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INTRODUCTION: THE GEOGRAPHY OF EXPRESSION

The 2004 Democratic National Convention in Boston was a critical democratic moment. Delegates were gathering at the Fleet Center to choose a presidential nominee. Opponents of the nominees and various party detractors also intended to assemble there, to demonstrate and protest. Quite naturally, these speakers wanted to be both seen and heard – by the delegates and others near the Fleet Center. They also wanted the media to notice their assemblies and report on their criticisms and causes. Federal and local officials constructed a place for this purpose. The “Demonstration Zone (DZ)”, as it came to be known, was located within a “hard” security zone around the immediate perimeter of the Fleet Center. This “hard” zone was located within a larger “soft” security zone stretching beyond the Fleet Center.

The DZ was an oppressive architecture. Barricades and fences marked its perimeters. Two layers of thick mesh were added to this imposing and restrictive shell. To prevent anyone from climbing out of the “pen” or “cage,” as many demonstrators referred to it, officials placed coiled razor wire at its apex. National Guardsmen were strategically positioned to observe any activity within the DZ, and presumably to respond to any threats to public safety and order. Once inside, speakers would have no meaningful access to the delegates. No leaflets or other materials could be passed. No signs of any appreciable size would be allowed into the zone. Given the access points to the Fleet Center to be used by delegates, demonstrators would not be seen, or perhaps even heard (Figure 1.1).

A federal judge described the DZ as “a space redolent of the sensibility conveyed in Piranesi’s etchings published as *Fanciful Images of Prisons*.”¹ This “internment camp,” the judge continued, was “a symbolic affront to

¹ *Coal. to Protest the Democratic Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61, 67 (D. Mass. 2004), *aff’d sub nom. Bl(a)ck Tea Soc’y v. City of Boston*, 378 F.3d 8 (1st Cir. 2004).



Figure 1.1. The “Demonstration Zone”.

the First Amendment.”² According to the judge, it was not even clear that the DZ was a *safe* place for protesters to be. Nevertheless, citing “security” concerns and the lack of alternative places, both trial and appellate courts held that the DZ did not offend any First Amendment doctrine or principle. Not a single protester ultimately used the DZ.

PLACE AND PUBLIC EXPRESSION

The DZ illustrates many of the themes discussed in this book. The protesters and demonstrators wanted to assemble and speak near the Fleet Center, in a public place. The historian Gordon Wood has shown that the impulse of the people to assemble “out of doors” – outside ordinary political channels and institutions and, more literally, in outdoor places – extends as far back as the prerevolutionary period.³ As discussed in the next chapter, colonial Americans assembled in public committees, conventions, and “mobs” to petition authorities, make grievances known, and realize political goals. Popular sovereignty originated in this fashion – out of doors, on the ground, and in public places. Public protest, dissent, and

² *Id.* at 74–75.

³ Gordon S. Wood, *The Creation of the American Republic, 1776–1787*, 319–28 (1969).

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contention are venerable American traditions. In many contexts, but especially at critical democratic moments like national party conventions, people still want to be seen and heard in person by audiences large and small.

As the Supreme Court has observed on many occasions, “First Amendment freedoms need breathing space to survive.”⁴ Both doctrinal and *physical* space are required for a robust expressive culture. Today, of course, speakers can find many outlets for “cheap” speech – particularly on the Web. As the Supreme Court has noted, a speaker can communicate from a “virtual soapbox” to a potentially worldwide audience.⁵ Virtual spaces and places are indeed a critical part of the modern expressive culture. As the Boston protesters were aware, however, material public places – also known in today’s parlance as “bricks and mortar” places or, somewhat more derisively, “meatspaces” – possess unique characteristics and benefits as channels of public expression.⁶

For centuries now, public places have been important stages for the exercise of First Amendment liberties and sites of popular democracy. They remain so. Fundamentally, the proximity and physicality of expression in material public places often make it difficult to ignore. This sets tactile expression apart from the daily avalanche of words conveyed online, which can be readily avoided, ignored, or quickly deleted. Public places also assist in amplifying speakers’ messages. The place itself may have symbolic power and meaning. Further, as conventional media are more likely to cover physical contest and dissent, public places can assist speakers in conveying messages to broader audiences.⁷ Providing adequate public space for speech and assembly is especially critical to what the Supreme Court has called “the poorly financed causes of

⁴ NAACP v. Button, 371 U.S. 415, 433 (1963) (emphasis added).

