Permitting Protest: Parsing the Fine Geography of Dissent in America

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The District of Columbia is unique in that demonstrations are governed by a variety of rules depending on whether the location is under the control of the D.C. Government, the National Park Service, the Capitol Police, or some other federal agency. The location will also control who issues the permit, if one is necessary, who will provide police protection, whose set of rules controls, and where you are taken if arrested (ACLU, 1982: 4).

Additionally, there is a difference between what you are legally entitled to do in a theoretical sense, and what the police on a particular occasion are going to let you do (National Lawyer’s Guild, n.d.: 2).

On 15 February, 2003, the world witnessed the largest coordinated protests in history. At least 30 million people demonstrated in national capitals, large cities, small towns and rural villages around the world. Angered by the United States’ plans to go to war against Iraq, ordinary people the world over took to the streets to assure that their voices were heard and their sheer numbers seen. In New York City at least a quarter of a million people turned up to protest, but they found that police had closed off streets and used horse charges to force thousands away from the protest site (Dewan, 2003; Lefkowitz, 2003). The likelihood of confrontation between police and protesters had been apparent since the moment the New York protest was announced. Organizers had wanted to stage a march past the United Nations building. They argued that the UN was a key symbolic site in the effort to halt the war. In the words of one protest organizer, the UN is ‘a symbol for the possibility of international cooperation, and that’s what we want to be promoting’ (quoted in Saulny, 2003: B1).

But the City of New York refused to grant a permit for a protest march, claiming that such a march would create a considerable security threat. The city asserted that the heightened security alert that the new Department of Homeland Security had issued several days before the planned protest, together with a foiled plot to bomb New York landmarks, indicated that allowing a march would create unacceptable risks both to the UN complex and to the marchers themselves. A federal judge upheld the city’s permit denial, saying that she did not want to ‘second guess’ the testimony of an assistant police chief that such a march created a real security risk (quoted in Saulny, 2003: B1). In turn, the ruling was upheld on appeal.

Instead of a march past the UN, the city announced it would allow a rally for up to 10,000 people in the Dag Hammerskjold Plaza on 47th Street and First Avenue. From there, the UN buildings could be glimpsed four blocks away. Police argued that the site was advantageous because ‘an overflow crowd of any size could be accommodated in pens on First Avenue’ to the north of the plaza (Saulny, 2003: B1). First Amendment

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activists and many newspapers around the country cried foul. But even though elsewhere on its pages it had reported that in testimony the police had admitted that they had no reason to expect violence at the parade and that there was no evidence suggesting there was a heightened risk of terrorism associated with the protest (Haberman, 2003a; 2003b), the New York Times argued in an editorial that ‘given the number of people expected to attend, the short notice the city had to prepare for the event and the United Nations’ history as a terrorism target, the city seems to be within its rights under the First Amendment’ (New York Times, 14 February 2003). Yet, the Times suggested, ‘the way this demonstration is being handled should not become the standard for the future . . . It is crucial . . . that this not become the norm’ (ibid.).

The problem with the Times position was that this way of handling protest already was the norm. The New York City government admitted that it had refused all permits for protest marches for several months, and that it had become city policy to only allow stationary rallies (Haberman, 2003a). And, more generally, limiting where and how protesters can meet through protest permits that spell out the exact place, time and manner of allowable dissent had already long been established as ‘the norm’ across the country. So too had the construction of ‘protest pens’ (or fences to keep protesters in particular areas and away from others) become a key strategy for policing dissenting political speech. What was remarkable about New York’s denial of a march permit was not, contra the Times, the precedent it set, but rather how much precedent there was for it.

This article concerns that precedent, a precedent that over the past 60 years has constructed a particular landscape of dissent in the United States (Mitchell, 2003). While the landscape is highly developed in the US, it is not unique to it (see Della Porta and Reiter, 1998; McPhail et al., 1998). Nor are the tools that have been used to construct it, including laws and bureaucratic rules, legal cases and changing police practices. The tools are used not to silence dissent outright, but rather to regulate it in such a way that dissent can be fully incorporated into, and become part of, the liberal democratic state (Marx, 1998). That is, the protest permit system in America has evolved as a means to actively shape, if not directly control, political dissent. And yet, even as permit systems are becoming fully regularized and fully routinized, debates over their legitimacy indicate that geographically based permit systems might be inadequate to the task of incorporating dissent. As we will argue, while recent protest shows just how important geography — in the sense of the jurisdictional fragmentation of regulation and the sites and relative location of events of different types and sizes — is to regulating, incorporating and policing dissent, it also exposes just how blunt and how fragile a tool it is.

While much could be said about the legal geography of dissent, we focus in particular on Washington, DC in order to ground our arguments. There are two related reasons for this. First, as the seat of national government, Washington is the ‘protest capital’ of the US. It has perhaps the most advanced, and the most institutionalized, system of protest permitting. Thus it provides a good case study of the intricate ways protest has been regularized in America — and, as we will show, of how that process may have reached its limits. But, secondly, Washington is also on the leading edge of trends in the policing of protest. As the sociologists of protest and policing McPhail et al. (1998: 49–50) argue:

[the Washington] permit system is one aspect of a public order management system . . . that has since been replicated, with some modifications, in many state capitals, large cities, and university campuses across the United States. Significant components of this system recently have been adopted in South Africa and in Belarus and facsimiles are present within the protest policing systems of England, Germany, France, Switzerland, and Spain.¹

¹ McPhail et al. (1998: 49) define a public order management system as ‘the organizations charged with managing public disorder problems, their policies and programs, their individual and collective policing actions, and their enabling technologies’.
Furthermore, there is a great deal of communication between governments and police agencies, and police experienced in policing protest in DC are often called upon to consult with other city, state and national governments. It is reasonable to assume, therefore, that the practice of, and the limits to, regulating protest through permits as it operates in Washington is indicative of practices and strains in the system elsewhere.

In order to understand how the permit system has developed and to understand what this permit system means for the ways protests unfold, we interviewed representatives of city and National Park police agencies, civil liberties attorneys, event planners, local residents and activists. The purpose of these interviews was to understand the shaping of the protest landscape through everyday application of the system. The interviews were conducted in May 2001, in the wake of a series of large demonstrations in the city against the policies of the International Monetary Fund and the World Bank and the first inauguration of President George W. Bush. The interviews — and the practices and worries they voice — provide a baseline for evaluating struggles at the center of both the demonstrations that immediately preceded them, and those held subsequently. These struggles are examined through an analysis of news accounts, particularly the Washington Post and New York Times. Our analysis of these reports suggests that the effectiveness of the permit system in incorporating dissent is weakening — despite the claims of representatives of the civil liberties organizations and police agencies — and is being replaced by a more prohibitionist regime of policing. The denial of a parade permit for the 15 February 2003 New York protest was not so much a precedent as simply another example.

