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Don't Fence Us In: A First Amendment Right to Freedom of Assembly and Speech

*Nicole C. Winnett**

INTRODUCTION

Taking to the streets to protest against the government is a time-honored tradition and a common occurrence in the United States. Especially today, amidst a divided political environment, it is not uncommon to see citizens rallying or protesting, armed with signs and banners, energized by their ideals, and hopeful of changing the status quo. Believing that this type of participation was critical to maintaining a government “by the people, for the people and of the people,” our forefathers protected the rights to peaceably assemble and protest against the government through the guarantees of the First Amendment.¹ Yet new law enforcement tactics aimed at demonstrators threaten to obliterate those cherished and protected freedoms by relegating those who exercise their First Amendment rights to designated demonstration zones behind pens and fences, effectively muffling the voices our forefathers sought to protect.

In recent years, and perhaps most notably during the 2004 Democratic and Republican National Conventions,² police officers

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1. U.S. CONST. amend. I (“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.”). See *Bridges v. California*, 314 U.S. 252, 265 (1941) (“No purpose in ratifying the Bill of Rights was clearer than that of securing for the people of the United States much greater freedom of religion, expression, assembly, and petition than the people of Great Britain had ever enjoyed.”).

2. See Dahlia Lithwick, *Tyranny in the Name of Freedom*, N.Y. TIMES, Aug. 12, 2004, at A25 (arguing that free-speech zones and fences used during political protests are used by the government to quash protest even when no

have used pens and fences as a means of law enforcement during demonstrations, parades and rallies, thereby silencing, intimidating, and deterring many American citizens from exercising their constitutional rights of free speech and assembly.³ Described by United States District Court Judge Douglas P. Woodlock⁴ as “grim, mean, and oppressive space[s]”⁵ where “one cannot conceive of what other design elements could be put into a space to create more of a symbolic affront to the role of free expression,”⁶ these “pens,” covered with wire-mesh and interlocking metal barricades, have few openings for access or exit, and are increasingly being used to enclose protestors into so-called “demonstration zones.”⁷

Pens and fences have an oppressive and chilling effect on assembly and speech. The continued use of pens and fences is irreconcilable with existing First Amendment precedents, and, accordingly, they must be found unconstitutional. This article will explore, in turn, how pens and fences are utilized; the impact of

threat of terrorism or violence can be found). One example discussed by the author is the arrest of a couple wearing anti-Bush T-shirts at a presidential public speech in 2002 even though they showed no signs of violence or disruption. *Id.*

3. Letter from New York City Policing Roundtable (NYCPR) to Mayor Michael Bloomberg and Police Commissioner Ray Kelly (March 12, 2004), available at <http://home.earthlink.net/~alvgc/justice/id36.html> [hereinafter NYCPR Letter]. The NYCPR is a coalition of civil-rights litigants, public interest attorneys, community organizers, researchers, and academics seeking to reduce police misconduct in NYC by fostering research, litigation, community organizing, and public education. See also Alex S. Vitale, *Analysis of the NYPD's Use of Demonstration Pens*, NYC Criminal Justice Activism at <http://home.earthlink.net/~alvgc/justice/id33.html> (Mar. 2004).

4. Douglas P. Woodlock was the presiding Judge in the District of Massachusetts for *Coalition to Protest the Democratic National Convention v. City of Boston*, 327 F. Supp. 2d. 61 (D. Mass. 2004).

5. *Id.* at 67.

6. *Id.* at 74-75.

7. See Alex S. Vitale, *What You Can Expect from the NYPD at the RNC*, NYC Criminal Justice Activism, at <http://home.earthlink.net/~alvgc/justice/id54.html> (July 8, 2004); see also *Stauber v. City of New York*, Nos. 03 Civ. 9162 to 9164, 2004 U.S. Dist. LEXIS 13350 (S.D.N.Y. July 16, 2004), clarified by 2004 U.S. LEXIS 14191 (S.D.N.Y. July 27, 2004), *injunctive relief granted in part denied in part*, 2004 U.S. LEXIS 14192 (S.D.N.Y. July 27, 2004).

pens and fences on a protestor's First Amendment rights to freedom of assembly and speech; and alternative crowd-control methods that can be utilized in lieu of the pens and fences. Part I of this article will chronicle how these pens and fences have been used by law enforcement and relay the primary arguments advanced by those in favor of the continued use of these police tools. Part II of this article will explain what constitutes a permissible prior restraint on First Amendment freedoms and explore the relevant caselaw. Lastly, Part III will show, by way of analysis that pens and fences are not allowable "time, place, and manner" restrictions but are rather unconstitutional prior restraints on speech.

I. SURROUNDING THE PROTESTORS

A. *Recent History of Pens and Fences*

The use of interlocking metal barricades (usually referred to as "pens") and wire-mesh fences that establish "free speech zones" during political protests, rallies and parades, has only in the last ten years become a standard police practice.⁸ During the 2000 Republican National Convention in Philadelphia, pens were notably utilized to keep protestors at bay.⁹ Assembled citizens were

8. See *Coalition to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d. 61, 73-75 (D. Mass. 2004). Protest zones are a recent innovation and have become routine since the 1999 World Trade Organization meeting in Seattle. *Id.* at 73. See also *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *7 (stating that the NYPD has used four-sided pens at demonstrations since at least 1995).

