The Court therefore applied the *O’Brien* test for incidental restrictions of speech (see the section below on “Incidental Restrictions”) and concluded “that the State has demonstrated a substantial interest in preventing access to tobacco products by minors and has adopted an appropriately narrow means of advancing that interest.”⁸²

In *Thompson v. Western States Medical Center*,⁸³ the Court struck down section 503A of the Food, Drug, and Cosmetic Act, 21 U.S.C. § 353a, which “exempts ‘compounded drugs’ from the Food and Drug Administration’s standard drug approval requirements as long as the providers of those drugs abide by several restrictions, including that they refrain from advertising or promoting particular compounded drugs.”⁸⁴ “Drug compounding,” the Court explained, “is a process by which a pharmacist or doctor combines, mixes, or alters ingredients to create a medication tailored to the needs of an individual patient.”⁸⁵ The Court found that the speech restriction in this case served “important” governmental interests, but that, “[e]ven assuming” that it directly advances these interests, it failed the fourth prong of the *Central Hudson* test.⁸⁶ In considering the fourth prong, the Court wrote that “the Government has failed to demonstrate that the speech restrictions are ‘not more extensive than is necessary to serve’” the governmental interests, as “[s]everal non-speech-related means [of serving those interests] might be possible here.”⁸⁷ “If the First Amendment means anything,” the Court added, “it means that regulating speech must be a last — not first — resort. Yet here it seems to have been the first strategy the Government thought to try.”⁸⁸ The Court noted that it had “rejected the notion that the Government has an interest in preventing the dissemination of truthful

⁷⁹ *Id.*

⁸⁰ *Id.* at 567.

⁸¹ *Id.* at 569.

⁸² *Id.*

⁸³ 535 U.S. 357 (2002).

⁸⁴ *Id.* at 360.

⁸⁵ *Id.* at 360-361.

⁸⁶ *Id.* at 369, 371.

⁸⁷ *Id.* at 371, 372.

⁸⁸ *Id.* at 373.

commercial information in order to prevent members of the public from making bad decisions with the information.”⁸⁹

In saying that the speech restrictions were “not more extensive than is necessary to serve” the governmental interests, the Court was quoting from the fourth prong of the *Central Hudson* test, but nowhere in *Thompson* did it note that it had previously modified the fourth prong to require merely a reasonable “fit” between the legislature’s ends and means, and not use of the least restrictive means to serve the governmental interests. Rather, it wrote: “In previous cases addressing this final prong of the *Central Hudson* test, we have made clear that if the Government could achieve its interests in a manner that does not restrict speech, or that restricts less speech, the Government must do so.”⁹⁰ Yet the Court did not state that it intended to overrule its reasonable “fit” construction of the fourth prong.

Defamation

Defamation (libel is written defamation; slander is oral defamation) is the intentional communication of a falsehood about a person, to someone other than that person, that injures the person’s reputation. The injured person may sue and recover damages under state law, unless state law makes the defamation privileged (for example, a statement made in a judicial, legislative, executive, or administrative proceeding is ordinarily privileged). Being required to pay damages for a defamatory statement restricts one’s freedom of speech; defamation, therefore, constitutes an exception to the First Amendment.

The Supreme Court, however, has granted limited First Amendment protection to defamation. The Court has held that public officials and public figures may not recover damages for defamation unless they prove, with “convincing clarity,” that the defamatory statement was made with “‘actual malice’ — that is, with knowledge that it was false or with reckless disregard of whether it was false or not.”⁹¹

The Court has also held that a private figure who sues a media defendant for defamation may not recover without some showing of fault, although not necessarily of actual malice (unless the relevant state law requires it). However, if a defamatory falsehood involves a matter of public concern, then even a private figure must show actual malice in order to recover presumed damages (i.e., not actual financial damages) or punitive damages.⁹²

⁸⁹ *Id.* at 374.

⁹⁰ *Id.* at 371.

⁹¹ *New York Times v. Sullivan*, 376 U.S. 254, 279-280 (1964); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967).

⁹² *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974).

Speech Harmful to Children

Speech that is otherwise fully protected by the First Amendment may be restricted in order to protect children. This is because the Court has “recognized that there is a compelling interest in protecting the physical and psychological well-being of minors.”⁹³ However, any restriction must be accomplished “‘by narrowly drawn regulations without unnecessarily interfering with First Amendment freedoms.’ It is not enough to show that the government’s ends are compelling; the means must be carefully tailored to achieved those ends.”⁹⁴

Thus, the government may prohibit the sale to minors of material that it deems “harmful to minors” (“so called ‘girlie’ magazines”), whether or not they are not obscene as to adults.⁹⁵ It may prohibit the broadcast of “indecent” language on radio and television during hours when children are likely to be in the audience, but it may not ban it around the clock unless it is obscene.⁹⁶ Federal law currently bans indecent

⁹³ *Sable Communications of California, Inc. v. FCC*, 492 U.S. 115, 126 (1989). A federal district court noted that, in cases that involve a restriction of minors’ access to sexually explicit material, “the Supreme Court’s jurisprudence does not require empirical evidence. Only some minimal amount of evidence is required....” *Playboy Entertainment Group, Inc. v. U.S.*, 30 F. Supp. 2d 702, 716 (D. Del. 1998); *aff’d*, 529 U.S. 803 (2000). By contrast, in cases not involving access of minors to sexually explicit material, the Supreme Court generally requires that the government, to justify a restriction even on speech with less than full First Amendment protection, “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.” *Turner Broadcasting System v. FCC*, 512 U.S. 622, 664 (1994) (incidental restriction on speech). See also, *Edenfield v. Fane*, 507 U.S. 761, 770-771 (1993) (restriction on commercial speech); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377, 392 (2000) (restriction on campaign contributions).

⁹⁴ *Id.* In the case of content-based regulations, narrow tailoring requires that the regulation be “the least restrictive means to further the articulated interest.”

⁹⁵ *Ginsberg v. New York*, 390 U.S. 629, 631 (1968).

⁹⁶ *Federal Communications Commission v. Pacifica Foundation*, 438 U.S. 726 (1978); *Action for Children’s Television v. Federal Communications Commission*, 58 F.3d 654 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996). The Supreme Court has stated that, to be indecent, a broadcast need not have prurient appeal; “the normal definition of ‘indecent’ refers merely to nonconformance with accepted standards of morality,” *Pacifica*, 438 U.S. at 740. The FCC holds that the concept “is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.” *Id.* at 732. The FCC applied this definition in a case in which the singer Bono said at the Golden Globe Awards that his award was “[***]ing brilliant.” The FCC Enforcement Bureau found that use of the word “as an adjective or expletive to emphasize an exclamation” did not fall within the definition of “indecent.” The Commission, however, overturned the Bureau, ruling that “any use of that word or a variation, in any context, inherently has a sexual connotation....” In the Matter of Complaints Against Various Broadcast Licensees Regarding Their Airing of the “Golden Globe Awards” Program, File No. EB-03-IH-0110 (March 3, 2004). In a later case, however, which the Supreme Court

(continued...)

broadcasts between 6 a.m. and 10 p.m.⁹⁷ Similarly, Congress may not ban dial-a-porn, but it may (as it does at 47 U.S.C. § 223) prohibit it from being made available to minors or to persons who have not previously requested it in writing.⁹⁸

In *Reno v. American Civil Liberties Union*, the Supreme Court declared unconstitutional two provisions of the Communications Decency Act (CDA) that prohibited indecent communications to minors on the Internet.⁹⁹ The Court held that the CDA’s “burden on adult speech is unacceptable if less restrictive alternatives would be at least as effective in achieving the legitimate purpose that the statute was enacted to serve.” “[T]he governmental interest in protecting children from harmful materials ... does not justify an unnecessarily broad suppression of speech addressed to adults. As we have explained, the Government may not ‘reduc[e] the adult population ... to ... only what is fit for children.’”¹⁰⁰

The Court distinguished the Internet from radio and television because (1) “[t]he CDA’s broad categorical prohibitions are not limited to particular times and are not dependent on any evaluation by an agency familiar with the unique characteristics of the Internet,” (2) the CDA imposes criminal penalties, and the Court has never decided whether indecent broadcasts “would justify a criminal prosecution,” and (3) radio and television, unlike the Internet, have, “as a matter of history ... ‘received the most limited First Amendment protection, ... in large part because warnings could not adequately protect the listener from unexpected program content.... [On the Internet], the risk of encountering indecent material by accident is remote because a series of affirmative steps is required to access specific material.’”

In 1998, Congress enacted the Child Online Protection Act (COPA), P.L. 105-277, title XIV, to replace the CDA. COPA differs from the CDA in two main respects: (1) it prohibits communication to minors only of “material that is harmful to minors,” rather than material that is indecent, and (2) it applies only to communications for commercial purposes on publicly accessible websites. COPA

⁹⁶ (...continued)

has agreed to hear, the Second Circuit held “that the FCC’s new policy regarding ‘fleeting expletives’ is arbitrary and capricious under the Administrative Procedure Act.” *Fox Television Stations, Inc. v. Federal Communications Commission*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, No. 07-582 (U.S. March 17, 2008). For additional information, including an analysis of whether prohibiting the broadcast of “indecent” words regardless of context would violate the First Amendment, see CRS Report RL32222, *Regulation of Broadcast Indecency: Background and Legal Analysis*, by Henry Cohen and Kathleen Ann Ruane.

⁹⁷ For additional information, see CRS Report 95-804, *Obscenity and Indecency: Constitutional Principles and Federal Statutes*, by Henry Cohen. Restrictions on cable television intended to protect children are discussed in that report and also in this report under “Radio and Television.”

⁹⁸ *Sable Communications of California, Inc. v. Federal Communications Commission*, 492 U.S. 115 (1989); *Dial Information Services v. Thornburgh*, 938 F.2d 1535 (2d Cir. 1991), *cert. denied*, 502 U.S. 1072 (1992).

⁹⁹ 521 U.S. 844 (1997).

¹⁰⁰ *Id.* at 874-875.

has not taken effect, because a constitutional challenge was brought and the district court, finding a likelihood that the plaintiffs would prevail, issued a preliminary injunction against enforcement of the statute, pending a trial on the merits. The Third Circuit affirmed, but, in 2002, in *Ashcroft v. American Civil Liberties Union*, the Supreme Court held that COPA's use of community standards to define "material that is harmful to minors" does not by itself render the statute unconstitutional. The Supreme Court, however, did not remove the preliminary injunction against enforcement of the statute, and remanded the case to the Third Circuit to consider whether it is unconstitutional nonetheless. In 2003, the Third Circuit again found the plaintiffs likely to prevail and affirmed the preliminary injunction. In 2004, the Supreme Court affirmed the preliminary injunction because it found that the government had failed to show that filtering prohibited material would not be as effective in accomplishing Congress's goals. It remanded the case for trial, however, and did not foreclose the district court from concluding otherwise.¹⁰¹ On March 22, 2007, the district court found COPA unconstitutional and issued a permanent injunction against its enforcement. The grounds for its decision were that "COPA is not narrowly tailored to Congress' compelling interest," the Attorney General "failed to meet his burden of showing that COPA is the least restrictive, most effective alternative in achieving the compelling interest," and "COPA is impermissibly vague and overbroad."¹⁰²

Children's First Amendment Rights

In a case upholding high school students' right to wear black arm bands to protest the war in Vietnam, the Supreme Court held that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁰³ They do, however, shed them to some extent. The Supreme Court has upheld the suspension of a student for using a sexual metaphor in a speech nominating another student for a student office.¹⁰⁴ It has upheld censorship of a student newspaper produced as part of the school curriculum.¹⁰⁵ (Lower courts have indicated that non-school-sponsored student writings may not be censored.¹⁰⁶)

¹⁰¹ *American Civil Liberties Association v. Reno*, 31 F. Supp. 2d 473 (E.D. Pa. 1999), *aff'd*, 217 F.3d 162 (3d Cir. 2000), *vacated and remanded sub nom. Ashcroft v. American Civil Liberties Union*, 535 U.S. 564 (2002), *aff'd on remand*, 322 F.3d 240 (3d Cir. 2003), *aff'd and remanded*, 542 U.S. 656 (2004). *See also*, footnote 8 of this report.

¹⁰² *American Civil Liberties Union v. Gonzales*, 478 F. Supp. 2d 775 (E.D. Pa., March 27, 2007).

¹⁰³ *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969).

¹⁰⁴ *Bethel School District No. 463 v. Fraser*, 478 U.S. 675 (1986).

¹⁰⁵ *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁰⁶ E.g., *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988); *Romano v. Harrington*, 725 F. Supp. 687 (E.D. N.Y. 1989).

A plurality of the justices found that a school board must be permitted “to establish and apply their curriculum in such a way as to transmit community values,” but that it may not remove school library books in order to deny access to ideas with which it disagrees for political or religious reasons.¹⁰⁷ The Supreme Court has also held that Congress may not prohibit people 17 or younger from making contributions to political candidates and contributions or donations to political parties.¹⁰⁸ Most recently, in *Morse v. Frederick*, the Court held that a school could punish a pupil for displaying a banner that read, “BONG HiTS 4 JESUS,” because these words could reasonably be interpreted as “promoting illegal drug use.”¹⁰⁹ The Court indicated that it might have reached a different result if the banner had addressed the issue of “the criminalization of drug use or possession.”¹¹⁰ Justice Alito, joined by Justice Kennedy, wrote a concurring opinion stating that they had joined the majority opinion “on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction on speech that can plausibly be interpreted as commenting on any political or social issue, including speech on issues such as ‘the wisdom of the war on drugs or of legalizing marijuana for medicinal use.’”¹¹¹ As *Morse v. Frederick* was a 5-to-4 decision, Justices Alito’s and Kennedy’s votes were necessary for a majority and therefore should be read as limiting the majority opinion with respect to future cases.

Time, Place, and Manner Restrictions

Even speech that enjoys the most extensive First Amendment protection may be subject to “regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.”¹¹² In the case in which this language appears, the Supreme Court allowed a city ordinance that banned picketing “before or about” any residence to be enforced to prevent picketing outside the residence of a doctor who performed abortions, even though the picketing occurred on a public street. The Court noted that “[t]he First Amendment permits the government to prohibit offensive speech as intrusive when the ‘captive’ audience cannot avoid the objectionable speech.”¹¹³

Thus, the Court, while acknowledging that music, as a form of expression and communication, is protected under the First Amendment, upheld volume restrictions

¹⁰⁷ Board of Education, Island Trees School District v. Pico, 457 U.S. 853, 864 (1982). The Court noted that “nothing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools.” *Id.* at 871.

¹⁰⁸ *McConnell v. Federal Election Commission*, 540 U.S. 93, 231-232 (2003).

¹⁰⁹ 127 S. Ct. 2618, 2624 (2007).

¹¹⁰ *Id.* at 2625.

¹¹¹ *Id.* at 2636.

¹¹² *Frisby v. Schultz*, 487 U.S. 474, 481 (1988).

¹¹³ *Id.* at 487.

placed on outdoor music in order to prevent intrusion on those in the area.¹¹⁴ Other significant governmental interests, besides protection of captive audiences, may justify content-neutral time, place, and manner restrictions. For example, in order to prevent crime and maintain property values, a city may place zoning restrictions on “adult” theaters and bookstores.¹¹⁵ And, in order to maintain the orderly movements of crowds at a state fair, a state may limit the distribution of literature to assigned locations.¹¹⁶

However, a time, place, and manner restriction will not be upheld in the absence of sufficient justification or if it is not narrowly tailored. Thus, the Court held unconstitutional a total restriction on displaying flags or banners on public sidewalks surrounding the Supreme Court.¹¹⁷ And a time, place, and manner restriction will not be upheld if it fails to “leave open ample alternative channels for communication.” Thus, the Court held unconstitutional an ordinance that prohibited the display of signs from residences, because “[d]isplaying a sign from one’s own residence often carries a message quite distinct from placing the same sign someplace else....”¹¹⁸

When a court issues an *injunction* that restricts the time, place, or manner of a particular form of expression, because prior restraint occurs, “a somewhat more stringent application of general First Amendment principles” is required than is required in the case of a generally applicable statute or ordinance that restricts the time, place, or manner of speech.¹¹⁹ Instead of asking whether the restrictions are “narrowly tailored to serve a significant governmental interest,” a court must ask “whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest.”¹²⁰ Applying this standard, the Supreme Court, in *Madsen v. Women’s Health Center, Inc.*, upheld a state court injunction that had ordered the establishment of a 36-foot buffer zone on a public street outside a particular health clinic that performed abortions. The Court in this case also upheld an injunction against noise during particular hours, but found that

¹¹⁴ *Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

¹¹⁵ *Young v. American Mini Theaters, Inc.*, 427 U.S. 50 (1976); *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). Although singling out “adult” material might appear to be a content-based distinction, the Court in *Renton* said that regulations of speech are content-neutral if they “are *justified* without reference to the content of the regulated speech.” 475 U.S. at 48 (emphasis in original). Zoning restrictions are justified as measures to “prevent crime, protect the city’s retail trade, maintain property values, and generally ‘protec[t] and preserv[e] the quality of [the city’s] neighborhoods, commercial districts, and the quality of urban life,’ not to suppress the expression of unpopular views.” *Id.*

¹¹⁶ *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981).

¹¹⁷ *United States v. Grace*, 461 U.S. 171 (1983).

¹¹⁸ *City of Ladue v. Gilleo*, 512 U.S. 43 (1994).

¹¹⁹ *Madsen v. Women’s Health Center, Inc.*, 512 U.S. 753, 765 (1994). In this case, the Court held that the challenged injunction was content-neutral, even though it was directed at abortion protestors, because its purpose was to protect patients, not to interfere with the protestors’ message.

¹²⁰ *Id.* This is not “prior restraint analysis,” which courts apply to content-based injunctions; see, “Prior Restraint,” *supra*.

a “broad prohibition on all ‘images observable’ burdens speech more than necessary to achieve the purpose of limiting threats to clinic patients or their families.”¹²¹ It also struck down a prohibition on all uninvited approaches of persons seeking the services of the clinic, and a prohibition against picketing, within 300 feet of the residences of clinic staff. The Court distinguished the 300-foot restriction from the ordinance it had previously upheld that banned picketing “before or about” any residence.¹²²

In *Schenck v. Pro-Choice Network of Western New York*, the Court applied *Madsen* to another injunction that placed restrictions on demonstrating outside an abortion clinic.¹²³ The Court upheld the portion of the injunction that banned “demonstrating within fifteen feet from either side or edge of, or in front of, doorways or doorway entrances, parking lot entrances, driveways and driveway entrances of such facilities” — what the Court called “fixed buffer zones.” It struck down a prohibition against demonstrating “within fifteen feet of any person or vehicles seeking access to or leaving such facilities” — what it called “floating buffer zones.” The Court cited “public safety and order” in upholding the fixed buffer zones, but it found that the floating buffer zones “burden more speech than is necessary to serve the relevant governmental interests” because they make it “quite difficult for a protester who wishes to engage in peaceful expressive activity to know how to remain in compliance with the injunction.” The Court also upheld a “provision, specifying that once sidewalk counselors who had entered the buffer zones were required to ‘cease and desist’ their counseling, they had to retreat 15 feet from the people they had been counseling and had to remain outside the boundaries of the buffer zones.”

In *Hill v. Colorado*, the Court upheld a Colorado statute that makes it unlawful, within 100 feet of the entrance to any health care facility, to “knowingly approach” within eight feet of another person, without that person’s consent, “for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.”¹²⁴ This decision is significant because it upheld a statute that applies to everyone, and not, as in *Madsen* and *Schenck*, merely an injunction directed to particular parties. The Court found the statute to be a content-neutral time, place, and manner regulation of speech that “reflects an acceptable balance between the constitutionally protected rights of law-abiding speakers and the interests of unwilling listeners....”¹²⁵ The restrictions are content-neutral because they regulate only the places where some speech may occur, and because they apply equally to all demonstrators, regardless of viewpoint. Although the restrictions do not apply to all speech, the “kind of cursory examination” that might be required to distinguish casual conversation from protest,

¹²¹ *Id.* at 773.

¹²² See, text accompanying notes 112-113, *supra*.

¹²³ 519 U.S. 357 (1997).

¹²⁴ 530 U.S. 703, 707 (2000).

¹²⁵ *Id.* at 714.

education, or counseling is not “problematic.”¹²⁶ The law is “narrowly tailored” to achieve the state’s interests. The eight-foot restriction does not significantly impair the ability to convey messages by signs, and ordinarily allows speakers to come within a normal conversational distance of their targets. Because the statute allows the speaker to remain in one place, persons who wish to hand out leaflets may position themselves beside entrances near the path of oncoming pedestrians, and consequently are not deprived of the opportunity to get the attention of persons entering a clinic.

Incidental Restrictions

Some laws are not designed to limit freedom of expression, but nevertheless can have that effect. For example, when a National Park Service regulation prohibiting camping in certain parks was applied to prohibit demonstrators, who were attempting to call attention to the plight of the homeless, from sleeping in certain Washington, D.C. parks, it had the effect of limiting the demonstrators’ freedom of expression. Nevertheless, the Court found that application of the regulation did not violate the First Amendment because the regulation was content-neutral and was narrowly focused on a substantial governmental interest in maintaining parks “in an attractive and intact condition.”¹²⁷

The Supreme Court has said that an incidental restriction on speech is constitutional if it is not “greater than necessary to further a substantial governmental interest.”¹²⁸ However, the Court has made clear that an incidental restriction, unlike a content-based restriction, “need not be the least restrictive or least intrusive means” of furthering a governmental interest. Rather, the restriction must be “narrowly tailored,” and “the requirement of narrow tailoring is satisfied ‘so long as the ... regulation promotes a substantial governmental interest that would be achieved less effectively absent the regulation.’”¹²⁹

The Court has noted that the standard for determining the constitutionality of an incidental restriction “in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions.”¹³⁰ Thus, the restriction on camping

¹²⁶ *Id.* at 722.

¹²⁷ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

¹²⁸ *San Francisco Arts & Athletics, Inc. v. United States Olympic Committee*, 483 U.S. 522, 537 (1987). This is known as the “*O’Brien* test,” which was first formulated in the case cited in note 138, *infra*.

¹²⁹ *Ward v. Rock Against Racism*, 491 U.S. 781, 798-799 (1989). This case makes clear that, although both “strict scrutiny” and the *O’Brien* test for incidental restrictions require “narrow tailoring,” “the same degree of tailoring is not required” under the two; under the *O’Brien* test, “least-restrictive-alternative analysis is wholly out of place.” *Id.* at 798-799 n.6. It is also out of place in applying the *Central Hudson* commercial speech test.

¹³⁰ *Clark*, *supra* note 127, 468 U.S. at 298. And, “the validity of time, place, or manner restrictions is determined under standards very similar to those applicable in the commercial (continued...)”

may be viewed as a restriction on conduct that only incidentally affects speech, or, if one views sleeping in connection with a demonstration as expressive conduct, then the restriction may be viewed as a time, place, and manner restriction on expressive conduct. In either case, as long as the restriction is content-neutral, the same standard for assessing its constitutionality will apply.

In 1991, the Supreme Court held that the First Amendment does not prevent the government from requiring that dancers wear “pasties” and a “G-string” when they dance (non-obscenely) in “adult” entertainment establishments. Indiana sought to enforce a state statute prohibiting public nudity against two such establishments, which asserted First Amendment protection. The Court found that the statute proscribed public nudity across the board, not nude dancing as such, and therefore imposed only an incidental restriction on expression.¹³¹ In 2000, the Supreme Court again upheld the application of a statute prohibiting public nudity to an “adult” entertainment establishment. It found that the statute was intended “to combat harmful secondary effects,” such as “prostitution and other criminal activity.”¹³²

In a 1994 case, the Supreme Court apparently put more teeth into the test for incidental restrictions by remanding the case for further proceedings rather than deferring to Congress’s judgment as to the necessity for the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992.¹³³ To justify an incidental restriction of speech, the Court wrote, the government “must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way.”¹³⁴ The Court added that its

obligation to exercise independent judgment when First Amendment rights are implicated is not a license to reweigh the evidence *de novo*, or to replace Congress’ factual predictions with our own. Rather, it is to assure that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence.¹³⁵

¹³⁰ (...continued)

speech context.” *United States v. Edge Broadcasting Co.*, *supra* note 40, 509 U.S. at 430.

¹³¹ *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

¹³² *Erie v. Pap’s A.M.*, 529 U.S. 277 (2000).

¹³³ *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 512 U.S. 622 (1994), discussed under “Radio and Television,” below. David Cole describes *Turner* as “effectively giving bite to the *O’Brien* standard.” He writes that, “if the Court had applied the *O’Brien* standard the way it applied that standard in *O’Brien*, it should have upheld the ‘must carry’ rule. The *O’Brien* standard is extremely deferential.” *The Perils of Pragmatism*, *LEGAL TIMES*, July 25, 1994, at S27, S30.

¹³⁴ *Id.* at 664.

¹³⁵ *Id.* at 666.

Symbolic Speech

“The First Amendment literally forbids the abridgment only of ‘speech,’ but we have long recognized that its protection does not end at the spoken or written word.”¹³⁶ Thus wrote the Supreme Court when it held that a statute prohibiting flag desecration violated the First Amendment. Such a statute is not content-neutral if it is designed to protect “a perceived need to preserve the flag’s status as a symbol of our Nation and certain national ideals.”¹³⁷

By contrast, the Court upheld a federal statute that made it a crime to burn a draft card, finding that the statute served “the Government’s substantial interest in assuring the continuing availability of issued Selective Service certificates,” and imposed only an “appropriately narrow” incidental restriction of speech.¹³⁸ Even if Congress’s purpose in enacting the statute had been to suppress freedom of speech, “this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive.”¹³⁹

In 1992, in *R.A.V. v. City of St. Paul*, the Supreme Court struck down an ordinance that prohibited the placing on public or private property of a symbol, such as “a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others, on the basis of race, color, creed, religion or gender.”¹⁴⁰ Read literally, this ordinance would clearly violate the First Amendment, because, “[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.”¹⁴¹ In this case, however, the Minnesota Supreme Court had construed the ordinance to apply only to conduct that amounted to fighting words. Therefore, the question for the Supreme Court was whether the ordinance, construed to apply only to fighting words, was constitutional.

The Court held that it was not, because, although fighting words may be proscribed “*because of their constitutionally proscribable content*,” they may not “be made the vehicles for content discrimination unrelated to their distinctively proscribable content.”¹⁴² Thus, the government may proscribe fighting words, but it may not make the further content discrimination of proscribing particular fighting words on the basis of hostility “towards the underlying message expressed.”¹⁴³ In this case, the ordinance banned fighting words that insult “on the basis of race, color,

¹³⁶ *Texas v. Johnson*, 491 U.S. 397 (1989).

¹³⁷ *United States v. Eichman*, 496 U.S. 310 (1990).

¹³⁸ *United States v. O’Brien*, 391 U.S. 367, 382 (1968).

¹³⁹ *Id.* at 383.

¹⁴⁰ 505 U.S. 377 (1992).

¹⁴¹ *Texas v. Johnson*, *supra* note 136, at 414.

¹⁴² *R.A.V.*, *supra* note 140, at 384-385 (emphasis in original).

¹⁴³ *Id.* at 386.

creed, religion or gender,” but not “for example, on the basis of political affiliation, union membership, or homosexuality.... The First Amendment does not permit St. Paul to impose special prohibitions on those speakers who express views on disfavored subjects.”¹⁴⁴ This decision does not, of course, preclude prosecution for illegal conduct that may accompany cross burning, such as trespass, arson, or threats. As the Court put it: “St. Paul has sufficient means at its disposal to prevent such behavior without adding the First Amendment to the fire.”¹⁴⁵

In a subsequent case, the Supreme Court held that its opinion in *R.A.V.* did not mean that statutes that impose additional penalties for crimes that are motivated by racial hatred are unconstitutional. Such statutes imposed enhanced sentences not for bigoted thought, but for the commission of crimes that can inflict greater and individual and societal harm because of their bias-inspired motivation. A defendant’s motive has always been a factor in sentencing, and even in defining crimes; “Title VII [of the Civil Rights Act of 1964], for example, makes it unlawful for an employer to discriminate against an employee ‘because of such individual’s race, color, religion, sex, or national origin.’”¹⁴⁶

In *Virginia v. Black*, the Court held that its opinion in *R.A.V.* did not make it unconstitutional for a state to prohibit burning a cross with the intent of intimidating any person or group of persons.¹⁴⁷ Such a prohibition does not discriminate on the basis of a defendant’s beliefs — “as a factual matter it is not true that cross burners direct their intimidating conduct solely to racial or religious minorities.... The First Amendment permits Virginia to outlaw cross burning done with the intent to intimidate because burning a cross is a particularly virulent form of intimidation. Instead of prohibiting all intimidating messages, Virginia may choose to regulate this subset of intimidating messages....”¹⁴⁸

¹⁴⁴ *Id.* at 391.

¹⁴⁵ *Id.* at 396.

¹⁴⁶ *Wisconsin v. Mitchell*, 508 U.S. 476, 487 (1993) (emphasis added by the Court to its quotation of the statute).

¹⁴⁷ *Virginia v. Black*, 538 U.S. 343 (2003). A plurality held, however, that a statute may not presume, from the fact that a defendant burned a cross, that he had an intent to intimidate. The state must prove that he did, as “a burning cross is not always intended to intimidate,” but may constitute a constitutionally protected expression of opinion. *Id.* at 365.

¹⁴⁸ *Id.* at 363.

Compelled Speech

On occasion, the government attempts to compel speech rather than to restrict it. For example, in *Riley v. National Federation of the Blind of North Carolina, Inc.*, a North Carolina statute required professional fundraisers for charities to disclose to potential donors the gross percentage of revenues retained in prior charitable solicitations.¹⁴⁹ The Supreme Court held this unconstitutional, writing

There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees “freedom of speech,” a term necessarily comprising the decision of both what to say and what *not* to say.¹⁵⁰

In the commercial speech context, by contrast, the Supreme Court held, in *Zauderer v. Office of Disciplinary Counsel*, that an advertiser’s

constitutionally protected interest in *not* providing any particular factual information in his advertising is minimal.... [A]n advertiser’s rights are reasonably protected as long as disclosure requirements are reasonably related to the State’s interest in preventing deception of consumers.... The right of a commercial speaker not to divulge accurate information regarding his services is not ... a fundamental right.¹⁵¹

In *Zauderer*, the Supreme Court upheld an Ohio requirement that advertisements by lawyers that mention contingent-fee rates disclose whether percentages are computed before or after deduction of court costs and expenses.

In *Meese v. Keene*, however, the Court upheld compelled disclosure in a noncommercial context.¹⁵² This case involved a provision of the Foreign Agents Registration Act of 1938, which requires that, when an agent of a foreign principal seeks to disseminate foreign “political propaganda,” he must label such material with certain information, including his identity, the principal’s identity, and the fact that he has registered with the Department of Justice. The material need not state that it is “political propaganda,” but one agent objected to the statute’s designating material by that term, which he considered pejorative. The agent wished to exhibit, without the required labels, three Canadian films on nuclear war and acid rain that the Justice Department had determined were “political propaganda.”

¹⁴⁹ 487 U.S. 781 (1988). In *Illinois ex rel. Madigan v. Telemarketing Associates, Inc.*, 538 U.S. 600, 605 (2003), the Supreme Court held that a fundraiser who retained 85 percent of gross receipts from donors, but falsely represented that “a significant amount of each dollar donated would be paid over to” a charitable organization, could be sued for fraud. “So long as the emphasis is on what the fundraisers misleadingly convey, and not on percentage limitations on solicitors’ fees *per se*, such [fraud] actions need not impermissibly chill protected speech.” *Id.* at 619.

¹⁵⁰ 487 U.S. 781, 796-797 (1988) (emphasis in original).

¹⁵¹ 471 U.S. 626, 651, 652 n.14 (1985) (emphasis in original).

¹⁵² 481 U.S. 465 (1987).

In *Meese v. Keene*, the Supreme Court upheld the statute’s use of the term, essentially because it considered the term not necessarily pejorative. On the subject of compelled disclosure, the Court wrote:

Congress did not prohibit, edit, or restrain the distribution of advocacy materials.... To the contrary, Congress simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda.¹⁵³

One might infer from this that compelled disclosure, in a noncommercial context, gives rise to no serious First Amendment issue, and nothing in the Court’s opinion would seem to refute this inference. Thus, it seems impossible to reconcile this opinion with the Court’s holding a year later in *Riley* (which did not mention *Meese v. Keene*) that, in a noncommercial context, there is no difference of constitutional significance between compelled speech and compelled silence.

In *Meese v. Keene*, the Court did not mention earlier cases in which it had struck down laws compelling speech in a noncommercial context. In *Wooley v. Maynard*, the Court struck down a New Hampshire statute requiring motorists to leave visible on their license plates the motto “Live Free or Die.”¹⁵⁴ In *West Virginia State Board of Education v. Barnette*, the Court held that a state may not require children to pledge allegiance to the United States.¹⁵⁵ In *Miami Herald Publishing Co. v. Tornillo*, the Court struck down a Florida statute that required newspapers to grant political candidates equal space to reply to the newspapers’ criticism and attacks on their record.¹⁵⁶

The Court decided two cases in its 1994-1995 term involving compelled speech. In *McIntyre v. Ohio Elections Commission*, the Court, applying strict scrutiny, struck down a compelled disclosure requirement by holding unconstitutional a state statute that prohibited the distribution of anonymous campaign literature. “The State,” the Court wrote, “may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.”¹⁵⁷

In *Hurley v. Irish-American Gay Group of Boston*, the Court held that Massachusetts could not require private citizens who organize a parade to include among the marchers a group imparting a message — in this case support for gay rights — that the organizers do not wish to convey. Massachusetts had attempted

¹⁵³ *Id.* at 480.

¹⁵⁴ 430 U.S. 705 (1977).

¹⁵⁵ 319 U.S. 624 (1943).