The politics of and in public space: shifting geographies of dissent

Among its many other functions, public space is where dissent becomes visible. The question is, then: What are the conditions under which visibility becomes possible? Some of these conditions include the processes of exclusion that accompany any public space (see, for example, Marston, 1990; Mitchell, 1995; Sennett, 1996). The politics of public space are in part struggles over how these exclusions take place and who they affect. In part, though never entirely, publics are therefore constituted in public space (Fraser, 1990; Young, 1990; Staeheli, 1996), and where these public spaces are located can be decisive. In this sense, political exclusion can be effected by banning political activities in particular places while allowing the same activities elsewhere. By closing key sites to protest, permit systems can have the effect of silencing dissentive voices while at the same time giving the appearance that public space is politically inclusive. The politics of public space is thus a politics of location: where voices are silenced makes a huge difference as to which voices are heard. The politics of public space, therefore, can shape the nature of politics in public space.

Resistance and dissent in the liberal state

A great deal of urban research has addressed the relationship between exclusion, location and politics in public space through the optic of resistance (see D’Arcus, 2003). Resistance is seen as constitutive of ‘unfolding relations of authority, meaning and identity’, while it also is the means through which people ‘occupy, deploy and create alternative spatialities from those defined through oppression and exploitation’ (Pile, 1997: 3). But while much has been said about resistance, surprisingly little has been said about dissidence as a crucial ingredient in any political system, and therefore for the structuring of politics in and of public space.

Perhaps dissidence has not received much attention because researchers have been largely (if not exclusively) interested in the politics of resistance in liberal democracies where dissidence is already, presumably, incorporated into the model of governance,
and thus not readily ‘visible’. Unlike in authoritarian states where dissidence is an
outright act of defiance, dissent is, presumably, always already accounted for in liberal
democracies; it is, presumably, not an act of resistance in and of itself. Since dissent is
accounted for, there seems to be little impetus to studying it, except insofar as finding
ways to incorporate it into the state might prove vital to the health of the state itself.

Much First Amendment jurisprudence in the twentieth century, therefore, has been
concerned with the questions of exactly how (and how much) to open space for dissent,
so that dissent would be productive to, rather than destructive of, the state. Indeed,
Supreme Court justices as diverse as the liberal Oliver Wendell Holmes and the
conservative Felix Frankfurter agreed on at least this much: liberal democratic states
had to open a space for dissent.

In some ways, the history of mid- and late-twentieth century policing of protest in
liberal democracies can be told as a progressive history of ongoing attempts to
incorporate and normalize the politics of the streets within the liberal state — and often
of essays examining European and American developments in the policing of protest
since the 1960s, ‘there has been a leavening of police response to protest, regardless of
the country. Rather than taking an adversarial and intentionally violent approach, police
seek a more neutral stance. The policing of protest has become more normalized’. This
is in part because protest itself has become more normalized. In the US, the several
commissions examining urban unrest and protest in the wake of the riots of 1964–69
and the campus unrest and antiwar demonstrations of 1964–73, together with a
questioning from within police forces about the efficacy of repressive policing of protests,
have led to a system of what McPhail et al. (1998: 50) call ‘negotiated management’ of
protests. In this negotiated system, permits, meetings between police and protesters, and
the intervention of judges and other authorities allow for what could be called a ‘co-
production’ of protest between the state and protesters. That is, ‘to a greater extent than
ever before, police view their job to be managing, rather than repressing, protest,
protecting the right to demonstrate and guaranteeing (even to those whose views they
find intolerable) due process of law’ (Marx, 1998: 254). During the 1970s, 1980s and
for much of the 1990s, protest was brought more and more under the aegis of the state
itself, and the policing function concomitantly evolved from repression — or pacification
through ‘escalated force’, as McPhail et al. (1998: 50) call it — to one of management.

Such a managed incorporation of dissent has been one means for liberal democracies
to draw the line more firmly between dissent that is productive (that is, dissent that
allows for a range of voices to be heard, decisions to be evaluated and mistakes
corrected) and dissent that is, at least potentially, destructive of the liberal state. That is
to say, shifts in policing have been a means not just to incorporate dissent, but also to
actively shape it (see Mitchell, 2003). Indeed, shaping dissent, rather than just quashing
it outright, has been one of the main historical tasks of the liberal state (Gramsci, 1971).
In this project, the politics of public space has assumed a central role, as material public
spaces have become a primary venue for shaping dissent. The politics of public space
is a politics of the street (and of policing), as we shall see. But both this politics, and
this policing, are also shaped in law: dissent in liberal democracies is constituted by a
legal geography that establishes the bounds of the acceptable for both protesters and the
police. The evolution of law, too, has been crucial to just how dissent is incorporated
and protest regularized.

‘Law,’ Blomley (2000: 436), has written, ‘is not confined to the statute book or the
law courts but [can be] seen as a much more pervasive (and important) medium through
which society and politics are lived, whether in constrained or liberatory ways’. Law is
thus a codification — a set of rules that underlie behavior, including the behavior of the
police charged with enforcing the law. Law is a powerful force for normalization in that
we all internalize it and mould our behavior accordingly. Whether based in common
law or statutory legislation, law serves to define the boundaries of social relations and
confer authority to the state and its agents.
Law, therefore, is a significant site of social struggle and, as such, is complex. Among other ways, it is *geographically* complex because it is *jurisdictionally* complex, with nested and sometimes overlapping hierarchies of territorial authority (cf. Blomley and Clark, 1990; Blomley *et al.*, 2001). In Washington, DC this is especially the case, as the Federal government plays a larger jurisdictional role than elsewhere — about 25% of the land is controlled by the National Park Service — and because the city is made up of a patchwork of public property controlled by different federal and local authorities, each accountable to different political constituencies and bound by different rules and norms.