9. Jim Hightower, *Bush Zones Go National: In the Declared War Against Dissent, Disagreement Has Become a Crime*, NATION, Aug. 16, 2004, at 27. The Philadelphia Convention was one of the first times that pens were used during a political convention and rally. Up until this time, the use of pens and fences was not as wide-spread. See HEIDI BOGHOSIAN, THE ASSAULT ON FREE SPEECH, PUBLIC ASSEMBLY, AND DISSENT: A NATIONAL LAWYERS GUILD REPORT ON GOVERNMENT VIOLATIONS OF FIRST AMENDMENT RIGHTS IN THE UNITED STATES 79 (2004), available at www.nlg.org/resources/DissentBookWeb.pdf.

forced to protest behind pens of limited capacity.¹⁰ Moreover, the demonstration zone was placed out of sight of the convention delegates, visiting Congressmen, and even the media; additionally, the protestors' actions were constantly monitored by law enforcement.¹¹ As mentioned above, these pens and fences were used most recently during the Democratic and Republican National Conventions held in the summer of 2004. Both conventions produced litigation involving the First Amendment implications of the use of pens and fences by law enforcement.

The 2004 Democratic National Convention was held in Boston, Massachusetts and was the first national political convention since the tragedy of September 11, 2001.¹² Due to the magnitude and significance of the event and heightened fears of terrorist activity, the U.S. Secret Service and the Boston Police Department set up a demonstration zone located a block from Boston's Fleet Center.¹³ The demonstration zone consisted of wire-mesh fences standing eight feet high, which were designed to "withstand assault by persons who might attempt to breach it."¹⁴ These fences were also constructed in order to allow emergency vehicles to access the roadway located behind the fence in case of any accidents or attacks.¹⁵ However, the fences were lined with an opaque fabric that obstructed the view of delegates passing by on their way to the convention and, thus, effectively reduced the impact of the protest. This opaque fabric made it completely impossible for the protestors to engage in a dialogue with the delegates or pass out leaflets or other literature.¹⁶

In his opinion addressing the use of pens at the Boston convention, Judge Douglas P. Woodlock, focusing primarily on the multiple layers of fencing, mesh, and netting, described the setting

10. See BOGHOSIAN, *supra* note 9, at 79. The fenced in demonstration zones could only hold 1,500 people at a time. *Id.* Thousands of people came out to protest the Republican National Convention. *See id.*

11. Hightower, *supra* note 9.

12. *Coalition to Protest the Democratic Nat'l Convention*, 327 F. Supp. 2d at 64.

13. *Id.*

14. *Id.* at 66.

15. *Id.*

16. *Id.* at 68.

as one that “conveys the symbolic sense of a holding pen where potentially dangerous persons are separated from others.”¹⁷ One of the protestors relegated to the pen described the area as being made up of “concrete blocks and steel fencing, with razor lining the perimeters . . . [and] a giant black net over the entire space.”¹⁸ The protestor added that the area looked like “a scene from some post-apocalyptic movie—a futuristic, industrial detention area from a Mad Max film.”¹⁹ The look of the pen reminded one workman of a concentration camp,²⁰ hardly a scene conducive to the effective, unburdened exercise of one’s First Amendment freedoms.

Similarly, during the 2004 Republican National Convention at Madison Square Garden in New York City, the New York City Police Department (“NYPD”) used interlocking metal barricades to set up demonstration zones.²¹ Although numerous groups aligned with the Convention platform exercised their freedom of speech and assembly over the course of the Convention, including a prayer vigil held by the Christian Defense Coalition opposite where the convention was held,²² those protesting against the Bush

17. *Id.* at 74–75.

18. James Bovard, Editorial, *Protests Pre-empted*, BALTIMORE SUN, Aug. 6, 2004, at 13A (“Organizers sought to confine protestors in a holding pen that would have disgraced perhaps any previous political convention in U.S.”) Bovard went on to describe the scene as a “large patch of asphalt in a dank and dark area.” *Id.*

19. *Id.*

20. *Id.*

21. *Stauber v. City of New York*, Nos. 03 Civ. 9162 to 9164, 2004 U.S. Dist. LEXIS 13350 (S.D.N.Y. July 16, 2004), *clarified by* 2004 U.S. LEXIS 14191 (S.D.N.Y. July 27, 2004), *injunctive relief granted in part denied in part*, 2004 U.S. LEXIS 14192 (S.D.N.Y. July 27, 2004).

22. See Diane Cardwell, *Police Offer Convention Protestors a Site Far From Garden*, N.Y. TIMES, July 15, 2004, at B1. Fourteen organizations were approved to stage protests during the convention, including a reading of the Constitution by People for the American Way at the Central Park band shell and a twelve-hour anti-gun-violence display at Union Square Park organized by Silent March. *Id.* See also Act Up, *Republican National Convention Protests*, at www.actupny.org/reports/rnc_nyc.html (Aug. 18, 2004). This website gives brief descriptions of the numerous groups and organizations that protested during the week of the Convention, including where they protested, how many people participated, and any issues that the protestors had with the NYPD.