¹⁵⁶ 418 U.S. 241 (1974). In *Pacific Gas & Electric Co. v. Public Utilities Commission of California*, 475 U.S. 1 (1986), the Court held that a state may not require a privately owned utility company to include in its billing envelopes views of a consumer group with which it disagrees. While a plurality opinion adhered to by four justices relied heavily on *Tornillo*, there was not a Court majority consensus as to rationale.

¹⁵⁷ 514 U.S. 334, 357 (1995).

to apply its statute prohibiting discrimination on the basis of sexual orientation in any place of public accommodations, but the Court held that parades are a form of expression, and the state’s “[d]isapproval of a private speaker’s statement does not legitimize use of the Commonwealth’s power to compel the speaker to alter the message by including one more acceptable to others.”¹⁵⁸

In *Glickman v. Wileman Brothers & Elliott, Inc.*, the Supreme Court upheld the constitutionality of marketing orders promulgated by the Secretary of Agriculture that imposed assessments on fruit growers to cover the cost of generic advertising of fruits.¹⁵⁹ The First Amendment, the Court held, does not preclude the government from “compel[ling] financial contributions that are used to fund advertising,” provided that such contributions do not finance “political or ideological” views.¹⁶⁰

In *United States v. United Foods, Inc.*, the Court struck down a federal statute that mandated assessments on handlers of fresh mushrooms to fund advertising for the product.¹⁶¹ The Court did not apply the *Central Hudson* commercial speech test, but rather found “that the mandated support is contrary to First Amendment principles set forth in cases involving expression by groups which include persons who object to the speech, but who, nevertheless, must remain members of the group by law or necessity.”¹⁶² It distinguished *Glickman* on the ground that “[i]n *Glickman* the mandated assessments for speech were ancillary to a more comprehensive program restricting marketing authority. Here, for all practical purposes, the advertising itself, far from being ancillary, is the principal object of the regulatory scheme.”¹⁶³

In *Johanns v. Livestock Marketing Association*, the Supreme Court upheld a federal statute that directed the Secretary of Agriculture to use funds raised by an assessment on cattle sales and importation to promote the marketing and consumption of beef and beef products.¹⁶⁴ The Court found that, unlike in *Glickman* and *United Foods*, where “the speech was, or was presumed to be, that of an entity other than the government itself,” in *Johanns* the promotional campaign constituted the government’s own speech and therefore was “exempt from First Amendment scrutiny.”¹⁶⁵ It did not matter “whether the funds for the promotions are raised by

¹⁵⁸ 515 U.S. 557, 581 (1995).

¹⁵⁹ 521 U.S. 457 (1997).

¹⁶⁰ *Id.*, 521 U.S. at 471, 472. The Court found that the marketing orders did not raise a First Amendment issue, but “simply a question of economic policy for Congress and the Executive to resolve.” The *Central Hudson* test (see “Commercial Speech,” above), therefore, was inapplicable. *Id.* at 474.

¹⁶¹ 533 U.S. 405 (2001).

¹⁶² *Id.* at 413.

¹⁶³ *Id.* at 411.

¹⁶⁴ 544 U.S. 550 (2005).

¹⁶⁵ *Id.* at 559, 553.

general taxes or through targeted assessment.”¹⁶⁶ As for the plaintiffs’ contention “that crediting the advertising to ‘America’s Beef Producers’” attributes the speech to them, the Court found that, because the statute does not *require* such attribution, it does not violate the First Amendment, but the plaintiffs’ contention might form the basis for challenging the manner in which the statute is applied.¹⁶⁷

Radio and Television

Radio and television broadcasting has more limited First Amendment protection than other media. In *Red Lion Broadcasting Co. v. Federal Communications Commission*, the Supreme Court invoked what has become known as the “scarcity rationale” to justify this discrimination:

Where there are substantially more individuals who want to broadcast than there are frequencies to allocate, it is idle to posit an unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.¹⁶⁸

The Court made this statement in upholding the constitutionality of the Federal Communication Commission’s “fairness doctrine,” which required broadcast media licensees to provide coverage of controversial issues of interest to the community and to provide a reasonable opportunity for the presentation of contrasting viewpoints on such issues.

Later, in *Federal Communications Commission v. Pacifica Foundation*, the Court upheld the power of the FCC “to regulate a radio broadcast that is indecent but not obscene.”¹⁶⁹ The Court cited two distinctions between broadcasting and other media: “First, the broadcast media have established a uniquely pervasive presence in the lives of all Americans ... confront[ing] the citizen, not only in public, but also in the privacy of the home,” and “Second, broadcasting is uniquely accessible to children.”¹⁷⁰

In *Turner Broadcasting System, Inc. v. Federal Communications Commission*, the Court declined to question the continuing validity of the scarcity rationale, but held that “application of the more relaxed standard of scrutiny adopted in *Red Lion*

¹⁶⁶ *Id.* at 562.

¹⁶⁷ *Id.* at 564-566.

¹⁶⁸ 395 U.S. 367, 388 (1969).

¹⁶⁹ 438 U.S. 726, 729 (1978).

¹⁷⁰ *Id.* at 748-749. In *Action for Children’s Television v. Federal Communications Commission* (ACT III), 58 F.3d 654, 660 (D.C. Cir. 1995) (en banc), *cert. denied*, 516 U.S. 1043 (1996), the court of appeals, in upholding a ban on indecent broadcasts from 6 a.m. to 10 p.m., wrote: “While we apply strict scrutiny to regulations of this kind regardless of the medium affected by them, our assessment of whether section 16(a) survives that scrutiny must necessarily take into account the unique context of the broadcast media.” See, “Speech Harmful to Children,” *supra*.

and other broadcast cases is inapt when determining the First Amendment validity of cable regulation.”¹⁷¹ In *Turner*, however, the Court found the “must-carry” provisions of the Cable Television Consumer Protection and Competition Act of 1992, which require cable television systems to devote a portion of their channels to the transmission of local broadcast television stations, to be content-neutral in application and subject only to the test for incidental restrictions on speech. Attempting to apply this test, however, the Court found “genuine issues of material fact still to be resolved” as to whether “broadcast television is in jeopardy” and as to “the actual effects of must-carry on the speech of cable operators and cable programmers.”¹⁷² It therefore remanded the case for further proceedings.¹⁷³

In *Denver Area Educational Telecommunications Consortium, Inc. v. Federal Communications Commission*, a plurality of the Supreme Court (four justices) apparently retreated from the Court’s position in *Turner* that cable television is entitled to full First Amendment protection.¹⁷⁴ In Part II of its opinion, the plurality upheld § 10(a) of the Cable Television Consumer Protection and Competition Act of 1992, 47 U.S.C. § 532(h), which permits cable operators to prohibit indecent material on leased access channels. (The Cable Communications Policy Act of 1984 had required cable operators to provide leased access and public access channels free of operator editorial control.) In upholding § 10(a), the Court, citing *Pacifica*, noted that cable television “is as ‘accessible to children’ as over-the-air broadcasting,” has also “established a uniquely pervasive presence in the lives of all Americans,” and can also “‘confron[t] the citizen’ in ‘the privacy of the home,’ ... with little or no prior warning.”¹⁷⁵ It also noted that its “distinction in *Turner*, ... between cable and broadcast television, relied on the inapplicability of the spectrum scarcity problem to cable,” but that that distinction “has little to do with a case that involves the effects of television viewing on children.”¹⁷⁶ Applying something less than strict scrutiny, the Court concluded “that § 10(a) is a sufficiently tailored response to an extraordinarily important problem.”¹⁷⁷

In Part III of *Denver Area*, a majority of the Court (six justices) struck down § 10(b) of the 1992 Act, 47 U.S.C. § 532(j), which required cable operators, if they do not prohibit such programming on leased access channels, to segregate it on a single channel and block that channel unless the subscriber requests access to it in writing. In this part of the opinion, the Court seemed to apply strict scrutiny, finding

¹⁷¹ *Turner*, *supra* note 133, 512 U.S. at 639.

¹⁷² *Id.* at 667-668.

¹⁷³ On remand, the lower court upheld the must-carry rules, and the Supreme Court affirmed, finding “that the must-carry provisions further important governmental interests; and ... do not burden substantially more speech than necessary to further those interests.” *Turner Broadcasting System, Inc. v. Federal Communications Commission*, 520 U.S. 180, 185 (1997).

¹⁷⁴ 518 U.S. 727 (1996).

¹⁷⁵ *Id.* at 745.

¹⁷⁶ *Id.* at 748.

¹⁷⁷ *Id.* at 743.

“that protection of children is a ‘compelling interest,’” but “that, not only is it not a ‘least restrictive alternative,’ and is not ‘narrowly tailored’ to meet its legitimate objective, it also seems considerably ‘more extensive than necessary.’”¹⁷⁸

In Part IV, which only three justices joined, the Court struck down § 10(c), 42 U.S.C. § 531 note, which permitted cable operators to prohibit indecent material on public access channels. Without specifying the level of scrutiny they were applying, the justices concluded “that the Government cannot sustain its burden of showing that § 10(c) is necessary to protect children or that it is appropriately tailored to secure that end.”¹⁷⁹

In *United States v. Playboy Entertainment Group, Inc.*, the Supreme Court made clear, as it had not in *Denver Consortium*, that strict scrutiny applies to content-based speech restriction on cable television.¹⁸⁰ The Court struck down a federal statute designed to “shield children from hearing or seeing images resulting from signal bleed,” which refers to blurred images or sounds that come through to non-subscribers. The statute required cable operators, on channels primarily dedicated to sexually oriented programming, either to fully scramble or otherwise fully block such channels, or to not provide such programming when a significant number of children are likely to be viewing it, which, under an FCC regulation meant to transmit the programming only from 10 p.m. to 6 a.m. The Court apparently assumed that the government had a compelling interest in protecting children from sexually oriented signal bleed, but found that Congress had not used the least restrictive means to do so. Congress in fact had enacted another provision that was less restrictive and that served the government’s purpose. This other provision requires that, upon request by a cable subscriber, a cable operator, without charge, fully scramble or fully block any channel to which a subscriber does not subscribe.

Freedom of Speech and Government Funding

The Supreme Court has held that Congress, incident to its power to provide for the general welfare (Art. I, § 8, cl. 1),

may attach conditions on the receipt of federal funds, and has repeatedly employed the power “to further broad policy objectives by conditioning receipt of federal moneys upon compliance with federal statutory and administrative directives.” ... The breadth of this power was made clear in *United States v. Butler*, 297 U.S. 1, 66 (1936), where the Court ... determined that “the power of Congress to authorize expenditure of public moneys for public purposes is not limited by the direct grants of legislative power found in the Constitution.” Thus, objectives not thought to be within Article I’s “enumerated legislative

¹⁷⁸ *Id.* at 755.

¹⁷⁹ *Id.* at 766.

¹⁸⁰ 529 U.S. 803 (2000).

fields,” *id.*, at 65, may nevertheless be attained through the use of the spending power and the conditional grant of federal funds.¹⁸¹

This means that Congress may regulate matters by attaching conditions to the receipt of federal funds that it might lack the power to regulate directly. However, the Court added, “other constitutional provisions may provide an independent bar to the conditional grant of federal funds.” One of these other constitutional provisions is the First Amendment. The Court has held, in fact, that the government “may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — especially, his interest in freedom of speech.”¹⁸² Similarly, in *Federal Communications Commission v. League of Women Voters*, the Court declared unconstitutional a federal statute that prohibited noncommercial television and radio stations that accepted federal funds from engaging in editorializing, even with nonfederal funds.¹⁸³

Congress would have the authority to prohibit television and radio stations from using the federal funds they accept to engage in editorializing, as the Court would view Congress in that case not as limiting speech, but as choosing to fund one activity to the exclusion of another.¹⁸⁴ “A refusal to fund protected activity [i.e., speech], without more, cannot be equated with the imposition of a ‘penalty’ on that activity.”¹⁸⁵ In *Rust v. Sullivan*, the case in which this quotation appears, the Court upheld a “gag order” that prohibited family planning clinics that accept federal funds from engaging in abortion counseling or referrals. The Court found that, in this case, “the government is not denying a benefit to anyone, but is instead simply insisting that public funds be spent for purposes for which they were authorized.”¹⁸⁶

In *Rust v. Sullivan*, the Court also indicated that it will allow Congress to condition the receipt of federal funds on acceptance of a limitation on the use of nonfederal funds as well as of federal funds, but apparently will not allow Congress to limit the use of nonfederal funds outside the project that accepts the federal funds.¹⁸⁷ Justice Blackmun, dissenting, feared that, “[u]nder the majority’s reasoning, the First Amendment could be read to tolerate *any* governmental

¹⁸¹ *South Dakota v. Dole*, 483 U.S. 203, 206-207 (1987).

¹⁸² *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (striking down state university’s refusal to renew teacher’s contract because of his public criticism of the college administration).

¹⁸³ 468 U.S. 364 (1984).

¹⁸⁴ See, *id.* at 400.

¹⁸⁵ *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

¹⁸⁶ *Id.* at 196.

¹⁸⁷ *Id.* at 196. Thus, a grantee who accepts federal funds to operate a family planning clinic may be prohibited from using nonfederal funds to provide abortion counseling through the clinic, but may not be prohibited from using nonfederal funds to provide abortion counseling outside the clinic.

restriction upon an employee’s speech so long as that restriction is limited to the funded workplace.”¹⁸⁸

The Court also “recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”¹⁸⁹

In *National Endowment for the Arts v. Finley*, the Supreme Court upheld the constitutionality of a federal statute (20 U.S.C. § 954(d)(1)) requiring the NEA, in awarding grants, to “tak[e] into consideration general standards of decency and respect for the diverse beliefs and values of the American public.”¹⁹⁰ The Court acknowledged that, if the statute were “applied in a manner that raises concern about the suppression of disfavored viewpoints,”¹⁹¹ then such application might be unconstitutional. The statute on its face, however, is constitutional because it “imposes no categorical requirement,” being merely “advisory.”¹⁹² “Any content-based considerations that may be taken into account in the grant-making process are a consequence of the nature of arts funding.... The ‘very assumption’ of the NEA is that grants will be awarded according to the ‘artistic worth of competing applications,’ and absolute neutrality is simply ‘inconceivable.’”¹⁹³

The Court also found that the terms of the statute, “if they appeared in a criminal statute or regulatory scheme, ... could raise substantial vagueness concerns.... But when the Government is acting as patron rather than as sovereign, the consequences of imprecision are not constitutionally severe.”¹⁹⁴

In *Legal Services Corporation v. Velazquez*, the Court struck down a provision of the Legal Services Corporation Act that prohibited recipients of Legal Services Corporation (LSC) funds (i.e., legal-aid organizations that provide lawyers to the poor in civil matters) from representing a client who seeks “to amend or otherwise challenge existing [welfare] law.”¹⁹⁵ This meant that, even with non-federal funds, a recipient of federal funds could not argue that a state welfare statute violated a federal statute or that a state or federal welfare law violated the U.S. Constitution.

¹⁸⁸ *Id.* at 213 (emphasis in original).

¹⁸⁹ *Id.* at 200.

¹⁹⁰ 524 U.S. 569, 572 (1998).

¹⁹¹ *Id.* at 587.

¹⁹² *Id.* at 581. Justice Scalia, in a concurring opinion, claimed that this interpretation of the statute “gutt[ed] it.” He believed that the statute “establishes content- and viewpoint-based criteria upon which grant applications are to be evaluated. And that is perfectly constitutional.” *Id.* at 590.

¹⁹³ *Id.* at 585.

¹⁹⁴ *Id.* at 588-589.

¹⁹⁵ 531 U.S. 533 (2001).

If a case was underway when such a challenge became apparent, the attorney had to withdraw.

The Supreme Court distinguished this situation from that in *Rust v. Sullivan* on the ground “that the counseling activities of the doctors under Title X amounted to governmental speech,” whereas “an LSC-funded attorney speaks on behalf of the client in a claim against the government for welfare benefits.”¹⁹⁶ Furthermore, the restriction in this case “distorts the legal system” by prohibiting “speech and expression upon which courts must depend for the proper exercise of the judicial power,” and thereby is “inconsistent with accepted separation-of-powers principles.”¹⁹⁷

In *United States v. American Library Association*,¹⁹⁸ the Supreme Court followed *Rust v. Sullivan*, and upheld the Children’s Internet Protection Act, which requires schools and libraries that accept federal funds to purchase computers used to access the Internet to block or filter minors’ Internet access to visual depictions that are obscene, child pornography, or “harmful to minors”; and to block or filter adults’ Internet access to visual depictions that are obscene or child pornography. Blocking or filtering technology may be disabled, however, “to enable access for bona fide research or other lawful purpose.”

The plurality noted that “Congress may not ‘induce’ the recipient [of federal funds] ‘to engage in activities that would themselves be unconstitutional.’”¹⁹⁹ The plurality therefore viewed the question before the Court as “whether [public] libraries would violate the First Amendment by employing the filtering software that CIPA requires.”²⁰⁰ Does CIPA, in other words, effectively violate library *patrons* rights? The plurality concluded that it does not, as “Internet access in public libraries is neither a ‘traditional’ or a ‘designated’ public forum,”²⁰¹ and that therefore it would not be appropriate to apply strict scrutiny to determine whether the filtering requirements are constitutional.

But the plurality also considered whether CIPA imposes an unconstitutional condition on the receipt of federal assistance — in other words, does it violate public *libraries*’ rights by requiring them to limit their freedom of speech if they accept federal funds? The plurality found that, assuming that government entities have First Amendment rights (it did not decide the question), CIPA does not infringe them. This is because CIPA does not deny a benefit to libraries that do not agree to use filters; rather, as in *Rust v. Sullivan*, the statute “simply insist[s] that public funds be

¹⁹⁶ *Id.* at 541, 542.

¹⁹⁷ *Id.* at 544, 545, 546.

¹⁹⁸ 539 U.S. 194 (2003).

¹⁹⁹ *Id.* at 203.

²⁰⁰ *Id.*

²⁰¹ *Id.* at 205.

spent for the purposes for which they were authorized.”²⁰² “CIPA does not ‘penalize’ libraries that choose not to install such software, or deny them the right to provide their patrons with unfiltered Internet access. Rather, CIPA simply reflects Congress’ decision not to subsidize their doing so.”²⁰³

The Court distinguished *Velazquez* on the ground that public libraries have no role comparable to that of legal aid attorneys “that pits them *against* the Government, and there is no comparable assumption that they must be free of any conditions that their benefactors might attach to the use of donated funds or other assistance.”²⁰⁴

In *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, the Supreme Court upheld the Solomon Amendment, which provides that, in the Court’s summary, “if any part of an institution of higher education denies military recruiters access equal to that provided other recruiters, the entire institution would lose certain federal funds.”²⁰⁵ FAIR, the group that challenged the Solomon Amendment, is an association of law schools that barred military recruiting on their campuses because of the military’s discrimination against homosexuals. FAIR challenged the Solomon Amendment as violating the First Amendment because it forced schools to choose between enforcing their nondiscrimination policy against military recruiters and continuing to receive specified federal funding.

The Court first rejected an interpretation of the Solomon Amendment that would have avoided the constitutional issue; under this interpretation, “a school excluding military recruiters would comply with the Solomon Amendment so long as it also excluded any other employer that violates its nondiscrimination policy.”²⁰⁶ The Court instead construed the Solomon Amendment to require schools to allow the military the same access as *any* other employer, including employers who do not discriminate and whom the schools allow on campus.

Interpreting the Solomon Amendment as such, the Court concluded: “Because the First Amendment would not prevent Congress from directly imposing the Solomon Amendment’s access requirement, the statute does not place an unconstitutional condition on the receipt of federal funds.”²⁰⁷ The Court added: “The Solomon Amendment neither limits what law schools may say nor requires them to say anything.... It affects what law schools must *do* — afford equal access to military recruiters — not what they may or may not *say*.”²⁰⁸ The law schools’ conduct in barring military recruiters, the Court found, “is not inherently expressive,” and,

²⁰² *Id.* at 211.

²⁰³ *Id.* at 212.

²⁰⁴ *Id.* at 213 (emphasis in original).

²⁰⁵ 547 U.S. 47, 51 (2006).

²⁰⁶ *Id.* at 56.

²⁰⁷ *Id.* at 60. The Court stated that Congress’s authority to directly require campus access for military recruiters comes from its Article I, section 8, powers to provide for the common defense, to raise and support armies, and to provide and maintain a navy. *Id.* at 58.

²⁰⁸ *Id.* at 60.

therefore, unlike flag burning, for example, is not “symbolic speech.”²⁰⁹ Applying the *O’Brien* test for restrictions on conduct that have an incidental effect on speech, the Court found that the Solomon Amendment clearly “promotes a substantial government interest that would be achieved less effectively absent the regulation.”²¹⁰

The Court also found that the Solomon Amendment did not unconstitutionally compel schools to speak, or even to host or accommodate the government’s message. As for compelling speech, law schools must “send e-mails and post notices on behalf of the military to comply with the Solomon Amendment ... This sort of recruiting assistance, however, is a far cry from the compelled speech in *Barnette* and *Wooley*.²¹¹ ... [It] is plainly incidental to the Solomon Amendment’s regulation of conduct.” As for forcing one speaker to host or accommodate another, “[t]he compelled speech violation in each of our prior cases ... resulted from the fact that the complaining speaker’s own message was affected by the speech it was forced to accommodate.”²¹² By contrast, the Court wrote, “Nothing about recruiting suggests that law schools agree with any speech by recruiters, and nothing in the Solomon Amendment restricts what the law schools may say about the military’s policies.”²¹³

Finally, the Court found that the Solomon Amendment was not analogous to the New Jersey law that had required the Boy Scouts to accept a homosexual scoutmaster, and which the Supreme Court struck down as violating the Boy Scouts’ “right of expressive association.”²¹⁴ Recruiters, unlike the scoutmaster, are “outsiders who come onto campus for the limited purpose of trying to hire students — not to become members of the school’s expressive association.”²¹⁵

²⁰⁹ *Id.* at 64, 65. The flag burning cases are quoted at notes 136 and 137, *supra*.

²¹⁰ *Id.* at 67. The *O’Brien* test is quoted in the text accompanying note 128, *supra*.

²¹¹ *Id.* at 61, 62. *Barnette* and *Wooley* are cited, respectively, in notes 155 and 154, *supra*.

²¹² *Id.* at 63. The Court cited *Hurley*, *supra* note 158, and *Tornillo*, *supra* note 156.

²¹³ *Id.* at 65.

²¹⁴ *Id.* at 68, quoting *Boy Scouts of America v. Dale*, 530 U.S. 640, 644 (2000).

²¹⁵ *Id.* at 69.

Free Speech Rights of Government Employees and Government Contractors

Government Employees

In *Pickering v. Board of Education*, the Supreme Court said that “it cannot be gainsaid that the State has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with the regulation of speech of the citizenry in general.”²¹⁶ The First Amendment, however, “protects a public employee’s right, in certain circumstances, to speak as a citizen addressing matters of public concern.”²¹⁷

In *Pickering*, the Supreme Court held it unconstitutional for a school board to fire a teacher for writing a letter to a local newspaper criticizing the administration of the school system. The Court did not, however, hold that the teacher had the same right as a private citizen to write such a letter. Rather, because the teacher had spoken as a citizen on a matter of public concern, the Court balanced “the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.”²¹⁸ In this case, the Court found that the statements in the letter were

in no way directed towards any person with whom appellant [the teacher] would normally be in contact in the course of his daily work as a teacher. Thus no question of maintaining either discipline by immediate superiors or harmony among coworkers is presented here. Appellant’s employment relationships with the Board ... are not the kind of close working relationships for which it can persuasively be claimed that personal loyalty and confidence are necessary to their proper functioning.²¹⁹

In *Arnett v. Kennedy*, the Supreme Court again balanced governmental interests and employee rights, and this time sustained the constitutionality of a federal statute that authorized removal or suspension without pay of an employee “for such cause as will promote the efficiency of the service,” where the “cause” cited was an employee’s speech.²²⁰ The employee’s speech in this case, however, consisted in falsely and publicly accusing the director of his agency of bribery. The Court interpreted the statute to proscribe

only that public speech which improperly damages and impairs the reputation and efficiency of the employing agency, and it thus imposes no greater controls on the behavior of federal employees as are necessary for the protection of the

²¹⁶ 391 U.S. 563, 568 (1968).

²¹⁷ *Garcetti v. Ceballos*, 547 U.S. 410, 417 (2006).

²¹⁸ *Id.*, quoting *Pickering*, *supra* note 216, 391 U.S. at 568.

²¹⁹ *Pickering*, *supra* note 216, 391 U.S. at 569-570.

²²⁰ 416 U.S. 134, 140 (1974).

Government as employer. Indeed, the Act is not directed at speech as such, but at employee behavior, including speech, which is detrimental to the efficiency of the employing agency.²²¹

In *Givhan v. Western Line Consolidated School District*, the Court upheld the First Amendment right of a public school teacher to complain to the school principal about “employment policies and practices at [the] school which [she] conceived to be racially discriminatory in purpose or effect.”²²²

In *Connick v. Myers*, an assistant district attorney was fired for insubordination after she circulated a questionnaire among her peers soliciting views on matters relating to employee morale.²²³ The Supreme Court upheld the firing, distinguishing *Pickering* on the ground that, in that case, unlike in this one, the fired employee had engaged in speech concerning matters of public concern:

When employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy a wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment....

We do not suggest, however, that Myers’ speech, even if not touching upon a matter of public concern, is totally beyond the protection of the First Amendment. “[T]he First Amendment does not protect speech and assembly only to the extent it can be characterized as political....” ... We hold only that when a public employee speaks not as a citizen upon matters of public concern, but as an employee upon matters only of personal interest, absent the most unusual of circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior.²²⁴

In *Connick v. Myers*, however, one question in Myers’ questionnaire did touch upon a matter of public concern, and, to this extent, Myers’ speech was entitled to *Pickering* balancing to determine whether it was protected by the First Amendment. The Court also considered that the questionnaire interfered with working relationships, was prepared and distributed at the office, arose out of an employment dispute, and was not circulated to obtain useful research. The Court repeated something it had said in *Pickering*: it did “not deem it either appropriate or feasible to attempt to lay down a general standard against which all such statements may be judged.”²²⁵

²²¹ *Id.* at 162.

²²² 439 U.S. 410, 413 (1979).

²²³ 461 U.S. 138 (1983).

²²⁴ *Id.* at 146-147. Subsequently, in *Garcetti v. Ceballos*, *supra* note 217, 547 U.S. at 418, the Court wrote that, if an employee did not speak as a citizen on a matter of public concern, then “the employee has no First Amendment cause of action based on his or her employer’s reaction to the speech. See *Connick*, *supra*, at 147.”

²²⁵ *Id.* at 154.

In *Rankin v. McPherson*, the Court upheld the right of an employee to remark, after hearing of an attempt on President Reagan’s life, “If they go for him again, I hope they get him.”²²⁶ The Court considered the fact that the statement dealt with a matter of public concern, did not amount to a threat to kill the President, did not interfere with the functioning of the workplace, and was made in a private conversation with another employee and therefore did not discredit the office. Furthermore, as the employee’s duties were purely clerical and encompassed “no confidential, policymaking, or public contact role,” her remark did not indicate that she was “unworthy of employment.”²²⁷

These Supreme Court cases indicate the relevant factors in determining whether a government employee’s speech is protected by the First Amendment. It should be emphasized that the Court considers the time, place, and manner of expression.²²⁸ Thus, if an employee made political speeches on work time, such that they interfered with his or others’ job performance, he could likely be fired as “unworthy of employment.” At the same time, he could not be fired for the particular political views he expressed, unless his holding of those views made him unfit for the job. Thus, a governmental employer could not allow employees to make speeches in support of one political candidate on work time, but not allow employees to make speeches in support of that candidate’s opponent. But a Secret Service agent assigned to guard the President would not have the same right as the clerical worker in *Rankin* to express the hope that the President would be assassinated.

In *Waters v. Churchill*, a plurality of justices concluded that, in applying the *Connick* test — “what the speech was, in what tone it was delivered, what the listener’s reactions were” — the court should not ask the jury to determine the facts for itself.²²⁹ Rather, the court should apply the test “to the facts as the employer *reasonably* found them to be.”²³⁰ That is, the employer need not “come to its factual conclusions through procedures that substantially mirror the evidentiary rules used in court,” but it may not come to them based on no evidence, or on “extremely weak evidence when strong evidence is clearly available.”²³¹

In *United States v. National Treasury Employees Union (NTEU)*, the Court struck down a law that prohibited federal employees from accepting any compensation for making speeches or writing articles, even if neither the subject of the speech or article nor the person or group paying for it had any connection with the employee’s official duties. The prohibition did not apply to books, nor to fiction

²²⁶ 483 U.S. 378, 380 (1987).

²²⁷ *Id.* at 390-391.

²²⁸ See, e.g., *Connick v. Myers*, *supra* note 223, 461 U.S. at 152 (“Also relevant is the manner, time, and place in which the questionnaire was distributed.”).

²²⁹ 511 U.S. 661, 668 (1994).

²³⁰ *Id.* at 677 (emphasis in original).

²³¹ *Id.* at 676, 677.

or poetry.²³² The Court noted that, “[u]nlike *Pickering* and its progeny, this case does not involve a *post hoc* analysis of one employee’s speech and its impact on that employee’s public responsibilities.... [T]he Government’s burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action.”²³³ Doing the balancing it had mandated in *Pickering*, the Court concluded that “[t]he speculative benefits the honoraria ban may provide the Government are not sufficient to justify this crudely crafted burden on respondents’ freedom to engage in expressive activities.”²³⁴

In *City of San Diego v. Roe*, the Court held that a police department could fire a police officer who sold a video on the adults-only section of eBay that showed him stripping off a police uniform and masturbating.²³⁵ The Court found that the officer’s “expression does not qualify as a matter of public concern ... and *Pickering* balancing does not come into play.”²³⁶ The Court also noted that the officer’s speech, unlike federal employees’ speech in *NTEU*, “was linked to his official status as a police officer, and designed to exploit his employer’s image,” and therefore “was detrimental to the mission and functions of his employer.”²³⁷ Therefore, the Court had “little difficulty in concluding that the City was not barred from terminating Roe under either line of cases [i.e., *Pickering* or *NTEU*].”²³⁸ This leaves uncertain whether, had the officer’s expression not been linked to his official status, the Court would have overruled his firing under *NTEU* or would have upheld it under *Pickering* on the ground that his expression was not a matter of public concern.

In *Garcetti v. Ceballos*, the Court cut back on First Amendment protection for government employees by holding that there is no protection — *Pickering* balancing is not to be applied — “when public employees make statements pursuant to their official duties,” even if those statements are about matters of public concern.²³⁹ In this case, a deputy district attorney had presented his supervisor with a memo expressing his concern that an affidavit that the office had used to obtain a search warrant contained serious misrepresentations. The deputy district attorney claimed that he was subjected to retaliatory employment actions, and sued. The Supreme Court held “that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”²⁴⁰ The fact that the employee’s speech occurred inside his office, and the fact that the speech concerned the subject matter of his employment, were not sufficient to

²³² 513 U.S. 454 (1995).

²³³ *Id.* at 466-468.

²³⁴ *Id.* at 477.

²³⁵ 543 U.S. 77 (2004).

²³⁶ *Id.* at 84.

²³⁷ *Id.*

²³⁸ *Id.* at 80.

²³⁹ *Garcetti*, *supra* note 217, 547 U.S. at 421.

²⁴⁰ *Id.*

foreclose First Amendment protection.²⁴¹ Rather, the “controlling factor” was “that his expressions were made pursuant to his duties.”²⁴² Therefore, another employee in the office, with different duties, might have had a First Amendment right to utter the speech in question, and the deputy district attorney himself might have had a First Amendment right to communicate the information that he had in a letter to the editor of a newspaper. In these two instances, a court would apply *Pickering* balancing.

Government Contractors

In *Board of County Commissioners v. Umbehr*, the Court held that “the First Amendment protects independent contractors from the termination of at-will government contracts in retaliation for their exercise of the freedom of speech.”²⁴³ The Court held that, in determining whether a particular termination violates the First Amendment, “the *Pickering* balancing test, adjusted to weigh the government’s interests as contractor rather than as employer,” should be used.²⁴⁴ The Court did “not address the possibility of suits by bidders or applicants for new government contracts....”²⁴⁵

In *Elrod v. Burns*²⁴⁶ and *Branti v. Finkel*,²⁴⁷ the Supreme Court held that “[g]overnment officials may not discharge public employees for refusing to support a political party or its candidates, unless political affiliation is a reasonably appropriate requirement for the job in question.”²⁴⁸ In *O’Hare Truck Service, Inc. v. Northlake*, the Court held “that the protections of *Elrod* and *Branti* extend to ... [a situation] where the government retaliates against a contractor, or a regular provider of services, for the exercise of rights of political association or the expression of political allegiance.”²⁴⁹

²⁴¹ The Court cited *Givhan*, *supra* note 222, for these points. The difference between *Givhan* and *Ceballos* was apparently that *Givhan*’s complaints were not made pursuant to her job duties, whereas *Ceballos*’ were. Therefore, *Givhan* spoke as a citizen whereas *Ceballos* spoke as a government employee. See, 547 U.S. at 420-421.

²⁴² *Garcetti*, *supra* note 217, 547 U.S. at 421.

²⁴³ 518 U.S. 668, 670 (1996).

²⁴⁴ *Id.* at 673.

²⁴⁵ *Id.* at 685.

²⁴⁶ 427 U.S. 347 (1976).

²⁴⁷ 445 U.S. 507 (1980).

²⁴⁸ *O’Hare Truck Service, Inc. v. Northlake*, 518 U.S. 712, 714 (1996).

²⁴⁹ *Id.*

PERIODICAL ARTICLES

INDIVIDUAL BELIEFS VS. THE FIRST AMENDMENT. By Krista Streisel, The Daily Athenaeum; SOURCE: West Virginia U. University Wire, September 18, 2007

West Virginia University has been abuzz of late with angry conversations and heated debates since the pro-life demonstrations in front of the Mountainlair last Thursday.