The geography of dissent in Washington, as elsewhere, is framed by such jurisdictional geographies. But it is also framed through legal categorizations of space, or more accurately, of property. Law is sensitive to variations in property (Blomley, 2003). What is legal on one kind of property might be illegal next door. And this not just a public–private dichotomy, either. Instead (and perhaps this is especially the case in the US), laws make distinctions between different kinds of public property and different kinds of private property. The geography of rights — rights to speech and political assembly that are the cornerstone of dissent’s incorporation into liberal democracy — is a function of this spatial sensitivity of law, and of how both dissidents and the police interpret the nuances of geography. To understand how, we now turn to a brief account of the development of a liberal legal regime of protest in the US.

### Permitting dissent

Before the first world war, the United States Supreme Court evidenced little interest in First Amendment jurisprudence.\(^2\) Policing of dissent was left largely to the states and localities, and it was often violent (cf. Preston, 1963; Marx, 1988). If the federal government got involved, it was usually in the form of authorizing the National Guard to break strikes and disperse rallies. During the First World War, however, the Supreme Court decided four landmark First Amendment cases, three concerning speech critical of the newly instituted draft and one concerning a protest against US intervention in Russia after the revolution. It upheld the conviction of the dissidents in each case, but in doing so, it began to lay the foundation for a theory of free speech that incorporated, rather than suppressed dissident speech. In 1925, the Court furthered the incorporation process by finding for the first time that the First Amendment not only bound the federal government, but also applied to local and state jurisdictions (*Gitlow v. New York* 1925). And in 1939, a deeply divided Court finally declared that ‘the people’ really did have a right to assemble in public space (*Hague v. CIO* 1939).

This last decision introduced a set of practical issues related to how public dissent was to be incorporated into the American state. The Court held that ‘wherever the title of the streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for the purposes of assembly, communicating thoughts between citizens, and discussing public questions’ (*Hague v. CIO* 1939: 515). The Court continued, ‘the use of the streets and parks for the communication of views on national questions may be regulated in the interests of all . . . [but] it must not, in the guise of regulation, be abridged or denied’ (*ibid*.). Indeed, speech and assembly in public space has to be ‘exercised in subordination to the general comfort and convenience . . . peace and good order’ (*ibid*.). The practical issues raised by this ruling concerned how to allow for the use of the streets and parks for political assembly while also subordinating that use to the demands of comfort, peace and order. These issues concerned the specific geography of protest.

To define this geography, the Court has developed, and continues to refine, what is known as ‘public forum doctrine’. Public forum doctrine holds that in ‘traditional public

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2 The First Amendment to the US Constitution reads, in part: ‘Congress shall make no law . . . abridging the freedom of speech, or of the press, or of the right of the people to peaceably assemble’.
forums’ (the streets and parks noted above), speech and assembly cannot be banned outright, but its ‘time, place and manner’ can be regulated just so long as regulations are content-neutral and serve a compelling state interest. Not all public property is a traditional public forum, however. Some properties are considered to be ‘dedicated public forums’. These are properties that have not been held from ‘time immemorial’ in the public trust, but on which government agencies nonetheless specifically allow speech and assembly. Regulation of dedicated public forums is bound by the same rules as regulation for traditional public forums, but government agencies can revoke the dedication, banning all First Amendment activities. Most public properties, however, are classified as ‘non-public forums’, including everything from military bases and national forests to the inside of government buildings and the parking lot of the Pentagon. On these properties, controlling agencies may choose to allow or disallow speech and assembly as they see fit.

Public forum doctrine thus creates a broad legal context for allowing and regulating speech and assembly on public property. Within that context, a massive amount of legal wrangling occurs. Much of it concerns the minutiae of ‘time, place and manner’ restrictions on traditional and dedicated public forums. Since the 1940s, the development of public forum doctrine has led local governments and police agencies to develop intricate local rules governing protest, making some sites off limits (removing dedications), encouraging the use of others, and setting limits on size, timing, noise and so forth. The broad context of public forum doctrine has legitimated the construction of an intricate geography of rights in American cities. And, in particular, it has encouraged the development of protest permit systems in almost every city in the US as a means to enforce this intricate geography.

The near universal acceptance of such permitting systems is ironic. In Hague v. CIO, the Court struck down just such a system, finding that it was a form of prior restraint on expressive activity. ‘Prior restraint’ refers to the government suppression of communication before it has the chance to take place. In 1931, the Supreme Court developed a ‘prior restraint doctrine’ (see Near v. Minnesota 1931) that holds that ‘there is a heavy presumption against’ the constitutional validity of prior restraint (Bantam Books, Inc. v. Sullivan 1963: 70). This means that the validity of any prior restraint practice cannot be assumed by lawmakers or courts; it has to be proven. Even as it has recognized that protest systems are a kind of prior restraint, however, the Court has nonetheless encouraged their development as a means of balancing the right to protest against the need for convenience, comfort and order. Only two years after the Court had declared a right to protest in Hague, striking down Jersey City’s permit system, it upheld the constitutionality of a New Hampshire law that required a license for any ‘parade or procession upon a public street’ (Cox v. New Hampshire 1941: 570–1). The Court held that parades were different from rallies and could be regulated both to maintain ‘good order’ and to keep the streets free for traffic. But if the Court here seemed to limit the validity of permit systems to parades in public streets, a dozen years later it made it clear that narrowly tailored permit systems could be used in other spaces — like parks — and for stationary as well as moving protests (Poulos v. New Hampshire 1953; see Cantwell v. Connecticut 1940; Shuttlesworth v. Birmingham 1969).

Any regulation of speech and assembly — whether through permit, law or injunction — the Court has held, must be ‘justified without reference to the content of the regulated speech, [be] narrowly tailored to serve a significant governmental interest, [and] leave open ample alternative channels for communication of the information’ (Clark v. Community for Creative Non-Violence 1984: 293). This three-part test of constitutionality gives great scope to governments to limit and even deny the right to protest, as we shall see. At the very least, the near universal adoption of permit systems means that it is now simply illegal in the US to have a protest of any significant size without first getting the state’s approval. ‘Free speech’ is really ‘permitted speech’; prior restraint is alive and well in America.
Policing dissent

Prior restraint is the public means by which protest — dissent — is accommodated and incorporated into liberal democracy. Laws, injunctions and permit systems provide the set of ground rules that cover protesters and police alike, in the process often regularizing — and thereby shaping — protest activity. Indeed, with such legal frameworks at hand, acts of civil disobedience are now often highly scripted, with protesters agreeing in advance with police how specific aspects of public forum law will be broken, by whom, and what the penalties will be. Much of the groundwork for protest takes place in pre-protest meetings between protest organizers, police representatives and lawyers for both sides, as they wrangle over the ways that permits will be written, and even the plans to exceed or ignore aspects of the permit.