Administration were forced to assemble in pens.²³ Although the group United for Peace and Justice (“UPJ”) was issued a permit for 250,000 people to march past Madison Square Garden where the convention was held, their proposals to hold rallies at Times Square and Central Park’s Great Lawn were denied.²⁴

The NYPD also used pens during a February 2003 demonstration organized by United for Peace and Justice²⁵ to oppose the war in Iraq. Originally, UPJ’s request for a permit to hold a 50,000 person march past the United Nations was rejected because of heightened terrorist alert and concern for public safety.²⁶ After UPJ’s original request was denied, UPJ proposed that the demonstration be held on Second Avenue, but again their request was denied.²⁷ Instead, the NYPD proposed that the event take place within a stationary demonstration zone on First Avenue. On this occasion, the NYPD set up the stationary demonstration zone with block-long pens along both sides of First Avenue, even after UPJ requested that the police forego use of the pens.²⁸

The NYPD allowed people to enter the pens until the department deemed them to be full.²⁹ Once full, each pen was closed off and additional pens were formed, filled, and closed.³⁰ Participants were forced to move further north to find an open pen in order to exercise their First Amendment freedoms. Moreover,

23. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *25.

24. Cardwell, *supra* note 22.

25. UPJ is a nationwide coalition of national associations and local groups that was formed to create a unified effort to oppose the military action and occupation in Iraq.

26. *The Antiwar Non-March*, N.Y. TIMES, Feb. 14, 2003, at A30 (arguing that “protests that move down the street have a symbolic power that stationary rallies do not, and delivering a message at a location like the United Nations can have far greater impact than saying the same thing in a small park”).

27. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *9.

28. *Id.* The case tends to imply that the use of pens was not up for discussion and their use implicit in the demonstration being held. Alex S. Vitale, *Open Letter to Michael Bloomberg Concerning the Mishandling of the February 15th Demonstration by the NYPD*, NYC Criminal Justice Activism at <http://home.earthlink.net/~alvgc/justice/id50.html> (Feb. 20, 2003).

29. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *10–11.

30. *Id.*

police officers refused to allow the demonstrators to use the sidewalks along First Avenue.³¹ As police began to shut down streets and set up more pens, protestors were unable to make their way towards the demonstration site, causing some to give up and others to engage in “disorderly” conduct³² either by leaving the pens, despite contrary orders by police, or by jumping over the barricades to gain access to the demonstration site.³³ Tens of thousands of people were unable to reach the central protesting site after the NYPD sent them on lengthy detours.³⁴

The NYPD used similar tactics during a September 9, 2003 demonstration organized by the New York Civil Liberties Union (“NYCLU”) to express opposition to United States Attorney General John Ashcroft and the USA PATRIOT Act of 2001. The NYPD also used pens to control this demonstration,³⁵ asserting that this practice was standard for almost every parade or demonstration held within the city. Because of the pens, Donna Lieberman, the Executive Director of the NYCLU, received numerous complaints after the event from protest participants who were late to the event because the NYPD required them to take a “circuitous route to the demonstration.”³⁶

B. Arguments in Favor of “Pens” and “Fences”

States justify the use of pens and fences as a method to control protestors by arguing that they serve the governmental interests of safety, security, and crowd control, and act as a substitute for personnel.³⁷ Police departments as well as city officials have strongly supported the use of pens and fences as a law enforcement tool,³⁸ arguing that that the need to respond quickly in

31. *Id.* at *11.

32. *Id.* at *12.

33. *Id.*

34. Randal C. Archibold, *It May Be Hard to Tell a Rally From a Lot of People in the Park*, N.Y. TIMES, Aug. 27, 2004, at B4.

35. *Staubert*, 2004 U.S. LEXIS 13350, at *18.

36. *Id.* at *18-19.

37. *See supra* note 3 and accompanying text.

38. *Staubert*, 2004 U.S. Dist. LEXIS 13350, at *6-7.

the case of an emergency,³⁹ the geographical limitations of the sites themselves,⁴⁰ and the safety concerns⁴¹ for the delegates and protestors make the use of these items necessary.⁴² Proponents consider these devices security measures designed to prevent any physical confrontation and “hand-to-hand combat” between demonstrators and law enforcement officers.⁴³ They also usually focus on experiences at prior conventions and events during which some protestors toppled fences or squirted liquids such as bleach or urine onto delegates and police.⁴⁴ As one commentator noted, “[t]he government has pre-emptively decided that all protestors are collectively guilty and thus deserve preventative incarceration.”⁴⁵ Due to the potential that some protestors will be aggressive and violent, the police feel they must have a safety plan for violence.⁴⁶ Proponents have also argued that pens and fences help alleviate the burden on overtaxed police departments⁴⁷ by keeping control over the events, helping them address crime situations more easily,⁴⁸ and helping them respond to injuries or emergencies in a timely fashion.⁴⁹ One federal court judge in the Southern District of New York stated in dicta that police departments’ use of pens, if done in a prudent manner, can accomplish the duties of officers to keep the public peace and order, to disperse unlawful assemblages, and to

39. *Coalition to Protest the Democratic Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61, 75 (D. Mass. 2004).

40. *Id.* at 74.

41. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *6-7; see *Coalition to Protest the Democratic Nat’l Convention*, 327 F. Supp. 2d at 75.