⁵ Reno v. ACLU, 521 U.S. 844 (1997).

⁶ The concepts of “space” and “place” are theoretically complex. Although it does not ignore notions of abstract or linear space, this book focuses primarily upon *concrete* places – those that are used and experienced by people. See William H. Sewell, Jr., “Space in Contentious Politics,” in Ronald Aminzade, Jack A. Goldstone, Doug McAdam, Elizabeth J. Perry, William H. Sewell, Jr., Sidney Tarrow, & Charles Tilly, *Silence and Voice in the Study of Contentious Politics* 52–54 (2001). As of the 1980s, this sort of space was referred to by many geographers as “place.” See Doreen Massey, *Space, Place, and Gender* (1994).

⁷ As we shall see, however, speakers must be careful not to lose control of their own message during media amplification. See Jackie Smith, John D. McCarthy, Clark McPhail, & Boguslaw Augustyn, “From Protest to Agenda Building: Description Bias in Media Coverage of Protest Events in Washington, D.C.,” 79 *Social Forces* No. 4 (June 2001), 1397–1423; Pamela E. Oliver & Gregory M. Maney, “Political Processes and Local Newspaper Coverage of Protest Events: From Selection Bias to Triadic Interactions,” *The American Journal of Sociology*, 106(2) (Sept. 2000), 463–505.

little people.”⁸ These causes still exist today. Finally, there is something unique, in terms of emotive quality and solidarity, about the experience of assembling with others and speaking in material public places. These characteristics of proximity, symbolism, emotion, and solidarity are very difficult, if not impossible, to replicate in existing virtual places.

The DZ also demonstrates that the power of place works in more than one direction. Spatial restrictions can limit or extinguish the benefits often associated with material public places. Governments have historically used place to exert disciplinary and sometimes repressive power over persons and groups. Officials have imposed public order by restricting access to and use of certain public places. In more recent times, governments have claimed that spatial control is necessitated by a special kind of public order problem – “security.” As we shall see, fear of terrorism has significantly affected public liberties; public places and public expression are now situated on the much-discussed fault line between security and liberty. Whatever the reasons or motives for its imposition, displacement can and often does immobilize protest, mute speakers, and distort messages. The architecture of the DZ did just these things; it prevented movement, facilitated surveillance, and prohibited certain forms of expression. Place, in short, can be a useful tool of repression.

Finally, the DZ demonstrates the *vocality* of place. The area around the Fleet Center was a hotly contested social and political space. Speakers desired access to convey and amplify complaints and objections relating to the proceedings inside and to larger matters of public concern. Officials sought to militarize the area, constructing “soft” and “hard” security zones and the DZ itself. In this instance, militarization prevailed. The DZ’s tactical architectures and the strategic placement of guardsmen sent an unmistakable message that public contest and expression posed serious threats. Had it been used, the DZ might have branded the persons confined and their speech as unworthy of serious attention and perhaps even dangerous to society. Places can be highly vocal – symbolic, evocative, and even communicative.

This book examines the complex and dynamic intersection of speech and spatiality. To be sure, that dynamic does not always resemble the DZ episode. My claim is not that place is *always* expressive or generally repressive; indeed, sometimes it is neither. But far more often than we generally appreciate, the character of a place substantially affects the exercise of First Amendment liberties. The remainder of this introductory chapter describes a conceptual and theoretical framework for

⁸ *Martin v. City of Struthers*, 319 U.S. 141, 146 (1943).

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better appreciating this connection. It also presents a roadmap for the rest of the book.

THE EXPRESSIVE TOPOGRAPHY

As numerous examples in this book will show, assembly, expression, and contention in public places remain significant to our social, political, and expressive cultures. People still regularly engage in speech, assembly, press, and petition activities out of doors. Some, no doubt, view such activities as ineffective, silly, antiquated, disruptive, or some combination of these things. In some of the instances we shall consider, these may be entirely fair descriptions or criticisms. As a general matter, however, the public exercise of First Amendment liberties cannot be so readily dismissed. For both historical and contemporary reasons, we ought to take this aspect of our expressive culture more seriously. If we are poised to lose it, we ought to understand why. We ought also to appreciate what this loss might portend in terms of the scope of First Amendment liberties more generally.