The disturbing images of aborted fetuses and the presence of children have fueled a controversy concerning the First Amendment. It was the right to peacefully assemble, to petition and a freedom of speech that enabled it to occur.

Many students were offended by the messages and enraged that such a graphic display took place on their campus. But while the protest may have been upsetting to some, students must look beyond their personal beliefs regarding the issues of the demonstration and realize the bigger picture.

Regardless of how you feel about the protesters on Thursday or any other demonstration, the belief that all Americans are entitled to the rights and liberties granted to them in the First Amendment should overpower and take precedence over our individual beliefs.

These fundamental rights are part of what the United States of America is built on, and it is our responsibility as Americans to uphold them above all else.

Without the right to protest or demonstrate your position, no matter how controversial the issue or (non-violent) means may be, every American's voice is diminished. It is only because of the First Amendment that the individual's voice can be heard to make a difference and change what they feel to be unjust.

If the gay and lesbian community is not able to protest the government's unequal view of their relationships, then couples of the same sex may never be regarded the same as the traditional married couple. And if pro-life, feminist rights advocates are not there to protest government actions that may infringe upon the rights women have (in regard to making decisions about their own bodies), then it is possible that women may have these rights taken away.

If demonstrations, such as the one on Thursday, were not allowed to take place on campus simply because the issues are controversial, or are carried out in an extremist manner, then college students across America as a whole would lose a piece of their voice; therefore, lose a means of accomplishing their goals of raising awareness of their cause.

Those with views with which you disagree have the same right to free speech, to assemble and to petition as you.

However, we also have the right to choose whether or not to listen, the right to make our own decisions, formulate our own opinions, the right to oppose what we feel is wrong and the right to demonstrate our opinions.

It is so important to remember that while you may not agree with someone, their right to demonstrate or petition is more important than the issue at hand.

If we were not able to take a stance against what may be popular opinion and make known what we feel, the issue may never be addressed and what is wrong may never be made right.

As college students, we are the next decision-makers and leaders of this country.

So rather than complain about how others are wrong, channel your anger into proactively making a difference in the world, such as the students who engaged in a counter-protest.

By holding up signs and chanting, they showed how positive energy can be used in diverting attention away from what they felt was wrong.

When it comes to our rights, we must never let our individual beliefs deter us from what enables us to express them: the First Amendment.

We must agree to disagree on specific issues, but we must remember what ultimately allows us to do so.

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**THOUSANDS RALLY AGAINST PERCEIVED BIAS IN PROSECUTIONS;
RESPONSE TO HATE CRIMES IS DECRIED. By Michael E. Ruane and
Hamil R. Harris; Washington Post Staff Writers. The Washington Post,
November 17, 2007 Saturday**

Thousands of African American demonstrators from across the country marched on the Justice Department yesterday in a large and emotional protest over what they termed the inequality of the nation's justice system.

Chanting "No Justice, No Peace!" and "No More Nooses!" the throng was large enough to fill several blocks of Pennsylvania Avenue while simultaneously ringing the department's fortress-like Robert F. Kennedy Justice Building at 10th Street and Pennsylvania.

The demonstration was headed by the Rev. Al Sharpton, president of the National Action Network; Martin Luther King III, son of the slain civil rights leader; and Charles Steele Jr., president of the Southern Christian Leadership Conference.

The trio marched with arms locked, surrounded by legions of demonstrators carrying red-green-and-black flags that whipped in the cold wind under the day's clear blue sky.

While the march was aimed at what organizers said was the department's failure to vigorously prosecute hate crimes, many participants expressed anger at what they perceived as widespread inequality in the administration of justice.

Many expressed outrage over such incidents as the display of lynching-style nooses from a tree during racial turmoil in Jena, the rural Louisiana town that also has been beset by fistfights and other interracial confrontations. Thousands gathered in September for a civil rights demonstration there.

Protesters, carrying signs reading "Enough Is Enough," yelled, wept and quoted the Bible, the Koran, and the late soul singer James Brown.

"We are ready to raise hell!" Steele shouted at a pre-march rally. "We're fired up!"

The crowd chanted: "We're sick and tired of being sick and tired!"

Marchers came from as far away as Michigan, Ohio and Georgia. One, Walter Herndon, 53, a salesman from Lansing, Mich., pushed his mother, Willie Spires, 78, of Council Bluffs, Iowa, in a wheelchair.

Leaders and protesters said they were pleased at the turnout for a march that was called only a few weeks ago.

"Incredible!" King declared as he walked in the center of the crowd. "It's incredible!"

At yesterday's protest, one man wore a shirt on which was printed: "A noose is not a prank or a joke. It is a terroristic threat and a weapon of mass destruction."

At one point, demonstrators paused to sign a huge piece of cloth stretched in the street and painted with the opening words of the preamble of the Constitution, "We the people. . . ."

The Justice Department said yesterday that it is committed to prosecuting civil rights cases.

"The Justice Department shares with those who demonstrate today their objective of bringing to justice those who commit criminal acts of hate," Attorney General Michael B. Mukasey said in a statement.

"It shares their vision of eradicating hate in our society," said Mukasey, who was sworn in as attorney general this week. "At the same time, the Department must follow the law and the principles of federal prosecution in every case it investigates and prosecutes."

But marcher Ellis Maupin, 62, a retired Energy Department worker from Southwest Washington, said he thinks the department has not treated all citizens equally.

"After we stopped marching, the justice stopped," he said. "We're now saying: Look, you've got to get your judicial system together. You've got to get your police forces together. Because we're all citizens and we expect to be treated like citizens. That's not happening right now."

Of the turnout, he said, "This is, I think, emblematic of just how tired people are."

Patricia Austin, 58, a minister from Richmond, said she had come with several busloads of people from her church. "It's been a long time," she said. "And until we get the justice that we need in America, I'm going to continue to march."

She said she was not surprised at the size of the crowd. "Too much injustice is going on right now," she said. "Too much. And we need to speak out against it. . . . If we don't speak out, nothing is going to get done."

She noted some of the slogans carved in the stone of the Justice building as she marched past.

"To render every man his due," said one. "Justice in the life and conduct of the state is possible only as first it resides of the hearts and souls of the citizens," read another.

At a morning rally before the 12:30 p.m. march, King said if his father were alive he would be leading the march, and he quoted his father: "How long? Not long!"

Sharpton warmed up the crowd, by calling, "What do you want?"

"Justice!" people shouted back.

"When do you want it?" Sharpton called.

"Now!" the crowd replied.

After the march, he said he was pleased.

"The outstanding turnout today exceeded everyone's expectations," he said. "We said that we would march around the Justice Department seven times. We actually encamped the Justice Department and had four or five blocks to spare."

King said: "This is very significant because we had over 20,000 people to come to Washington to say we want our Justice Department to be activated.

"The lights in the civil rights division of the Justice Department are turned off," he said. "We came to encourage this Justice Department to get engaged."

Bloggers inspire new civil rights wave; Jena 6 protest nurtured on Web. By Howard Witt, Tribune senior correspondent. Chicago Tribune, September 19, 2007 Wednesday

There is no single leader. There is no agreed schedule. Organizers aren't even certain where everyone is supposed to gather, let alone use the restroom. The only thing that is known for sure is that thousands of protesters are boarding buses at churches, colleges and community centers across the country this week, headed for this tiny dot on the map of central Louisiana.

What could turn out to be one of the largest civil rights demonstrations in years is set to take place here Thursday, when Rev. Jesse Jackson, Rev. Al Sharpton, Martin Luther King III, popular black radio talk show hosts and other celebrities converge in Jena to protest what they regard as unequal treatment of African-Americans in this racially fractured Deep South town.

Yet this will be a civil rights protest literally conjured out of the ether of cyberspace, of a type that has never happened before in America -- a collective national mass action grown from a grass-roots word-of-mouth movement spread via blogs, e-mails, message boards and talk radio.

Jackson, Sharpton and other big-name civil rights figures, far from leading this movement, have had to scramble to catch up. So have the national media.

As formidable as it is amorphous, this new African-American blogosphere, which scarcely even existed a year ago, now includes hundreds of interlinked blogs and tens of thousands of followers who within a matter of a few weeks collected 220,000 petition signatures -- and more than \$130,000 in donations for legal fees -- in support of six black Jena teenagers who are being prosecuted on felony battery charges for beating a white student.

"Ten years ago this couldn't have happened," said Sharpton, who said he first learned of the Jena case on the Internet. "You didn't have the Internet and you didn't have black blogs and you didn't have national radio shows. Now we can talk to all of black America every day. We've been able to form our own underground railroad of information, and when everybody else looks up, it's already done."

Big preparations

Hotels are booked up for miles around Jena, the Louisiana State Police are drawing officers from across the state to help control the crowds, and schools and many businesses in the town of 3,000 will close Thursday in anticipation of 10,000 or more demonstrators who are expected, organizers predicted.

The momentum for the protest did not slow even when the original reason -- the scheduled sentencing of Mychal Bell, 17, the first of the "Jena 6" defendants to be tried and convicted of aggravated second-degree battery -- evaporated.

Last week, a state appellate court abruptly vacated Bell's June 28 conviction, ruling that he had been improperly tried as an adult rather than a juvenile. The local district attorney, Reed Walters, has vowed to challenge that decision, and Bell remains jailed in lieu of \$90,000 bond.

What is animating the protesters is not merely Bell's legal predicament but the larger perception that blacks in Jena, who make up 12 percent of the population, are still subjected to the kind of persistent racial inequality that once predominated across the Old South.

In a town where whites voted overwhelmingly for former Ku Klux Klan leader David Duke when he ran for Louisiana governor in 1991, one local barbershop still refuses to cut black men's hair.

The trouble in Jena, started a year ago with a resonant symbol from the Jim Crow past: After black students asked administrators at the local high school for permission to sit beneath a shade tree traditionally used only by whites, white students hung three nooses from the tree. The incident outraged black students and parents but was dismissed by the superintendent as a youthful prank; he punished the white students with three-day suspensions.

A series of fights between whites and blacks ensued, on and off campus. Whites implicated in the fights were charged with misdemeanors or not at all, while the blacks were charged with felonies.

In November, someone burned down the central wing of the high school -- an arson for which no one has been arrested.

And then in early December, Bell and five other black students at the high school were charged after a white student was jumped and beaten while he lay unconscious.

Although the white student was treated and released at a local hospital, Walters initially charged the six black youths with attempted murder -- charges that he later reduced to aggravated second-degree battery after black bloggers and civil rights leaders from across the country raised complaints.

Besides Sharpton, King and Jackson, the NAACP and the ACLU will have contingents here Thursday, as will the Millions More Movement led by Nation of Islam leader Louis Farrakhan.

Blogs to the fore

But many black bloggers say the Jena demonstration is more about a new generation of civil rights activists who learned about the Jena case not from Operation PUSH but from hip-hop music blogs that featured the story or popular black entertainers such as Mos Def who have turned it into a crusade.

"In traditional civil rights groups, there's a pattern -- you call a meeting, you see when everybody can get together, you have to decide where to meet," said Shawn Williams, 33, a pharmaceutical salesman and former college NAACP leader who runs the Dallas South Blog.

"All that takes time," Williams added. "When you look at how this civil rights movement is working, once something gets out there, the action is immediate -- here's what we're going to write about, here's the petition, here's the protest. It takes place within minutes, hours and days, not weeks or months."

This new viral civil rights movement still benefits from the participation of well-known leaders -- it just doesn't depend on them, bloggers say.

It was black bloggers, for example, who first picked up the story of Shaquanda Cotton, a 14-year-old black girl from the east Texas town of Paris who was sentenced to up to 7 years in youth prison for shoving a hall monitor at her high school. The judge who heard her case had given probation to a 14-year-old white girl charged with the more serious crime of arson.

After the bloggers and their readers bombarded the Texas governor with protest letters and petitions, Texas authorities freed Cotton.

The blogs also serve as watchdogs over more traditional civil rights groups. When the NAACP first began featuring the Jena case on its Web site and claimed to be soliciting contributions for the teens' legal defense, it was a black blogger who noted that the donation link directed visitors to the generic NAACP fundraising page.

Within days, the link was redirected to a bona fide Jena 6 fundraising site.

DEMONSTRATORS' RIGHTS

YOUR RIGHTS TO DEMONSTRATE AND PROTEST

A guide for demonstrators, marchers, speakers and others who seek to exercise their First Amendment rights.

GENERAL GUIDELINES

Q. Can my free speech rights be restricted because of what I want to say – even if it's controversial?

A. No. The First Amendment prohibits restrictions based on the content of speech. However, this does not mean that the Constitution completely protects all types of free speech activity in every circumstance. Police and government officials are allowed to place certain non-discriminatory and narrowly drawn "time, place and manner" restrictions on the exercise of First Amendment rights.

Q. Where can I engage in free speech activity?

A. Generally, all types of expression are constitutionally protected in traditional "public forums" such as public sidewalks and parks. Public streets can be used for marches subject to reasonable permit conditions. In addition, speech activity may be permitted at other public locations such as the plazas in front of government buildings which the government has opened up to similar speech activities.

Q. What about free speech activity on private property?

A. The general rule is that free speech activity cannot take place on private property without the consent of the property owner. However, in California, the courts have recognized an exception for large shopping centers and have permitted leafleting and petitioning to take place in the public areas of large shopping centers. The shopping center owners, however, are entitled to impose regulations that, for example, limit the number of activists on the property and restrict their activities to designated "free speech areas." Most large shopping centers have enacted detailed free speech regulations that require obtaining a permit in advance. Recent court decisions have found that the "shopping center exception" does not apply to single, free-standing stores, such as a Wal-Mart or Trader Joe's.

Q. Do I need a permit before I engage in free speech activity?

A. Not usually. However, certain types of events require permits. Generally, these events include:
(1) a march or parade that does not stay on the sidewalk and other events that require blocking traffic or street closures;
(2) a large rally requiring the use of sound amplifying devices; or
(3) a rally at certain designated parks or plazas, such as federal property managed by the General Services Administration.

Many permit procedures require that the application be filed several weeks in advance of the event. However, the First Amendment prohibits such advance notice requirements from being used to prevent rallies or demonstrations that are rapid responses to unforeseeable and recent events. Also, many permit ordinances give a lot of discretion to the police or city officials to impose conditions on

the event, such as the route of a march or the sound levels of amplification equipment. Such restrictions may violate the First Amendment if they are unnecessary for traffic control or public safety, or if they interfere significantly with effective communication with the intended audience. A permit cannot be denied because the event is controversial or will express unpopular views.

SPECIFIC PROBLEMS

Q. If organizers have not obtained a permit, where can a march take place?

A. If marchers stay on the sidewalk and obey traffic and pedestrian signals, their activity is constitutionally protected even without a permit. Marchers may be required to allow enough space on the sidewalk for normal pedestrian traffic and not unreasonably obstruct or detain passers-by.

Q. May I distribute leaflets and other literature on public sidewalks?

A. Yes. Pedestrians on public sidewalks may be approached with leaflets, newspapers, petitions and solicitations for donations. Tables may also be set up on sidewalks for these purposes if sufficient room is left for pedestrians to pass. These types of free speech activity are legal as long as entrances to buildings are not blocked and passers-by are not physically or unreasonably detained. No permits should be required.

Q. Do I have a right to picket on public sidewalks?

A. Yes. This is an activity for which a permit is not required. However, picketing must be done in an orderly, non-disruptive fashion so that pedestrians can pass by and entrances to buildings are not blocked. Contrary to the belief of some law enforcement officials, picketers are not required to keep moving, but may remain in one place as long as they leave room on the sidewalk for others to pass.

Q. Can the government impose a financial charge on exercising free speech rights?

A. Increasingly, local governments are imposing financial costs as a condition of exercising free speech rights. These include application fees, security deposits for clean-up, or charges to cover overtime police costs. Unfortunately, such charges that cover actual administrative costs or the actual costs of re-routing traffic have been permitted by some courts so long as they are uniformly imposed on all groups. However, if the costs are greater because an event is controversial (or a hostile crowd is expected) – by such things as requiring a large insurance policy – the courts will not allow such costs to be imposed. Also, regulations with financial requirements should include a waiver for groups that cannot afford the charge, so that even grassroots organizations can exercise their free speech rights. Therefore, a group without significant financial resources should not be prevented from engaging in a march simply because it cannot afford the charges the City would like to impose.

Q. Can a speaker be silenced for provoking a crowd?

A. Generally, no. Even the most inflammatory speaker cannot be punished for merely arousing the audience. A speaker can be arrested and convicted for incitement only if he or she specifically advocates violence or illegal actions and only if those illegalities are imminently likely to occur.

Q. Do counter-demonstrators have free speech rights?

A. Yes. Although counter-demonstrators should not be allowed to physically disrupt the event they are protesting, they do have the right to be present and to voice their views. Police are permitted to

keep two antagonistic groups separated but should allow them to be within the general vicinity of one another.

Q. Is heckling protected by the First Amendment?

A. Although the law is not settled, heckling should be protected, unless hecklers are attempting to physically disrupt an event, or unless they are drowning out the other speakers.

Q. Does it matter if other speech activities have taken place at the same location in the past?

A. Yes. The government cannot discriminate against activists because of the controversial content of their message. Thus, if you can show that events similar to yours have been permitted in the past (such as a Veterans or Memorial Day parade), then the denial of your permit application is an indication that the government is involved in selective enforcement.

Q. What other types of free speech activity are constitutionally protected?

A. The First Amendment covers all forms of communication including music, theater, film and dance. The Constitution also protects actions that symbolically express a viewpoint. Examples of such symbolic forms of speech include wearing masks and costumes or holding a candlelight vigil. However, symbolic acts and civil disobedience that involve illegal conduct may be outside the realm of constitutional protections and can sometimes lead to arrest and conviction. Therefore, while the act of sitting in a road may be expressing a political opinion, the act of blocking traffic may lead to criminal punishment.

Q. What should I do if my rights are being violated by a police officer?

A. It rarely does any good to argue with a street patrol officer. Ask to talk to a superior and explain your position to her or him. Point out that you are not disrupting anyone else's activity and that your actions are protected by the First Amendment. If you do not obey an officer, you might be arrested and taken from the scene. You should not be convicted if a court concludes that your First Amendment rights have been violated.

For more information, contact the National Lawyers Guild

(323) 653-4510 • www.nlg-la.org

KNOW YOUR RIGHTS: DEMONSTRATING IN NEW YORK CITY by The New York Civil Liberties Union

New Yorkers have the right to engage in peaceful, protest activity on public sidewalks, in public parks, and on public streets in New York City. This includes the right to distribute handbills or leaflets; the right to hold press conferences, demonstrations, and rallies; and the right to march on public sidewalks and in public streets. The City can and does impose certain restrictions on these activities, and in some instances one must obtain a permit before engaging in certain activity. This brochure is intended to inform New Yorkers of the basic rules governing demonstration activity.

Do I Need a Permit?

It depends on what you want to do. If you want to distribute handbills on a public sidewalk or in a public park, have a demonstration, rally, or press conference on a public sidewalk, or march on a public sidewalk and you do not intend to use amplified sound, you do not need any permit. If you want to use amplified sound on public property, want to have an event with more than 20 people in a New York City park, or wish to conduct a march in a public street, you will need a permit. If you wish to have an event on the steps of City Hall or in the plaza in front of the steps, you need to make special arrangements with the Police Department.

If I Want to Distribute Handbills; Have a Demonstration, Rally, Press Conference; or March on a Public Sidewalk, What Do I Need to Do?

Nothing but plan your event. If you want, you can notify the Police Department, but that is not required. If you do notify the Police Department, officers may appear at the event; if your event involves a significant number of people, the Police Department may set up a "pen" in which they will ask you to stand.

In conducting your event, you cannot block pedestrian passage on a sidewalk, and thus should leave at least one-half of the sidewalk free for use. You also cannot block building entrances.

What if I Want to March on a Public Street?

You may be able to march in a public street (as opposed to on a sidewalk) in some circumstances. In every instance, you must apply (for) and obtain a permit from the Police Department. If you expect to have fewer than 1000 people in your march, you can apply for a permit at the precinct in which the march will originate. If you expect 1000 people or more, you must apply at Police Headquarters (1 Police Plaza, Room 1100A) in lower Manhattan. There is no fee to apply for a parade permit.

As a general rule, the Police Department will only allow marches to take place in the street if the group has enough people so that it is not safe or otherwise reasonable for the group to march on the sidewalk. In those instances in which a group is allowed to march in the street, the police will close a portion of the roadway for the group. (1)

What If I Want to Use Amplified Sound?

If you want to use amplified sound in a public place, you must receive a permit from the Police Department. You apply for the permit at the precinct within which you wish to use sound, and in most precincts you obtain the application from the precinct's Community Affairs Office. The fee for a one-time permit is \$45.00.

Though City rules specify that permits must be sought at least five days before the event, you are entitled to receive a permit even if you apply less than five days before your event. City rules prohibit the use of amplified sound within 500 feet of a school, courthouse or church during hours of school, court or worship, or within 500 feet of a hospital or similar institution. In many instances, the permit may specify a decibel limit on the level of permissible sound. City rules also prohibit the use of amplified sound between 10:00 p.m. and 9:00 a.m. in nonresidential areas; in residential areas, amplified sound is not permitted between 8:00 p.m. or sunset (whichever is later) and (9:00 a.m. on weekdays, and between 8:00 p.m. or sunset (whichever is later) and 10:00 a.m. on weekends.

Finally, if you intend to use amplified sound that requires electricity, you are not allowed to tap into public power (e.g. a light pole) unless you have made specific arrangements with the City to do so.
2)

What If I Want to Have a Rally, Press Conference or Demonstration in a City Park?

You are entitled to distribute expressive materials or to have a rally, press conference, or demonstration in a City Park. If the event will include more than 20 participants, you must obtain a Special Events permit from the Parks Department. You can obtain a permit application, which contains the general rules governing the permit process, from the Department's main office in the borough where the park is located or from the Parks Department's website (nycparks.completeinet.net). The fee for applying for a permit is \$25.00.

You also are entitled to use amplified sound at an event in a City park. As with amplified sound in other public places, you must obtain a permit from the Police Department to use amplified sound in a public park. Generally, the Police Department will not issue a sound permit until you obtain your Parks Department permit. (3)

Footnotes

(1) The official rules governing parades can be found at section 110 of title 10 of the Administrative Code of the City of New York and at section 19 of title 38 of the Rules of the City of New York.

(2) The official rules governing the use of amplified sound can be found at section 108 of title 10 of the Administrative Code of the City of New York and at chapter 8 of title 38 of the Rules of the City of New York.

(3) The official rules governing demonstration activity in City parks can be found at sections 1-05 and 2-07 of Chapter 56 of the Rules of the City of New York.

<http://www.unitedforpeace.org/article.php?id=905>

American Civil Liberties Union of Washington State
**STREET SPEECH: YOUR RIGHTS IN WASHINGTON TO PARADE,
PICKET, AND LEAFLET**
April 24, 2006

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

Justice Owen I. Roberts (Hague v. CIO, 1939)

Introduction

This pamphlet provides general information about your right to parade, picket, leaflet, circulate petitions and otherwise express your political beliefs in public. It describes the kinds of regulations on speech activities that the government may enforce and the kinds of restrictions which are not permitted by the United States and Washington constitutions.

A general pamphlet cannot cover every possible situation. If after reading this pamphlet you still have questions or concerns, call the American Civil Liberties Union of Washington (ACLU) for more information.

The Right of Free Speech

The right of free speech is guaranteed by the United States Constitution and the Washington state Constitution. The right of free speech protects more than the right to talk. It protects expression and communication of all sorts, including picketing, leafleting, marching to city hall, gathering signatures, or wearing an armband.

The Declaration of Rights in the Washington Constitution contains very strong language on this topic. Regarding freedom of speech, it says: "Every person may freely speak, write and publish on all subjects, being responsible for the abuse of that right." Regarding the right to petition and assemble in public, it says: "The right of petition and of the people peaceably to assemble for the common good shall never be abridged."¹

Free speech protections apply not only to speech that the government considers to be truthful and valid, but also to speech that is unpopular, strange, or even hateful. Our nation's founders believed that the best protection against ideas society believes are wrong is to have a free exchange of opposing ideas, not to censor wrong ideas.

The right of free expression is not an absolute right to express ourselves at any time, in any place, in any manner. For example, we do not necessarily have a right to hold a large rally at midnight outside a hospital. While we may have the right to march in a parade or on a city street, we may not have the right to decide the exact time or route. The government has the authority to make reasonable restrictions on the time, place, and manner of certain speech activities if there is a compelling reason to do so.

On the other hand, the government cannot make regulations merely because it does not like the message of the speaker. If parades are permitted for Democrats and Republicans, they must be permitted for socialists or anarchists, too. If Catholics and Protestants can hand out literature on a street corner, so can Hare Krishnas.

The right to free speech belongs to all of us, popular or unpopular, rich or poor. The government can place reasonable restrictions on the manner in which we express ourselves but not on the message we express.

Free Speech Rights by Location

Whether a particular government regulation over speech is reasonable and serves a compelling interest depends a great deal on the location and medium of the speech. The following sections describe some of the legal rules that have developed for different kinds of forums for speech.

Traditional Public Forums: Streets, Sidewalks, and Parks

The U.S. Supreme Court has declared that public streets, sidewalks, and parks are "traditional" public forums². These are places where society expects people to have the freedom to communicate with each other with the fewest possible government limitations. Generally speaking, the government can regulate the time, place, and manner of speech in a traditional public forum only to ensure that other peoples' rights to use the streets, sidewalks, and parks, are not disrupted.

Speeches

Generally, people are free to speak as they please on sidewalks. No permit is required even if a large crowd gathers. It is a good idea, however, to encourage those gathered to leave space for passersby.

The speaker is not responsible for the presence of hecklers or angry listeners. Their hostile actions do not make the speaker's speech illegal. The presence of hecklers or counter-demonstrators is not, by itself, enough to justify an order to disperse the crowd or arrest the speaker.

Picketing and Leafleting

Sidewalk picketing and handing out leaflets are perfectly permissible. Since they generally do not cause traffic problems, a permit is not required. A law requiring people to get a permit for such nondisruptive activity is likely to be unconstitutional³.

However, people picketing or leafleting must do so in an orderly fashion. They must not physically disrupt passersby or force them to accept the leaflets. Picketers are not required to keep moving but may remain in one place as long as they leave room on the sidewalk for others to pass.

Demonstrations and Rallies in Parks

Public parks are our most traditional public forums. Currently, state park regulations may require reservations or permits for large demonstrations and rallies or for the use of sound equipment. Apply

for a permit from the city, county, or state parks department well in advance of the event. If your permit is denied, you must be told why and be provided an opportunity to appeal the denial.

The government may limit demonstrations of extremely long duration, if the regulations are designed to ensure that the park is not unduly monopolized or damaged. For example, the court approved of a National Park Service regulation prohibiting demonstrators from sleeping overnight in Lafayette Park across from the White House⁴. Late night demonstrations may also be curtailed if the park is closed to the public after a certain time.

Marches

A march or rally in a street that would stop or slow traffic is considered a parade and usually requires a permit. You should apply for a permit from the street or transportation department well in advance of the event. A march in the street without a permit may result in arrest for interference with traffic.

A march on the sidewalk is not a parade. No permit is required for a sidewalk march. Individuals may march as far as they like as long as they leave room on the sidewalk for passersby and obey traffic laws. Organizers of large sidewalk marches sometimes appoint marshals to help keep the march orderly.

Sound Equipment

A city may put limits on the volume of sound equipment (measured by decibel level) or limit the use of sound equipment to certain times or certain areas. The restrictions must relate to a substantial government concern such as traffic safety or community tranquility. Of course, the city cannot restrict the sound on the basis of the speaker's message. The city may require a use permit for sound equipment.

Sale of Literature and Buttons

The sale of religious and political literature and buttons is protected by the First Amendment, subject to reasonable time, place and manner restrictions⁵. For example, the government may restrict the sale of literature or buttons to areas where pedestrian traffic is not obstructed. A table can be used to sell or distribute books or buttons.

A direct request for money, unlike a sale, is more strictly regulated in order to prevent fraud. The law requires advance registration in certain instances⁶. If you seek to raise money for your group by asking for donations, check with the Secretary of State's office to determine whether you must register.

Government Buildings

Not every property owned by the government is a traditional public forum. For example, a government office building may keep out persons not conducting business there, so that employees are able to do their work. The degree of public access depends on the type of building and the history of past use at the particular building. In some circumstances, government property that is not a

traditional public forum might have been designated as a type of limited public forum. Some of the more common locations for demonstrations inside government buildings are discussed below.

Post Offices and Other Federal Buildings

Free speech activities may ordinarily take place on the sidewalks, grounds, and other public areas of government buildings.⁷ Officials may restrict the times, locations, and manner of free speech activities as long as the restrictions are reasonable and do not unduly hamper the speech activities. In some instances, a use permit may be required. For example, permits are required for gatherings on federal property managed by the General Services Administration, such as the Federal Building in downtown Seattle⁸.

Demonstrators must not block entrances or interfere with the normal business of the government building. Check with the building manager or do some advance scouting of the site, so you know where your group should or should not stand.

The Supreme Court has ruled that no one has a right to protest on military bases even if the person is a member of the military. Most federal property, however, is less restricted. There are no regulations prohibiting free speech activities at post offices, except for partisan political activity. In addition, flyers or handbills cannot be posted on postal property. When a public building is used as a polling place, partisan activity and campaign signs may be required to be a certain distance away.

The U.S. Supreme Court ruled in 1983 that speech activities cannot be banned from the public sidewalks around the Supreme Court grounds.

Schools

Generally speaking, administrators may restrict access to public school property. However, if they open the school facilities to some nonstudents, they cannot keep others out because of their ideals. For example, a Louisiana school district adopted a policy allowing private organizations to use school facilities during nonschool hours. The Ku Klux Klan sued after its request to hold a meeting at one of the schools was refused. The court ruled that by opening its doors to some groups, the school district was obligated to leave them open to other groups⁹. In a similar situation in Boston, a school district that allowed a group to circulate anti-busing literature was required to let a pro-busing group circulate literature as well¹⁰.

In general school administrators do not allow nonstudents to distribute literature, hold rallies, or engage in any other form of expressive activity on school grounds. However, picketing or leafleting near school grounds (for example, the public sidewalk in front of the school) is constitutionally protected.

Airports, Train Stations and Ferry Terminals

People may exercise their free speech rights in the public areas of airports¹¹. Nevertheless, airport officials may impose reasonable restrictions on the time, place, and manner in which the rights are exercised.

For example, speech activity may be prohibited where there is a captive audience or where it interferes with the normal use of the airport facility. Also, a temporary ban on speech may be justified in emergency situations, but the ban must last no longer than the emergency.

Officials may not impose regulations that are arbitrary or unreasonable. They may not require people to register in advance with airport officials for peaceful leafleting, picketing and communication. However, you may have to register in advance for large-scale activities, such as rallies, where the activity may be disruptive. You may also have to register in advance to ask for donations.

Shopping Malls and Other Private Commercial Property

Under federal law, private landowners historically have had the right to prevent anyone from speaking or demonstrating on their property. A person refusing to leave after being asked to do so could be prosecuted for trespassing. Although the U.S. Constitution may not grant us free speech rights at shopping malls¹², some state constitutions do. In Washington, the state Supreme Court has determined that the Washington Constitution's protection of free speech does not apply to private shopping malls¹³. However, the ACLU participated in a case which established the right to gather initiative signatures in a shopping mall. The state Supreme Court held that individuals have a right to collect signatures in shopping malls under the state Constitution's initiative and referendum provision. Other types of activities, however, such as handing out leaflets, picketing, or giving speeches, are not protected.

People wishing to gather signatures for an initiative may still be required to get permission from mall management and to adhere to reasonable time, place, and manner regulations.

How to Obtain a Permit

Where permits or advance registration requirements are reasonable, such as with parades and large demonstrations, a filing fee may be required. The fee is to pay for administrative costs. It may not be unduly large, nor may it be a tax on speech. An insurance bond cannot be required. Permits may not be withheld because of the philosophy, political ideas, or message of the speakers. Lengthy advance notice requirements (anything more than a few days) may not hold up to a challenge in court.

For information on how to obtain a permit within city or county limits, contact the appropriate city or county clerk several days in advance of the event.

State parks are governed by the State Parks and Recreation Commission. Applications must be submitted along with a \$10 nonrefundable fee. The Commission recommends that applications be submitted 15 days in advance of the proposed event to allow for verification and coordination with other jurisdictions, if necessary¹⁴. If you are denied a permit, you should be informed in writing of both the reasons why and the procedure to follow to appeal the decision.

Groups desiring access to a shopping mall should obtain an application form from the shopping mall management. Groups that are denied a permit for reasons that appear arbitrary or unfair should contact the ACLU.

Speech Not Protected by the Constitution

The Supreme Court has held that the Constitution does not protect all types of speech. For example, you may not directly incite a riot or encourage an angry mob to injure someone. You may not directly provoke someone into a fight, and you may face penalties for spreading falsehoods about someone or for distributing literature that the courts have declared to be "obscene."

It is sometimes difficult to distinguish between legal and illegal speech. It is legal to demonstrate against draft registration, but it is illegal to knowingly counsel an individual to evade registration. It is legal to picket a store, but it is illegal to block entry to the store. It is legal to preach that our form of government is wrong, but it may be illegal to directly encourage a crowd to storm the White House. Broadly speaking, we are free to communicate our ideas but not to encourage immediate crimes.

Demonstrators are encouraged to abide by reasonable rules. They should not harass passers-by or cause unreasonable disruptions. The use of legal observers, discussed below, is advised if demonstration organizers believe a confrontation is likely.