42. *Id.*

43. *Coalition to Protest the Democratic Nat’l Convention*, 327 F. Supp. 2d at 75.

44. *Id.*

45. Bovard, *supra* note 18.

46. *Coalition to Protest the Democratic Nat’l Convention*, 327 F. Supp. 2d at 77; see Vitale, *supra* note 28 (arguing that law enforcement has a growing tendency to treat the public as the enemy).

47. *Coalition to Protest the Democratic Nat’l Convention*, 327 F. Supp. 2d at 79. See Shaila K. Dewan, *Police to Use Containment Pens to Handle Protest on March 20*, N.Y. TIMES, Mar. 12, 2004, at B2.

48. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *6-7.

49. *Id.*

control, regulate, and direct the movement of traffic.⁵⁰

Although the proponents' arguments are relevant, they are not persuasive. Pens and fences infringe on demonstrators' freedom of speech and assembly by silencing, intimidating, and deterring citizens from participating in the political process and engaging in a dialogue with other participants, government officials or passersby. Furthermore, the use of pens and fences is not a permissible "time, place, or manner" restriction and, therefore, should be scrutinized as an impermissible prior restraint on speech and assembly.

II. FIRST AMENDMENT IMPLICATIONS: FREEDOM OF ASSEMBLY AND SPEECH

The rights of the people to assemble peaceably, speak freely, and petition the government for redress of grievances have long been guaranteed and protected by the First Amendment.⁵¹ These rights are "attribute[s] of national citizenship, and, as such, [exist] under the protection of, and [are] guaranteed by, the United States."⁵² The significance of these fundamental rights to our democratic form of government is clear;⁵³ the freedom to peaceably

50. *Id.* at *70-71.

51. See U.S. CONST. amend. I; see also *United States v. Cruikshank*, 92 U.S. 542, 551 (1875) ("The right of the people peaceably to assemble for lawful purpose existed long before the adoption of the Constitution of the United States. In fact, it is, and always has been one of the attributes of citizenship under a free government."). Similarly, in *De Jonge v. Oregon*, 299 U.S. 353 (1937), the Court held that the due process clause of the Fourteenth Amendment extended these fundamental rights to the states. *Id.* at 364. The Court in *De Jonge* went on to say:

Freedom of speech and of the press are fundamental rights which are safeguarded by the due process clause of the Fourteenth Amendment of the Federal Constitution. The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.

Id. (citations omitted).

52. *Cruikshank*, 92 U.S. at 552.

53. *De Jonge*, 299 U.S. at 364. The *De Jonge* Court held:

"The very idea of a government, republican in form, implies a right on the part of its citizens to meet

assemble ensures citizens the opportunity to come together to engage in political discussion and to bring the will of the people to the government, thereby protecting the security of the Republic.⁵⁴ By protecting freedom of speech and assembly from censorship or punishment, the First Amendment prevents the “standardization of ideas either by legislatures, courts, or dominant political or community groups.”⁵⁵

Thus, by the command of the First Amendment, the government can neither absolutely prohibit meetings held for peaceable political action, nor make those meetings a crime.⁵⁶ Similarly, protest speech,⁵⁷ leafleting,⁵⁸ peaceful picketing,⁵⁹ and parading⁶⁰ receive First Amendment protection⁶¹ based on their valuable role in fostering political discussions, bringing about political change and thereby protecting individual freedoms.⁶²

peaceably for consultation in respect to public affairs and to petition for a redress of grievances.” For the right is one that cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions, – principles which the Fourteenth Amendment embodies in the general terms of its due process clause.

Id. (quoting *Cruikshank*, 92 U.S. at 552) (internal citations omitted).

54. *Id.* at 365; see also *United States v. Grace*, 461 U.S. 171, 176-77 (1983) (holding that federal government’s ability to restrict expressive conduct in public places is extremely limited).

55. *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949).

56. *De Jonge*, 299 U.S. at 365.

57. *Coalition to Protest the Democratic Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61, 69 (D. Mass. 2004); see *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 152 (1969).

58. *United States v. Grace*, 461 U.S. 171, 176-77 (1983).

59. *Shuttlesworth*, 394 U.S. at 152.

60. *Id.*; see *Cox v. Louisiana*, 379 U.S. 536, 558 (1965).

61. *Shuttlesworth*, 394 U.S. at 152; see *Cox*, 379 U.S. at 558; *Coalition to Protest the Democratic Nat’l Convention*, 327 F. Supp. 2d at 69.

62. See BOGHOSIAN, *supra* note 9. The author quoted the following from *Terminiello v. Chicago*, 337 U.S. 1, (1949)

Accordingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with

Yet, while recognizing that “[t]he Constitution commands the government to treat [protesters’ and demonstrators’] peaceful expressions of dissent with the greatest respect,”⁶³ the right to assemble peaceably, like other fundamental constitutional rights, is not absolute or unlimited. Rather, those rights are subject to limitations and regulations, known commonly as time, place and manner restrictions, which have the effect of regulating the *way* in which a message is conveyed, but not the *content* of that message.⁶⁴

conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea.

Id. at 4.

63. *Coalition to Protest the Democratic Nat'l Convention*, 327 F. Supp. 2d. at 77.

64. *Shuttlesworth*, 394 U.S. at 152.