Even so, such bureaucratic pre-protest planning is never complete, and sometimes fails. The police in Seattle in 1999 during the World Trade Organization meetings, for example, were caught off-guard. While permits had been issued for dozens of protests and parades around the city, some 20,000 unpermitted protesters gathered downtown and an overwhelmed police force was able to do little to either keep traffic flowing or deter violence against property. The mass mobilizations against the IMF and World Bank, the World Economic Forum, and the G8 and EU summits that followed, along with the images of sometimes violent demonstrations that they produced, have encouraged police in the US and elsewhere to supplement their pre-protest permit systems and negotiations with ‘emergency rules’, but also to send undercover officers to activist group meetings (Montgomery and Santana, 2000b; Phillips and Trofimov, 2001; Mendoza, 2003; Archibold, 2004). At the request of then-Attorney General John Ashcroft and numerous police agencies, federal courts have begun relaxing restrictions on police spying on domestic political organizations.

Restrictions on police spying in the US stem from public anger over FBI and local police infiltration of progressive and radical groups during the Civil Rights and Vietnam eras (Cole and Dempsey, 2002). Limits on spying have often taken the form of court-ordered consent decrees that required police to refrain from undercover infiltration of left-wing groups. In the wake of September 11th, many now argue that such restrictions are a hindrance to the prosecution of the ‘war on terrorism’ (Powell, 2002). But the loosening of consent decrees predates 9/11. Even before then, and despite consent decrees, police spying often occurred anyway (Cole and Dempsey, 2002). But as Jim Redden (2000) details, restrictions implemented across the country in the 1970s just as often led to the privatization of spying, rather than its elimination. More and more police began working with private security and detective firms to gain intelligence on political organizations. Police argue that they need these tools to anticipate how protests will develop, and to ‘protect themselves’ from violence and charges of police abuse. Infiltration of activist groups is one of those tools (Mendoza, 2003: A14). In Washington, DC, however, such police infiltration of protest groups has led to a number of lawsuits by activists seeking to curb such actions (ibid.). Activists argue that exceeding the bounds placed on dissent is essential to the extension of democracy (Monbiot, 2004). The geography of dissent is shaped by this kind of legal wrangling, too. But the question remains: What effect does all this have on the politics of and in public space in particular places?

Fine parsings of geography: negotiating Washington's protest landscape

Both the National Lawyer’s Guild (NLG, n.d.) and the American Civil Liberties Union (ACLU, 1982) publish guides to protest in Washington, DC. The former explains policing in Washington and advises readers about the various charges that could be
pressed against them at demonstrations, how the police might behave, what the arrest procedure will likely entail, the options arrested demonstrators might have for posting bail, securing legal representation, contesting charges, and so forth. It focuses on the likely policing of massive, extraordinary protests and explains both how to cooperate with and how to resist the system of protest policing that has developed in Washington. The ACLU’s guide, by contrast, explains the logistics of more ‘regular’ protests — the sort of protests that go on everyday. In Washington there are hundreds of demonstrations every year that cross multiple jurisdictional boundaries (McCarthy et al., 1996). Given this complexity, the ACLU guide seeks to demystify the process by which protests are regulated and policed. It explains the rules that govern public space in the city’s different jurisdictions, when permits are required and how to obtain them, and how to work within the system to exercise speech and protest rights. Though out of date, the ACLU’s pamphlet tries to make the ground rules for demonstrations clear, so that at least as far as ordinary protest goes, the Washington ‘system’ can remain (as Art Spitzer, a representative of the ACLU, put it in an interview of 21 May 2001) ‘pretty well-oiled’.  

Together these two guides present a good overview of the protest landscape in Washington. But it is a landscape that is constantly shifting: ‘Going back into the ’60s and ’70s and ’80s there was a lot more litigation than we have had recently’, says Art Spitzer (interview, 21 May 2001). This litigation concerned everything from restrictions on the size of demonstrations allowed in Lafayette Park (across the street from the White House), to whether protesters demonstrating against homeless policies could sleep in that same park as a means of dramatizing their point, to whether it was permissible to hand out leaflets on the grounds of the Capitol. And while time, place and manner restrictions may work smoothly in Washington, it is also the case, according to the ACLU, that rules and restrictions on protest in public space ‘never decrease . . . For example, if there is all of a sudden a fear of terrorism during the Persian Gulf War [of 1991], they’ll put new restrictions in place. Well, they never turn out to be temporary restrictions’ (ibid.). Negotiating these restrictions can be a challenge: special rules govern protest at the Supreme Court, a different set governs the Capitol grounds, and with dedicated public forums and non-public forums incorporated into nearly every federal building and property in the city, the ACLU has found that it has often had to engage in ‘very fine parsings of the geography’ of the city (interview with F. Mulhauser of the ACLU, 21 May 2001).

Though the ACLU describes the protest system in Washington as ‘well-oiled’, it is clear that it is a system of many moving and complex parts:

This city is very complicated, because of overlapping and cooperative jurisdictions. For someone who has a benign goal — the socialists want to put up a table with literature on a street corner for two hours some afternoon or somebody wants to hand out leaflets in one place at one time, or do something expressive — it is not a simple question. Or it is a simple question but it is not easy to find the answer to [it] (interview with F. Mulhauser, 21 May 2001).  

The former commander in charge of protest policing for the Washington, DC Metropolitan Police says that for most demonstrations and other expressive activity, things really are not so complicated: ‘It’s a very easy process’. For parades, ‘It’s a one-page application for a . . . permit’ (interview, 23 May 2001). The permit has to be

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3 When we have explicit permission to give full identifying information about interviewees, we cite them by name (as here). When we do not have explicit permission we merely note that the information was from an interview and give the date of the interview.
4 We know first hand that getting answers to where protest is possible, and who regulates it, can be difficult. Repeated phone calls to the Supreme Court to find someone to interview about protest on and around its grounds (the Court has distinct rules and separate police force from the rest of the government), finally led a Court phone receptionist to declare in exasperation: ‘I guess no one around here knows anything about protest!’. Calls to the Secret Service were finally returned by a spokesman who blithely declared that the Service never involves itself in planning for protests.
requested fourteen days in advance, and ‘If a parade is for an issue under the First Amendment . . . we just do the safe flow of traffic to get you from one point to another’. Large rallies (that might block a sidewalk, disrupt traffic or block an entrance) have a similar application process. Other sorts of demonstrations — picketing, leafleting, street speaking — do not require a permit if they occur on DC-controlled property. But much of the property in DC is not DC-controlled. The National Park Service controls about 25% of the land, and there are dozens of other jurisdictions, each with its own rules, and sometimes with its own police that control public property in the city.