If you are instructed not to speak, demonstrate, or engage in some other free speech activity — whether by a law, a police officer, or other government official — you should know that continuing to engage in the activity may result in criminal charges. The police order may later be tossed out of court, but you would still have gone through the hassle of being charged. Please alert the ACLU if you believe an official order has unreasonably restricted your right to protest.

Failure to obey a police officer may result in arrest under one of the following criminal offenses:

Disorderly Conduct (RCW 9A.84.030)
Failure to Disperse (RCW 9A.8A.020)
Resisting Arrest (RCW 9A.76.040)
Interference, obstruction of any court, building, or residence (RCW 9.27.015)
Trespass (RCW 9A.52.070; RCW 9A.52.080)
Disturbing school, school activities, or meetings (RCW 28A.87.060)

Endnotes

1. Washington Constitution, Article I, sections 4 and 5.
2. *Hague v. CIO*; 307 U.S. 496 (1939).
3. *Lovell v. Griffin*; 303 U.S. 444 (1938).
4. *Clark v. Community for Creative Non-Violence*; 468 U.S., 82 L Ed 2d 221 (1984).
5. *Jamison v. Texas*; 318 U.S. 413 (1943).
6. *Shaumburg v. Citizens for Better Government*; 444 U.S. 620 (1980).
7. *U.S. v. Grace*; 461 U.S. 171(1983). A Washington statute, RCW 9.27.015, makes it unlawful to protest outside a building where state court is being held. This statute is presumably unconstitutional after *Grace*.

8. 41 C.F.R. 102-74.460 et seq.
9. *Knights of the KKK, Realm of Louisiana v. East Baton Rouge Parish School Board*; 578 F. 2d 1122 (5th Cir. 1978).
10. *Bonner-Lyons v. School Committee of the City of Boston*; 480 F. 2d 442 (1st Cir. 1973).
11. *City of Chicago v. Chicago Military Project*; 508 F. 2d 921 (7th Cir. 1975).
12. *Pruneyard Shopping Center v. Robins*, 444 U.S. 74 (1980).
13. *Southcenter v. NDCP*, 113 Wn 2d 413 (1989).
14. See WAC 352-32-165.

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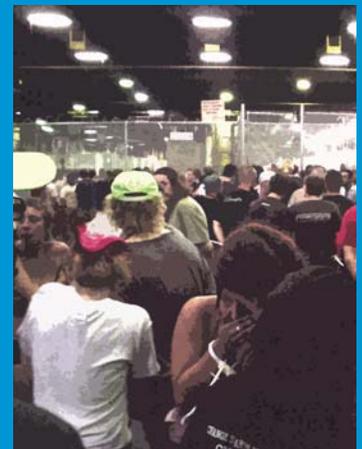
ATTACHMENT

RIGHTS AND WRONGS AT THE RNC: A Special Report about Police and Protest at the Republican National Convention



Rights and Wrongs at the RNC

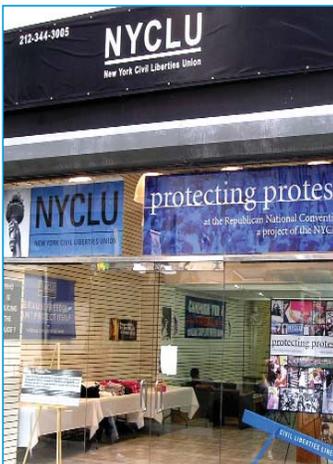
A Special Report about Police
and Protest at the Republican
National Convention





Rights and Wrongs at the RNC

A Special Report about Police and Protest at the Republican National Convention



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Claudia Angelos, President
Miriam O. Hyman, Vice President
Jonathan F. Horn, Secretary
Julie Clegg, Treasurer

Executive Director: Donna Lieberman
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Deputy Director: Nanette Francia-Cotter
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Genesee Valley: Barbara de Leeuw
Nassau: Barbara Bernstein
Suffolk: Jared Feuer
Lower Hudson Valley: Linda S. Berns
Western Regional: Jeanne-Noel Mahoney

Written by
**Christopher Dunn, Donna Lieberman,
Palyn Hung, Alex Vitale, Zac Zimmer,
Irum Taqi, Steve Theberge and Udi Ofer**

Graphic design by
Li Wah Lai

Production, editing and proofreading by
Maggie Gram, Martha Fay, and Marty Miller

Photographs by
**Alex Vitale, Ashley Collins, Associated Press,
Connie Murillo, Fred Askew @ fredaskew.com,
Izumi Kuremoto, Jacob Richards, Jeff Marracino,
Jeff Paterson, Judith Le, Maggie Gram,
Matt Ipcar, Mike @ Satan's Laundromat,
Peter Possenti, Pippin Petty, Ruth Benn**

Drawings by
Marcellus Hall

Message from the Executive Director

The New York Civil Liberties Union has produced this report to document and assess police practices involving protest at the Republican National Convention in New York City during the summer of 2004. The historical account provided by *Rights & Wrongs at the RNC* is particularly important in light of the fact that the New York City Police Department has defended all of its actions during the Convention and has insisted that it made no mistakes.

The NYCLU had a unique perspective on protest activities around the RNC. Well over a year before the Convention, we launched a major Protecting Protest campaign to ensure that New York would be as welcoming to those who came to protest as to the delegates themselves. The NYCLU's long history and legal expertise defending free speech rights enabled us to develop a broad campaign that included litigation, negotiations, public education, and advocacy. We negotiated with the New York Police Department on behalf of nearly every group that sought to demonstrate at the Convention. NYCLU lawsuits enjoined some of the most abusive police tactics that had been used at past demonstrations. We trained demonstrators to "Know Your Rights" and distributed tens of thousands of informational pamphlets and flyers. And, from our Protecting Protest Storefront just blocks from the Convention site, we operated a police monitoring program that deployed scores of easily identified NYCLU observers at nearly every demonstration.

The record of the NYPD's performance during the RNC is a decidedly mixed one. Hundreds of thousands of people were able to make their voices heard over the course of the week, and the police department displayed the necessary flexibility to allow many demonstrations to take place without major incident. But the right to protest was severely undermined by the mass arrests of hundreds of peaceful demonstrators and bystanders, the pervasive surveillance of lawful demonstrators, and the illegal fingerprinting and prolonged detention (in a filthy bus depot) of nearly 1,500 people charged with the most minor of offenses.

Included in the report is a chapter describing first-hand eyewitness accounts of police misconduct from over 200 people who filed complaints with the NYCLU. At the end of the report, the NYCLU makes a series of recommendations that, if implemented, will avoid a repeat of the problems that plagued the Convention. The NYCLU will continue to advocate for these and other measures for protecting protest so that all voices can be heard, whatever the issue, whatever the point of view. That's what democracy is all about.



Donna Lieberman
New York Civil Liberties Union

Executive Summary

The arrival of the Republican National Convention in New York City at the end of August 2004 marked an important moment in our nation’s civil-liberties history. Coming three years after the September 11, 2001 terrorist attacks that fundamentally altered the balance between security and civil liberties, in the midst of a war that had divided much of the country and was opposed by many New Yorkers, and in a city with a long history of fervent protest activity, the Convention presented a crucial test of our commitment to the right to free speech and dissent.

As expected, hundreds of thousands of people participated in peaceful Convention protests, with an antiwar march the day before the Convention opened being the largest protest to take place at a presidential nominating convention. Despite dire predictions — some emanating from law-enforcement authorities — that the Convention would be the target of violence or even terrorism, the demonstrations were peaceful. Nonetheless, police arrested more than 1,800 people — protesters, observers, members of the media, and bystanders — the largest number of arrests to take place at a national political convention.

As President George W. Bush flew out of New York City just before midnight on Thursday, September 2, and the final demonstration drew to a close, the focus shifted from the politics inside and the protests outside Madison Square Garden to assessing the actions of law enforcement agencies, in particular that of the New York City Police Department (NYPD). Because the New York Civil Liberties Union (NYCLU) represented the organizers of virtually every major Convention demonstration, the NYCLU was deeply involved in permit negotiations. It also successfully sued the NYPD over demonstration policing tactics and ran a major project monitoring the NYPD’s policing of Convention protests. As a result, the NYCLU has a unique and comprehensive perspective on how the government handled the Convention protests.

In this report the NYCLU documents the important events leading up to the Convention, the swirl of activity surrounding the Convention, and its considerable aftermath. Focusing primarily on the NYPD, the NYCLU concludes that the Department performed many of its duties well during the Convention while respecting the right to free speech, and the NYCLU commends the Department for those actions. At the same time, this report documents many troubling NYPD actions and makes a series of specific recommendations for changes in NYPD practices to assure that similar problems do not arise at future large-scale demonstrations.

The high point of the NYPD’s actions was the department’s handling of the United for Peace and Justice (UFPJ) antiwar march on Sunday, August 29, when as many as half a million people peacefully marched past Madison Square Garden, largely without incident, and with generally good cooperation. Low points included the long delays in processing permit applications, the closing of Central Park to political rallies, the mass arrests of hundreds of people lawfully gathered on City sidewalks, the lengthy detention and illegal fingerprinting of people charged with minor offenses, the use of a filthy bus depot



as a holding facility, and the pervasive videotaping of lawful protest activity.

Events Leading up to the Convention

The January 2003 announcement that New York City had been selected as the site of the August 2004 Republican National Convention marked the beginning of an intense 18 months of organizing by police and protesters, negotiations over permits, and legal challenges to anticipated police demonstration tactics. Other developments not specifically related to the Convention also were unfolding and would have a major impact on Convention policing.

Just months before the January 2003 announcement, New York City had asked a federal court to eliminate restrictions on its ability to conduct surveillance of political activity. The City had agreed to these restrictions in 1985 to settle a 1971 lawsuit — brought by the NYCLU and other civil rights organizations — that arose out of unlawful NYPD surveillance and infiltration of political groups in the late 1960's but now was contending that the 9/11 attacks justified scrapping restrictions on its spying power.

While this request was pending in court, a substantial controversy erupted over a large demonstration scheduled for February 15, 2003, by the group United for Peace and Justice (UFPJ) to protest the looming American invasion of Iraq. After the NYPD refused to allow the group to conduct a peace march in Manhattan — a decision upheld by the federal courts in litigation brought



by the NYCLU — a stationary rally took place on First Avenue north of the United Nations. As documented in the NYCLU report *Arresting Protest*, that bitterly cold day was marred by serious problems, with tens of thousands of people never reaching First Avenue because the NYPD had closed streets and sidewalks leading to the event, with thousands of people facing mounted police officers who rode into crowds packed onto sidewalks and streets with no possibility of retreating, and with those protesters who made it to First Avenue being herded into NYPD “pens” made of interlocking metal barricades. Hundreds of people were arrested, and New York City was heavily criticized for its handling of the event by the press, by lawyers’ groups, and by City Council members.

Six weeks later the NYCLU learned that the NYPD had secretly interrogated those arrested at the February rally about their political affiliations and about past protest activity. The Department’s Intelligence Division was compiling this information on a “Demonstrator Debriefing Form” — which also bore the emblem of a federal law-enforcement agency — and entering it in a computer database. When the NYCLU exposed this program, the Department quickly abandoned it amidst widespread public outrage.

With this as background, groups started to apply for permits for Convention demonstrations. In June 2003 UFPJ applied to have a 250,000-person rally on the Great Lawn of Central Park the day before the start of the Convention, and in November the NYCLU notified the Department of two other large demonstrations for which organizers were seeking permits.

At this point, the NYPD had not agreed to any meetings, despite numerous requests from the NYCLU going back to January 2003. Concerned about a repeat of the February 2003 rally fiasco, the NYCLU in November 2003

filed three federal lawsuits against the NYPD, challenging restrictions on access to demonstrations, the use of mounted officers to disperse crowds, the use of pens at demonstrations, and blanket searching of protesters seeking to attend public demonstrations. Through these three cases, the NYCLU sought to block NYPD use of these tactics at protests expected at the Convention.

In December 2003 the NYPD met with the NYCLU for the first time to discuss two planned Convention demonstrations. At that time, however, the Department said it was unable to make any decisions about permits and could make no commitment as to when permit decisions would be made.

It was not until two months later that permit meetings resumed. A serious controversy arose immediately when the City denied the UFPJ application for a rally Central Park, and insisted it take place on the West Side Highway. The City did agree, however, to allow UFPJ to march directly in front of Madison Square Garden and — after substantial delays that prompted objections from the NYCLU and other advocates — began approving permits for a wide range of other events.

Eventually, the City issued permits for virtually every demonstration with the NYCLU securing permits for 11 large events. The major exception was the UFPJ Central Park application, which ultimately led to last-minute litigation that was rejected by the courts, which in turn prompted UFPJ to cancel its rally and limit its event to a march past the Garden.

In late June the NYPD announced that large demonstrations near Madison Square Garden would be allowed to take place on Eighth Avenue in an area extending south of 30th Street to 23rd Street but only at that location. (The Garden is bounded by Seventh Avenue and Eighth Avenue to the east and west, respectively, and by 31st Street and 33rd Street to the south and north, respectively.) At the same time, the Department announced that most sidewalks in the vicinity of the Garden would remain open during the Convention.

As permit negotiations were winding down, the NYCLU's three federal lawsuits challenging the NYPD's demonstration-policing tactics went to trial. In mid-July, United States District Court Judge Robert W. Sweet issued a decision finding that the Department had unconstitutionally restricted access to demonstrations, had unlawfully used



pens to confine demonstrators, and had unlawfully searched people seeking to attend demonstrations. Judge Sweet subsequently barred the use of these practices at Convention demonstrations.

Meanwhile, in the months leading up to August 2004, the media were full of reports — many of which seemed to emanate from the NYPD and other law-enforcement agencies — of potential terrorist attacks on the Convention and of “anarchists” planning on disrupting the City through violent means. These reports, combined with a widespread belief on the part of protest organizers and the NYPD that hundreds of thousands of demonstrators would be flooding the streets of Manhattan during the Convention, created an atmosphere of tension and genuine fear about what would happen once the Convention opened.

The Convention Protests and Conflicts

Between Thursday, August 26 and Thursday, September 2, scores of demonstrations took place all over New York City. Most were peaceful and took place without incident, but many were marred by arrests and police conflict, most notably on Tuesday, August 31, when the NYPD arrested nearly 1,200 people. Throughout the protests, the police presence was massive, and police officials — using hand-held cameras, cameras mounted on buildings and street poles, and even a blimp — appeared to be videotaping all protest activity.

The first major demonstration took place on Friday, August 27, two days before the official start of the Convention, when nearly 5,000 people on bicycles gathered at Union Square Park for the monthly Critical Mass bike ride in which cyclists traditionally have taken to the streets and ridden spontaneous routes in an effort to draw attention to the need for transportation alternatives and improved safety for cyclists. In the days leading up to the ride, the NYPD had attempted to discourage cyclists from participating and threatened to enforce the traffic laws strictly. Nevertheless, the Department permitted the group to leave the park, and the ride continued for nearly an hour and a half before the police seemingly lost patience, pulled nets across Seventh Avenue to halt the ride and made mass arrests of riders without any warnings to disperse. Ultimately, over 250 people were arrested and had their bikes confiscated and held for weeks.

The following day, pro-choice groups led a march across the Brooklyn Bridge to a rally near City Hall that published reports estimated at 25,000 participants. This event took place without incident and with the cooperation





of the NYPD. Farther uptown, the Green Party staged a political festival in Washington Square Park that went equally smoothly.

Sunday, August 29, was the day of the UFPJ march, the largest Convention demonstration. Hundreds of thousands of people marched past Madison Square Garden largely without incident. Later that evening, however, even as thousands gathered in Central Park without challenge from the police, the NYPD used nets, horses and officers on scooters to corral and arrest groups of people walking on sidewalks in Times Square.

On Monday, August 30, the opening day of the Convention, a coalition of AIDS groups marched from Union Square across 15th Street and up Eighth Avenue to 30th Street, the designated rally area for large groups near the Garden. Later that day, thousands of people assembled in Dag Hammarskjöld Plaza near the United Nations, planning to march to the same rally area even though organizers had not obtained a march permit. Following negotiations on the scene, police officials agreed to allow the group to march, and the procession moved down Second Avenue to 23rd Street, across 23rd Street, and up Eighth Avenue to the designated rally site. Problems arose when police officers at 29th Street attempted to pull barricades through the group, protesters began to panic, and plainclothes police officers then drove their scooters into the crowd.

Tuesday, August 31 was designated by protest organizers as “direct action” day — a day of nonviolent civil disobedience — and police officials were geared up to clamp down on protesters. When hundreds gathered near the World Trade Center for a march that was to end with some participating in a “die-in” near Madison Square Garden, police officials agreed to allow the group to march along sidewalks even though no formal permit had been issued. The march had not moved one full block, however, before an NYPD chief ordered the arrest of over 200 people, with everyone being surrounded by nets, handcuffed, and loaded onto buses for processing. This marked the beginning of a series of confrontations around the City that resulted in nearly 1,100 people — protesters, legal observers, members of the press, and innocent bystanders — being arrested in a four-hour period in locations around New York City. Most of them then were taken to Pier 57, a bus depot the NYPD had converted into a holding facility, a choice that was to mushroom into a major controversy.



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The next day was a relatively quiet one on the streets, with the largest events being a rally by organized labor at the designated demonstration area on Eighth Avenue, a sidewalk protest stretching from Wall Street to the Garden called “The Line,” and an evening women’s rights rally in the East Meadow of Central Park. Of greater significance, however, was the fact that many of those arrested the previous day were still being held by the police, although they had been charged only with minor offenses that did not qualify as crimes. Late that night the Legal Aid Society and then the Lawyers’ Guild went to court and obtained court orders requiring the City to release the protesters. When hundreds remained in custody on Thursday morning, a New York State judge found the City in contempt.

Thursday was the last day of the Convention and the day President Bush was scheduled to appear at Madison Square Garden to accept the nomination. Security around the City was particularly tight, and only a few significant demonstrations were scheduled. That evening, however, thousands of people gathered in Union Square and sought to march to the Garden, though the NYPD had not issued a permit. After negotiations with the NYCLU, police officials on the scene agreed to allow the crowd to march across 15th Street and up Eighth Avenue to the designated rally site, where they were met by a large contingent of police officers in helmets and riot shields under the command of Chief of Department Joseph Esposito. The spirited crowd remained in the streets until nearly midnight, by which time point President Bush had departed and the Convention had officially ended.

Though the demonstrations had concluded, the controversy surrounding the NYPD’s detention of protesters was coming to a boil. With the long-delayed release of arrestees on Thursday and Friday came disturbing reports of unhealthy and perhaps dangerous conditions at Pier 57. On top of the fact that hundreds of people were held far longer than the 24 hours permitted under state law, the NYPD was accused of intentionally delaying the release of protesters to keep them from participating in demonstrations taking place while the President was in the city. Those released from detention also told of being denied medical care, of spending many painful hours in too-tight plastic handcuffs, of not being given any *Miranda* warnings, and of generally being mistreated while in detention. There were also reports of police harassment of protesters carrying signs, and there was a report of at least one police officer citing his own political opinions as justification for threatening to arrest a demonstrator who was

with the prints being sent to state authorities in Albany and then in many instances to the FBI. Because New York law does not allow the police to take the fingerprints of people charged with minor offenses except in special circumstances (such as the lack of valid identification), the NYCLU in early October wrote to NYPD Commissioner Raymond Kelly and called on him to destroy the fingerprints. Two weeks later — after the NYCLU filed a lawsuit — the City agreed to do just that.

NYPD actions prompted the filing of two sets of major federal lawsuits. On October 7 the NYCLU filed two cases arising out of mass arrests at the World Trade Center and Union Square, challenging NYPD mass-arrest tactics, the length and conditions of detention, and the fingerprinting of those arrested. On November 22 a group of lawyers and advocates led by the National Lawyers Guild filed a class-action lawsuit claiming that the NYPD had carried out mass arrests in order to suppress protest activity and also challenging the length and conditions of detention of those arrested. Since then, over a dozen additional lawsuits have been filed (with many more expected), and, as of June 2005, 569 people had filed notices that they intended to sue the City, seeking damages totaling \$859,014,421.

After the Convention, the City Council held two oversight hearings into the NYPD's policing of the protests. At the first hearing, on September 15, the City declined to appear, and the bulk of the hearing was devoted to advocate testimony about the treatment of those arrested and the unlawful nature of many of the arrests. A second hearing on October 27 featured testimony from the NYPD chief in charge of Pier 57, who asserted that conditions at the holding facility were unobjectionable and posed no health risk to those being detained there. He also disclosed that the blanket fingerprinting of demonstrators was a special practice put in place for the Convention to address terrorism concerns.

Conclusions and Recommendations

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Given legitimate concerns about terrorism after 9/11, the Republican National Convention posed a substantial challenge to the NYPD and other law enforcement authorities. In many respects the NYPD handled the Convention protests well, and important lessons are to be drawn from that. Too often, however, in an effort to maintain tight control over protest activity, the NYPD lost sight of the distinction between lawful and unlawful conduct.

In the sections that follow, the NYCLU provides a detailed chronology of events leading up to and during the Convention, an analysis of NYPD tactics and actions during the Convention, a description of 271 individual complaints received by the NYCLU following the Convention, a description of NYCLU's "Protecting Protest" campaign, and a series of specific recommendations for changes in NYPD practices. ■

Chronology of Major Events Leading Up to Convention

9/11/01: Terrorist attack destroys World Trade Center and damages Pentagon. 2,749 people die at World Trade Center.

9/25/02: New York City asks a federal court to eliminate restrictions on the ability of NYPD to conduct surveillance on lawful political activity.

1/06/03: The Republican National Committee announces selection of New York City as site of the August 2004 Republican National Convention.

2/15/03: United for Peace and Justice (UFPJ) anti-war rally attended by more than 100,000 people but is marred by NYPD closing of streets and sidewalks leading to the event, the use of pens to confine demonstrators, the use of police horses against peaceful crowds packed on public streets and sidewalks trying to get to the event, and hundreds of arrests.

4/06/03: NYCLU discloses that NYPD used a “Demonstrator Debriefing Form” to interrogate people arrested at the February 15, 2003, antiwar rally about their political activities and associations and was using the information to build a database. NYPD agrees to discontinue the use of forms and questioning about political affiliation and to destroy database.

4/07/03: A federal court grants City’s request to loosen restrictions on NYPD’s ability to monitor political activity.

11/19/03: NYCLU files three federal lawsuits arising out of the February 2003 anti-war demonstration and challenging NYPD demonstration practices expected to be used at the Convention, including the closing of streets and sidewalks leading to demonstration sites, the use of pens to confine demonstrators, the use of mounted officers to disperse peaceful crowds, and the blanket searching of people seeking to attend demonstrations.

12/23/03: First NYPD meeting about planned demonstrations takes place when NYPD meets with NYCLU to discuss demonstrations planned by Not in Our Name and the Still We Rise Coalition.

1/04-4/04: NYPD meets on several occasions with UFPJ, NYCLU, and

Center for Constitutional Rights (CCR) about the planned UFPJ march past Madison Square Garden and rally on Great Lawn of Central Park.

4/26/04: Parks Department formally denies UFPJ application for Great Lawn.

5/27/04: NYPD informs NYCLU that it will allow UFPJ to march on 7th Avenue past Madison Square Garden.

6/09/04: NYPD starts series of meetings with NYCLU and various groups seeking permits for Convention demonstrations.

6/26/04: NYPD designates Eighth Avenue south of 30th Street as place where large rallies near Madison Square Garden will take place.

6/28/04: The New York City Council, by a vote of 44-5, passes a resolution calling on government officials to protect and uphold First Amendment rights at the Convention.

6/04-7/04: NYPD agrees to issue permits for virtually all protest events.

7/19/04: Federal Judge Robert Sweet issues decision finding NYPD restrictions on access to demonstrations, use of pens, and searching of demonstrators unconstitutional. He later bans the use of these tactics at the Convention.

7/26-29/04: The Democratic National Convention takes place in Boston. Demonstrations are small, but substantial controversy arises over police-mandated frozen zones and designation of a “protest area.”

7/29/04: NYCLU opens its Protecting Protest Storefront at 520 Eighth Avenue, three blocks north of Madison Square Garden.

8/18/04: CCR and NYCLU file suit on behalf of UFPJ against the City over denial of permits for Central Park.

8/25/04: New York court rejects the UFPJ challenge to the Parks Department denial of a permit for use of the Great Lawn on August 29. UFPJ announces it will have no rally, only a march.

Chronology of Major Events Surrounding Convention

8/25/04: First significant Convention demonstration takes place as AIDS activists strip naked, baring political messages and blocking traffic on Eighth Avenue near Madison Square Garden.

8/26/04: Protesters walking from the Democratic National Convention to the Republican National Convention arrive at Columbus Circle and march down Broadway to Union Square accompanied by local political activists.

8/27/04: The monthly Critical Mass bike ride draws approximately 5,000 participants who ride through Manhattan streets for approximately 90 minutes before NYPD cracks down on the event, stretches orange netting across Seventh Avenue to block riders, and arrests over 250 people.

The Christian Defense Coalition holds candlelight vigil at Madison Square Garden.

8/28/04: Planned Parenthood, NYCLU, and other women's rights groups lead a march of as many as 25,000 across the Brooklyn Bridge to a rally at City Hall Park, without problems.

The Green Party holds political festival in Washington Square Park without incident.

8/29/04: Not In Our Name holds a rally in Union Square Park before the UFPJ march.

The UFPJ march draws as many as 500,000 people, who march past Madison Square Garden, across 34th Street to Fifth Avenue, down Fifth Avenue to Broadway, and down Broadway to Union Square Park. The event takes place largely without police interference.

After UFPJ march, thousands casually gather in Central Park without interference from the NYPD.

That evening NYPD uses nets and motor scooters to surround and arrest scores of people on public sidewalks in and near Times Square.

8/30/04: Still We Rise Coalition, in an event co-sponsored by NYCLU, marches from Union Square to the designated demonstration area at 30th Street for a rally.

Thousands gather at Dag Hammarskjöld Plaza near the United Nations to participate in a march for which no permit has been issued. High-level police officials negotiate with organizers and NYCLU and agree to allow group to march to 8th Avenue demonstration area. As group approaches rally area, police officers without warning run line of barricades across 8th Avenue at 29th Street, sparking panic amongst marchers. As people start pushing against

barricades, police officers storm into crowd and strike people with batons and plainclothes officers on unmarked scooters ride into crowd. One officer is pulled from his scooter and assaulted.

8/31/04: Designated day of "direct action." NYPD arrests nearly 1,200 people in four-hours, almost all of whom are charged with minor offenses such as disorderly conduct or parading without a permit. At World Trade Center, officers arrest 227 at War Resisters' League March after telling them they could march on a sidewalk. At New York Public Library, scores are arrested for standing on building steps. At Union Square, police officers use mesh nets to seal entire blocks and to arrest hundreds, including bystanders. Sole protester at demonstration scheduled at a Hummer dealership is arrested for blocking a sidewalk.

9/01/04: "The Line" takes place without incident.

NYCLU first contacts the District Attorney's Office seeking dismissal of charges against 227 people arrested at World Trade Center.

Reports start surfacing that people arrested by NYPD are being held in filthy former bus depot on Hudson River known as Pier 57.

Protest outside Pier 57 over NYPD detention of people at the facility.

Central Labor Council holds large rally in the designated demonstration area on 8th Avenue.

NOW-NYC rally takes place in Central Park's East Meadow without incident.

President Bush arrives in New York City and participates in an event in Queens.

Legal Aid Society files lawsuit to force release of hundreds of people who were arrested on August 31 and are still being held. National Lawyer's Guild follows with a similar suit. A state court judge orders the City to release certain prisoners.

9/02/04: The Legal Aid Society and National Lawyers Guild seek and obtain a contempt order against City for its failure to comply with the court order to release arrestees.

ANSWER holds a rally attended by several thousand in designated demonstration area on 8th Avenue. NYPD uses four-sided pens that substantially impair movement at demonstration.

Thousands gather in Union Square and spontaneously decide they wish to march to 8th Avenue rally site. NYCLU negotiates with NYPD, which agrees to allow the march.

The Convention ends and President Bush leaves New York

Law Enforcement Convention Tactics

During the Republican National Convention the NYPD deployed a number of tactics that raise serious concerns and in some instances were unlawful. Most seriously, the NYPD used indiscriminate-arrest tactics that resulted in the unlawful arrests of hundreds of protesters, legal observers, members of the media, and passersby; it held arrestees charged with only minor offenses for lengthy periods of time in hazardous conditions; fingerprinted everyone arrested during the Convention; and engaged in pervasive and indiscriminate videotaping of lawful and peaceful protest activity. Also of concern was the improper used plastic handcuffs, the Department's encouragement of inflammatory pre-Convention reports in the press, its use of plainclothes officers on unmarked motor scooters, its use of metal barricades for crowd control, and its overwhelming show of force at all demonstrations. Some of these tactics were unveiled by the NYPD especially for the Convention.

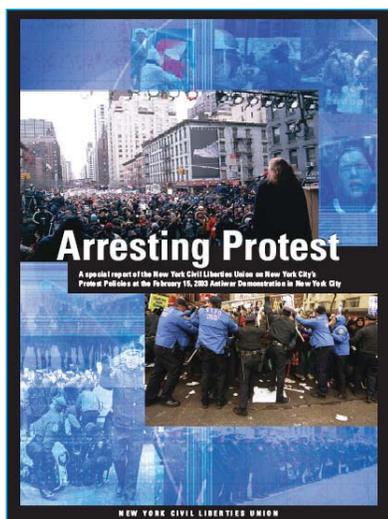
Background

Over the last ten years the NYPD has developed a comprehensive approach to the policing of demonstrations. This model of policing is based on the “broken windows” theory, which says that serious crime can be controlled by eliminating minor public disorders through a variety of zero-tolerance policing tactics.¹ Beginning in earnest in 1998, the NYPD has used this approach at almost all demonstrations, large and small. This “command and control” model utilizes large numbers of officers, numerous barricades and protest pens, limited access to

demonstration areas, and in extreme cases, the willingness to use force against non-violent demonstrators for minor violations of the law. The term “command and control” captures the degree to which this new approach is highly structured, hierarchical, and relies on direct regulation and micro management of all aspects of demonstrations.² The most egregious instance of this model was seen on February 15, 2003, when hundreds of thousands of demonstrators were denied the right to march, held involuntarily in protest pens, or prevented from entering the event because of overly restrictive access plans; in some cases they were subjected to police batons, pepper spray, and mounted police charges while standing in the street or on sidewalks while attempting to gain access to the rally.³

Since then the NYCLU has attempted to highlight the problems of this approach. In April 2003 we issued the report *Arresting Protest*, which documented the problems that arose at the February demonstration and made specific recommendations to address those problems. In November 2003, the NYCLU filed federal lawsuits that successfully challenged various NYPD demonstration policing tactics.

American Civil Liberties Union offices across the country have been monitoring an increased use of heavy-handed demonstration-policing tactics in other cities where large demonstrations have taken place in the past several years. Much of the justification for these kinds of restrictive and preemptive tactics comes from the assessed failure of the Seattle Police Department to adequately handle the large and disruptive protests during



the World Trade Organization (WTO) meetings in 1999.⁴ During the WTO, demonstrators succeeded in preventing delegates from reaching the convention site by the systematic blockading of surrounding streets through non-violent civil disobedience. In addition, some small groups broke windows at a few targeted locations. The police responded by indiscriminately attacking demonstrators whether or not they were engaged in illegal or destructive activity with pepper spray, rubber bullets, and baton charges. In the process a state of emergency was declared, effectively shutting down large parts of central Seattle and contributing to the WTO meetings being adjourned early.⁵



Since then, police departments have come to view high levels of police infiltration and surveillance, the deployment of huge numbers of officers with a variety of high tech “less lethal” weaponry, and preemptive arrests and detentions as the model for controlling similar large protests.⁶ This approach is sometimes referred to as the “Miami Model” after the widespread use of these tactics during the Free Trade Area of the Americas demonstrations in November of 2003.⁷ Similar approaches were used by police during the 2000 Republican National Convention in Philadelphia and the IMF/World Bank Meetings in Washington D.C. in 2000.

Unfortunately, the NYPD seems to have adopted aspects of this approach in its handling of large demonstrations here in New York City. Some of these tactics were particularly prevalent during the Convention.

12 Indiscriminate Mass Arrests

Approximately 1800 were arrested at Convention-related protests between Thursday, August 26 and Thursday, September 2. Hundreds were swept up in mass arrests and there were at least four incidents at which the NYPD arrested more than 100 people at a single event.

In each instance of mass arrests, large numbers of people were peacefully assembled on public streets or sidewalks, and the police failed to provide any meaningful order or opportunity for people to disperse before arresting them. In each instance, as well as on many other occasions during the week, the NYPD used orange mesh netting to surround groups and then arrest everyone inside.

The most egregious example of unlawful mass arrests was the NYPD’s arrest of 227 people on Fulton Street near Ground Zero during the August 31 demonstration by the War Resisters League. The group had notified police of their intention to march on the sidewalk from Ground Zero to Madison Square Garden, where some would engage in non-violent civil disobedience. Negotiations were undertaken with police as the group gathered. The police agreed to allow a sidewalk march east across Fulton Street to Broadway and then north on Broadway to Union Square. From there protesters would proceed toward the Garden. These negotiations were witnessed by City Council Member Bill Perkins and NYCLU monitors. Demonstrators were informed that they would be allowed to march as long as they did not block pedestrian or vehicular traffic. Police attempted to communicate this to those assembled, though their hand-held bullhorns were not adequate. Nonetheless, demonstrators complied with the

According to press reports, arrests by day were as follows:

Aug. 26:	22 arrests
Aug. 27:	264 arrests
Aug. 28:	10 arrests
Aug. 29:	253 arrests
Aug. 30:	13 arrests
Aug. 31:	1,187 arrests
Sept. 1:	21 arrests
Sept. 2:	29 arrests



police order and proceeded east on Fulton as instructed. Halfway down the block Chief Terence Monahan, the commanding officer at the event, claimed that demonstrators were blocking the sidewalk, shouted that people should disperse, and almost immediately ordered that they all be arrested, with officers surrounding everyone on the sidewalk with netting.