A. *Time, Place, and Manner Regulations*⁶⁵

Although the government may impose time, place and manner restrictions on First Amendment freedoms *if certain constitutional guarantees are met*, there is a heavy presumption against the validity of such prior restraints.⁶⁶ Any prior restraint on speech is constitutional only if accompanied by the procedural safeguards necessary “to obviate the dangers of a censorship

65. Generally speaking, the degree of scrutiny applied to governmental limitations on speech and assembly will depend on whether the property on which the speech or assembly will occur is a traditional public forum, a government-designated public forum, or a non-public forum. *Lederman v. United States*, 291 F.3d 36, 41 (D.C. Cir. 2002). The primary focus of this article is assemblies, demonstrations and protests that take place on streets, sidewalks, and parks -- areas which have historically been associated with the free exercise of First Amendment freedoms. *United States v. Grace*, 491 U.S. 171, 177 (1983), and are considered traditional public forums wherein people may freely exercise their expressive activities and assemble. As the Court said in *Hague v. Committee for Industrial Organization*, 307 U.S. 496 (1939),

[w]herever the title of 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 purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515-16. The government’s ability to restrict expressive conduct is limited in a traditional public forum, *Grace*, 461 U.S. at 177, and is “subject to the highest constitutional scrutiny.” *Service Employee Int’l Union v. City of Los Angeles*, 114 F. Supp. 2d 966, 970 (C.D. Cal. 2000). The government may not restrict access broadly or absolutely, but may enforce reasonable time, place, and manner regulations on traditional public forums as will be discussed as the article progresses. *Grace*, 461 U.S. at 177; *Hague*, 307 U.S. at 515-16.

66. *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 130 (1992) (citing *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

system.”⁶⁷ Quite simply, the prior restraint doctrine “guards against the threat of government censorship by requiring that public licensing and permit schemes contain adequate substantive and procedural safeguards against arbitrary (or content-based) State action.”⁶⁸

Yet, while the government must not absolutely prohibit speech or assembly,⁶⁹ a state or municipality may constitutionally impose “time, place, and manner” restrictions when they are necessary to further a significant governmental interest.⁷⁰ While the protection offered by the First Amendment is broad, citizens do not have the right to express their opinions at any time, at any place, by any method.⁷¹ Similarly, citizens may not unlawfully assemble⁷² or engage in or incite violent behavior,⁷³ crime,⁷⁴ or breaches of the peace.⁷⁵ The government may impose time, place and manner restrictions to protect the safety of its citizens⁷⁶ and keep public order,⁷⁷ because the “constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without

67. *Freedman v. Maryland*, 380 U.S. 51, 58 (1963) (holding that prior submission of a film to censor is constitutionally valid if there are procedural safeguards). However, the Supreme Court has never required that a content-neutral permit scheme regulating speech in a public forum adhere to the procedural requirements set forth in *Freedman*. *Thomas v. Chi. Park Dist.*, 534 U.S. 316, 322 (2002).

68. *New Eng. Reg'l Council of Carpenters v. Kinton*, 284 F.3d 9, 21 (1st Cir. 2002).

69. *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989).

70. *Id.* at 791.

71. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965).

72. M. GLENN ABERNATHY, *THE RIGHT OF ASSEMBLY AND ASSOCIATION* 19 (2d ed. 1968) (defining unlawful assembly as “a group formed together to accomplish an unlawful act in a violent manner, or one which forms together for a lawful purpose but which intends to accomplish that purpose in a violent and unlawful manner”).

73. *Id.*

74. *Id.* at 26.

75. *Id.*

76. *Coalition to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 77 (D. Mass. 2004).

77. *Cox v. Louisiana*, 379 U.S. 536, 554 (1965) (holding that giving local officials unfettered discretion in regulating the use of streets for peaceful parading is an unwarranted abridgement of freedom of speech and assembly).

which liberty itself would be lost in the excesses of anarchy.”⁷⁸

Government regulations, however, must be reasonable, be applied evenhandedly and have a nondiscriminatory purpose.⁷⁹ For example, the United States Supreme Court has held that public inconvenience, annoyance, and unrest are not sufficient reasons to carve out exceptions to the First Amendment through time, place and manner restrictions.⁸⁰

In *Ward v. Rock Against Racism*,⁸¹ the Supreme Court clarified the legal standard applicable to governmental regulation of the time, place, or manner of protected First Amendment rights. The Court held that

the 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, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for the communication of the information.”⁸²

First, in making the decision to impose a time, place, or manner restriction, a government official’s discretion must be exercised in a uniform manner and be free from improper or inappropriate considerations or unfair discrimination.⁸³ In

78. *Id.*

79. See *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (holding that “a time, manner or place regulation may [not] burden substantially more speech than is necessary to further the government’s legitimate interests”).

80. *Terminello v. Chicago*, 337 U.S. 1, 4 (1949).

81. 491 U.S. 781 (1989). The Supreme Court held that the city’s regulations of volume of amplified music at the band shell, so that the performances were satisfactory to the audience without intruding upon those living in the vicinity, met the demands of the First Amendment. The Court concluded that the regulation was valid as a reasonable regulation of the place and manner of expression because it was content neutral and narrowly tailored to serve the city’s legitimate public interest in protecting citizens from unwelcome noise.