As noted, the public exercise of First Amendment liberties requires an adequate supply of material space. This raises one of the fundamental concerns of this book. As scholars in political science, sociology, urban geography, and other disciplines have noted, there has been a steady erosion of public space over the past several decades. Development and privatization have been critical forces in this diminution.⁹ The general physical erosion, in combination with a variety of legal, political, and social circumstances, has severely diminished our *expressive topography* – the public space in which First Amendment liberties may be exercised.

Imagine a simple map of the public places in and around a single city or town anywhere in the United States. On this map are traditional public thoroughfares like streets, sidewalks, parks, and squares. There are also public buildings of various sorts, public gardens, large and small developments, shopping malls, auditoriums, museums, and stadiums. If the city or town is near water, there might be a public beach and a boardwalk. A college or university might occupy several acres or city blocks. On the outskirts of the town, there might be an airport, highway rest stops, and

⁹ For an insightful discussion of the manner in which privatization has affected public democracy, see Margaret Kohn, *Brave New Neighborhoods: The Privatization of Public Space* (2004).

other transit hubs. In all of these places, we may assume that the general public is invited to be and often is present.

Now imagine that this same map is divided into zones of three different colors. *Green* spaces on the map represent the spaces in which public liberties are afforded the most robust constitutional respect and protection. Among other things, this means that speakers have a constitutional right to be in such places, and can be denied access only for valid and compelling reasons. This is, of course, an over-simplification. As we shall see, even in the “green” zones, expressive liberties can be substantially limited in terms of the time, place, and manner of their exercise. Thus, many of these spaces might just as well be colored *yellow*, to signify a state of conditional expressive liberty. Finally, *red* zones represent areas in which speakers have either no or minimal speech protections. In red zones, governments (and in situations like shopping malls and gated communities, private owners) may deny access altogether or remove speakers and assemblies for minimally rational reasons or even no reasons at all.

Although it is obviously very rudimentary, this mapping of the expressive topography highlights a rather serious and complex problem. In fundamental terms, the public areas on the expressive topography that are located within red and yellow zones now far exceed the areas that can genuinely be colored green. What is even more alarming, the green spaces are rapidly shrinking, while the red and yellow zones continue to expand. This steady erosion of the expressive topography has affected all forms and modes of public expression, from face-to-face citizen interaction, to expressive events intimately connected to particular places, to mass protests at critical democratic moments like the Democratic National Convention in Boston.

There have, of course, always been limits on the exercise of public liberties. The First Amendment is not a license to create chaos or do public harm. Thus there have always been red (and yellow) zones on the expressive topography. No one has a First Amendment right to deliver a message in the place of her choice. Assemblies cannot meet in the middle of the street, or in the Mayor’s office. A speaker does not have the right to assemble with others and shout “No More War!” in the middle of the Pentagon – although that right certainly may be protected in some other place. As the legal scholar Harry Kalven, Jr. observed long ago, having and enforcing Robert’s Rules for public places is a legal and practical necessity.¹⁰

¹⁰ Harry Kalven, Jr., “The Concept of the Public Forum: *Cox v. Louisiana*,” 1965 *Sup. Ct. Rev.* 1, 12.

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As the next chapter demonstrates, the expressive topography has been shaped by a variety of forces, many of which have little or nothing to do with common sense and largely uncontested rules of public order and decorum. These forces include massive population shifts to suburban and exurban areas; large-scale privatization and commercialization of public places; architectural trends; zoning laws; conditions of general economic prosperity; deep cultural schisms; societal and political centralization; repressive law enforcement methods; tactical and other errors by speakers; public attitudes regarding public liberties; heightened security concerns; and the development and proliferation of new technologies. In conjunction with these social and political forces, First Amendment doctrines relating to place – principally the “public forum” and “time, place, and manner” doctrines (discussed in the next chapter) – have helped create an ossified and anemic expressive topography. As we shall see, these doctrines have generally failed to reflect, and have proven incapable of flexibly responding to, social forces like urban and suburban planning, population migration, and privatization. The combination of these and other influences has diminished the expressive topography and, with it, the scope of public First Amendment liberties.