The NYPD also used mesh netting to make indiscriminate mass arrests at the August 27 Critical Mass ride, where it pulled netting across Seventh Avenue at two locations and arrested everyone on the block; on East 16th Street near

Union Square, where on August 31 it used netting to seal both ends of the block before arresting everyone trapped in between; and at the Public Library, again on August 31, where it corralled an entire crowd of people standing on the steps and arrested them.

Not surprisingly, reliance on this tactic resulted in large numbers of wrongful arrests. While some individuals caught in the nets may have been engaging in unlawful activity, the nets snared hundreds of demonstrators who were acting entirely lawfully, people who were simply watching the demonstrators, and even passers-by who had nothing to do with the protests but were simply in the wrong place at the wrong time. In each case the police made no effort to distinguish between those allegedly engaged in unlawful activity and those simply caught up in the nets.

Hacer Dinler, a dancer who is a plaintiff in one of the NYCLU's post-Convention lawsuits, was walking across East 16th Street on her way to work the evening of August 31 when the NYPD sealed both ends of the block with netting to block a protest march. After being trapped for several hours and watching the police arrest hundreds of people around her, Ms. Dinler collapsed and suffered convulsions as police officers moved in to arrest her. A videotape shows her writhing on the ground before being strapped to a gurney and taken to a hospital, where she experienced further seizures. The NYCLU received dozens of additional reports of the arrests of people with no connection to the demonstration, including foreign tourists and people on their way to work.

The nets also captured scores of clearly identified legal observers and a large number of members of the media. In some instances the NYCLU was able to secure the release of reporters, but the Department refused to release any legal observers, and many of them spent lengthy time in NYPD custody. According to the National Lawyer's Guild, approximately 20 individuals were arrested while acting as legal observers.

The NYCLU recognizes that nets allow the police to surround large numbers of people quickly with less use of force. While this reduction in force is laudable and might be appropriate for certain crowd-control situations, the use of netting to make mass arrests virtually assures that many people will be



wrongly arrested, as happened during the Convention.

Prolonged Detention of Protesters

Of the approximately 1,800 people arrested during the Convention, nearly 1,500 were charged with minor offenses such as parading without a permit or disorderly conduct. Under New York law, these offenses are not even considered crimes but instead are known as “violations.”

Under standard NYPD procedure, people charged with violations generally are not held for arraignment before a judge but instead are given what is known as a desk appearance ticket or a summons. Under either procedure, the person under arrest usually is released in a few hours. When someone is to be arraigned, the person is supposed to be presented to a judge within 24 hours of arrest.

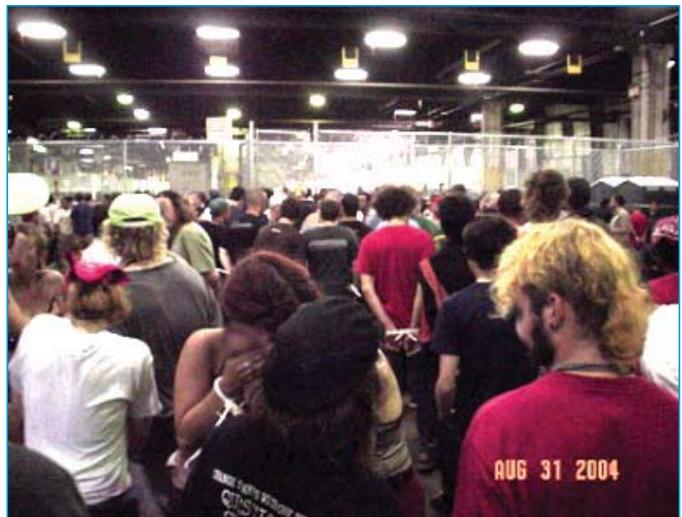
The NYPD’s handling of those arrested during the Convention diverged from these standards in two important respects. First, virtually all of those arrested were held for arraignment, a process that results in considerably longer detention. Second, Convention arrestees were not arraigned in a timely manner, with some people being held for as long as three days. This problem was most acute with the nearly 1,200 people arrested on Tuesday, August 31. When hundreds of them were still in custody 24 hours later, the Legal Aid Society and then the National Lawyers Guild sued in court and obtained orders requiring the release of protesters. When the City failed to comply, the court held it in contempt on Friday, September 2.

As is detailed later in this report (see page 34), the NYCLU received reports from 169 people about how long they were held after being arrested. Two-thirds of them reported having been detained for more than 24 hours and nearly 40% of them reported being held for 36 hours or more.

The explanation for the long delays in arraignment during the Convention is in dispute. The NYPD has claimed that it was overwhelmed by the numbers of arrests on August 31 and that arraignments were delayed because of lags in the fingerprinting process. New York State officials, however, claim that fingerprints sent to it by the NYPD were turned around quickly, and court officials say that judges and lawyers were sitting around waiting for arraignments but that the NYPD was not producing people for arraignment. Some advocates have alleged that the NYPD intentionally delayed the release of protesters to prevent them from reappearing while President Bush was still in the City, a charge the NYPD vehemently denies.

Detention of Protesters in Hazardous Conditions

Beyond the issue of the length of time people charged with minor offenses were held is that of the conditions in which people were held. Most significantly, many concerns have been raised about the detention of hundreds of demonstrators at a facility on the Hudson River at 15th Street.



That facility is a bus depot known as “Pier 57.” In preparation for the Convention, the NYPD had constructed large holding cells topped with razor wire inside the depot. As one would expect for an active bus depot, the concrete floors were covered with grime, soot, and other substances. It apparently was unheated.

By all accounts, there was inadequate seating in the holding cells at Pier 57, which forced people to sit or lie on the bare concrete floors covered with soot and grease. Though hundreds of people were held at Pier 57 for extended periods of time and in many instances overnight, they had no access to running water or blankets. The only bathroom facilities were portable toilets, which quickly became disgusting; many detainees reported people relieving themselves in the open out of desperation.

Many people emerged from police custody with accounts of respiratory ailments, rashes, and other medical conditions reportedly caused by these conditions. Some advocates have alleged that conditions inside Pier 57 posed serious health hazards to detainees and police officers. The conditions of detention are now the subject of several lawsuits against the City.

Fingerprinting of People Charged with Minor Offenses

Soon after the Convention concluded, the NYCLU started to receive reports that everyone arrested during the Convention had been fingerprinted by the NYPD. We further learned that all of these fingerprints had been sent to Albany and that several hundred may have been forwarded to the Federal Bureau of Investigation.

Concerned about the prospect that law-enforcement agencies were using arrests for minor offenses as a means of collecting the fingerprints of hundreds of political activists, the NYCLU examined New York State laws governing fingerprint collection and learned that the law did not allow the NYPD to fingerprint people charged with minor offenses except in narrow circumstances. Since we believed that the NYPD had in fact fingerprinted every single person arrested during the Convention, we wrote to Commissioner Raymond Kelly on October 4 alerting him to the legal restrictions on fingerprinting and asking that the Department assure that all unlawfully obtained fingerprints be destroyed and expunged from any computer databases.

Three days later the NYCLU filed two federal lawsuits against the Department, which included a legal challenge to the fingerprinting of those arrested at the Convention. Two weeks later, following negotiations with the NYCLU, the NYPD announced it had destroyed the fingerprints.

One week later, at the October 27, 2004 hearing before the Government Operations Committee of the City Council, the NYPD deputy chief who was in charge of Pier 57 testified that the fingerprinting of the demonstrators was pursuant to a special policy because the Convention was a national security event. When confronted with the New York State law provisions governing fingerprinting, he declined to explain how the Department’s blanket fingerprinting of demonstrators was lawful.



Plastic Handcuffs

By all accounts, virtually every person arrested during the Convention was restrained using plastic handcuffs known as “flex-cuffs.” Despite their benign-sounding name, flexcuffs can cause considerable discomfort and even pain or injury when not used properly. Flexcuffs pose a serious risk when applied too tightly or when left on for extended periods of time.



The NYCLU has received many complaints about improper use of flexcuffs by the NYPD at demonstrations in recent years, but the Convention generated the most serious complaints to date. As is discussed in the next section, some of these complaints suggest that officers used flexcuffs in a deliberately sadistic way, tightening them to the point of cutting off circulation, in retaliation for complaints about police treatment of those under arrest.

Surveillance and Videotaping

Troubling NYPD practices were not limited to the Department's arrest and arrest-processing tactics. One of the most disturbing was the Department's pervasive videotaping — with hand-held cameras, cameras mounted on poles and vehicles, even a blimp — of people engaged in lawful protest activity. In addition, reports received by the NYCLU and media stories suggest that the Department was engaging in surveillance of protest groups and organizers throughout the Convention.

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In February 2003, the month after it was announced that the Republican National Convention would take place in New York City, a federal judge ruled that he would grant the City's request to relax a 1985 consent decree that had substantially restricted the NYPD's ability to videotape people participating in protest activity, to conduct surveillance of political groups, and to retain information about such activity.⁸ The new restrictions, which were based on guidelines adopted by the FBI in May 2002, allowed surveillance when "information... indicated the possibility of criminal activity."⁹ Though the new guidelines lowered the standard for conducting surveillance and eliminated many of the information-retention restrictions of the original consent decree, most people were unprepared for the dramatic change in NYPD surveillance practice that surfaced during the Convention.



Most significantly, the NYPD engaged in blanket videotaping of lawful protest activity. Countless numbers of police officers with video cameras filmed tens of thousands of people who were engaged in wholly lawful and peaceful activity. An NYCLU survey of the designated demonstration site on Eighth Avenue near Madison Square Garden revealed a tripling of the number of surveillance cameras in the area, with at least seven new cameras being operated by the NYPD. A blimp used by the NYPD for the duration of the Convention reportedly had the ability to



photograph individual license plates.¹⁰

The NYCLU also received reports indicating that the NYPD may have spied on people who were organizing legally permitted demonstrations in which there was no reasonable threat of even minor illegal activity. The organizer of the August 30 Still We Rise Coalition march and rally, while visiting her parents in New Jersey shortly before the event, was followed by a vehicle containing what appeared to be law-enforcement personnel. When she returned home to Brooklyn late that night, a different vehicle with two men and a computer screen remained in front of her building through the night.

Press reports also indicate that police attended political events and organizing meetings without identifying themselves.¹¹

Protest Pens and Access

Concerns about NYPD restrictions on access to demonstrations and its use of “pens” made of interlocking metal barricades had been building in New York City for years and finally boiled over at the February 2003 anti-war demonstration. In anticipation of similar problems at the Convention, the NYCLU obtained a court order prohibiting the NYPD from closing streets and sidewalks to demonstrations without informing the public of alternative routes of access and requiring the Department to ensure that people could move freely in and out of any pens set up by the police.

As it turned out, most of the demonstrations did not involve the type of large, stationary rallies on city streets where access and pens have been of greatest concern. Rather, many of the bigger Convention protests were marches. The larger stationary rallies that took place in the designated protest area on Eighth Avenue were mostly preceded by marches through which participants freely entered the protest area. Moreover, the Department had agreed even before the Convention started not to use four-sided pens.

Nonetheless, problems surfaced. Most significantly, on three occasions (the Still We Rise March the afternoon on August 30, the March for Our Lives the evening of August 30, and the march from Union Square during Bush’s acceptance speech on September 2), as groups marched up Eighth Avenue, the police, without warning, rushed a line of interlocked metal barricades through the crowd to segment it and create three-sided pens. This tactic caused considerable confusion among demonstrators, and in one instance (the March for Our Lives march) prompted a melee between officers and protesters who thought they were being arrested en masse. The confrontation in turn prompted riot police to strike members of the crowd with batons while about a dozen plainclothes officers dangerously rode their scooters into the crowd, leading to a confrontation in which one police officer was pulled off his scooter and assaulted.

Problems of access were most noticeable at the Central Labor Council rally on September 1 and the ANSWER rally on September 2. Both took place at the Eighth Avenue protest area, and neither was preceded by a march,

but in both instances streets and sidewalks leading to the demonstration area from Seventh and Ninth Avenues were blocked and police officers gave inaccurate or no information about how people could get into the rally site, often directing people as far south as 23rd Street.

Pre-Convention Publicity

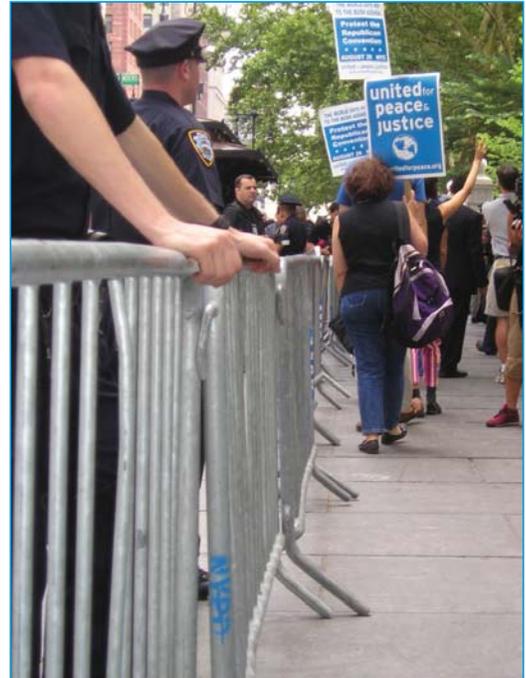
Before the Convention even began, numerous media reports suggested that demonstrations might involve violence by protesters. Similar reports preceded major demonstrations in other cities, including Washington D.C. (2000), Philadelphia (2000), St. Louis (2003), and Miami (2003), New York prior to the World Economic Forum in 2001 and the anti-Iraq war demonstration on February 15, 2003.¹² Happily, the demonstrations were peaceful. However, the NYPD's apparent involvement in some of this reporting raises concerns about the extent to which the Department may have been trying to discourage people from attending demonstrations or may have been using the press preemptively to justify excessive policing at Convention demonstrations.

In general, on-the-record police statements about potential problems at demonstrations were reasonable and balanced. Police Commissioner Raymond Kelly and Deputy Commissioner for Public Information Paul Browne both said on a number of occasions that they expected the vast majority of demonstrators to be law-abiding (*Daily News* 8/19/04, *Newsday* 8/20/04). Unfortunately, other statements were made both officially and unofficially and actions taken that served to “poison the well” of police-demonstrator relations in the weeks leading up to the protests.

Most troubling, perhaps, was the Department's conduct of a series of training drills on August 19 at Floyd Bennett Field with the press present. The drills were designed to show that the NYPD was prepared for a variety of both protester and terrorist tactics. One mock protest action included people locking their arms together inside metal pipes and storming a bus full of RNC delegates. The police also showed off new bullet-proof armored vehicles and sound devices capable of communicating with crowds over long distances. The clear suggestion was that confrontational protests were expected and that the Department was prepared to use overwhelming numbers of officers to control any type of protest activity.

Other disturbing reports preceded this event. On July 12 the *Daily News* reported that “fringe elements are hoping to spark major disruptions at the Republican National Convention with a series of sneaky tricks — including fooling bomb sniffing dogs on trains bound for Penn Station... decoying specially trained Labrador retrievers with gunpowder or ammonium nitrate laced tablets... and throwing marbles under the hooves of police horses.”¹³ While the *Daily News* claimed to have obtained this information from anonymous Internet chat rooms, Commissioner Kelly gave credence to these threats and added to their impact by making his own inflammatory statements: “Where is the legitimate protest in trying to endanger the public...? These hardcore groups are looking to take us on...They have increased their level of sophistication and violence.”

In a similar vein, starting with an August 13 story in *Newsday*, several media reports cited police sources to support stories about the NYPD tracking “anarchists” bent on creating chaos at the Convention.¹⁴ On August 20 *The New York Times* reported that police officials had “identified about 60 people as militants, some of whom were arrested for violent acts at past protests.”¹⁵ This rather innocuous statement indicated that the police had developed lists of demonstrators they considered a threat and were sharing this information with the press. More



details were released by *The New York Post* on August 23, which quoted “a top level source” with knowledge of police intelligence gathering as saying “These people are trained in kidnapping techniques, bomb making and building improvised munitions.”¹⁶ On August 26, *The Daily News* ran a report that seemed to be based on similar police intelligence. Quoting “police intelligence sources,” “a high-ranking police source,” and “NYPD intelligence reports,” they describe the threat posed by numerous specific individuals and organizations being tracked by the police as potentially violent protesters. Some of the individuals and organizations profiled were accused of being “violent fanatics,” with a history of violent actions and with plans of “hurling bricks followed by Molotov cocktails through the widows of military recruiting stations” and “vandalizing McDonald’s and Starbucks.”¹⁷

Finally, FBI sources apparently played a similar role in some pre-Convention reporting. For instance, in an August 19 *Daily News* article, FBI Counterterrorism Chief Gary Bald and other “senior federal law enforcement officials” expressed fears that some demonstrators were “plotting bloody confrontations during the Republican National Convention.”¹⁸

Searches

Consistent with the court order obtained by the NYCLU prior to the Convention, the NYPD did not conduct blanket searches of persons seeking to participate in Convention demonstrations. We did learn of a small number of individual searches, most of which involved people taking photographs or videotaping in the vicinity of Madison Square.

Plainclothes Officers and Motor Scooters

Plainclothes officers were deployed on foot, motor scooter and bicycle during the Convention. Typically, these officers are used to look for signs of illegal activity — such as rock throwing — from within otherwise legal demonstrations. This allows the officers to notify uniformed police of the problem and to identify specific individuals engaged in illegal activity. For reasons of officer safety and to avoid confrontations within a crowd, these officers rarely take direct enforcement action, leaving that to uniformed teams. When they do engage in enforcement action, NYPD policy requires them to identify themselves by displaying their shield with badge number on the outside of their clothing. Unfortunately, many of these procedures were not followed during the Convention.

The most troubling practice was the use of plainclothes officers on motor scooters. This new tactic utilized approximately a dozen officers working together to control crowds. During the August 27 Critical Mass ride they

rode within the event and assisted in making arrests by driving their scooters into moving bicyclists and by blocking the path of cyclists. On Sunday, August 29 there were numerous incidents of these officers harassing bicyclists riding in the vicinity of the United for Peace and Justice march. These officers rode into and knocked over bicyclists on several occasions. On the morning of August 30 scooter officers following the permitted Still We Rise march from Union Square to Madison Square Garden rode on the heels of the rear of the march, heightening tensions and causing the NYCLU to intervene with the ranking officer at the scene to have them removed.





These officers were also used later in the day at the March for Our Lives demonstration on Eighth Avenue to charge a crowd during an altercation with the police. They rode into a large demonstration without identifying themselves as police officers in an effort to disperse a crowd that was enclosed within a protest pen that had few exit points, creating a dangerous situation for both the officers and the demonstrators. In the resulting confusion, several demonstrators were struck by officers, and one officer was pulled from his scooter and seriously injured.

The use of plainclothes officers in these situations created considerable confusion among demonstrators, who on several occasions were

physically confronted by people on motor scooters they had no reason to believe were police officers. On one occasion senior NYCLU personnel observed uniformed officers attempting to cut off the plainclothes unit, apparently not realizing they were law enforcement personnel. One high-ranking official told the NYCLU that his task force was completely confused by the motor scooter unit, as they had no idea they were fellow officers.

Finally, the NYCLU was deeply troubled to learn that one of the members of the NYPD's plainclothes scooter unit had stenciled on his helmet, "Loud Wives, Lose Lives." To the extent the Department thought this type of offensive message would allow the officer to appear to be a protester, that offers a disturbing insight into the NYPD's view of those engaged in protest activity.



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Use of Force

Excessive use of force against non-violent demonstrators was the most troubling aspect of the NYPD's handling of the February 2003 demonstration. Fortunately, there was little replay of that problem during the Convention.

There were, however, some problems. Several people participating in the August 27 Critical Mass bike ride reported that they were pulled from their bicycles while moving and without warning, causing a variety of minor injuries. On August 29 in Times Square, mounted police officers rode their horses into a crowd on the sidewalk. On August 30, videotape shows police officers striking protesters with batons in a chaotic scene prompted by officers suddenly pulling a line of barricades across Eighth Avenue near Madison Square Garden. Finally, there were reports of pepper spray used on demonstrators and a legal observer on August 27 and 31. ■

Eyewitness Accounts of Police Misconduct

During and after the week of the Convention, the NYCLU invited people to share their experiences while protesting, observing protests, or simply moving around the City during the Convention. A questionnaire was posted on the NYCLU website and e-mailed to several NYCLU lists. At the NYCLU Storefront near Madison Square Garden NYCLU staff and volunteers conducted legal intake interviews in person and over the phone. In addition, the NYCLU received reports from a number of advocacy organizations.

As of March 25, 2005, the NYCLU had received 271 accounts of people's experiences and observations during the Convention,¹⁹ with 202 of the accounts coming from people who had been arrested. These reports recount a wide range of experiences raising serious concerns, paralleling those discussed in the previous section. Specifically, these accounts complained of mass and indiscriminate arrests of protesters and bystanders, the misuse of plastic handcuffs, the prolonged detention of arrestees, the detention of arrestees in inappropriate and potentially dangerous conditions at Pier 57, a lack of medical services, and aggressive actions directed at people documenting police actions. The NYCLU also received reports about the targeting of demonstrators and about the mistreatment of the media and of legal observers.

UNLAWFUL ARRESTS

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The NYCLU received 163 accounts from people who reported that they were falsely arrested, arrested en masse, or both.

A. Mass Arrests

The NYCLU received many accounts from people who were swept up in mass arrests. In many instances, those arrested were fully complying with police directions, raising troubling questions about whether the Department was targeting protesters for arrest. In other instances, police gave no directions but simply arrested people without warning. In most instances the NYPD used mesh nets to effect indiscriminate arrests of groups of people.



War Resisters' League March Near World Trade Center (Tuesday August 31)

The most egregious instance of people being arrested after following police directions was the War Resisters League march, at which 227 people were arrested. The NYCLU



received 42 reports (all but one from arrestees) concerning this incident. The accounts that follow are all from arrestees.

The War Resisters League had planned a march from the World Trade Center site to Madison Square Garden for the afternoon of August 31. Some marchers reportedly planned to engage in civil disobedience at 28th Street and Broadway, but the march itself was meant to be law-abiding and peaceful. While no permit had been obtained for the march, the march organizers and the commanding officer on the scene reached an agreement whereby the group could march without a permit as long as it remained on the sidewalk, walked no more than two abreast, and obeyed all traffic signals. [R. 71.]²⁰

With this agreement in place, people felt free to march. A 55-year-old man from upstate New York stated that “[he] had not been aware that there was no permit but felt safe from [from] arrest when the police said we could proceed.” [R. 82.] He also conveyed his impression that “[t]he overwhelming majority of people arrested with me had not planned to be arrested. They were there to voice their opposition to the war.” [R. 82.] A 50-year-old labor lawyer from Philadelphia, at the march with his 17-year-old son, asked a legal observer if the police were going to arrest people. He was told that people would be subject to arrest only if they tried to get close to Madison Square Garden. [R. 266.] Since he and his son were planning to leave the march to see a play at Union Square, a mile away from Madison Square Garden, he “thought we had nothing to worry about.” [R. 266.]

The police announced the rules of the agreement with a bullhorn. A tourist from California at the site to take pictures and a woman from Nyack, New York, there with a friend who has emphysema, heard the police tell them to “have a nice march.” [R. 112, R. 161.] The march began, with the first marchers crossing Church Street at about 4 p.m. The lawyer and his son followed the rules, but, along with everyone else on the block were arrested nonetheless:

When the pedestrian crossing light changed to red, we waited. When it changed to white, we crossed. After we traveled about twenty feet on the sidewalk, pedestrian traffic stopped. The police surrounded us with their bicycles. I looked for a way out. There was no escape. The commanding officer placed police at the end of the block so there was no way to cross back over Church Street. A fellow traveler jumped over the fence into the Trinity Church cemetery only to be immediately captured by three bicycle police. None of the police would tell us what was going on or what we had done. The crowds [sic] chant to

“let us disperse” were ignored. So was the chant to “give the cops a raise.” In a few minutes, the orange mesh nets were unraveled. [R. 266.]

Almost every account the NYCLU received specifically mentions that the protesters never heard any order to disperse and that the march had not broken any of the conditions set out only minutes before. A 42-year-old from Brooklyn reports an Officer Shea’s response to the question of why the police never warned the marchers or ordered them to disperse: “If I caught someone robbing a bank, would I allow him to disperse? You all wanted to be arrested anyway, so I just sped things up for you.” [R. 127.] The woman from Nyack overheard comments by officers while she was in custody that illustrated this police mentality as well: “‘You were going to MSG, you came here to start trouble.’ ‘No point in rushing the process, they’ll just be back tomorrow.’ ‘What did you think would happen walking there [near ground zero] today?’” [R. 161.]

Reports received by the NYCLU indicate the indiscriminate nature of the arrests. The Philadelphia lawyer and his son were assembled into a group of five with “a political science professor, a father from Madison Wisconsin who just dropped his daughter off at Pratt Institute and a toll collector from the Port Authority who had just bought a new camera and decided to come into the city to photograph some of his port authority police friends who told him they’d be working security at the WTC Station.” [R. 266.] At Pier 57, one woman met “tourists who were picked up and who spoke no English, people coming out of book stores, Wall St. financiers going home, on lookers [sic] who were swept up, art professors, reporters, lawyers, NLG [National Lawyers Guild] observers, even the children of cops on duty, healthcare workers, and minors who were arrested with me and kept for as long.” [R. 242.]

Union Square March across 17th Street, Tuesday (August 31)

A second particularly troubling example of people being arrested after trying to comply in good faith with police directives occurred later in the evening of Tuesday, August 31 on East 17th Street near Union Square. The NYCLU received 10 reports about this incident, all but one from arrestees. The cited accounts are all from arrestees.

Between 8 and 8:30 p.m., a group of 40 to 70 people left Union Square with the intention of marching to the NYPD-designated protest area at Seventh Avenue and West 32nd Street. They walked single file. [R. 91.] At Broadway and East 17th Street/Union Square North, the police stopped them. At that point, according to a 27-year-old man from Brooklyn, “[s]everal people informed the police of our intention to walk in a single file line to the legal protest area. An officer told us to walk down 17th Street and then go up 8th Ave., instead of walking up Broadway as we had planned.” [R. 88.]

This man then stated that the group “went West on 17th and were blocked off at the next intersection [Fifth Avenue] by line [sic] of police officers. As soon as they saw us they stood up behind the metal barricades that had already been in place, and quickly stretched orange netting across the street.” [R. 88.] One member of the group began to negotiate with the police. An officer in a white shirt said “it should be fine” and that the group should “just wait for a minute.” [R. 88.] A 23-year-old woman from Seattle states that the police told the group “to hold on and that they would find us the best path to get to the garden [Madison Square Garden] and that they would escort us there.” [R. 234.]

Ten minutes later, however, more police officers arrived. [R. 234] The group was “told to line up in the street” and “at least a dozen police on mopeds drove up behind the police line. Within 5 minutes the line was opened up on the North side of the street and the mopeds rushed in and boxed us all in against the South sidewalk. We were told to stand on the sidewalk, then told to turn around and put our hands on the wall. We were all cuffed and about 45 minutes later put on city buses.” [R. 88.]



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People did not know why they were being held on the sidewalk and the police did not provide them with any answers. A 22-year-old woman from New Paltz, New York reports: “We asked [the police] what was wrong. They wouldn’t tell us. They stood about five feet away from us. We were all very scared. No one cursed or yelled at them. I asked them if we were being arrested. They said no. I asked them if we were free to leave. They said no. I asked them if we were being detained. They said no. I asked again if we could leave. They said no. Someone tried to leave and they restrained him. After awhile they started to cuff us working from one end of the line to the other. I asked what we did wrong. My arresting officer didn’t know.” [R. 186.] Later, according to the woman, an officer told her that the arrests of the people in this group were “bullshit” and apologized. [R. 186.]

East 16th Street (Tuesday, August 31)

Another egregious example of indiscriminate mass arrests on August 31st occurred early in the evening when the police closed off both ends of East 16th Street between Union Square East and Irving Place and arrested everyone who happened to be on the block. The NYCLU received 41 accounts concerning the East 16th Street arrests, of which 39 came from arrestees and 2 from witnesses.

At around 7 p.m. that evening a group of musicians set off north on Union Square East with a substantial crowd of people, many of whom were walking on the sidewalks. Police officers prevented the crowd from proceeding north on Union Square East and diverted them onto East 16th Street. When the group reached Irving Place, they found that the police had blocked it off.

A Brooklyn resident, who along with his girlfriend (a journalism student at Brooklyn College working on a school assignment) was arrested, reported that at Irving Place the police instructed people to walk back towards Union Square East in order to leave the area. [R. 89.] Those who reached Union Square East, however, found that this end of the block was also blocked off. [R. 89.] When people asked to leave, they “were told that ‘the time for questions is over, step the fuck back!’” [R. 89.] The police gave no orders to disperse and did not give people an opportunity to leave the block once they had blocked it off. [R. 89.] Instead, a 42-year-old Manhattan arrestee reports, they surrounded everyone on the block. [R. 30.]

Another arrestee was a freelance photographer working on a photo documentary about Union Square. She reported that “[the cops] wouldn’t let you in or out.” [R. 17.] A video producer documenting the Convention who was arrested reports that the police used orange mesh netting to prevent people from leaving. [R. 45.] A 23-year-old demonstrator who was arrested states that the police “blocked any possible exits with police officers on mopeds.” [R. 36.] The Brooklyn man with his girlfriend indicates that the police presence on this block was high: “Police were also positioned on rooftops and fire-escapes, as well as blocking the entrance to buildings on that block.” [R. 89.]

After blocking any means of egress, “[a] line of officers advanced, pushing us forward into a crowd, but since they were also pushing us from the opposite side, there was no place to go. I was grabbed by captain [sic] . . . who took my bike and threw it aside. . . .” [R. 30.] Similarly, the Brooklyn man states: “They then formed strategic lines and pushed pedestrians and demonstrators onto the sidewalk with their clubs, forcing us into several groups compacted and immobile.” [R. 89.] One man, who followed the marching musicians after leaving Petco, a pet supply store on Union Square East, was arrested and reported that the police themselves formed a wall penning people in. [R. 93.] A woman stopping off in New York on her way home to Philadelphia from vacation states that the police grabbed instruments from the marching musicians and threw them into the street. [R. 209.] A 22-year-old from the Hudson Valley reports that later, “an officer told everyone to sit down and announced that everyone on the block would be arrested for marching without a permit.” [R. 192.]

While trapped on the block, the Philadelphia woman noticed the actions of one police officer in particular: “[He] yelled at us violently and angrily that we had brought this upon ourselves. He was walking past us on the sidewalk and he yelled and screamed; and this was the moment when I became seriously afraid. . . . I was afraid that he would grab me and hurt me: I was very scared.” [R. 209.]

New York Public Library (Tuesday, August 31)

The NYCLU also received 10 accounts from people who were arrested Tuesday, August 31 at the main branch of the New York Public Library where they had gathered for a march to Madison Square Garden scheduled to start at 7 p.m. The accounts are strikingly similar and document the arrest of law-abiding protesters who asked for and followed specific police instructions, thinking they would be allowed to protest lawfully. Instead, the police directed these demonstrators, along with bystanders and legal observers, into makeshift barricades of orange mesh netting, where they were arrested.

A freelance photographer from Colorado came to New York during the Convention to develop his portfolio for a prospective employer. He went to the library to cover a planned march to Madison Square Garden but surmised, “with the entire show of force of police that was there,” that there was “most likely not going to be any march . . . so [he] stayed to cover what would happen instead.” [R. 42.]

According to a 44-year-old woman from Oakland, California, who came to the library from a demonstration in front of Fox News, people were initially on the steps of the library, which was a “gathering point”. [R. 72.] Believing that there had been no arrests at the Fox News event, she “expected the same at the Library, but the mood was completely different. The police were gruff and hostile . . .” [R. 72.]

Some people were arrested on the library steps without warning. Others left the steps and the area immediately in front after the police ordered them to do so, and were arrested elsewhere. The Oakland woman followed orders from the police to leave the library steps and the adjacent sidewalk, but was arrested soon thereafter:

When the cops said, “Everybody off the stairs” I got off the stairs. When they said, “Off the



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sidewalk” I asked, “Where would you like us to go?” He said, “Keep moving.” When I asked where to, he said, “Around the building.” So I walked with others around the building. When I was almost three-fourths of the way around, someone screamed, “They’re dropping the nets!” (Bait and Switch). There was a stampede away from the front of the building, which was halted abruptly by a line of tactical cops. The people behind me came to a dead stop, too. We were caught. Nobody ever gave an order to disperse. [R. 72.]

The freelance photographer from Colorado also followed police orders to leave the steps and the area on Fifth Avenue in front of the library. Proceeding towards 42nd Street, he saw a small rally on the side steps of the library, facing 42nd Street, and went up to photograph it. The rally ended in ten or fifteen minutes and people began to leave. The photographer states: “They proceeded west off of the library property onto the sidewalk of 42nd Street heading towards 6th Avenue . . . I continued shooting [photographing] this young man who had led the small rally, and around us was only a half dozen others or more all together walking towards Sixth.” Before the group reached Sixth Avenue, it turned into Bryant Park and started up a set of stairs there, and soon the photographer was arrested:

A couple steps up the steps they were met by a white shirted police officer telling them that they could not cut through there, and would have to stay on the sidewalk. The small group complied without a word and headed back to the sidewalk, as soon as they were [on the sidewalk], they and all and everyone else [sic] who just happened to be on the sidewalk also [including the photographer], were corralled in by officers brandishing this orange netting from the west and then from the east, pinning us all together right immediately in front of a newsstand.” [R. 42.]