82. *Id.* at 791 (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)) (internal citations omitted).

83. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 154 (1969).

Shuttlesworth v. City of Birmingham,⁸⁴ the Court reaffirmed:

“[A]n ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official—as by requiring a permit or license which may be granted or withheld in the discretion of such official—is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.”⁸⁵

In abiding by the axiom asserted in *Shuttlesworth*, government officials must not be allowed to dispense or withhold “permission to speak, assemble, picket, or parade, according to their own opinions regarding the potential effect of the activity in question on the ‘welfare,’ ‘decency,’ or ‘morals’ of the community.”⁸⁶

Second, regarding content neutrality, the courts must consider whether the government regulation of First Amendment rights was adopted because of the state’s disagreement with the message conveyed.⁸⁷ A government regulation will be considered neutral as long as it serves some purpose unrelated to the expression’s content, “even if it has an incidental effect on some speakers or messages, but not others.”⁸⁸ Justification of a restriction that does not include reference to the content of the regulated activity will also be considered content-neutral.⁸⁹

Third, as with all restrictions on fundamental rights, state infringement must be narrowly tailored to meet the asserted

84. 394 U.S. 147 (1969). Several marchers and a minister were arrested and later convicted for violating a statute that required a permit from the City Commission before participating in any parade or procession on city streets or public ways. The Court reversed the minister’s conviction, holding that the city authorities clearly indicated to the minister that under no circumstances would he and his group be permitted to demonstrate. The Court held that such a denial was a deprivation of their constitutionally protected right of assembly.

85. *Id.* at 151 (quoting *Staub v. Baxley*, 355 U.S. 313, 322 (1958)).

86. *Id.* at 153.

87. *Id.*

88. *Id.*

89. *Id.*

significant government interest.⁹⁰ In considering whether the regulation is narrowly tailored to serve a significant governmental interest, the courts do not need to determine whether the state has provided “the *least intrusive means*” of achieving the ends,⁹¹ neither will they have to declare a regulation invalid “simply because there is some imaginable alternative that might be less burdensome on speech.”⁹² Rather, the courts must consider whether the “regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”⁹³ However, the Supreme Court held that the “government may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”⁹⁴

Lastly, regarding the question of whether the government regulation leaves open ample alternative channels of communication, the courts must consider whether the time, place and manner restriction continues to allow expressive activity that does not affect the quantity or content of that expression.⁹⁵ A small reduction in the potential audience caused by the restriction will not serve as a sufficient basis to mount a First Amendment challenge.⁹⁶

Court challenges to the use of pens and fences have been sparse given their only recently increased use. In *Coalition to Protest the Democratic National Convention v. City of Boston*,⁹⁷

90. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 n.6 (1989) (holding that content-based restrictions on political speech “‘must be subject[] to the most exacting scrutiny’ . . . [w]hile time, place, or manner regulations must also be ‘narrowly tailored’ in order to survive First Amendment challenge”). The First Amendment is designed to protect people’s right to assembly and speech, and courts will strictly scrutinize statutes or regulations that are directed at the content of an individual’s or group’s ideas while subjecting to less scrutiny those statutes or regulations that merely restrict the forum on the basis of reasonable time, place and manner.

91. *Id.* (emphasis in original).

92. *United States v. Albertini*, 472 U.S. 675, 689 (1985).

93. *Shuttlesworth*, 394 U.S. at 799.

94. *Id.*

95. *Id.* at 802.

96. See *id.*

97. 327 F. Supp. 2d 61 (D. Mass. 2004). Plaintiffs, consisting of a loose coalition of political activists who oppose various elements of the Democratic

plaintiffs sought injunctive relief against the planned construction and location of fenced-in demonstration zones on the grounds that they violated their First Amendment rights.⁹⁸ Due to the limited amount of space and the concerns about providing enough safe exits, the capacity of the demonstration zone was limited to no more than 1,000 people.⁹⁹ After considering past threats faced by law enforcement and their concerns over security around the event, the District Court held that the design of the demonstration zone did appear reasonable and narrowly tailored,¹⁰⁰ even though it was “a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights.”¹⁰¹ Despite the fact that protestors would be unable to reach their intended audience, the district court refused to grant injunctive relief against a practice that the court said would not cause significant harm to the City, delegates, or the public interest.¹⁰²

Similarly in *Stauber v. City of New York*,¹⁰³ plaintiffs sued under 42 U.S.C. § 1983,¹⁰⁴ alleging that defendants violated

Party’s official agenda and wish to protest against the DNC, moved for a preliminary injunction against the City of Boston a week before the city hosted the Democratic National Convention. The plaintiffs also challenged the denial of permits for parade routes and the construction of a demonstration zone but did not specifically challenge the use of fences by law enforcement.

98. *Id.*

99. *Id.* at 76 n.4.

100. *Id.* at 75-76.

101. *Id.* at 76.

102. *Id.*

103. 2004 U.S. Dist. LEXIS 13350 (S.D.N.Y. July 16, 2004), *clarified by* 2004 U.S. LEXIS 14191 (S.D.N.Y. July 27, 2004), *injunctive relief granted in part denied in part*, 2004 U.S. LEXIS 14192 (S.D.N.Y. July 27, 2004). Plaintiffs, consisting of the New York Civil Liberties Union and former demonstrators who wished to protest various elements of the Republican Party’s official agenda, moved for a preliminary injunction against the City of New York. The NYCLU is a membership organization whose mission it is to defend the Amendments of the Constitution and for which protection of First Amendment rights is a “core mission.”