On National Park property (most of the parks and monuments in the city, as well as the Mall), any protest activity by more than 25 people requires a permit. Permits for protests larger than the limits set for Lafayette Park (3,000 people) or for the sidewalk in front of the White House (750 people) must be applied for 10 days in advance. All others can be applied for as late as 48 hours in advance according to the ACLU and representatives of the National Park Service. If the Park Service does not act on a permit application within 24 hours, it is considered presumptively granted; the Park Service may, however, withdraw approved applications if done in a content-neutral way (ACLU, 1982: 7). On National Park property, a whole section of the Code of Federal Regulations (36 CFR7.96), extending to some 12 pages, regulates the location of protests and the kinds of allowable actions (such as standing or moving). The rules are intricate, in part because many of them are the result of lawsuits.

On both DC and National Park property a distinction is drawn between a demonstration and a special event. According to the commander of the Metro Police (as the DC police are called) ‘A special event is usually a sponsored event, a celebration of some sort, or a parade of some sort that’s not a First Amendment issue’ (interview, 23 May 2001). Organizers of special events have to pay for logistics and special policing; organizers of demonstrations do not; and the line between the two is often difficult to draw. But it is an important line since it determines who will bear the cost of political expression. The line becomes especially difficult to draw when demonstration organizers draw on celebrities to help boost crowds: ‘If you get Stevie Wonder up there . . . you’re going to get another 30,000 young people from DC coming to your demonstration, maybe more than that . . . And yet the Park Service would say, “Well, you’ve got Stevie Wonder and you’ve got this other group and you’ve got this other group, you’re putting on a concert. You’re not doing a demonstration”’ (interview with A. Spitzer, 21 May 2001). Costs associated with both demonstrations and special events can be steep, and so a representative of the National Park Service joked, ‘As far as we’re concerned, they’re all special events!’ (interview, 23 May 2001).

To parse the fine geography of the District and to assure that the complex regulatory fabric woven around protest and special events is properly understood and negotiated, both Park and Metro Police try to work closely with event and demonstration organizers. The Metro Police has:

a squad that does nothing but plan presidential movement, dignitary routes, special events, and demonstrations. They meet with organizers. If it’s large scale, involving multiple jurisdictions, there’s a joint meeting with the Capitol Police and the Park Police to meet with the organizers and plan out the march or demonstration or whatever it is. A lot of times you are going from Capitol territory to our territory and to Park territory, and so all these agencies work together. We can’t issue a permit if you go on the Capitol territory unless we know Capitol is going to issue a permit. So there’s lots of coordination amongst the agencies (interview, 23 May 2001).

The Park Police meets with demonstrators and event organizers ‘when they apply for their permits . . . If it’s a group we think we might have problems with, we might have a lawyer there . . . to deal with them . . . [W]e try to work it out as best as possible for the convenience and safety of all’ (interview, 23 May 2001). Demonstration and event organizers ‘basically tell us what they want to do, and we’ll explain what the law allows
them to do. And there’s lots of compromise. Certain things we just can’t allow. Certain things maybe we can allow, and we end up helping them plan a lot’.

The jurisdictional and regulatory complexity of Washington has led to the professionalization of protest organizing. Like wedding or convention coordinators, professional consultants are now often employed to negotiate the permit process, meet with police forces, arrange for stages, sound systems, preparation and clean up — ‘everything that they need within the confines and laws of the District of Columbia to perform [an] event’, according to one event coordinator (interview, 23 May 2001). A lot of groundwork thus goes into many of the protests, demonstrations and special events in Washington, DC. Protest appears fully regularized, fully incorporated into the business of the nation-state. Indeed, the very complexity of protest organizing in DC has been a significant factor in the drive to routinize it.

An additional incentive to routinize protest has been a desire — both on the part of police and protesters in the wake of the violent riots and demonstrations of the 1960s — to find ways to minimize the threat of violence (see Marx, 1998: 253). In this, routinization has been effective, or at least had been until the past few years. A Park Police captain observes that the routine helps protestors understand how to make their protest known without undue disturbance to them personally:

“They want to know, ‘What do I have to do to get arrested and minimize the impact against the police or against property?’ and what’s going to happen to them. So we explain it to them. Like in front of the White House, if you sit down in the center portion holding a sign, that’s illegal, you’ll be arrested. There are times where they’ll time their arrest to make sure it gets on the evening news and stuff like that. And we will explain to them exactly what steps they can take to minimize the disruption in their lives. If they have a valid ID, and they don’t have any contraband on them, and they cooperate fully, you can probably be processed pretty quickly (interview, 23 May 2001).

The Metro Police commander also speaks of arrest:

“A lot of people come to us and say, “Well, we want to march, we want to demonstrate, and we want fifty people to be arrested.” And we will work that out beforehand, and what the charge is going to be, and where they’re going to be taken so they can have their legal people there and be ready to post bail and get them out (interview, 23 May 2001).

Standard protest logistics and organization, to summarize, now often include consultation with the police, negotiation over who will be arrested (and for what), and ‘compromise’ over where protests and parades can occur, what sort of signs can be carried, what kinds of costumes can be worn, and so forth.

For the police, this planning also includes such things as the number of buses chartered in distant cities (as a means of gauging protest size), and drawing on information about various political organizations from police in other cities and states. It may also involve undercover work or drawing on informants to anticipate those parts of protest planning that organizers do not bring to the negotiating table. And police agencies expend considerable resources to learn from protests elsewhere. The commander of the Metro Police, for example, recalls: ‘I went to Prague and Switzerland when they had their protests there, and we sent people to Seattle. I went to Los Angeles when the Democratic Convention was out there. We just sent somebody to Quebec . . . So we try to follow them [the protesters] around to see, because it [the nature of protest] changes’ (interview, 23 May 2001).