Another person who reported being arrested after following police orders was a 31-year-old woman from Brooklyn who went to the library after work to join a peaceful rally. [R. 220.] After the demonstration on the library steps was stopped, she left and walked west on the sidewalk on 42nd Street. There, she “encoun-

tered a line of police who advised the people who had just left the library that they could not go any further and told them to leave. People attempted to comply, but the police blocked all exits. We were not given an official order of dispersal. As some people tried to leave the area by crossing to the north side of 42nd Street, one of the officers called out to another group of police who were moving into position to block that exit, ‘Don’t let ‘em cross!’ Once we had been completely contained, the police [] surrounded us with orange netting and told [us] to sit down. Shortly thereafter, we were taken out one by one and arrested.” [R. 220.]

A 24-year-old arrestee from Manhattan writes of a conversation between officers scripting a story after the protesters had been penned in: “I overheard some officers making up our charges as we were arrested. They said something to the effect of ‘the story at the library is they did not disperse when we asked them to, and then sat down to refuse arrest.’ In reality we did everything they told us to. They pinned us in with the orange nets, leaving us nowhere to go.” [R. 201.]

Critical Mass Bike Ride (Friday August 27)

The NYCLU received 25 reports concerning the RNC Critical Mass bike ride, at which more than 250 people were arrested; 22 of the reports came from arrestees. Critical Mass is a monthly bicycle ride that has been taking place in New York City since 1994. Cyclists assemble on the last Friday of each month at Union Square Park and ride a spontaneous route through the city. Some cyclists regard the ride as a demonstration, others do not.

On Friday, August 27 — three days before the start of the Convention — an unusually large number of riders assembled at Union Square Park in the midst of a substantial police presence. A 44-year-old man from Brooklyn on his first Critical Mass ride reported that press and cyclists assembled at Union Square Park were “concerned about threatened arrests by the NYPD.” However, he “paid little attention to these remarks as I am not the type to do anything that would warrant arrest.” He further stated that cyclists followed police instructions: “At all times I had obeyed and continued to obey all directions all instructions [sic] or demands given to me by New York Police Officers. As far as I could tell, all cyclists were obeying the instructions of the

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Police.” [R. 106.]

One first-time rider from Manhattan reports that 90% of the people he spoke with on the ride that night were, like him, first-time Critical Mass participants. He had heard that on the previous month’s ride there had been a police “escort” on 34th Street between Ninth and Tenth Avenues across from the Loews movie theater and thought that Critical Mass was a “lawful, sanctioned ride.” He reports that he never would have ridden a \$1500 bicycle had he thought he would be “susceptible to arrest,” and believes that most riders shared his belief that the ride was sanctioned. [R. 131.]

One man joined the ride “on a whim.” He had a comforter he had just purchased at Bed, Bath, and Beyond tied to his bike. [R. 155.] A 16-year-old boy who had never heard of Critical Mass before August 27 and did not own a bicycle was “invited to go bike riding for pleasure” with someone he had met on an exchange trip. This person told him that “we would be cycling around the streets for about an hour and ending up at Chelsea Piers.” He borrowed a bicycle and met his friends at Union Square. He states: “We were cycling for exercise & enjoyment. I was not there to protest, nor did I know there would be protesting.” [R. 257.]

As the first-time rider from Brooklyn reports, the group of 5,000 to 7,000 cyclists left Union Square heading south on Broadway: “Police were present all along the way and in many instances were blocking traffic in order to facilitate the ride.” [R. 106.] The 16-year-old states that people were following traffic laws, and that he was told “there [wa]s a larger group than normal.” [R. 257.]

The cyclists turned west onto Houston Street, then proceeded north on Sixth Avenue. At 30th Street “the police began to split the ride into smaller groups.” R. 106. At this point, he was in a smaller group of about 1,500 cyclists. They went “[a]cross 30th Street, up Madison Avenue, back across 53rd Street and down 7th Avenue, all the while following the path the police would allow and stopping when we were told by the police.” [R. 106.]

[A]t 35th Street and 7th Avenue the festive atmosphere began to change. At that corner it was obvious that we would not be allowed to cross past 34th Street and I mistakenly assumed that they simply did not want us near Madison Square Garden (actually, arrests were being made at that corner). Therefore, we, now numbering about 700 cyclists, took the only route available and headed west on 35th Street. . . . At Dyer Avenue (midway between 8th and 9th). I noticed many police vehicles. As I approached 9th Avenue about 25 policemen with bicycles suddenly ran out to block our path. I stopped and other [sic]

stopped, a police [sic] yelled, “You can’t come through here” and I responded, “Where do you want us to go”. There was no response. We headed back towards Dyer Avenue but I already knew we had been trapped. [R. 106.]²¹

The police gave no warnings to disperse. [R. 134, R. 106.] Nor did they tell the cyclists whether they were under arrest, or why. [R. 106.] A 28-year-old man from Manhattan reports that the cyclists were handcuffed and left to sit on 35th Street for several hours before being taken to Pier 57. [R. 96.]

Cyclists who made it to the end of the ride at St. Mark’s Church on Second Avenue faced a police crackdown there as well. Following police orders to “Move along,” the cyclist with the strapped-on comforter walked his bicycle on Second Avenue towards 9th Street, away from the church. After an officer told him to move, he “asked him if [he] should go up on the sidewalk or [if he] could proceed along the street.” The officer responded “This way,” and then “led [him] into the arms of nearby cops who pulled [his] wrists behind [him] and snapped plastic handcuffs around them.” He was told that he was under arrest and ordered to sit down, and an officer “forced [him] onto the asphalt where [he] knelt with other handcuffed people.” The arrestees’ bicycles were “thrown onto a pile, [his] with the comforter still tied to it.” [R. 155.]

Times Square (Sunday, August 29)

The NYCLU received 16 reports concerning events in the area of Times Square on the afternoon of August 29, of which 15 came from arrestees. People came to Times Square that afternoon to voice their political opinions in front of Broadway theaters where Republican delegates were attending matinees. In attempting to contain people, the police brought out their orange mesh netting and swept up, along with the peaceful protesters, many who were not even demonstrating. This happened in several places in the Times Square area.

At 46th and Broadway at around 5:00 p.m., about 50 people were arrested as they tried to get closer to the “Kiss-In” sponsored by the group Queer Fist. [R. 29.] The group was not given an order to disperse. Instead, they were ordered to get on the sidewalk, off the street, and after they complied, “the orange net all of a sudden came out and we were cordoned off.” [R. 29.] A Brooklyn woman at that corner reports that the police did not answer questions about what was happening or tell the group what they were being charged

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with. [R. 146.]

Fifteen minutes later, a woman who had just arrived at the corner of 7th Avenue and 45th Street was surrounded by orange netting, as was everyone else on that corner. [R. 121.] At about 5:20 p.m., a man in town from San Francisco was arrested while crossing the street at Broadway and 43rd Street. While he was waiting for the light to change at that corner, about 15 members of the group Queer Fist walked up to where he was standing, with a cop “trailing them. As they crossed the street, cops barricaded them in.” [R. 10.] At about 5:30 p.m., a man in town from Ohio was walking on 7th Avenue near 46th Street with a friend when he spotted a paddy wagon and many arrestees. The police suddenly surrounded the immediate area, put up orange netting, and arrested everyone there. The Ohio man reports that although the police released people who had RNC press passes, they did not release people who were with Indymedia (the Independent Media Center), a network of collectively-run media outlets. [R. 20.]

Also at about 5:30 p.m., over at 46th Street and 8th Avenue, a Vassar College student was arrested with about 65 other members of Queer Fist. She reports that as several members of the group moved forward to try to pull street medics away from the police, the police “rode horses onto the traffic island [where the Queer Fist members were standing] in some sort of intimidatory [sic] gesture of ‘crowd control.’” She also reports that the group was surrounded by police officers and ordered three times to get down on their knees. The police then put flexcuffs on the arrestees, who were not told why they were being arrested or read their rights. [R. 230.]

B. Bystanders

By blocking off entire blocks and making mass arrests, the police swept up and arrested people who were simply bystanders. Of the 202 accounts the NYCLU received from people who were arrested, 40 came from people who were not demonstrating.

On the afternoon of August 29 in Times Square, a man visiting from Ohio was walking on Seventh Avenue



with a friend when he spotted a paddy wagon and many arrestees. Although he was not demonstrating outside the Broadway theaters that afternoon, he was surrounded by orange netting and arrested. [R. 20.]

A woman who works for the American-Scandinavian Foundation was near Bryant Park, behind the library, on the afternoon of August 31. She states:

I did not even know I was in the demonstration minutes before the arrest. I was asking around, to find out what was happening. The number of protesters on the sidewalk increased in a matter of minutes when I heard shouts and could barely make out the word “disperse.” There was nowhere to go however, there [sic] were people all around me and instinctively I kept still, backing into a newsstand behind me. I did what I was told to do: sat down on the sidewalk. After which followed the arrest.

. . . I believe it was assumed that I belonged to a crowd of political protesters. [R. 44.]

Of the 38 accounts the NYCLU received from arrestees at East 16th Street the night of August 31, 10 were from bystanders. A Sarah Lawrence College student was arrested while watching the “parade” from the sidewalk. She states that “[the police] simply blocked off the block and arrested anyone there.” [R. 28.] A 44-year-old woman from Manhattan was arrested standing on the sidewalk with her bicycle watching the demonstration. [R. 30.]²² A dance instructor on her way to teach a class was not permitted to leave the block and was later arrested. After the police refused to let her leave, the dance instructor began to experience a panic attack. As her temperature and pulse rose, she informed a police officer that she did not feel well. She was ignored. She then fainted and was taken to the hospital [R. 83.] A woman simply trying to make her way home tried to explain to the police that she was not a protester. She and others were told “we were in the wrong place at the wrong time with the wrong people and now we have to pay the price.” [R. 212.]

At about 9 p.m., a high school senior on her way to the movies with a friend was arrested on West 35th Street between 5th and 6th Avenues. She was not a protester and has no idea why she was arrested and then held for 46 hours. With college applications to submit in the fall, she was concerned about the implications of her arrest. [R. 208.]

Finally, a 19-year-old woman from Long Island, New York recounts how, around 9:40 pm. on August 31, she was walking on 35th Street when she encountered a group of people engaged in civil disobedience at Herald Square. After arresting those in the group, police put up barricades blocking westward movement on 35th Street. Since she could not move west, she went east.

Unfortunately we found our path blocked by a line of police with motorcycles. Then, a group of police came up from behind, effectively blocking us in. They split the group into two, crowding people onto the north and south sidewalks and beating people in the middle. . . . I asked about 5 times from the time I first arrived at the police barricade if and when I could leave. I was told that as soon as they ‘regained control’ I would be able to leave. Each officer approximated 5 minutes or so. R. 69.

Instead of being allowed to leave, she was arrested. The group she was with was never told to disperse. R. 69.

C. Targeting

The NYCLU received a number of reports indicating that people had been targeted for arrest for engaging in lawful activity associated with protests. These reports came from protesters, videographers, legal



observers, and street medics.

Protesters

One of the most troubling reports came from a person who sought to participate in a demonstration at the Hummer dealership in Manhattan the afternoon of August 31. When the protester — wearing a costume that included a sign reading “Bummer” — arrived at the dealership shortly after 4 p.m., expecting to join a planned protest, she discovered that she was the only protester there. After answering questions from several journalists, she approached the showroom and spoke with someone working there. She then left the showroom and stood on the edge of the sidewalk. A white-shirted police captain approached with about 10 police officers and read from a sheet of paper, stating that she was obstructing traffic and that if she did not disperse she would be arrested. The woman replied that she was neither obstructing traffic nor doing anything wrong. The captain then directed one of the officers to arrest and handcuff her. [R. 268.]

Earlier that day, a six-person theater group had boarded an uptown 6 train at Union Square. Their faces were painted white to represent those killed in the Iraq war, and they wore signs around their necks saying “War Dead.” [R. 74.] The group was followed by several uniformed and plainclothes police officers. [R. 74.] When the group attempted to switch to the downtown 6 train at the 125th Street station, they were arrested on the subway platform. [R. 75.]



Videographers

Ten independent videographers reported being targeted by police for videotaping. Seven were arrested, and of these three had their cameras and video equipment held as arrest evidence, even after their release. [R. 17, R. 42, R. 95.] One arrestee reported that the arresting officer smashed his video camera. [R. 233.]

A woman from West Virginia who was arrested while videotaping the War Resisters League demonstration reports that “[w]hile [I was] cuffed and moving towards the bus an officer asked: ‘What were you doing here?

Why were you videotaping?’ When I answered *because ... I want to hear what people have to say* he said something to the effect of ‘well, that’s what you get’ or ‘see what happens.’” [R. 49.]



One videographer, a 34-year-old from Brooklyn, reported that the police taped over a portion of his videotape of the August 27 Critical Mass ride. [R. 9.] On September 1, an organizer for Picture the Homeless who was filming near Madison Square Garden was grabbed by a police officer and dragged across the street, where a police captain told him that he was not allowed to film the police check point outside the post office and threatened to delete anything from the organizer’s video camera that he did not like. [R.275] The organizer had sought to document the problems faced by recipients of public assistance who needed to pick up their benefit checks at the main post office, across from Madison Square Garden. A Secret Service agent took the organizer’s cell phone and identification, placed a phone call to determine if he was “legitimate,” and informed him that the Secret Service would visit in the next few weeks. [R.275.]²³

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Legal Observers

The NYCLU received four reports from National Lawyers Guild (NLG) legal observers, three of whom had been arrested. Legal observers have two main tasks: to observe police activity and to obtain arrestees’ names so that they can be tracked. NLG legal observers are readily identified by their bright green NLG baseball caps.

One legal observer arrested at Union Square reports that: “One officer pointed out to me, [sic] that my NLG i-witness hat and badge made me a target. He said, ‘We hate you people.’” [R. 174.] Another observer was arrested that day, while videotaping an act of civil disobedience at the intersection of Beaver and South Michael Streets, in lower Manhattan. Although she informed officers that she was a Guild observer, and her hat was clearly visible, she was arrested. [R. 142.]

Street Medics

The NYCLU received three reports from street medics who were arrested. Two medics felt targeted because they were medics. Both were arrested between 5:30 and 6:00 p.m. on Sunday, August 29 on Eighth Avenue near 44th Street.

The street medics were readily identifiable: “I was . . . wearing a vest which clearly distinguished me as a nationally-registered EMT-Basic (national registry patch, red duct tape cross, plastic placard with the star of life and ‘Emergency Medical Technician’).” [R. 190.] The two medics who filed reports had responded, along with two other medics, to two calls on the medic radio net: the first, that police had used pepper spray on an asthmatic on Eighth Avenue at 44th Street, and the second that police had taken an insulin-dependent dia-

betic into custody. [R. 190, R. 111.] A fifth medic, a volunteer nurse, was negotiating with the police over the two cases when, according to one of the arrested medics, suddenly the police “grabbed us [the medics] and said ‘you, you, you. Up against the wall.’” [R. 190.] The arrested medics informed the officers that they were EMTs functioning as street medics. When they asked why they were being arrested, they were told, “They’ll tell you what you’re charged with later.” [R. 190, R. 111.] That was not the case: “During processing at pier 57 myself and the other 3 individuals arrested with me were told by our arresting officer ‘I don’t know why you were arrested, my CO just said to “pop those people.”’ I absolutely believe that myself and the others were targeted because we were volunteering and identified as marked medics.” [R. 190.]

A participant in the Kiss-In at 46th Street and Eighth Avenue, who was later arrested, observed a negative interaction between the police and street medics: “The cops were drawing near, so street medics put on their goggles (which is standard street medic procedure in preparation for having to tend to people against possible police violence). The cops perhaps thought the medics were putting on masks, and jumped on them + threw them to the ground.” [R. 230.]

MISTREATMENT OF PEOPLE ARRESTED BY THE NYPD

The NYCLU received many accounts from people that raise serious concerns, including about the length of time people arrested for minor offenses were held, the prolonged and injurious use of plastic handcuffs, the conditions at Pier 57, and the mistreatment of people with medical needs.

A. Length of Detention

The NYCLU received 202 reports from arrestees, 169 of whom reported how long they had been detained. One hundred and eleven (65.7%) of those were held for more than 24 hours. Of the 58 arrests that resulted in detentions of more than 40 hours, 54 of them occurred on August 31. ²⁴

Hours In	Number of Reports
0-4	2
5-9	1
10-14	11
15-19	12
20-24	32
25-29	28
30-34	17
35-39	8
40-44	13
45-49	38
50+	7

B. Use of Plastic Handcuffs (“Flexcuffs”)

The NYCLU received 50 reports complaining about the misuse of plastic handcuffs, known as “flexcuffs.” These fall into three categories: extended periods of confinement in flexcuffs, denials of requests for re-cuffing or loosening of cuffs, and injuries.

Nine reports claimed that people were held for four, five and, in two instances, as long as eight hours in cuffs that were too tight. [R. 226, R. 238, R. 235, R. 28, R. 89, R. 202, R. 246, R. 209, R. 248.] Of those held in flexcuffs for over four hours, most complained of bruises on the wrists and pain in the shoulders. [R. 202, R. 235, R. 246.] One person who was in flexcuffs for four or five hours had visible bruising from the flexcuffs two weeks after being released. [R. 248.]

Two reports concerned denials of requests for re-cuffing or cuff loosening. A 61-year-old woman from the Hudson Valley area of New York focused on a specific officer, whom she found particularly callous:

Although most of the officers were very kind to us, especially our arresting officer, Anderson, we did run into a particularly nasty one, Carmody, at the Pier. He was re-handcuffing people (for transport to Central) very tightly. Several women ahead of me were crying out in pain, a few were actually crying. When he cuffed me too tightly, I complained. He



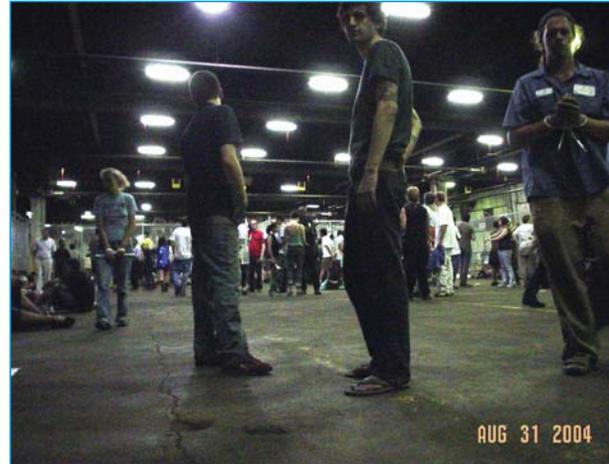
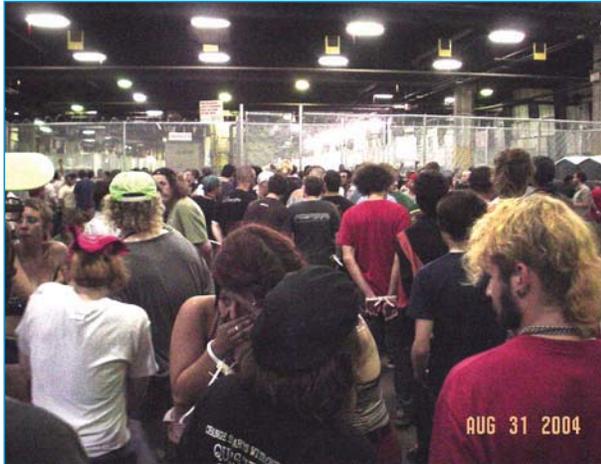
then yanked the cuffs tighter. One of the officers standing in the vicinity said, “He’s been doing that all day. We’ve told him to stop.” This officer (we didn’t get his name) cut the cuffs off my friend who has an arthritic wrist and was in intense pain. The cuffs were so tight, he had a difficult time getting them off. Because we were being rushed to the bus for Centre Street, there was not time to remove cuffs from others of us who were in pain. Those of us cuffed by Carmody had the circulation to our hands cut off and experienced numbness. The cuffs were cutting into our wrists, causing swelling, bruising and chafing. My wrists still bore some of the marks and still felt raw for a week. [R. 176.]

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A woman arrested on August 31 after calling attention to the use of force against a man at the corner of Park Avenue and 26th Street described the treatment of an arrestee on the transport bus with her:

As we are about to board the bus we hear a lady named Tonya who is screaming that her wrists hurt & to not touch her like that. She was apparently trying to loosen her cuffs because she is hypoglycemic. She asked for her cuffs to be loosened & instead had them tightened & said that she was kicked. She was put into solitary confinement section of the correction bus. All of the ladies on the bus pleaded with the driver/officer whom Tonya said was named Zach to please loosen her cuffs at the very least. We were completely ignored. We all then screamed “medical emergency” and were again completely ignored. The officer then drives as fast as possible with a police escort to Center St. trying to scare us and causing several cars to slam to a halt. R. 58.

Sixteen reports came from people who sustained injuries as a result of being in flexcuffs. One woman, arrested while acting as a National Lawyers Guild legal observer, requested that her cuffs be loosened when she started to lose feeling in her right hand. Instead of loosening the cuffs, someone she believed to be a lieutenant twisted her right arm, causing her immense pain. After being released, she went to the emergency room of a New York University hospital, where doctors placed her right arm in a splint and prescribed painkillers. Her diagnosis was abrasion of the wrists and impingement of the radial nerve. [R. 142.]



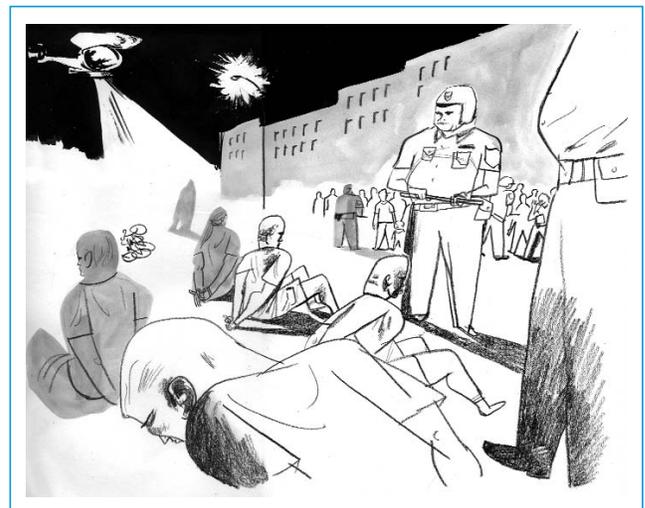
C. Conditions of Detention

The NYCLU received 82 complaints about the conditions of detention. Of these 82 accounts, 15 were from people who were not demonstrating when they were arrested.

Pens at Pier 57

A 37-year-old man from Hollywood arrested on August 31 reports that he was held “with about 500 guys in a big fenced pen with razor wire.” [R. 7.] A Brooklyn man who was arrested on East 16th Street on August 31 saw signs that read “‘hazardous chemical storage’ and ‘protective eyewear & clothing must be worn’ . . . hanging all around.” [R. 89.]²⁵ A photographer from Colorado was placed into two types of pens: one, 20-25 feet by 30-35 feet, “with 15’ tall chain link fence with razor wire all about the top, and a couple wooden benches, and a water cooler in the corner,” and another, “a 50-75 yard by 50-75 yard pen that they put all of the male occupants in[to] in the morning, that number, in the hundreds, five hundred at least easily.” [R. 42.] A 29-year-old Brooklyn man arrested on August 29 while biking to his elderly aunts’ apartment, was placed in a pen that was “extremely overcrowded with up to 70 people in a space no more than 250 square feet.” [R. 81.]

Two women, both arrested at Union Square on August 31, reported that inside the pens the floors were oily and



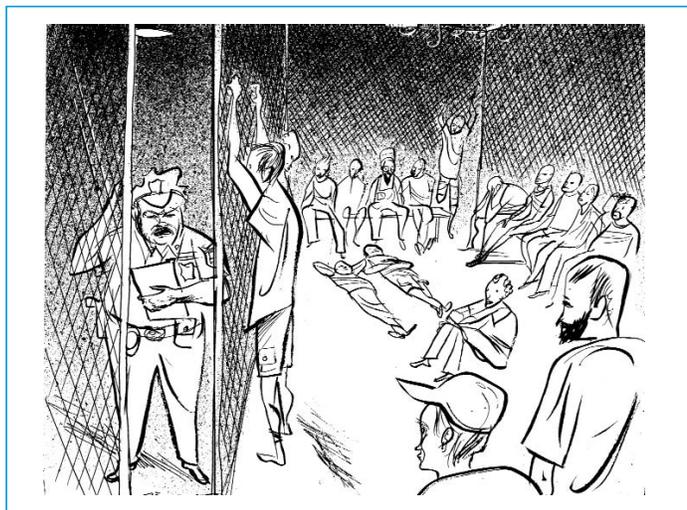
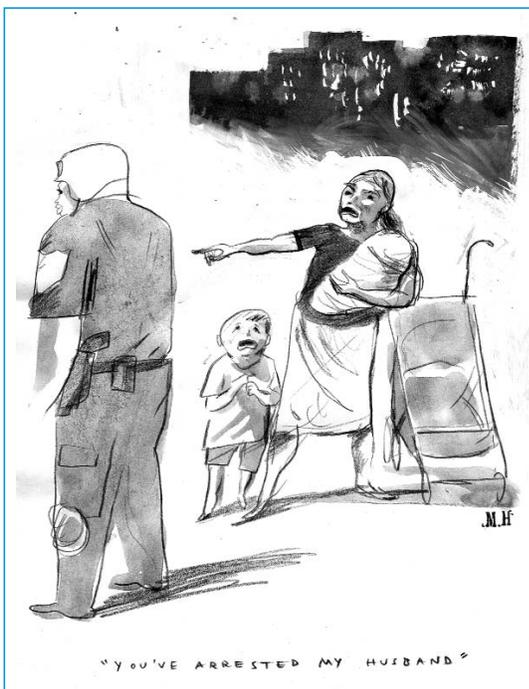


there was often nothing to sit on, especially in the larger pens. [R. 181, R. 186.] When there was seating, usually in the smaller pens, there was not enough for everyone. [R. 181, R. 186.] A 44-year-old Brooklyn man arrested on August 27 while participating in his first Critical Mass ride reports that in his pen, which contained 65 people and was “quite crowded,” there were only three benches, each about six feet long. [R. 106.]

A 36-year-old woman arrested by the public library on August 31 was held overnight in a pen that had urine and cockroaches on the floor. She likened the pen floors to “being under a car.” [R. 92.] A Sarah Lawrence College student said the pen floor was “[s]o grimy, if one lightly touched a fingertip to it, your skin would be blackened by the grease and dirt.” [R. 28.] A Brooklyn woman, age 25, arrested on East 16th Street on August 31 stated that “[a]ny part of my body or clothing that touched it turned black.” [R. 36; see also R. 106.] The man from Hollywood reported that “most guys in there came out with their clothes covered in oil,” [R. 7]. The Critical Mass first-timer states that even the ceiling of the pens was “black with the soot of some 50 years of bus exhaust.” [R. 106.] A 26-year-old Brooklyn man, arrested on East 17th Street on August 31, was in a pen “littered with trash” and containing “pudles of drying, rotting milk” after cereal and milk was provided. [R. 88.]

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The 25-year-old Brooklyn woman reports that because they were given nothing to sleep on, arrestees had to sleep directly on the floors of their pens, and only some people found cardboard boxes or plastic bags to sleep on. [R. 36.] A woman arrested on East 17th Street on August 31 reported that “it was



hard to sleep on the floor because of the smell coming off of it.” [R. 186.]

Bathrooms at Pier 57

The man from Hollywood reports that there were usually two “Porto-Sans” per pen, which “got pretty disgusting pretty quickly.” [R. 7.] Overnight, an East 17th arrestee states, these facilities became “completely full and repugnant.” [R. 88.] The public library arrestee states that after 18 hours, the Port-o-Potties were filthy and overflowing because they had not been cleaned in that time. [R. 92.] The East 17th Street arrestee states that at one point, bathrooms were not immediately available and several women urinated in a corner, which was “never cleaned up.” [R. 88.]

One woman reports having to wait six hours before she was allowed to use the bathroom for the first time; this caused her a significant amount of pain. [R. 36.] Two August 31 arrestees, a 19-year-old woman from Long Island arrested in Herald Square and a 22-year-old woman from New Paltz arrested on East 17th Street, were held in pens with hundreds of people and waited an hour and a half in the bathroom line. [R. 69, R. 186.] A 41-year-old Manhattan woman arrested at the War Resisters League event on August 31 stated that because of the long waits, some women urinated on the floor. [R. 202.]

Medical Services Provided to Those Under Arrest

The NYCLU received 29 accounts from individuals arrested during the RNC who complained of their lack of access to medication or medical care while in police custody at Pier 57 and Central Booking. Of the accounts received, 12 individuals reported that officers discouraged them from obtaining medical attention and 8 people complained that their requests for medical attention were ignored or denied. The NYCLU was also informed of 2 complaints of police officers or Department of Corrections personnel directing detainees to publicly disclose their HIV status.

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The majority of accounts the NYCLU received were from individuals who reported that officers threatened them with longer detentions in response to their requests for medication. For example, an NYU medical school professor informed police officers that he needed his pain medication after he was arrested at the War Resister’s League demonstration. He reported that “their first response was to put the cuffs on extra tight.” Subsequently, “whenever (at least 5 times during detention) I told the police I needed medication, I was told that if I insisted, I would be brought to a hospital and detained for an extra two days.” [R.53.]

Similarly, a woman who was arrested on Tuesday, August 31, 2004 at the Union Square demonstration reported that she told police officers to loosen her flexcuffs or else she would need to be taken to the hospital. She had recently had surgery on her hand and had broken her shoulder a few years ago. At one point, an officer told her “fine, you can go to the hospital but then you will not be released until late Friday night.” [R. 212]

Another arrestee recounted that he needed to take his prescription medications “but was told repeatedly throughout [his 26-hour] detention that requests for medical attention would be processed at St. Vincent’s Hospital, and time spent at St. Vincent’s would not be counted as time ‘under arrest’ and detainees at St. Vincent’s would lose their place in the processing queue and go to the end of the queue when they returned from the hospital.” At Central Booking, he was advised “not to go St. Vincent’s and to remain at Centre Street to keep my place in the processing queue.” [R.80]

Since those arrested during the RNC were subject to prolonged detentions at Pier 57 and Central Booking, the threat of being held even longer discouraged people from seeking medical care. As a result, according to 9 reports received by the NYCLU, individuals were unable to take their prescription medications or obtain treatment for conditions they developed during the arrest and detention process.

An arrestee reported, for example, that when she asked about the prescription medication she needed to take she was “highly recommended to not go to the hospital. I was threatened with being held for a longer



period of time.” As a result, “by the time I was brought in front of the judge I had been without my antidepressant medication for two days. I was so nauseous that I have little memory of the proceeding.” [R.250]

A witness observed a fellow detainee at Central Booking “debating whether or not to go to the doctor because she’s having heavy irritation in her eyes (they’re all red) from the pier, but she’s really worried that it will delay her processing. *While he’s standing right underneath a sign that explains that by law people being treated for medical conditions will not have their processing and arraignment delayed, one of the officers advises that she shouldn’t see the doctor because it will take her longer to get out of here. We point out the sign right above his head and he smiles and says: ‘I’m only being honest with you.’*” [R.236., italics in original]

Those individuals who eventually were taken to the hospital described harrowing experiences in which police and Department of Corrections officers made it extremely difficult and uncomfortable for them to obtain necessary medical treatment.

For example, a man who had a corneal ulcer and was in need of his prescribed regimen of antibiotics and steroids relayed that approximately 23 hours after he had been arrested, “I was allowed to see the EMT. . . [who] determined that I must go to the hospital for treatment.” Two hours later, “my feet were shackled together, hands bound with metal handcuffs, . . . and my arresting officer took me aside and told me that I was ‘fucking yourself, fucking me, fucking everybody by going to the hospital.’ He then indicated that I would have been out in two hours had I not asked to go to the hospital, but now I would be here for another 48 hours.” Despite instructions from the emergency room physician that his processing be expedited, he was released more than 20 hours after he returned from the hospital to Central Booking. [R.278.]

Twelve hours after her arrest, a woman recounted: “[A]n officer gave us a speech in which he covertly advised us to avoid mentioning any medical problems unless it was critical, as it would probably delay our release significantly. I am on a daily dose of medication for a depression/anxiety order, and although I can go [sic] skip a dose without too much risk, I make a gamble about my chances of being arraigned in time to get home to get my meds, or risk a serious panic attack. When interviewed by the medic, I told him I took daily medication but was not in immediate crisis. . . . After waiting again for some time, we were chained back together and a female officer asked again if anyone in our group used medication. I said yes, and they separated [me] from the group and took me to a special cellblock reserved for people who are a possible danger to the general population. I was held in a tiny, filthy, roach-infested cell there until 7:30 the next night. At 7:30 p.m., I was taken from my cell again, and told that they would need to take my fingerprints again, as the first set had been lost.”

At this point, the arrestee reported that she “began to panic as I saw that I might be staying another full night in the cell. . . . I then insisted that I needed to see a doctor.” Several hours later, after seeing a medic at Central Booking, she was finally taken to Bellevue. Contrary to what she had been told, she was immedi-

ately arraigned upon her return to Central Booking. [R.30.]

The NYCLU also received complaints describing instances in which the police simply ignored or refused individuals' requests for medication or treatment for conditions they developed during the arrest and detention process.

A young woman who was held at Pier 57 for approximately 24 hours related: "I experienced shortness of breath, tightness [in my] chest and a bad cough for about the last 4 hours of my stay at the pier. I also developed some small rashes and my eyes stung. I was denied medical attention. I pleaded for it for 1 hour and then every 15 minutes for 4 hours. They [police officers] barely turned their cheeks." [R.234.]

A man with kidney stones who takes prescribed pain medication reported that he "asked several different officers for my medication for pain should kidney stones begin to pass. I was refused my medication at all times." [R.75.]