104. The statute reads as follows:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or

plaintiffs' First Amendment rights and seeking an injunction against the practice of unreasonably restricting access to, and participation in, demonstrations through the use of pens.¹⁰⁵ Recognizing the limitations on speech and assembly that would result from pens policies, the district court granted injunctive relief by providing more ingress and egress for those participating in the demonstration. The court found that the existing policies unreasonably limited the movements of demonstrators and were not a narrowly tailored time, place, or manner restriction.¹⁰⁶ The court went on to find that "no security, safety or organizational interest would be harmed by the NYPD making efforts to assure greater access by demonstrators."¹⁰⁷

Outside these district court cases, the closest the judiciary has come to directly addressing the constitutionality of the use of pens and fences was in *Olivieri v. Ward*,¹⁰⁸ where the Second Circuit stated in dicta that the use of *barricades* by law enforcement was a "practical device used by the police to protect those actively exercising their rights from those who would prevent its exercise."¹⁰⁹

causes to be subjected, any citizen of the U.S. or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C.S. § 1983.

105. *Stauber*, 2004 U.S. Dist. LEXIS 13350. Additionally, plaintiffs challenged the use of horse-mounted officers on the grounds that it was dangerous and constituted excessive force and challenged police searches of all demonstrators' bags on the grounds that such searches were unreasonable.

106. *Id.* at *81.

107. *Id.* at *80.

108. 801 F.2d 602 (2d Cir. 1986).

109. *Id.* at 607. The barricades referenced in the *Olavari* decision were put in place to assure the safety of two volatile groups of demonstrators by ensuring that both groups would not occupy the sidewalks during the same time. The barricades employed in this case were particularly small and both

That court concluded that the use of barricades was a permissible time, place, and manner restriction after finding it content neutral, as it applied to both demonstrators and counter-demonstrators,¹¹⁰ “adequately tailored to promote the significant governmental interest in public order”¹¹¹ and “provide[d] a reasonable alternative for communication, rather than the requested use of the entire block-long stretch of the sidewalk.”¹¹²

Since neither *Coalition to Protest the Democratic National Convention* nor *Stauber* made a categorical challenge of the use of pens and fences by police officers,¹¹³ potential litigants can only guess whether a court would find the use of these devices to be a constitutional time, place and manner restriction. If presented with a challenge to police use of pens and fences, courts are likely to follow the legal standards discussed in *Ward v. Rock Against*

groups agreed to their use. Although the barricades were not explicitly described in the court’s opinion, at the time the NYPD used wooden saw-horses as barricades that are not nearly as restrictive as the types of pens used at the conventions. So, while these barricades were found to be reasonable, the use of pens and fences discussed below might cross the boundary from permissible time, place, and manner restrictions to unconstitutional restrictions on speech and assembly.

110. *Id.* The demonstrators consisted of the plaintiffs who were gay activists and who wished to conduct a peaceful demonstration on a public sidewalk in front of the Saint Patrick Cathedral. *Id.* at 603. The defendants, who consisted of the Police Commissioner and Mayor, refused plaintiffs unlimited access to the sidewalk, because they thought it was a focal point for potential confrontation with counter-demonstrators formed loosely into a Committee for the Defense of Saint Patrick’s Cathedral. *Id.* Due to the time constraint, the police suggested a barricaded enclosure be used by both sets of demonstrators at different times of the day and during an allotted time. *Id.* Both the plaintiffs and the counter-demonstrators agreed to this suggestion. The court’s opinion was handed down only after the demonstration and barricades had been used and agreed upon by both parties. *Id.* at 605.

111. *Id.*

112. *Id.*

113. *Stauber v. City of New York*, Nos. 03 Civ. 9162 to 9164, 2004 U.S. Dist. LEXIS 13350, *67 (S.D.N.Y. July 16, 2004), *clarified by* 2004 U.S. LEXIS 14191 (S.D.N.Y. July 27, 2004), *injunctive relief granted in part denied in part*, 2004 U.S. LEXIS 14192 (S.D.N.Y. July 27, 2004); see *Coalition to Protest the Democratic Nat’l Convention v. City of Boston*, 327 F. Supp. 2d 61, 70 (D. Mass. 2004). Both *Stauber* and *Coalition to Protest the Democratic National Convention* dealt with protests that took place on traditional public forums.

Racism and *Olivieri v. Ward* by examining whether the use of demonstration pens and fences was (1) at the discretion of a government official, (2) and content neutral, (3) narrowly tailored to further a significant governmental interest, (4) while leaving open ample alternative channels of communication. Despite the courts' acquiescence to the use of *barricades* in some circumstances, the continued, and in some cases, increasing and seemingly arbitrary use of *pens and fences* in the face of other less restrictive but equally effective methods of crowd control suggests that the use of pens and fences could not withstand a concerted attack in the courts of the United States.