The routinization of protest in Washington, however, has come at a cost. ‘With so many demonstrations in Washington, if you really want to be on the front page, you almost have to break the rules, unless you’ve got 100,000 people coming’ (Spitzer, interview, 21 May 2001). ‘Washington is so sanitized with demonstrations; I don’t think people pay them any mind anymore. I mean they’re just everyday’, says the police commander (interview, 23 May 2001). Some thus argue that protest politics have run their course: ‘My wife’s been involved in the women’s movement for thirty years. And
now, any time someone would come to her and say, “We’re going to do a march,” she would say, “That’s just not an effective way in this day and age to make any points. Think of a better idea” (interview with F. Mulhauser, 21 May 2001). The incorporation of public dissent into the liberal state has perhaps led to its neutralization. In many cases, police have greater expertise and knowledge of the advantages and disadvantages of protest sites than do protest organizers; holding this expertise sometimes allows police to contain protests or to minimize its impacts without organizers understanding the implications of siting decisions (Fillieule and Jobard, 1998).

Other activists still hold by the importance of public protest, but they have begun to reject the permit system: ‘Look, I’m always going to challenge the permits . . . So many of the Constitutional rights disappear’ (interview with A. Eidinger, 21 May 2001). Indeed, police in Washington now worry that ‘demonstrations are changing because some of them are becoming more volatile, more uncooperative with the police. This is sort of sad for us, because we have always prided ourselves on working with them and letting them express themselves’ (interview, 23 May 2001).

If the police see a rise in violence as a consequence of failing to abide by the protest system in Washington, some activists see matters differently:

I remember this summit meeting, and the police show up and they start going on television and telling people if they go out in the streets, they might get beat up . . . And really the violence stems a lot from how the police view our right to public space. They are losing in the courts. They cannot justify what they’ve been doing against us, because it’s been proven to be their real crimes. There are very, very few convictions [of protesters] (interview with A. Eidinger, 21 May 2001).

As made clear by Eidinger, who is involved in numerous protest organizations in the city and who is frequently asked by local and national media to comment on demonstration tactics and the meaning of protest, the routinized incorporation of public dissent through the construction of a permit system has perhaps been most thoroughly tested in the large demonstrations that have rocked the city in the years since the Seattle World Trade Organization protests of 1999. The experiences in these protests, to which we now turn, suggest that perhaps dissent is not as easily incorporated through the ‘fine parsings of the geography’ as many would hope. It may be the case that the form of ‘soft’ prior restraint embodied in the permit system has reached the end of its usefulness. Whether that is the case or not, geographic strategies of policing remain the center of Washington’s protest landscape.

Protest beyond the permitted

The national Park Service has long designated certain events in the Capital as ‘National Celebration Events’ (ACLU, 1982: 7). During these times — the Cherry Blossom Festival, Independence Day celebrations, presidential inaugurations — the space designated for the event is off-limits to protest, but protest is permitted nearby. In January 2001, however, for the first time, the Secret Service designated George W. Bush’s inauguration not a National Celebration Event, but a National Special Security Event. This terminological switch meant that the Secret Service was in overall charge of security arrangements. Because of the contested 2000 presidential election and the judicial rather than electoral decision that installed the president, and because of the general upswing of protest nation- and world-wide, massive protests were expected along the route of the Inaugural Parade. The Secret Service and the DC-area police agencies thus sought to ‘ensure that the swearing-in of the next president, the parade, and other inaugural events [were] not “tainted by” protesters’ (Santana, 2000: B1).

The Secret Service and police were particularly concerned because undercover operations had indicated that ‘[s]ome likely demonstrators . . . [were] veterans of the
violent 1999 protests in Seattle. Others were among the 1,300 arrested in Washington in April’ at the 2000 IMF/World Bank meeting demonstrations (Santana, 2001: B1). Because of these concerns, much of the Mall was surrounded by a two-meter high metal fence and entirely closed on inauguration day; six checkpoints complete with metal detectors were established for the few thousand ticketed guests allowed into the parade viewing area in front of the White House; police were stationed every two meters along the parade route with hundreds of other police in riot gear posted nearby; subway stations were closed; Secret Service snipers were deployed on rooftops; and several dozen buses stood ready to transport arrestees to mass arraignment sites away from the inauguration area (Rosenbaum, 2001; Santana, 2001; Wildermuth, 2001).

The National Park Service argued that the intense security represented a general ratcheting-up of security over the last four years. But against this ratcheting-up, police planners had to contend with a 1997 court ruling that said protesters could not be barred entirely from inaugural parade routes (Davis, 1997; Aigen, 1998). In anticipation of President Bill Clinton’s second inauguration, Secret Service and police announced that all protest would be banned from anywhere near the parade route. In response to a suit contesting this, the DC District Court ruled that permitting Clinton’s supporters to hold signs along the parade route, but not his detractors, constituted a content-based restriction on speech. The Court also held, importantly, that the National Park Service’s standard practice of making itself the permittee for the parade route (and thereby blocking other users because of a first-come, first-served rule) was impermissible. Demonstration at the 1997 inauguration had to be incorporated; so did it too in 2001, security concerns notwithstanding.

In response, the NPS and the city granted a blanket permit for the entire parade route to the Presidential Inauguration Committee (PIC), and then granted protest groups permits only for places agreeable to the PIC’s parade planners. While individual protesters and very small groups had to be allowed access to the parade route, larger protests were sequestered in official ‘protest zones’ approved by the PIC. In the event, individual protesters had a strong presence and jeers were often louder than the cheers for the president (Rosenbaum, 2001: 1.17). The protests were remarkably peaceful, a result that police attributed to their stepped-up security, but that protesters said only indicated how unnecessary the extra security was (Barker and Montgomery, 2001).

Despite the few arrests, the Partnership for Civil Justice and other civil liberties organizations filed suit in March 2001 charging that police had violated a court order requiring that protesters and supporters be treated equally along the parade route, and that control over at least one of the checkpoints had been handed over to a representative of the PIC, who then proceeded to block a group of protesters from reaching a plaza for which they had a permit. Elsewhere, the suit claimed, police simply detained more than a hundred protesters in a preemptive action, and did not allow them to reach the parade route. In addition, the suit provides evidence that police agents provocateurs were working among the protest groups seeking to spark violence (Montgomery, 2001).