Some of the most abusive behavior reported to the NYCLU is as follows:

A witness recounted that a police officer "not only denied a girl on my bus medical attention when she alerted him that she had a heart condition and her handcuffs were too tight, he tightened her cuffs, kicked her into the solitary cage, and refused to give his name and badge number." [R.28.]

A woman with a prosthetic leg reported that an officer at Central Booking "threatened to 'lose my papers' if I didn't stop questioning and demanding medical attention. . . . I requested medical attention to no avail. . . meanwhile, my leg was beginning to swell, I had developed a rash on my face from conditions at Pier 57, respiratory problems, and had major edema at the wrists from the cuffs." She further reported that she was subjected to "an uncomfortably intimate search. . . and when it was noted that I was a 'crip' I . . . was dragged away from the rest of my group in a 'special' area in the basement of 100 Centre Street. . . . If this 'special' area was supposed to be particular for those who truly needed medical attention it seems an abysmal lie. The cops here were the cruelest and most imbecilic of all. . . ." [R. 277.]

An AIDS advocacy organization informed the NYCLU of reports it received that officers at Central Booking asked people to publicly disclose their HIV-positive status in order to remove them from the general population. An observer stated: "I witnessed the segregation of people that admitted to being HIV positive, the blatant disregard of their right to confidentiality of their HIV status, the deplorable filthy conditions of Central Booking and especially the 'special population' section (i.e., the folks with compromised immune systems being housed in the most extraordinarily unhygienic area)" [R.255.]

Food

A Brooklyn man arrested on East 16th Street August 31 reports that, after being arrested at 8 p.m. on August 31, he did not receive any food until 6 a.m. the following morning. [R. 89.] A 24-year-old Manhattan woman arrested at the public library on August 31 also had to wait 10 hours for any food at all. [R. 201.] Another Brooklyn man reports receiving no food for the 20 hours he was in police custody. [R. 81] When people did receive food, it was often in inadequate amounts: a Philadelphia woman arrested at Union Square on August 31 received an apple and two sandwiches in 14 hours. [R. 209.] An East 16th street arrestee reports that they were "very underfed. In my pen, there were 100 women, and for breakfast we were given 28 sandwiches of government cheese on white bread. It wasn't until lunch when we were given sufficient food for the number of people in the pen — rice crispies and milk and we had already been in the system for 12 hours at that point." [R. 36.]

Access to lawyers

A Sarah Lawrence College student reports that one policewoman refused to allow arrestees to make legal calls from the holding pens at 100 Centre Street; she allowed only personal calls. [R. 28.] A man arrested on

East 16th Street reports that he was not allowed to make a phone call “until after being incarcerated for 17 hours.” [R. 89.] Another Brooklyn man arrested that night, on East 17th Street, reports that he was not permitted to make any phone calls at all. [R. 91.]

A Manhattan man who had been looking for the police-designated protest area by Madison Square Garden when he was misdirected by the police and then arrested reports being told “repeatedly . . . by various NYPD staff that we had no legal right to see our lawyers.” R. 48. A woman arrested at the War Resisters League “die-in” and a Florida woman arrested in Herald Square on August 31 for sitting in a crosswalk never saw lawyers, despite their repeated requests to speak to one. [R. 202, R. 237.]

Of the 202 people who were arrested, 63 indicated that they had not been read their Miranda rights, and 42 indicated that they had not been told the charges against them. Thirty people fell into both categories.

D. Property Issues

The NYCLU received 22 reports that the police failed to return arrestees’ property promptly after their release. Three people complained of two- to seven-hour waits at the property-retrieval center; five reports complained that their property had been classified as “arrest evidence”²⁶ and not returned, and two reports were from people who received no documentation of the property taken from them and who encountered substantial obstacles when they tried to retrieve their belongings. A street vendor whose political T-shirts were seized when he was detained did not get his property back for four months, and then only after intervention by the NYCLU. [R. 211.]

POLICE INTIMIDATION OF PEOPLE ENGAGING IN EXPRESSIVE ACTIVITY

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Twelve people (none of whom was arrested) reported instances of the police interfering with leafleting activities or sign-carrying. Ten reports came people recounting their own experiences; the remaining two were from witnesses.

On September 1, a man stood on the corner of 34th Street and Seventh Avenue distributing leaflets. Neither a crowd nor an audience was surrounding him, and he was not blocking the sidewalk. A police officer told him to leave the area and to move on. When the leafleter questioned the officer, the officer replied that the man could leave or be arrested. [R. 101.] That same day, in Bryant Park a man distributed flyers with



photos of prisoners held at Abu Ghraib. An officer told him to leave the park. He insisted that he could remain because Bryant Park is a public park. The officer responded, “Not today, it isn’t.” The man was then surrounded by approximately ten officers. [R. 102.]

Four people reported the police denying them access to streets around Madison Square Garden and Penn Station because they were carrying signs. [R. 62, R. 114, R. 116, R. 154.] On September 1, a man carrying a sign reading “Another Gay Man Against Bush” was denied westbound access to 32nd Street from Sixth Avenue. An officer approached him and told him that he could not walk down 32nd Street with his sign. When the man asked why, the officer “told me that signs were prohibited on the street” and that “[he] could not ‘demonstrate’ on the block.” [R. 154.]



Later that day, an officer on Eighth Avenue told him he could not proceed carrying his “Another Gay Man Against Bush” sign. The officer said that “no signs were allowed near Madison Square Garden. . . . [specifically] I could not carry my sign on the sidewalk between Eighth Avenue and Sixth Avenue between 35th Street and 29th Street.” Proceeding to Seventh Avenue, he was stopped at the corner of 33rd Street by two officers who told him to step aside. One of the officers told him that “all ‘Anti-Republican, I mean demonstrating in front of Madison Square Garden is prohibited.’” The officer then told him that he could not carry his sign between 33rd and 31st Streets on Seventh Avenue. [R. 154.]

On September 2, a Brooklyn man “was walking in Herald Square alone with a protest sign, peacefully, when I was told I could not proceed down 34th St between 6th and 7th Ave. with my sign even though it was not in the security zone and thousands of people without signs were allowed to pass down the block between 6th and 7th Ave. on 34th Street.” A police officer repeatedly told him, “No signs between 6th and 7th Ave. on 34th St.” [R. 62.] That same day, a 38-year-old Manhattan man was stopped by a police officer as he was attempting to follow other pedestrians down 30th Street from Seventh Avenue to Sixth Avenue. The officer said: “You can’t go down this street with that sign.” When he responded that he would go to 29th Street, the officer demanded the sign, grabbed the man’s arm, and ripped the tubing off the sign. [R. 114.] Also on September 2, a man trying to turn west onto 32nd Street from 6th Avenue with posters rolled up in a tube was asked by a police officer: “What are the posters about?” The officer then stated: “You can’t take posters in there,” which the man understood to mean 32nd Street. [R. 116.]

Three people reported that on September 1, police denied them access to the subway at Penn Station/Madison Square Garden because they were carrying protest signs. [R. 25, R. 32, R. 63.] The police officers said they had orders to forbid signs in Penn Station or nearby subway entrances. [R. 25, R. 32, R. 63.] One man, traveling with his 12-year-old daughter and their dog, was stopped on Seventh Avenue attempting to reach Penn Station following a protest. An officer told him he could not enter the station with his poster, which read “Stop Bush Now While We Can” and “Money for Transit, Not for War.” The man left, placed his sign inside his bag, and was stopped again a few blocks away. There, an officer demanded to see the sign, which was partially sticking out of his bag. The man explained that it was a souvenir from the rally, but the officer said that if he wanted to get into Penn Station, he had to get rid of his poster; these were orders. The man asked the officer about his First Amendment rights, to which the officer replied: “Get rid of the sign; don’t go home; we’ll arrest you.” A superior officer stated that all officers had been given the same order: not to allow anyone into Penn Station with a poster. The man finally entered Penn Station at 34th Street and Seventh Avenue after folding his poster into fours and putting it inside his bag so that it would not be visible. [R. 25.]

A 34-year-old man from Brooklyn reported that on September 1, he was verbally abused by an officer for

his anti-Bush shirt. While he was stopped at a red light on the corner of Seventh Avenue and 34th Street, a police officer “lunged” at him, saying: “You fucking people had your say already, get the fuck out of here.” The man told the officer that he was just crossing the street to get home, to which the officer replied, “I don’t care what the fuck you’re doing. When this light changes, get the fuck across the street or I’ll fucking arrest you.” Bystanders asked the officer if he was instructed to arrest people with anti-Bush clothing, and he responded, “No, I’m just a ticked-off Bush supporter and I’m sick of you fucking people.” [R. 119.]

A 55-year-old man also reported that on September 1, he was pulled off an uptown local train at the 34th Street station by two officers. He had been engaged in a heated political discussion on the train with a woman wearing a “Terrorists for Kerry: Vote Bush” T-shirt. The officers forced the man out of the train car and when he asked “What have I done?” one of the officers responded, “I told you to get the fuck out of here.” The officer then hit the man very hard in his chest and pushed him down onto the stairs. The man lost his glasses, and was told that he was not “moving fast enough.” Five or six police officers followed him out of the station. [R. 122.]

EXCESSIVE FORCE AND OTHER POLICE MISCONDUCT

The NYCLU received 16 reports regarding excessive force and other police misconduct, including dangerous use of unmarked police scooters, officers’ hiding their badge numbers and the use of pepper spray.

Plainclothes Officers on Unmarked Scooters

The NYCLU received 7 reports concerning plainclothes police during the Convention. Three reports mention the aggressive presence of unmarked officers on motor scooters.

As the August 30 Still We Rise/Poor People’s March neared Madison Square Garden, plainclothes officers rode unmarked police scooters into a large crowd after other officers had without warning pushed metal barricades across the street to break up the march. In one of the two reports the NYCLU received about this situation, a 31-year-old woman from Brooklyn recounts:

I was at the very end of the march and the protesters were all demonstrating peacefully when suddenly the police charged the protest with metal pens and cut off the protesters directly behind where I was standing. Absolutely nothing had occurred that I had seen to incite this action. I turned around to see what was happening, and there were cops coming toward the protesters from all directions it seemed. . . . At this point, I noticed plainclothes officers on scooter bikes driving through the area. One was on the sidewalk blocking it not too far from near where I was standing on the street and the other was on the opposite side of the street driving towards the main section of the protesters ahead of where I was located. [R. 84.]

A 34-year-old man from Washington, D.C. gives a more detailed description of the plainclothes riders’ actions:

I also saw a motorcycle drive into a group of protesters. Some people were [sic] and not able to get out of the way. Instead of stopping, this African American man on the motorcycle charged into the crowd again and hit someone that had turned their back and was trying to move away. At that point this man was pulled from his motorcycle and some people in the crowd attacked him. I did not know that the motorcycle driver was a police officer and I only learned about this when someone from Utne interviewed me after the incident. Several other witnesses then shared with me that this man had to be a police officer since the entire area we were in had metal barricades around it and there was no way someone

could have moved a motorcycle into the area. I did not understand why a lone plain clothes officer with an unmarked motorcycle would charge into a peaceful group of people. [R. 87.]

The NYCLU also received reports about plainclothes scooter officers engaging in dangerous tactics during a bicycle protest on the afternoon of Sunday, August 29. The cyclists formed at Union Square and headed north around noon. A 58-year-old Manhattan participant states:



We did not impede traffic. We stopped at red traffic lights, except when the police blocked the side streets in which case we went with the flow of traffic. We dismounted and walked with our bikes whenever we went onto the sidewalks....Traveling north on 6th Ave., near 30th St. around ten motor scooter riders joined us. They were very reckless, swerving and sweeping their way within traffic. They were not wearing police uniforms though I spotted a walkie-talkie in the back pocket of one of them and so I slowed down trailing the group and planning to leave at the first sign of a problem. Turning west on 37th St., the scooter riders began running into bicyclists. I saw an orange net being strung across the intersection with 8th Ave., which cut the group in two. [R. 246.]

Other reports confirm scooters blocking streets and weaving dangerously amongst the riders. Eventually, the scooters forced the riders west on 37th street into a barricade across Seventh Avenue. Another ride participant, a 36-year-old Brooklyn man, stressed that no scooter rider identified himself as an officer or ordered the bicyclists to stop. [R. 130.] Another cyclist reported

Around this time [noon] as we were nearing 37th St on Broadway, the police on scooters tried to zoom in front of us and block our passage North. We therefore were forced to make a quick left turn onto 37th St towards 7th Ave. As we neared the corner of 37th and 7th officers on scooters drove in front of us and began blocking our passage in the road. An officer shouted for us to get on the sidewalk. Therefore myself and several others got off our bicycles and proceeded onto the north sidewalk to try and continue on foot. 2 or 3 more officers on scooters drove onto the sidewalk and one even bumped the woman standing next to me with his bike. This same officer (BADGE #2441, white male with blonde spiky hair) got off his scooter and grabbed the woman next to me . . . and pushed her to the ground using excessive force. She showed no signs of aggression or of trying to leave once the sidewalk was blocked. His actions were totally unnecessary.” [R. 235.]

Pepper Spray

The NYCLU received three reports from people who were pepper sprayed, all on August 29. Two incidents occurred during the bicycle protest that morning, one after an officer pushed a bicyclist to the ground. [R. 113.] Officers also pepper sprayed a National Lawyers Guild legal observer assigned to follow the bicyclists. [R. 128.] That afternoon, near Madison Square Garden, the police pepper sprayed a woman reportedly calling attention to police misconduct. [R. 139.]

Other Excessive Force

A 30-year-old cyclist from Rochester suffered a broken collarbone after an officer pushed him into some

scaffolding and he landed on the pavement. [R. 113.]

Two reports from witnesses describe incidents of excessive force at Union Square on August 31. One witness saw the police throw four or five people to the ground, apparently without provocation. [R. 110.] Another reports:

Several officers targeted and attacked young men and women who were dressed mostly in black, with backpacks, and handkerchiefs around their necks. One officer chased a white male from the street onto the sidewalk and pushed him face first onto the ground. Holding the man down with his foot, the officer began kicking him in the back as he reached down to grab his arms and hand cuff him. . . . the officer would not alleviate the force he was using to restrain him even after he was cuffed. [R. 192.]

Finally, near the end of the United for Peace and Justice march, where some participants set fire to a large dragon in middle of the crowd, a female Columbia graduate student and administrator, reported that she

found two other drummers (whose names I do not know) and we started banging the drums saying “Walk don’t run, walk don’t run” in an effort to calm things down. At this point it was getting chaotic. I was almost at 6th Avenue when I looked at the downtown side of 34th and saw cops beating a young male protester who was on his knees. I put my drumstick away into my backpack and went over and shouted to the cops, “Shame, shame, no, no, stop, stop.” I did not touch a police officer but I pointed my finger at the cops in an effort to raise awareness that this man was being beaten. This is typical at protest actions in order to prevent police brutality such as I was witnessing. I was grabbed all over by cops and forced down to the ground but I fell on my chest on the drum so I couldn’t get down. Meanwhile the cops were telling at me to get on the ground. I said I can’t and one of the cops cut the drum and yanked it away. I was pushed to the ground and my head and face was [sic] pressed to the pavement. My arms were pinioned and I was sprayed with peppers-pray [sic]. I was handcuffed and yanked up by the handcuffs in a painful manner and marched to a batch of police vehicles at 34th and 6th. [R. 139]

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Obstructed Shield Numbers



The NYCLU received only one report about an officer trying to conceal his identity. A 27-year old woman reports that an officer she encountered on August 30 at 29th Street and Eighth Avenue had covered his shield number in several places:

The shield number on his shirt was covered with black tape. On the front of his helmet it was covered with blue tape. He was standing on front of a metal barricade blocking the corner, at the point when the police were trying to shut down the March for Our Lives. I was barricaded in on a corner and wanted to know how to get out. He refused to answer my questions and just stood there silently. So I wrote down his name in case anything happened and asked him for his shield number. He refused to give it to me. R. 73.

Improper Political Action

A 45-year-old Brooklyn man arrested at the World Trade Center site on August 31 reports: “We were taunted by, ‘four more years’ and [sic] while being processed between. Taped on the walls were photocopies of Bush/Cheney ‘04 stickers, one of which we face during our ‘mug shots’.” [R. 178]. A professor of medical ethics also noted the presence of Bush-Cheney posters on the wall at 100 Centre Street. [R. 53].

IMPACT OF POLICE ACTIONS

The effect of many police actions during the Convention was to chill people’s willingness to attend future protests, and in some cases make people feel as though protesting was an illegal act. On August 31, a Philadelphia woman stopped in New York City on her way back from vacation with a friend to “bear witness” to the protests and “add two to their numbers, if only for a few moments.” She was arrested with her friend in Union Square. She says that she “never thought that [she] would be arrested, much less arrested without any explanation. ...I know that I personally am unlikely to attend any protest that is not legally permitted and well organized.” [R. 209.] Similarly, a new teacher “afraid for [her] job” said: “I am ashamed to say that the NYPD’s tactics worked — I wanted to join the protest at Pier 57 2 Saturday’s [sic] ago, but I was afraid I would get arrested again.” [R. 202.]

A West Virginia woman arrested at the World Trade Center site on August 31 while videotaping the War Resisters League march said: “I was made to feel as if protesting itself was a criminal act, as if free speech, personal opinion and dissent (even just to possibility of dissent) are illegal acts.” [R. 4.]

While people felt chilled in exercising their speech rights, they also reported being galvanized politically and likely to become more involved in the political process. The Philadelphia woman was encouraged “to become even more aware of politics, [her] rights and any possible influence [she] might have over issues that concern [her].” [R. 209.] The day after being released from jail, a New York City high school teacher registered to vote for the first time. [R. 212.] ■



Shortly after it was announced in January 2003 that New York City would host the Republican National Convention, the New York Civil Liberties Union started making plans for a major campaign to protect the right to protest during the Convention. The importance of this campaign became all the more apparent one month later when New York City refused to allow a large anti-war march to take place and the NYPD then used a series of extremely troubling tactics to police a large stationary rally that drew hundreds of thousands of people on February 15th of 2003.

While the NYCLU long has been involved in defending the right to protest, the February 2003 debacle convinced us that we would need to adopt a far more comprehensive approach to the Convention. We therefore launched the “Protecting Protest” campaign.

With support from the Open Society Institute and other important funders, the NYCLU was able to develop and sustain a multi-faceted campaign that

- ▶ represented virtually every group seeking to hold a major demonstration during the Convention;
- ▶ obtained a court order barring the NYPD from using certain policing tactics at Convention demonstrations;
- ▶ published and disseminated tens of thousands of copies of “know your rights” publications;
- ▶ got the City Council to adopt a resolution supporting the right to protest during the Convention;
- ▶ established and operated a special website dedicated to all aspects of Convention protest activity;
- ▶ opened and operated the NYCLU’s Protecting Protest Storefront just a few blocks from Madison Square Garden;
- ▶ offered public training and information sessions, and
- ▶ ran a major police-monitoring operation throughout the Convention.

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Protest Permits

In the year before the Convention, the NYCLU assisted scores of groups and individuals seeking legal advice about planned protest activity during the Convention. Many of those groups needed or wished to obtain permits, and the NYCLU represented virtually every group that held a major demonstration during the Convention. Our clients included:

- ▶ 9/11 Families for Peaceful Tomorrows
- ▶ Artists and Activists for Peace
- ▶ Christian Defense Coalition
- ▶ Green Party
- ▶ Hip-Hop Summit Action Network
- ▶ NARAL Pro-Choice New York
- ▶ National Organization for Women, New York City Chapter

- ▶ Not in Our Name
- ▶ Planned Parenthood of New York
- ▶ Still We Rise Coalition
- ▶ “The Line”
- ▶ United for Peace & Justice (along with the Center for Constitutional Rights)

In representing these groups the NYCLU worked for months with NYPD and Parks Department officials and attended numerous meetings to obtain permits and negotiate the details of the policing of planned protests. With one exception, the NYCLU was able to obtain a permit for every single event for which its clients sought a permit.²⁷

Legal Challenges to NYPD Demonstration Policing Tactics

In the aftermath of the February 15, 2003 anti-war demonstration, the NYCLU received hundreds of complaints about the NYPD’s restrictions on access to the rally; its use of “pens” made of interlocking metal barricades to confine the movement of people at the rally; and the Department’s use of mounted officers to disperse crowds of people packed on city streets or sidewalks just trying to get to the event. In April 2003 the NYCLU issued the report “Arresting Protest,” which included specific recommendations to address these problems.

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When the NYPD had not taken any meaningful steps to adopt needed reforms, the NYCLU filed three federal lawsuits in November 2003 that challenged a range of tactics we believed the Department would deploy during the Convention, including the unreasonable closing of streets and sidewalks leading to demonstrations, the unreasonable penning of protesters, the dangerous use of mounted officers, and the blanket searching of people seeking to attend public demonstrations.²⁸ Working with eight students from the NYU Civil Rights Clinic, the NYCLU conducted expedited discovery during the spring — including depositions of high-level NYPD officials including Commissioner Raymond Kelly — and then presented its case to federal Judge Robert Sweet in a four-day evidentiary hearing in early June 2004.



In a 78-page decision issued on July 16th, Judge Sweet ruled that the NYPD had been unconstitutionally restricting access to demonstrations, unconstitutionally using pens to confine demonstrators, and unconstitutionally searching the bags of people seeking to attend demonstrations.²⁹ Shortly thereafter, he issued an order barring the NYPD from using these tactics at future demonstrations, including at the Convention.

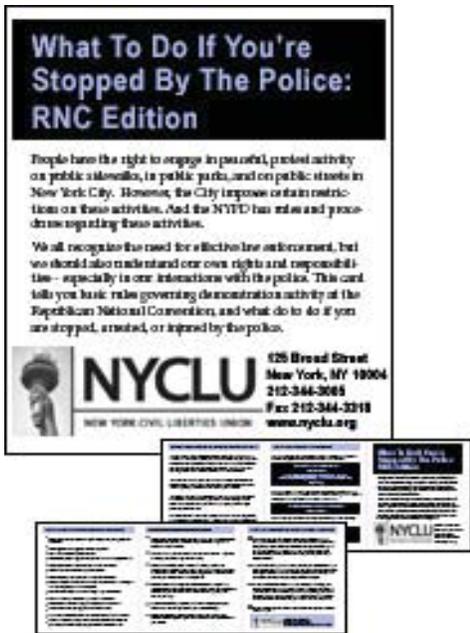
After initially praising the decision, the City reversed position and attacked Judge Sweet’s ruling on the searches (a ruling that had ignited a substantial public debate). However, though it eventually appealed the ruling, it

never sought an emergency appeal, and the ruling remained in effect throughout the Convention.

NYCLU Know-Your-Rights Publications

For many years the NYCLU has published and disseminated pamphlets, flyers, and brochures informing people of their legal rights. In the expectation that many people participating in Convention protests would be coming from out of town and thus would be unfamiliar with the NYPD, the NYCLU decided to prepare materials especially for the Convention.

In May 2004 the NYCLU produced a special Convention edition of its “Demonstrating in New York City,” which sets out all the basic rules concerning protest activity in New York and related permit requirements. We also produced the pocket-sized “What To Do If You’re Stopped by the Police,” which sets out the legal rights of people when interacting with the police and provides commonsense tips about how best to handle such interactions. In the months leading up to the Convention and during the Convention itself the NYCLU distributed over 50,000 copies of these know-your-rights publications.



City Council Resolution and Congressional Memorandum of Understanding

The NYCLU’s Bill of Rights Defense Campaign spearheaded the effort to pass the Right to Assemble resolution in the New York City Council. The resolution called on the NYPD to refrain from investigating individuals or groups based solely upon activities protected by the First Amendment, such as political advocacy or the practice of religion; to take prompt action on permit applications, provide written explanations when permits are denied, and offer suitable alternatives; to refrain from the use of four-sided enclosures, known as “pens,” to confine people at demonstrations; and to allow demonstrators within sight and sound of, and in close proximity to, the object of their demonstrations at the Convention. City Council Speaker Gifford Miller, Deputy Majority Leader Bill Perkins, and Council Member David Yassky introduced the resolution on June 7, and on June 28 the City Council adopted it by a margin of 44-5.

The NYCLU also worked with Congressional leaders to ask Mayor Michael Bloomberg to sign a Memorandum of Understanding on the regulation of expressive activities at the Convention. Seven members of the New York City Congressional delegation signed the Memorandum and presented a copy of it to Mayor Bloomberg on June 9th for his review and signature.

The Memorandum set out procedures and guidelines to ensure that the regulation and policing of public demonstration at the Convention were conducted in a manner that respected the rights of speech, expression and association. The Memorandum sought to resolve key outstanding issues prior to the commencement of the Convention. Subjects addressed in the Memorandum included: plans by the City Administration to facilitate access to, and freedom of movement at, demonstrations and rallies; special training by the NYPD to instruct police officials and the rank and file to respect people engaged in peaceful demonstrations; and the NYPD’s preparedness to document its compliance with the Handschu guidelines.

Representatives Charles Rangel, Major Owens, Jerrold Nadler, Eliot Engel, Carolyn Maloney, Jose Serrano, and Edolphus Towns endorsed the Memorandum. In addition to outreaching directly to Mayor Bloomberg through phone calls and letters, two news conferences were held in City Hall to ask the Mayor to meet with Congressional

lawmakers to discuss the Memorandum. Mayor Bloomberg never responded.

The NYCLU's Protecting Protest Website

In June 2004 the NYCLU launched its Protecting Protest website, which was a special section on the NYCLU's website (www.nyclu.org) and had its own domain address so people could access it separately (www.rncprotestrights.org). The website had two primary functions: as an outreach tool, it allowed the NYCLU to publicize our trainings and projects to a wide audience, and as a public education tool, it offered downloadable versions of all of the NYCLU's Know Your Rights materials, useful links, maps and calendars of most of the major demonstrations, and up-to-the-minute updates about events at the RNC from the NYCLU. During August alone the site had over 220,000 "hits."

The NYCLU's Protecting Protest Storefront

One of the most vibrant features of the NYCLU's campaign was its Protecting Protest Storefront located at 520 8th Avenue between 36th and 37th Streets. While the NYCLU has had a strong presence at demonstrations in New York for decades, the Storefront was the first time the organization had a street-level space to support its work. Just blocks from Madison Square Garden, the Storefront was alive with activity from the day it opened in early August until it closed the day after the Convention ended.

In the month it was in operation, the Storefront served many purposes:

- ▶ As the base of operations for NYCLU lawyers, staff, and volunteers who monitored police activity leading up to and during the Convention;
- ▶ As the location of our "Know Your Rights" trainings for groups and individuals planning to protest during the Convention;
- ▶ As a place where protesters, organizers, reporters, members of the media and even police officials could get information about the legal rights of groups and individuals planning to protest during the Convention;
- ▶ As a place for people to file complaints or provide reports about police activity before and during the Convention;
- ▶ As a location for members of the media to file stories during the Convention;
- ▶ As a central distribution point of information to the media, with the Storefront being used daily for interviews, press conferences, and briefings.

In the weeks preceding the Convention, the Storefront was open from 10:00 a.m. to 6:00 p.m., Monday through Saturday. Starting on Thursday, August 26, the storefront was open daily from 8:00 a.m. to 10:00 p.m. Soon after our opening in the first week of August, the Storefront began hosting regular events, press conferences,



and trainings. A steady stream of people came through the space, picking up literature and getting general information about the upcoming Convention.

The first floor of the storefront was dedicated to the public aspects of the campaign: trainings, meetings, and press interaction. The second floor was reserved for staff use, but desks, phones and other office equipment were available on both levels for staff use.

From its opening, the Protecting Protest Storefront received considerable attention from the media, the public, and from the activist community. On any given day the Storefront would host a press conference in the morning, a volunteer orientation at noon, and a training in the early evening, all against the backdrop of a steady stream of visitors throughout the day seeking information or advice. And on more than a few occasions, police officials visited the Storefront to see what all the excitement was about.



A central goal of the Protecting Protest campaign was to educate members of the public about their rights as participants in demonstrations. One of our most important educational activities came in the form of training and information sessions the NYCLU offered to the public.

Our interactive trainings were approximately two hours in length and facilitated by NYCLU staff and legal interns. They focused on common sense approaches to interactions with the police, providing an overview of what rights exist “on the books” and strategies for when those rights are infringed upon. The trainings also discussed ways to protect one’s rights in an encounter with the police and tactics to keep the situation from escalating. In addition, the training offered recommendations on how to interact with the police on the street, what to do if you are stopped or searched, and how to report police misconduct.

The trainings were held on August 14th, 18th, 21st, and 25th at the Protecting Protest Storefront. Additionally, we conducted trainings for three community organizations at their request: Gay Men’s Health Crisis, Positive Health Project, and the Books Not Bars Youth Convergence. Attendance at the trainings grew steadily as the convention grew closer - beginning with 20 people at our first training to over 150 at our last. The trainings were attended by a diverse group of people and included college activists, lawyers, and community organizers. Most striking was the large number of people who were preparing to attend their first demonstration or who were attending their first demonstration in many years.

The operation of the space was facilitated by a core group of staff and volunteers, who in turn were assisted by dozens of volunteers. During the Convention itself, the entire NYCLU office shifted to the Storefront. It also served as the base for our Monitoring Project volunteers and Outreach and Education volunteers. All of this translated into an energetic, fast-paced, and dynamic atmosphere.

Training & Education

Police-Monitoring Project

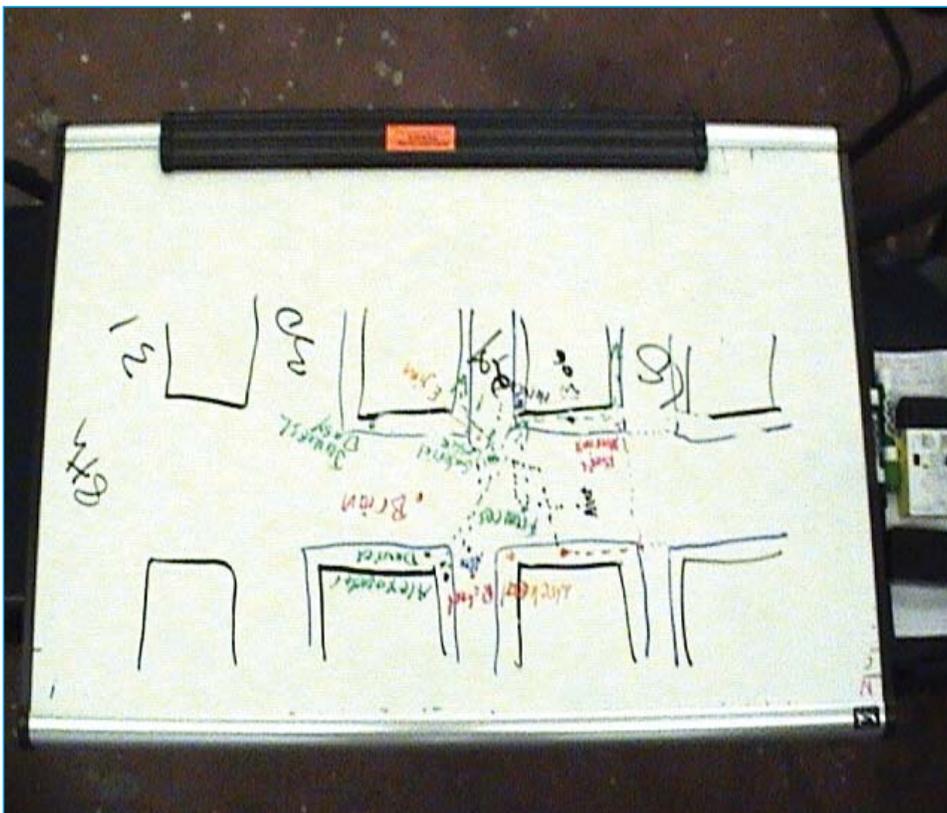
A central component of the Protecting Protest campaign was a police-monitoring project that the NYCLU ran throughout the Convention. While NYCLU attorneys long have been involved monitoring and negotiating demonstration policing, we recognized that a larger effort would be required for the Convention.

To supplement the work of NYCLU staff, we therefore decided to train a large group of volunteers who would fan out over the city to ensure that we had comprehensive and timely information about emerging problems as they developed. Rather than focus on arrest activity (which the National Lawyers Guild was observing), the NYCLU program emphasized observation of NYPD tactics used to police Convention demonstrations.

The goal of our monitoring project was to have at least one team of observers at every demonstration throughout the Convention. This allowed us both to track problems at individual events and to develop a more complete understanding of the tactics utilized by the police throughout the protests.



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Monitors were selectively recruited from across the city, making use of the NYCLU's connections within the civil liberties community and at law schools and public interest law firms. Many people on our monitoring team came from the NYCLU and ACLU National Office staff, while others were students interested in public interest law, media, and first amendment rights. A good portion of



our monitoring team were long-time activists, whose first-hand experience interacting with both police and protesters proved essential on the street.

Following an application and screening process, the monitors attended a mandatory intensive training session, at which they were trained in basic observation skills, use of still and video cameras, and guidelines for interacting with police and protesters. The training explored what to do at potential trouble areas (for example, large groups of people in the street without a permit) or situations in which the possibility of police misconduct was greatly increased (such as police massing or when a large number of arrests were underway). As one monitor put it, “The sort of information we looked for was something that could only be seen by people, using their eyes and minds, as opposed to, for instance, the kind of statistical information that could be found in databases...a premise behind this kind of monitoring is that some truth can only be seen and recorded by human observers.”



All told, the NYCLU trained 154 people to be monitors. During the Convention we deployed

approximately 117 teams of two to four monitors to over 40 events across the city. Monitors were in the streets for the duration of all events, usually working 6- to 8-hour shifts.