Both present-day management and future preservation of the expressive topography require a delicate balance of competing interests. Throughout American history, public places have been sites of remarkable democratic displays. But they have also been sites of disruption and violence. The geographer Don Mitchell has referred to this as “the dialectic of public space.”¹¹ Mitchell observes: “The central contradiction at the heart of public space is that it demands a certain disorder and unpredictability to function *as* a democratic public space, and yet democratic theory posits that a certain order and rationality are vital to the success of democratic discourse.”¹² This “dialectic” will be one of the recurring themes in the book.

First Amendment doctrine grants public officials broad discretion to calibrate this balance. Officials, who have a natural tendency to favor order over disruption of any kind, have often found that speakers’ interests in access, proximity, and manner of expression are outweighed by other interests. These include the privacy of the “unwilling” listener, the repose of the suburban homeowner, private property rights, preferred commercial and recreational uses, public order, security, and even aesthetics. A civilized society cannot, of course, exist without many of

¹¹ Don Mitchell, *The Right to the City: Social Justice and the Fight for Public Space* 130 (2003).

¹² *Id.*

these things. But neither can public liberties survive on an expressive topography designed, constructed, and regulated such that expressive interests are routinely sacrificed or curtailed in favor of a long and expanding list of nonexpressive interests. Courts can, and as we shall see sometimes do, correct or moderate this imbalance. But for a variety of reasons explored in this book, we cannot and should not rely too heavily upon the courts to maintain a robust expressive topography.

Writing during the pitched contest over civil rights in the 1960s, Harry Kalven, Jr. observed that the extent to which we make space for the exercise of public liberties is an “index of freedom.”¹³ So it remains, even as speech is digitized and migrates to virtual spaces. For this reason, too, we must carefully attend to speech out of doors. The health and vibrancy of our expressive topography is a direct reflection of undamental First Amendment values, theories, and commitments.

EXPRESSIVE PLACE

Commenting on political science scholarship regarding public contention and social movements, William Sewell has noted that “the literature has treated space as an assumed and unproblematized background, not as a constituent aspect of contentious politics that must be conceptualized explicitly and probed systematically.”¹⁴ The same can generally be said of judges’ and legal scholars’ treatment of the relationship between speech and spatiality. In First Amendment doctrine and scholarship, place has generally been treated as a background principle, not a *fundamental* aspect of assembly, expression, and other public liberties.

Place entered constitutional discourse as property, thing, or *res*. First Amendment scholars have acknowledged, with displeasure in most cases, that the treatment of place as *res* or thing is “deeply entrenched.”¹⁵ From

¹³ Kalven, *supra* note 10 at 12.

¹⁴ Sewell, *supra* note 6 at 51.

¹⁵ Calvin Massey, “Public Fora, Neutral Governments, and the Prism of Property,” 50 *Hastings L.J.* 309, 310 (1999). See also Lillian BeVier, “Rehabilitating Public Forum Doctrine: In Defense of Categories,” 1992 *Sup. Ct. Rev.* 79, 117. (“It is quite possible that the Court started off with a fundamental error – misconceiving the speech issues involved in the public forum problem as *property* issues.”) When scholars have occasionally proposed alternative approaches or refinements to the public forum doctrine they have done so from within the established property paradigm. See, e.g., Massey, 50 *Hastings L.J.* at 311 (proposing that access to public spaces be determined “by making an analogy to the common law of nuisance”); Steven G. Gey, “Reopening the Public Forum – From Sidewalks to Cyberspace,” 58 *Ohio St. L. J.* 1535, 1577 (1998) (proposing a focused balancing or “strong interference analysis” in forum cases).

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its first consideration of place as an element of freedom of expression, the Supreme Court has used a series of legal property metaphors and principles to define rights of access to public places.¹⁶ The government was initially considered the *owner* of traditional venues like public parks and streets, and some time later a *trustee* of these and other public properties on behalf of the people as beneficiaries.¹⁷ More recent cases suggest that governments exercise a form of *proprietaryship* with regard to public places. Over time, the people gained certain access and use “*easements*,” at least with regard to some public places.¹⁸ As to a great many public places, however, governmental *title* has proved a powerful exclusionary and regulatory tool.