Whatever the validity of these claims (the suit is still working its way through the courts), they make clear the limits of the permit system to incorporate dissent. These limits had already been thrown into question during the April 2000 meetings of the World Bank and IMF. Engaging in what the New York Times called ‘a pre-emptive show of force’ (Kifner, 2000), Metro and other police forces in Washington worked assiduously before and during the meetings, as the Washington Post put it, ‘to ensure that the world doesn’t change too dramatically on the streets of Washington’ (Montgomery and Santana, 2000a: A1). Though the previous year’s IMF/World Bank protest had attracted only about 25 demonstrators, in 2000 tens of thousands were expected (ibid.). Metro police thus monitored internet sites of protest groups, infiltrated protest group meetings, and showed up at key activists’ houses just as they were getting

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5 This strategy had been quite successfully field-tested at the 2000 Republican National Convention the previous August. Its Constitutional legitimacy is dubious at best; see Janiszewski (2002).
ready to leave to hang posters announcing demonstration events (Montgomery and Santana, 2000b).

Two days before the IMF/World Bank meetings started, police arrested seven people for possessing ‘instruments of crime’ — PVC pipe, bolt cutters, duct tape, gas masks and heavy chains (Goldstein and Santana, 2000: B1). The crime for which they were instruments was presumably engaging in acts of civil disobedience. Activists complained that the arrests were ‘pretextual and unjust’. Lending credence to the claim that such arrests were ‘pretextual’ and ‘preemptive’, the morning before the meetings, police raided a warehouse ‘convergence center’. Claiming suspected fire code violations, a police Emergency Response Team, assisted by Secret Service agents (an organization not usually involved in fire code infractions) and accompanied by a police helicopter hovering overhead, ordered protesters out, sealed the building and searched it thoroughly, finding ‘numerous’ violations. They declared the warehouse indefinitely closed (Hendren, 2000; Kifner, 2000; Kornblut, 2000). Among other things, police claimed in the press to have found a Molotov cocktail; it later turned out to be a partially finished soda. Later that day, police made a ‘display of force’ (Kornblut, 2000: A3), as ‘a line of police officers in riot helmets stamped their feet rhythmically and pumped their nightsticks in front of their chests and . . . moved in on . . . protesters a few blocks from the [World B]ank headquarters’ (Kifner, 2000: 1.1). Protesters had been marching down sidewalks, with police escorts, causing ‘little serious disruption on the city’s streets’ (ibid.). Though Executive Assistant Police Chief Terrance Gainer had earlier declared that ‘if [protesters] exercise peaceful demonstrations in areas that don’t block vehicle or pedestrian traffic, then everything is fine’ (ibid.), police decided to block the roadway in front of the marchers and then surround them on all sides, refusing to allow them to either continue their march or to leave. Protesters and bystanders pleaded and chanted to be let go, but the police refused. Eventually they arrested some 600 of the protesters on charges of failing to disperse and parading without a permit (Kifner, 2000; Kornbult, 2000). Lengthy arraignment procedures kept protesters locked up through much of the following day, the main day of the protests (Kifner, 2000). Washington’s mayor made no bones about why the arrests were made; they were ‘a matter of prudence’ (quoted in Kifner and Sanger, 2000: A1); they were ‘preventative’ and ‘proactive’ (quoted in Fifty Years is Enough v. District of Columbia, et al n.d.).

While Police Chief Charles Ramsey praised the preemptive arrests, the protest exclusion zone, and the performance of law enforcement officers because ‘[w]e didn’t lose the city, so as far as I am concerned, it was worth it’, activists filed a class-action suit claiming the city police ‘success’ was bought at the cost of First, Fourth and Fifth Amendment rights violations. In particular they asserted:

 Defendants planned and implemented a strategy to disrupt the plaintiffs’ exercise of First Amendment rights to speak and assemble. In furtherance of this unconstitutional disruption strategy defendants prevented protesters from demonstrating near the IMF-World Bank meetings; preemptively arrested hundreds of persons, including plaintiffs, journalists and tourists, without cause . . . closed plaintiffs’ Convergence Center on pretext; seized, confiscated, and refused to release thousands of pieces of plaintiffs’ political literature, signs, banners, puppets and related property and items; harassed and intimidated plaintiffs; deployed unwarranted ‘pop-up police lines’; deployed an agent provocateur; disseminated misinformation falsely portraying plaintiffs as violent; and used excessive force and brutality against non-violent protesters (Fifty Years is Enough v. District of Columbia et al., n.d.: Introduction, para. 2; also Spitzer, 2001).

In addition to asserting that the protest exclusion zone was overly large, was not narrowly tailored to serve a legitimate state interest, and did not leave open adequate channels of communication (all part of the tests for legitimate time, place and manner restrictions), the suit alleges that ‘pop-up police lines’ ‘well outside the “no-protest zone”’ would converge on and trap peaceful protesters, who would then be arrested. ‘The use of police lines, arbitrarily established and at times mobile, vaguely, arbitrarily
and capriciously created no-protest zones on public sidewalks’ (Fifty Years is Enough v. District of Columbia et al., n.d.: ‘Deployment’ para. 10).

Such policing suggests that, from the police perspective at least, prior restraint exercised through the permit system is insufficient for maintaining public order during large demonstrations. It also throws into question the standard assumption in the sociological literature that police are now more interested in managing dissent than repressing it. To the degree that protesters themselves are likewise increasingly worried that permit processes undermine their ability to effectively be heard, that preemptive policing strategies are designed to silence protest before it happens, and that extralegal protest tactics are now required, there is at least a strong possibility that what we are now witnessing, through the escalation of confrontational strategies on both sides, is a return to a more adversarial system of protest, a system of protest more akin to that practiced before dissent seemed to be so effectively incorporated into the liberal state. The evidence from recent protests in Washington and New York (and, of course, Philadelphia in 2000 and Boston in July 2004) suggest a revival of what McPhail et al. (1998) call an ‘escalation of force’ strategy and a move away from the ‘negotiated management’ style that developed in the 1970s and 1980s.

**Conclusion: after September 11th/beyond Washington**

In mid April 2002, perhaps as many as 100,000 people rallied at the Capitol in support of Israel, its policies in Palestine, and the Bush Administrations’ support for these policies. There is no record in the press that a protest permit was applied for or granted. And there is no record of a police presence at the rally (Schemo, 2002). After September 11th, the geography of affirmation seemed wide open.