In light of the NYCLU’s concerns about NYPD policing tactics, we outlined some key areas for observation. These included the placement of police barricades and pens, the accuracy of police instructions at such barricades, and concurrently, any difficulties experienced by people attempting to get to the demonstrations. We were also interested in the resources and unusual equipment made available to the police department, and how these resources were deployed. Also of particular interest was the police use of recording equipment, including cameras and video. Monitors were asked to record the names of high ranking officers present, and if applicable, details about the use of force. They were trained to record any police instructions, how those instructions were delivered, and whether or not people heard them. Data was gathered by the monitors through observation, note-taking, still photography, and video.

The monitors were supervised on the street by a team of NYCLU staff, and coordinated by a dispatch team based at the Storefront. The supervisory team, made up of senior staff attorneys and organizing staff, reviewed the reports from the field, as well as their own observations, on a regular basis. Each monitor had an official NYCLU photo identification, a sample of which had been provided to the NYPD before the Convention.

While some worked every day, most monitors worked two or three 6-8 hour shifts over the week of the Convention. Shifts were organized to cover the maximum number of events while keeping the monitors within the same general area. On lighter days, each shift would consist of 10-16 monitors, but on days of intense action we had upwards of 80 monitors in the field.



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At the beginning of their shift the monitors would gather at the Storefront for a brief orientation and overview of the day's events. As all monitors worked in teams, they would meet their partners and be outfitted with the necessary supplies: photo identification, NYCLU monitor hat, NYCLU monitor t-shirt, disposable camera, note pad, and water. After checking in with the dispatch desk, the monitors would be deployed into the field with a map of their assigned area. After their initial call in to dispatch upon arrival, they would continue to check in every couple of hours. At the conclusion of their shift, the monitors would regroup at the storefront to debrief and go over the days events with the supervisory staff. The staff would then assess the day's events, and plan accordingly for the next day.

Operating from our Storefront, the dispatch team functioned as the central distribution point of information during the convention. Staffed at all times that monitors were in the field, the dispatch desk received an ongoing stream of reports from the monitors. By maintaining constant communication with the supervisory team by two-way radio and with the monitors by cell phone, we were able to dispatch people immediately to areas that needed attention. This communication system was particularly effective in our direct work with the NYPD on the street. The senior staff of the NYCLU had access to reliable and concrete information about activities across the City and consequently were able to negotiate with the police to much greater effect.

Interaction between the NYPD and the NYCLU monitors was largely cooperative. However, in one instance (on Sunday, August 29), a monitor engaged in lawful activity was given a summons, and the police officer managed to "lose" the monitor's driver's license while writing the summons. The NYCLU appeared in court to challenge the summons, but the officer failed to appear, and the summons was dismissed. ■



Though the Republican National Convention is unlikely to return to New York City anytime soon, large demonstrations occur in the City on a regular basis. It therefore is important for policymakers, legislators, the mayor, the NYPD, and advocates to examine the Convention with an eye towards reforming practices so as to avoid problems at future demonstrations in New York City. With this in mind, the NYCLU offers the following recommendations.

1. THE NYPD MUST ADOPT NEW PROCEDURES AND INSTITUTE NEW TRAINING TO AVERT UNLAWFUL MASS ARRESTS

Perhaps the most troubling aspect of the NYPD's actions during the Convention was its resort to mass arrests on several occasions. This resulted in large numbers of innocent people being swept into police custody. To avoid this problem, the Department should do the following:

- ▶ [Stop the indiscriminate use of mesh nets as an arrest tactic](#) — Whatever the merit of using nets to restrict the movement of crowds or to stabilize a situation, it is inappropriate to surround crowds with nets and then arrest everyone. This sort of indiscriminate arrest tactic is assured of capturing large numbers of innocent people, as happened during the Convention.
- ▶ [Assure that clear warnings to disperse are given](#) — During the Convention, the NYPD made mass arrests without giving clear warnings to disperse. Despite Department claims that dispersal orders first were given, extensive videotape and eyewitness testimony reveal that warnings either were not given or were inaudible to most members of the crowd. There is no reason why the Department cannot give clear, audible warnings to disperse if it genuinely intends to give people the opportunity to disperse.
- ▶ [Assure that the only people arrested are those who actually have been observed engaging in unlawful activity](#) — When law enforcement officials seek to arrest large groups of people, it is essential that careful steps be taken to assure that the only people arrested are those who in fact are observed to have engaged in unlawful activity, as opposed to simply being in a public area near unlawful activity. That this is a problem is apparent from the large number of bystanders arrested during the Convention and evidence collected by the NYCLU that “arresting officers” during Convention mass arrests in fact did not observe any unlawful conduct by those they arrested.

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2. THE NYPD SHOULD NOT HOLD FOR ARRAIGNMENT PEOPLE CHARGED WITH MINOR OFFENSES

The problems created by the mass arrests during the Convention were greatly compounded by the fact that most people arrested were held for arraignment rather than being released with a desk appearance ticket or summons. There is no legitimate reason to hold people for arraignment when they are charged only with minor offenses such as parading without a permit or disorderly conduct (offenses that do not rise to even the lowest level of criminal offense in New York). Unless there is a specific reason not to hold the person (such as not having valid identification), every person charged with a minor offense during a demonstration should be released with a desk appearance ticket or summons.

3. PEOPLE HELD FOR ARRAIGNMENT SHOULD BE RELEASED WITHIN 24 HOURS

In those instances in which people are held for arraignment, they should be arraigned within 24 hours or released with a desk appearance ticket or summons. To assure this happens, the City Council should pass Intro. 649, which would require City agencies (the NYPD and Department of Correction) to take the steps necessary to assure this happens. In addition, state legislation may be required to assure that other agencies involved in the arraignment process are assuring the timely processing of those under arrest.

4. THE NYPD MUST STOP FINGERPRINTING POLITICAL PROTESTERS CHARGED WITH MINOR OFFENSES

Despite being barred by state law, the NYPD fingerprinted every person arrested during the Convention, including the nearly 1,500 people arrested for minor offenses like parading without a permit and disorderly conduct. This raised serious concerns that the NYPD was using minor arrests to build a fingerprint database of political activists.

While the NYPD, when challenged by the NYCLU, reported that it had destroyed all the fingerprints it took during the Convention, the Department must institute procedures and training to assure that it strictly adheres to state law, which prohibits the taking of fingerprints from those charged with minor offenses except in unusual circumstances particular to the person under arrest.

5. THE NYPD SHOULD CURTAIL ITS VIDEOTAPING OF LAWFUL PROTEST ACTIVITY

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Marking a dramatic change from prior years, NYPD personnel during the Convention were widely and indiscriminately videotaping people participating in lawful and peaceful protests, and the Department has insisted on retaining those videotapes. While the use of videotaping to document unlawful activity is perfectly appropriate, the NYPD clearly has adopted a strategy of simply videotaping all protest activity. There is no legitimate reason for the Department to be doing this, and this practice should be stopped.

In addition, all footage of lawful protest activity during the Convention should be destroyed unless it contains evidence relevant to a judicial proceeding. Any such videotape that is retained should be transferred from the Police Department to the Law Department.

6. THE NYPD MUST ASSURE THAT PLASTIC HANDCUFFS ARE USED APPROPRIATELY

In light of the large number of complaints the NYCLU received about the use of plastic handcuffs during the Convention and in light of similar complaints the NYCLU has received from people arrested at other demonstrations, it is apparent that the NYPD's training and supervision in this area is inadequate. Plastic handcuffs that are inappropriately tightened on a person or are left on the person for prolonged periods of time can cause injury, pain, and extreme discomfort. When one realizes that most people suffering through this experience have been charged with the most minor of offenses, it makes it all the more important to address this issue.

7. THE NYPD MUST DEVELOP BETTER PROCEDURES FOR PROCESSING DEMONSTRATION ARRESTS

On past occasions — such as the February 2003 anti-war rally — long delays in the processing of those under arrest might have been explained by the NYPD being surprised by the number of arrests. For the Convention, however, the Department reportedly was preparing for as many as 1,000 arrests a day. Though nothing close to that many arrests occurred, people still were held for as long as three days (and were released only following a court order), opening the Department to criticism that it was intentionally delaying the release of protesters.

Whatever may have been the Department's intentions during the Convention, it must do much better in pro-

cessing people it arrests at large demonstrations. The whole process will go much faster, of course, if the Department adopts the NYCLU's recommendations about not arraigning those charged with minor offenses and about not fingerprinting those charged with minor offenses. Beyond that, the Department should assure that any special holding facilities are equipped and staffed so that Central Booking does not become a bottleneck. (For instance, there were no fingerprinting machines at Pier 57.)

8. THE NYPD MUST BETTER PLAN WHEN IT COMES TO CHOOSING HOLDING FACILITIES

It is difficult to understand how the NYPD concluded that Pier 57 would be an appropriate holding facility for large numbers of people arrested during the Convention. While no one expects arrestees to be held in luxurious accommodations, the use of a bus depot with grime-covered concrete floors and inadequate seating and sanitation was plainly inappropriate. In the future, the NYPD must assure that special holding facilities are reasonably clean with adequate seating and sanitation.

9. NYPD DEMONSTRATOR HOLDING FACILITIES SHOULD BE OPEN TO PUBLIC INSPECTION

Given the serious allegation that have arisen about the conditions at Pier 57 and about the processing of people arrested at earlier demonstrations, the City must assure that in the future any special facilities designated for the detention of demonstrators are open to public inspection by appropriate government officials, advocates, and members of the press. In addition, given the lengthy time periods during which people are being held in these facilities, steps should be taken to allow attorneys and/or family members to visit with those being held.

10. THE NYPD MUST ASSURE THAT THOSE WITH MEDICAL NEEDS ARE TREATED APPROPRIATELY

The complaints received by the NYCLU from people with medical needs suggests that the Department needs to improve its training and supervision in this area. Most significantly, the NYPD must assure that officers are not responding to those seeking medical attention with threats of prolonged detention.

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11. THE NYPD SHOULD NOT BE SINGLING OUT THE PROPERTY OF DEMONSTRATORS FOR DISCRIMINATORY TREATMENT

During the Convention, the NYPD classified as "arrest evidence" property that normally is not treated as arrest evidence (including bicycles and cameras). When evidence is labeled as "arrest evidence" (rather than as personal effects) it is much more difficult to recover.

If the Department has an across-the-board policy of classifying certain types of property as arrest evidence, it plainly can apply that policy to people arrested at demonstrations. But the City cannot single out demonstrators for discriminatory treatment of their property. To do so simply targets protesters for punitive action.

12. NEW YORK CITY MUST ESTABLISH AN AUTHORITY INDEPENDENT OF THE NYPD TO PARTICIPATE IN THE PLANNING FOR AND MANAGEMENT OF LARGE DEMONSTRATIONS

Currently, the NYPD handles all aspects of large demonstrations in New York City, from the negotiation of permits to the staffing of the events. As a result of this and the large numbers of officers the Department is committing to such events, the police have become a central feature of what is otherwise lawful and peaceful protest activity, seriously altering the character of far too many protests.

The NYCLU's concern about the excessive policing of protest events is heightened by the fact that, to date, Commissioner Kelly has refused to acknowledge that the Department made any mistakes in its handling of the Convention protests. While, as this report acknowledges, the Department did good things during the Convention,

it also committed a number of serious mistakes. That the Department is unable or unwilling to acknowledge any mistakes simply reinforces the need to have an office outside of the Police Department be established to help the city manage protests.

The NYCLU recommends the creation of an agency, independent of the NYPD, that would be responsible for the management of public demonstrations. This agency would handle permit applications, negotiate event particulars with organizers, and staff events to handle logistical details (such as street closings, staging, and assembly areas).

The NYPD would certainly remain part of the process, but its focus would shift to traditional law enforcement. In this respect, demonstrations would be treated just like other large public events (such as street fairs or concerts). In those rare instances at which unlawful conduct takes place, the NYPD would of course respond. For all but a handful of events, however, this is not an issue, and the NYPD's role can be greatly reduced. ■

Footnotes

- 1 Wilson, James Q. and George Kelling. 1982. "The Police and Neighborhood Safety." *The Atlantic Monthly*. March.
- 2 Vitale, Alex S. Forthcoming "From Negotiated Management to Managed Control: How the NYPD Polices Protests." *Policing and Society*.
- 3 New York Civil Liberties Union. 2003. *Arresting Protest*. NYCLU.
- 4 American Civil Liberties Union-Washington. 2000. "Out Of Control: Seattle's Flawed Response to Protests Against the World Trade Organization." ACLU-Washington. <http://www.aclu-wa.org/issues/police/WTO-Report.html>. WTO Accountability Review Committee, Seattle City Council. 2000. "Report of the WTO Accountability Review Committee." Seattle City Council. <http://www.cityofseattle.net/wtocommittee/>.
- 5 American Civil Liberties Union-Washington. 2000. "Out Of Control: Seattle's Flawed Response to Protests Against the World Trade organization." ACLU-Washington. WTO Accountability Review Committee, Seattle City Council. 2000. "Report of the WTO Accountability Review Committee." Seattle City Council.
- 6 City of Miami Police Department. 2004. "FTAA After Action Review." City of Miami Police Department. <http://www.miami.com/mlm/miamiherald/7874639.htm>.
- 7 Scahill, Jeremy. 2003. "The Miami Model: Paramilitaries, Embedded Journalists and Illegal Protests. Think This is Iraq? It's Your Country." *Democracy Now*. November 24. <http://www.counterpunch.org/scahill11242003.html>.
- 8 In 1971, civil rights organizations including the NYCLU filed a lawsuit against the NYPD for their actions in infiltrating and attempting to destabilize dozens of organizations including the NAACP, ACLU, CORE, and numerous peace groups. This lawsuit, *Handschu v. Special Services Division*, resulted in a consent decree signed in 1985 that prohibited the NYPD from commencing an investigation into the political, ideological or religious activities of an individual or group unless, "specific information has been received by the Police Department that a person or group engaged in political activity is engaged in, about to engage in or has threatened to engage in conduct which constitutes a crime." *Handschu v. Special Services Division*, 349 F. Supp. 1384 (S.D.N.Y. 1985). The decree also required that a paper trail of all investigations be maintained.
- 9 *Handschu v. Special Services Division*, 71 Civ. 2203 (Feb. 11, 2003).
- 10 The NYPD videotaping of protest activity during the Convention has prompted advocates to challenge the Department's compliance with the remaining restrictions on NYPD surveillance activity.
- 11 On August 11th, *Newsday* ran a story quoting unnamed "police sources" as saying that the department was watching protest groups by attending rallies and meetings, "Our guys got in there without them knowing it... It helps us keep track of what they're doing." The article also discussed police training for the demonstrations involving the use of pain compliance holds and mass arrests.

On August 18, WABC television did an unsourced report stating that the NYPD had assembled a large group of undercover officers that were planning on tracking 56 "primary anarchists" from across the country. According to the report police teams of one supervisor and six officers were sent to places such as Boston, Washington, D.C., North Carolina, and California to provide surveillance of these individuals based on their past involvement in political demonstrations. This surveillance appears to have been undertaken without any specific evidence that these individuals had any plans to commit illegal activity or even attend the RNC protests.
- 12 Anderson, Christopher. 2004. "Getting used: How the Media Helps Create a Climate of Fear and Repression During Political Protests." Unpublished Manuscript. http://nyc.indymedia.org/usermedia/application/2/Getting_Used_Report.pdf.
- 13 Patrice O'Shaughnessy. "Fury at Anarchist Convention Threat." *New York Daily News*, 12 July 2004, p. 6.
- 14 Daryl Khan. "Activists Dismiss Police Security Fears." *New York Newsday*, 13 August 2004.
- 15 Randal C. Archibold. "Anarchists Emerge as the Convention's Wild Card." *New York Times*, 20 August 2004, p. A1.
- 16 Stefan C. Friedman. "Radicals Plot Bad Weather." *New York Post*, 23 August 2004, p. 10.
- 17 Patrice O'Shaughnessy. "Anarchists Hot for Mayhem: Police on Guard vs. Violent Tactics." *New York Daily News*,

26 August 2004, p. 5.

- 18 James Gordon Meek, Michele McPhee and Maggie Haberman. "Violence at RNC Feared: Protests May Turn Bloody, Feds Warn." *New York Daily News*, 19 August 2004.
- 19 These accounts have been compiled into a booklet entitled "RNC Intake, Received by the New York Civil Liberties Union between August 27, 2004, and March 25, 2005." Each intake form is individually numbered and referred to herein by its number, preceded by "R."
- 20 This account is verified by the eyewitness testimony of R. 75, R. 176, R. 53, R. 82, R. 107, R. 112, R. 127, R. 236, and R. 242, among others.
- 21 Editor's note: Dyer Avenue, which runs north-south, is between 9th and 10th Avenues. Accordingly, in the block quotation, the parenthetical reference should properly read "midway between 9th and 10th Avenues" and the reference to 9th Avenue should properly be to 10th Avenue. This account of the arrests on 35th Street was corroborated by a report from a 34-year-old man from Brooklyn. [R. 134.]
- 22 These accounts are echoed by that of a photographer working on a documentary about Union Square: "everyone, including innocent bystanders that were on the sidewalk not taking part of [sic] the march, were blocked off and cornered." R. 17.
- 23 The NYCLU also received a report from a photographer working freelance for a major daily newspaper who reported that, after photographing an exercise that took place in plain view on the steps of the Post Office building across from Madison Square Garden, he was approached by two Secret Service agents who interrogated him about his picture-taking. When he said he was working for a major newspaper, they demanded that he call his editor on the phone so they could speak with the editor.
- 24 A 27-year-old woman arrested in Herald Square on August 31 states: "The correction officers kept informing us that there was no 24 hour rule in NYC. There was a sign on the wall stating that the city of NY could hold us for up to 72 hours before arraignment." R. 238. A Critical Mass arrestee states that "regular arrestees off the st. were being moved ahead of [the bikers] + processed before them." R. 134.
- 25 The following reports corroborate this account: R. 93 (regarding safety gear); R. 186 (same); R. 192 (regarding hazardous material); R. 209 (same).
- 26 Any item classified as "arrest evidence" becomes part of the case against the arrestee, and as such cannot be released until after that case is closed or the District Attorney permits it to be released. Two of the reports the NYCLU received about classification of property as arrest evidence were from cyclists arrested during the Critical Mass ride on the evening of August 27, who were unable to retrieve their bicycles for days or even weeks, until civil rights lawyers intervened. [R. 5, 96.] One man describes the arbitrary classification of his property. He explains that, on the property voucher, there are ten lines for "personal property" and ten lines for "criminal evidence." The report states that when an officer ran out of room in the "personal property" section, he or she would list the remaining items as "criminal" and confiscate them, regardless of their relevance to the alleged crime. [R. 95.]
- 27 The sole exception was the permit sought by United for Peace and Justice for use of Central Park for a rally of 250,000 scheduled for August 29. UFPJ first applied for this permit in June of 2003, and many meetings took place between January and July 2004 before the group finally acquiesced in the City's insistence that the rally following its march take place on the West Side Highway. When UFPJ subsequently concluded it could not stage the rally on the highway and the City rejected a renewed application for Central Park, the the Center for Constitutional Rights and the NYCLU filed suit in state court over the permit denial. The state court rejected this challenge, and UFPJ then canceled its rally, electing to hold only a march.
- 28 The three cases were *Stauber v. City of New York*, 03 Civ. 9162 (S.D.N.Y.); *Conrad v. City of New York*, 03 Civ. 9163 (S.D.N.Y.); and *Gutman v. City of New York*, 03 Civ. 9164 (S.D.N.Y.).
- 29 For technical reasons, the judge did not decide the NYCLU's challenge to the NYPD's use of mounted officers to disperse crowds.

RNC Chronology / Appendix A

2001			
9/11	Terrorist attack destroys World Trade Center and damages Pentagon. 2,749 people die when terrorists crash two planes into World Trade Center.		
2002			
9/25	New York City asks a federal court to eliminate restrictions on the ability of NYPD to conduct surveillance on lawful political activity.		
2003			
1/06	The Republican National Committee announces it has selected New York City as the site of the August 2004 Republican National Convention. Within 10 days, NYCLU contacts NYPD to request a meeting to discuss policing of Convention demonstrations.		
2/15	On the eve of the American invasion of Iraq, United for Peace and Justice holds a stationary rally on First Avenue attended by more than 100,000 people. The event is marred by NYPD closing of streets and sidewalks leading to the event, the use of pens to confine demonstrators, the use of police horses against peaceful crowds packed on public streets and sidewalks trying to get to the event, and hundreds of arrests. Earlier that month City had denied UFPJ's request for a permit for a march, and federal courts rejected a legal challenge brought by NYCLU.		
3/22	New York City allows UFPJ to hold an anti-war march, which proceeds from Times Square to Washington Square Park. Over 200,000 people participate, and the event takes place without incident.		
4/06	NYCLU discloses that NYPD used a "Demonstrator Debriefing Form" to interro-		
		gate people arrested at the February 15, 2003, antiwar rally about their political activities and associations and was using the information to build a database. NYPD agrees to discontinue the use of forms and questioning about political affiliation and to destroy database.	
4/07		A Federal court grants City's request to loosen restrictions on NYPD's ability to monitor political activity.	
4/28		NYCLU releases its report "Arresting Protest," which chronicles the problems that arose from NYPD's handling of the February 15, 2003 antiwar rally and makes specific recommendations.	
6/04		UFPJ files a Parks Department application for use of the Great Lawn in Central Park for a 250,000-person antiwar rally on Sunday, August 29, 2004, the day before the Convention is scheduled to begin.	
8/06		The Parks Department denies UFPJ Great Lawn application in a letter that says the Great Lawn cannot accommodate a crowd of 250,000.	
		In response to demonstrator debriefing disclosures, federal court imposes new restrictions on NYPD surveillance of political activity.	
9/03		NYCLU starts regularly asking to meet with NYPD to discuss policing of demonstrations at the Convention. High-level representatives of the NYPD's Legal Bureau and of the City's Law Department say the City is not yet ready to meet.	
11/19		NYCLU files three federal lawsuits arising out of the February 2003 anti-war demonstration and challenging NYPD demonstration	
		practices expected to be used at the Convention, including the closing of streets and sidewalks leading to demonstration sites, the use of pens to confine demonstrators, the use of mounted officers to disperse peaceful crowds, and the blanket searching of people seeking to attend demonstrations.	
12/08		NYCLU notifies NYPD in writing about large planned demonstrations by Not in Our Name and the Still We Rise Coalition and request meetings.	
12/23		First NYPD meeting about planned demonstrations takes place when NYPD meets with NYCLU to discuss demonstrations planned by Not in Our Name and the Still We Rise Coalition.	
2004			
1/29		NYPD meets for the first time with UFPJ, NYCLU, and Center for Constitutional Rights (CCR) about the planned UFPJ march and rally.	
3/26		At meeting with UFPJ, NYCLU, and CCR, NYPD informs UFPJ that the Parks Department has rejected application for Central Park. Police Department proposes march route that would involve assembly on West Side Highway, march up 10th Avenue to 34th Street, across 34th Street to 8th Avenue, up 8th Avenue to 57th Street, across 57th Street to 11th Avenue, and down 11th Avenue to the West Side Highway for rally.	
3/29		The Parks Department's General Counsel informs NYCLU that the Department has made no decision about UFPJ application and agrees to meet with group.	

2004		RNC CHRONOLOGY (cont'd)
4/19	The Parks Department meets with UFPJ, NYCLU, and CCR to discuss group's application for Great Lawn.	7/02: Federal Judge Robert Sweet starts the trial in NYCLU's lawsuit challenging NYPD demonstration policing tactics.
4/26	The Parks Department formally denies UFPJ application for Great Lawn.	NYPD informs NYCLU it is rejecting UFPJ's Third Avenue proposal.
5/27	NYPD informs NYCLU that it will allow UFPJ to march on 7th Avenue past Madison Square Garden.	7/07 NYPD agrees not to use four-sided pens and not to search protesters at the Not In Our Name event. NION agrees to cancel its march and have a stationary rally on Eighth Avenue in designated demonstration area.
6/09	In first substantive meeting about any demonstration other than the UFPJ event, NYPD meets with Not In Our Name and NYCLU about a proposed march on Thursday, September 2. NYPD Assistant Chief Bruce Smolka, with a senior lawyer from Law Department present, announces that the City will not allow any marches to take place in Manhattan during the four days of the Convention. NYCLU objects, and the Department agrees to consider march proposals, though not on September 2.	7/09: NYPD representatives meet with UFPJ and NYCLU at the West Side Highway location being proposed by the Department as rally site.
6/11	NYCLU informs NYPD that UFPJ wishes to postpone by two weeks a meeting scheduled for next day. In a letter released to the press, Commissioner Kelly writes to NYCLU complaining about the postponement and pressuring UFPJ to accept its West Side Highway proposal.	7/12 The Parks Department notifies NYCLU it has approved a Green Party political festival in Washington Square Park for Saturday, August 28.
6/15	NYPD meets with organizers of "The Line" and NYCLU to negotiate an event at which people holding pink slips symbolizing unemployment will line Broadway sidewalks from Wall Street to Madison Square Garden.	7/13 NYPD informs NYCLU it has approved the Still We Rise/Hip-Hop Summit march and rally for August 29.
6/18	NYPD meets with NARAL Pro-Choice New York and NYCLU to negotiate a women's rights rally scheduled for Union Square Park on Tuesday, August 31.	7/14 Commissioner Kelly holds a press conference announcing that UFPJ must accept West Street as its rally location.
	NYPD meets with Still We Rise Coalition, Hip-Hop Summit Action Network, and NYCLU to negotiate a march and rally scheduled for Monday, August 30.	7/15 UFPJ stages a small demonstration at City Hall over the right to have a rally in Central Park.
		7/16 NYPD meets with UFPJ, NYCLU, and CCR about a march route and rally site. This is a contentious meeting at which no agreements are reached.
		7/18 NYPD informs NYCLU it will not participate in any more meetings about UFPJ event until the group accepts West Side Highway.
		7/19 Federal Judge Robert Sweet issues decision finding NYPD restrictions on access to demonstrations, use of pens, and searching of demonstrators unconstitutional. The judge's ruling about searches ignites substantial public controversy.

2004

- 7/20** UFPJ announces it will accept the West Side Highway location for rally.
-
- 7/28** The Parks Department meets with New York City Chapter of National Organization for Women and NYCLU about proposed NOW rally on Great Lawn. The Department rejects the Great Lawn but offers East Meadow, which the group accepts.
-
- 7/26-29** The Democratic National Convention takes place in Boston. Demonstrations are small, but substantial controversy arises over police-mandated frozen zones and designation of a “protest area.”
-
- 7/29** NYCLU opens its Protecting Protest Storefront at 520 Eighth Avenue, three blocks north of Madison Square Garden.
-
- 8/10** UFPJ announces it will not hold a rally at the West Side Highway location and is reapplying for Central Park, proposing that the event be split between Great Lawn, North Meadow, and East Meadow.
-
- 8/13** National Council of Arab-Americans and ANSWER file federal lawsuit challenging the Parks Department rejection of its application to use the Great Lawn for a 50,000 person rally on Saturday, August 28.
-
- 8/16** NYPD meets with Not In Our Name and NYCLU about the proposed September 2 rally near Madison Square Garden. Group informs NYPD it will cancel the rally if it can hold an event in Union Square on August 29 before UFPJ march. NYPD agrees to proposal.
-
- 8/18** CCR and NYCLU file suit on behalf of UFPJ against the City over denial of permits for Central Park.
-
- 8/23** Federal judge William H. Pauley III rejects the challenge of National Council of Arab-Americans to the Parks Department denial of a permit for use of the Great Lawn on August 28.

- 8/25** New York State Supreme Court Justice Jacqueline Silberman rejects the UFPJ challenge to the Parks Department denial of a permit for use of the Great Lawn on August 29. UFPJ announces it will have no rally, only a march.
-
- The first significant Convention demonstration takes place as AIDS activists strip naked, baring political messages and blocking traffic on Eighth Avenue near Madison Square Garden.
-
- 8/26** Protesters walking from the Democratic National Convention to the Republican National Convention arrive at Columbus Circle and march down Broadway to Union Square accompanied by local political activists.
-
- 8/27** The monthly Critical Mass bike ride draws approximately 5,000 participants who ride through Manhattan streets for approximately 90 minutes before NYPD cracks down on the event, stretches orange netting across Seventh Avenue to block riders, and arrests over 250 people, including scores of legal observers and members of the media.
-
- The Christian Defense Coalition holds candlelight vigil at Madison Square Garden.
-
- 8/28** Planned Parenthood, NYCLU, and other women’s rights groups lead a march across Brooklyn Bridge to a rally at City Hall Park. As many as 25,000 people reportedly participate, and the event takes place without problems.
-
- The Green Party holds political festival in Washington Square Park without incident.
-
- 8/29** Not In Our Name holds a rally in Union Square Park before the UFPJ march.
-
- The UFPJ march draws as many as 500,000 people, who march past Madison Square Garden, across 34th

RNC CHRONOLOGY (cont’d)

Street to Fifth Avenue, down Fifth Avenue to Broadway, and down Broadway to Union Square Park. The event takes place largely without problems with the police.

After UFPJ march, thousands casually gather in Central Park without interference from the NYPD.

That evening NYPD officers use nets and motor scooters to surround and arrest scores of people standing on public sidewalks in and near Times Square.

- 8/30** Still We Rise Coalition, in an event co-sponsored by NYCLU, marches from Union Square across 15th Street to 8th Avenue and up 8th Avenue to the designated demonstration area at 30th Street for a rally. The rally is marred by a long line of buses allowed to proceed across 30th Street between the stage and the crowd attending the rally, by problems getting speakers to the stage, and by the use of metal barricades to segment parts of the crowd.

Thousands gather at Dag Hammarskjold Plaza near the United Nations to participate in a march for which no permit has been issued. High-level police officials negotiate with organizers and NYCLU and agree to allow group to march to 8th Avenue demonstration area. Thousands march down 2nd Avenue to 23rd Street, across 23rd Street to 8th Avenue, and up 8th Avenue to designated rally site. As group approaches 30th Street police officers without warning run line of barricades across 8th Avenue at 29th Street, sparking panic amongst marchers. As people start pushing against barricades, police officers storm into crowd and strike people with batons and plainclothes officers on unmarked scooters ride into crowd. One officer is pulled from his scooter and assaulted.

2004

- 8/31** Designated day of “direct action.” NYPD arrests over 1,100 people in a four-hour period, almost all of whom are charged with minor offenses such as disorderly conduct or parading without a permit. At World Trade Center, officers arrest 227 people at War Resisters’ League March after telling them they could march on a sidewalk. At New York Public Library, scores are arrested for standing on building steps. At Union Square, police officers use mesh nets to seal entire blocks and to arrest hundreds, including bystanders. Sole protester at a demonstration scheduled at a Hummer dealership is arrested for blocking a sidewalk.
- 9/01** “The Line” demonstration takes place without incident.
- NYCLU first contacts the Manhattan District Attorney’s Office seeking dismissal of charges against 227 people arrested at World Trade Center.
- Reports start surfacing that people arrested by NYPD are being held in filthy former bus depot on Hudson River known as Pier 57.
- Protest outside Pier 57 over NYPD detention of people at the facility.
- Central Labor Council holds large rally in the designated demonstration area on 8th Avenue.
- NOW-NYC rally takes place in Central Park’s East Meadow without incident.
- President Bush arrives in New York City and participates in an event in Queens.
- Legal Aid Society files lawsuit to force release of hundreds of people who were arrested on August 31st and are still being held. National Lawyer’s Guild follows with a similar suit. A state court judge orders the City to release certain prisoners.

- 9/02** The Legal Aid Society and National Lawyers Guild seek and obtain a contempt order against City for its failure to comply with the court order to release arrestees.
- ANSWER holds a rally attended by several thousand in designated demonstration area on 8th Avenue. NYPD uses four-sided pens that substantially impair movement at demonstration, and NYCLU monitors observe that police officers along 7th and 9th Avenue provide inaccurate information or no information to those seeking to attend rally.
- Thousands gather in Union Square and spontaneously decide they wish to march to 8th Avenue rally site. NYCLU negotiates with NYPD, which agrees to allow the march. Marchers proceed across 15th Street to 8th Avenue and up 8th Avenue to 30th Street, where they are met by a line of police officers in riot gear, which is the first instance the equipment has been used. Marchers remain at the rally for a couple of hours without incident.
- The Convention ends and President Bush leaves New York City.
- 9/15** The City Council holds its first oversight hearing about policing of demonstrations. No one from the City appears to testify.
- 9/22** NYCLU meets with the District Attorney’s Office and requests the dismissal of 227 arrests from the War Resister’s League march.
- 9/30** NYCLU discloses that a plainclothes officer in the unmarked scooter unit had “Loud Wives Lose Lives” stenciled on his helmet. NYPD responds by attacking NYCLU for releasing a photograph of the officer and helmet.

RNC CHRONOLOGY (cont’d)

- 10/04** NYCLU charges that NYPD unlawfully fingerprinted people arrested for minor offenses during the Convention and calls upon NYPD to destroy fingerprints.
- 10/06** The Manhattan District Attorney’s Office announces it will dismiss the cases of all 227 people arrested at the World Trade Center.
- 10/07** NYCLU files two federal lawsuits challenging NYPD mass-arrest tactics, the length and conditions of detention (including at Pier 57), and the blanket fingerprinting of people arrested during the Convention.
- 10/20** The City informs NYCLU it will destroy all fingerprints.
- 10/27** The City Council holds its second hearing into policing of the Convention demonstrations. The NYPD chief in charge of Pier 57 testifies that the Department instituted a special program to fingerprint those arrested at Convention because it was a national security event.
- 11/04** A newspapers report discloses that in August, the NYPD established a panel to reinvestigate complaints of Convention police misconduct that are substantiated by the independent New York City Civilian Complaint Review Board. Prior to this, NYPD did not conduct such investigations.
- 11/22** The National Lawyer’s Guild files a class-action damages suit on behalf of people arrested during Convention.

2005

- 8/05** NYCLU issues *Rights and Wrongs at the RNC*, a special report about police and protest at the Republican National Convention.

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125 BROAD STREET

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