Thus, as a form of legal property, place appears in First Amendment discussions as a secondary, inert, mostly fungible, and (like other public resources) neutrally distributed backdrop for expression. This book will show that quite often place is, in fact, none of these things. We shall see that place can be as critical to one’s expressive experience as voice, sight, and auditory function.

Although it is comfortable and familiar to lawyers and judges, the conception of place-as-property is too blunt and narrow to recognize the *expressive* qualities of place.¹⁹ Place is often symbolic, vocal, and communicative – both in its own right, and in combination with a variety of speakers and manners of expression. This is not a metaphysical argument regarding place. Places like public streets and government buildings are, of course, properties – in the sense that they are material things ultimately owned and operated by someone or something. As many social science scholars have explained, however, tangible places have far greater significance than this for the people, including speakers, who occupy and experience them. To better understand the expressiveness of place, we must look beyond law, to disciplines in which place has been found to have greater meaning.

In general terms, material places are critical to human existence. People live in and through such places; indeed they cannot actually escape them, even in virtual realms. Many experience what the geographer Yi-Fu Tuan has called “*topophilia*” – an affinity for or connection to place.²⁰

¹⁶ See Massey, *supra* note 15 at 117.

¹⁷ *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939).

¹⁸ See Kalven, *supra* note 10 at 13.

¹⁹ See Timothy Zick, “Speech and Spatial Tactics,” 84 *Tex. L. Rev.* 581 (2006); Timothy Zick, “Space, Place, and Speech: The Expressive Topography,” 74 *Geo. Wash. L. Rev.* 439 (2006); Timothy Zick, “Property, Place, and Public Discourse,” 21 *Wash. U. J. of Law & Policy* 173 (2006).

²⁰ Yi-Fu Tuan, *Topophilia* (1974).

People not only experience but actively shape and construct the spaces and places they occupy.²¹ These acts of production give rise to a distinct spatial culture. When connections to place are severed or restricted, people may experience the condition or state of “placelessness.”²² In sum, places ground and give meaning to lives, activities, and cultures. Properties, as such, do none of these things; rather, their primary function is to order legal relationships.

The fundamental connection to place exists in many First Amendment contexts. The chapters in this book focus on several of these, in the process demonstrating that place is far more than a physical backdrop for expression. Message *placement* is often inextricably intertwined with message content. Choice of place is often an intentional act, one that facilitates a particular type of expression or conveys unique expressive meaning. Certain places provide critical proximity to target audiences. A particular place on the expressive topography may symbolize an ongoing contest, dispute, or grievance. As noted earlier, such places often help to maximize media coverage of a message or agenda. Places like public streets, parks, and squares are richly inscribed with memories, events, and histories. Still other places, like the National Mall, the White House, and Ground Zero, are sacred repositories of national memories and cultural moments. The public grounds of university campuses at one time facilitated robust political and social activism. Under the right conditions, these places may again serve as invaluable training grounds for public citizenship.

As this book also shows, places may be communicative or expressive in other respects as well. A spatial culture conveys a breadth of information regarding social and political conditions. Shopping malls, airport terminals, and other places in which public expression is generally prohibited or substantially muted symbolize commercialization, privatization, placelessness, and the general decline of our public expressive culture. The “militarization” of public places, especially during critical democratic moments like presidential campaigns, national party conventions, and meetings of world leaders (Chapter 7), signifies a new collection of threats to security, public order, and public liberties. The ongoing project to “network” public places, in particular by establishing ubiquitous public surveillance systems and wireless Web access (Chapter 9), signifies the

²¹ See Henri Lefebvre, *The Production of Space* 73 (Donald Nicholson-Smith trans., Blackwell Publishing 1991) (1974); David E. Sopher, “Place and Location: Notes on the Spatial Patterning of Culture,” 53 *Soc. Sci. Q.* 321–37 (1972).

²² Edward Relph, *Place and Placelessness* (1976).