Not so the geography of dissent. In advance of the April 2002 IMF/World Bank meetings to be held a week later, citing security concerns, police activated a network of 1,000 video cameras in downtown Washington to monitor the movement of protesters. Fearing First Amendment problems, the camera operators were given orders not to focus on fliers or handbills protesters might be carrying (Hsu, 2002). While anti-capitalism was still high on the agenda for the protests, much of the protest weekend was given over to rallies against Israel’s stepped-up occupation of Palestine, the US’ continued paramilitary presence in Colombia, and the continued operation of the School of Americas (a training ground for Latin American military officers). While the city and National Park Service decided not to erect a fence and create no-protest zones around key sites, police delayed issuing a parade permit to anti-capitalist activists for several weeks, finally approving a protest permit quite different from what the protest organizers had applied for. Organizers wanted to march in front of the headquarters of global corporations like Coca-Cola, Monsanto and Citibank. Instead of just attending to the safe flow of traffic, police denied protesters a permit for their chosen route. Instead, they issued a permit for protesters to gather outside the IMF and World Bank buildings before marching along a route to Freedom Plaza that steered clear of the multinationals’ headquarters. At Freedom Plaza, the anti-capitalist protesters would be allowed to join up with protesters concerned about other issues (Fernandez and Dvorak, 2002). Even though there was no credible evidence that the anti-capitalist protesters who had applied for the permit to parade past the corporate headquarters had ever engaged in violent or destructive behavior (the only legitimate reason for denying a permit [ACLU, 1982: 5]), police worried that ‘splinter groups’ might do so this time (Fernandez and Dvorak, 2002).

During the protests themselves, ‘an overwhelming police presence’ was visible on the streets (Morello and Fernandez, 2002: B1). The Partnership for Civil Justice among others complained that such a presence was intimidating (Dvorak, 2002). In addition to the uniformed officers on the streets, police infiltrated protest groups and masqueraded
as protesters during the marches (ibid.). The marchers themselves were entirely surrounded by police in cars, on bikes, and marching in front of the parade itself, batons at the ready (Morello and Fernandez, 2002). In essence, the police created a constant, moving barrier between protest groups and the rest of the city, creating, in comparison to the pro-Israel rally earlier, a quite restricted geography of protest.

The following September, police returned to fencing off the World Bank and IMF sites, establishing a four-block no-go zone that was expandable as necessary (Fernandez and Fahrenholdt, 2002a). Officials created a 3,000-strong police force with recruits from as far away as Chicago. In the event, police outnumbered protesters by about three to two, and used their numbers on the first day of protests to undertake hundreds of preemptive arrests (Fernandez and Fahrenholdt, 2002b). Once again, police forced protesters into a plaza, refused to let them leave, and then arrested about 600 for failure to obey police orders to disperse. If Constitutional jurisprudence after the 1939 Hague decision led to a politics of location aimed at moving protests to where they are bound to be least effective (Mitchell, 2003), then this politics of location was now supplemented by police practices that led protesters to locations where they could most easily be arrested. Indeed, an internal police report leaked to the press in March 2003 admitted that the order to disperse was never given; and even middle-of-the-road commentators began to call the Metropolitan Police a ‘paramilitary operation’ and wondered if the city government was operating more like a ‘junta’ than a ‘civilian authority’ (Milloy, 2003: B1). Such comments give pause — to say the least — about whether Washington’s permit system was still ‘well-oiled’ in quite the way that the ACLU’s Art Spitzer thought it was only two years earlier.

It also gives occasion to wonder whether the spatial incorporation of dissent in America — the time, place and manner rules that are supposed to make dissent safe for democracy (as well as keep the traffic flowing) — is a failure even on its own terms. An interesting dialectic is certainly at work: the legal incorporation of dissent has been accomplished by constructing spatial strategies that have had the effect of routinizing protest. This routinization of protest, in turn, has led to what many see as protests’ ineffectiveness; even more it has led to protest becoming part of the ‘well-oiled’ system itself. And as more and more people have become dissatisfied with the workings of the system, as exemplified in growing dissent to capitalist, corporate-led globalization and the anti-war movement, protesters have broken out of the routine, and even turned against the routine itself. Dissent has become resistance. In response, police have reinvigorated domestic spying practices and become more preemptive in their arrests (now frequently justifying both actions through a language of ‘security’). In addition, police themselves have begun to discard — or at least ignore — the rules for permitting protest they had developed in response to more than a half century of First Amendment jurisprudence.

As anti-capitalist protest has regrouped in the wake of September 11th, and as it has been joined by a massive peace movement, the protest permit system in America appears increasingly outmoded. Pretences of content-neutrality are increasingly difficult to sustain, as the contending protests in Washington over Israel’s Palestine occupation in April 2002 and as the refusal to grant a march permit for anti-war protesters in New York in February 2003 both indicate. And on the night the war against Iraq began, dissent quickly became resistance as hundreds of unpermitted protests were staged across the US. In many places, conscious decisions were made not to abide by local permit systems, and in a few cases, such resistance was met by violent police responses. Importantly, however, new police tactics are overlaid on zoning and other spatial tactics that continue to play an important role in policing dissent. Thus, just as protesters adjusted to the permit process by being explicit in their plans to ignore certain aspects of it precisely to gain attention, the police now rely on this strategy (whether implemented or not) to justify further restrictions on dissent in public space.

Before the February 2003 antiwar protest, the New York Times hoped that the city’s action in denying a parade permit would not become a norm. As we have shown here, in American cities such denials are now quite normal. They are part of a changing legal
geography of dissent that has developed — through struggles on the street and in the courtroom — over more than half a century. What New York showed, like the anti-capitalist demonstrations before it, is just how fragile this legal geography is, and just how quickly practices that incorporate dissent can break down, leading to a new geography within liberal democracies where even the pretence of tolerating dissent seems to be withering away. The permit system seems to be in the process of being replaced by a geography defined by the coralling of protesters, an urban landscape marked by fences, checkpoints, fenced-off ‘no-protest’ zones (which can be anything from a few blocks to a few kilometers wide), and the establishment of official ‘protest pens’ to hold all those who may disagree with the actions of their government or other powerful public players. As we suggested at the outset, the politics of public space can shape the politics in public space, but the reverse is also true: the politics in public space has now become a prime determinant of the politics of public space.

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