III. THE CONSTITUTIONALITY OF PENS AND FENCES

A. Discretion of government official

At present, most police departments that use pens and fences do not have written guidelines regulating when, how, or why these tools will be implemented.¹¹⁴ Government officials have provided no narrowly drawn, reasonable, definite standards guiding the hands of police departments, and, as a result, top officials within police departments have total discretion as to when the pens should be utilized. As such, courts have no framework for assessing either the appropriateness of the use the pens or fences, or whether the decision was prompted by a desire to suppress the content of speech.¹¹⁵

114. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *25. A law affecting the exercise of First Amendment freedoms without narrow, objective, and definite standards to guide those in charge is unconstitutional. *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Although guidelines need not be precise, the Supreme Court decisions in *Ward v. Rock Against Racism* and *Shuttlesworth v. City of Birmingham* implied that some written guidelines should be adopted. *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). Written guidelines help the courts determine whether city officials or police departments have "unbridled discretion" in applying the regulation. *Id.* at 793. Written guidelines also help the courts determine whether the regulations are based on the content of speech.

115. Perhaps the use of pens and fences by law enforcement would be

While New York City, for example, does have written policies in place for *planning* large demonstrations,¹¹⁶ troublingly, neither the NYPD nor the city government has written policies concerning the use of pens *during* demonstrations or any other event.¹¹⁷ While this arbitrary “pen policy” is generally disconcerting, when applied to political protest and assembly – the type of expression afforded the most heightened protection under the First Amendment – the lack of standards is particularly offensive.¹¹⁸

Opponents of the use of pens and fences should first challenge the lack of detailed written policies and procedures governing their use and ask the courts to take away complete, potentially arbitrary discretion from the hands of a few decision makers. According to the rule asserted in *Shuttlesworth*, time, place

allowed if the decision-makers were subject to specific written guidelines. Guidelines need to be drawn that ensure that pens and fences are only utilized in the very rare circumstance that pens or fences will actually protect security and safety. These guidelines should be made available to the public and organizations that engage in certain parades and demonstrations, so that they can plan around the use of these pens and fences and can determine the effect that these tools will have on their message. By making the guidelines public, there is less of a chance that discretion will be based on content and will ensure that these tools are being applied consistently and accurately to every demonstration, parade, or event. The guidelines should provide an internal appeals process by which organizations can appeal the use of pens and fences. These guidelines would solve the time issue and ensure that not just one individual or group is in charge of deciding when the barricades will be used.

Police departments and guidelines should also consider the effect of the pens and fences on the organizations’ rights to hand out leaflets, collect signatures, and engage in dialogue and should provide alternate means by which these goals may be accomplished. The guidelines should provide information on ways of getting to the event and the procedures for maneuvering the streets and sidewalks so that participants are not deterred from attending. Providing this information will make the participants feel comfortable and less threatened. The participants will have confidence that once they arrive they will not do something that will lead to confrontations with the police.

116. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *25.

117. *Id.*

118. The unguided, unpredictable use of pens during First Amendment assemblies suggests a selective policy of pen use that is particularly offensive to the First Amendment. *See infra*, text accompanying notes 84-86.

and manner restrictions on speech must be based on neutral criteria that provide narrowly drawn, reasonable and definite standards in order to ensure that total discretion is not based on the content of speech.¹¹⁹

B. Content Based Restrictions

When determining whether the use of pens and fences are content neutral, the inquiry focuses on whether the justification for the regulation is made without referencing content.¹²⁰ If the justification has nothing to do with content, then it will satisfy the content neutral prong of a permissible time, place, and manner restriction.¹²¹ When the primary justification for the use of pens and fences is public order and safety, the courts will uphold these regulations as content neutral.

The content neutral aspect of the pens is assumed since they have been used in the name of public order and safety for public gatherings from peace marches to cultural parades. For instance, the NYPD has employed the use of these pens as a law enforcement tool for both large and small demonstrations. Pens have been used during New Year's Eve celebrations at Times Square as well as various parades, protests, and demonstrations over the years.¹²² Yet not every public event held within New York City automatically triggers the use of these pens.¹²³

Although deference will be granted to the content neutral justification given for the regulation, "a court must carefully sort through the reasons offered to see if they are genuine."¹²⁴ Here, police departments argue that they make the decision to use demonstration pens based on safety concerns, security reasons, and

119. *Shuttlesworth*, 394 U.S. at 150-51.

120. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

121. *Id.* at 792.

122. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *6-7 ("Demonstrations and parades over the years have ranged from cultural events to protests. Parades for Dominican Day, Puerto Rican Day and Saint Patrick's Day have involved the participation of over 100,000 people.").

123. *Id.* at *20.

124. *Olivieri v. Ward*, 801 F.2d 602, 606 (2d Cir. 1986) (citing *Olivieri v. Ward*, 766 F.2d 690, 691 (2d Cir. 1985)).

the need for crowd control, and “not to create a hostile environment.”¹²⁵ However, these pens and fences are not used around the city in all circumstances in which those concerns arise. The police departments do not use these pens for many of the tourist attractions, city fairs, or parades found throughout the year.¹²⁶ “These fairs bring together tens of thousands of people at a time but the police feel no need to restrict their movements with metal pens in the interest of public safety.”¹²⁷ If a pattern of pen and fence use develops that suggests that the pens and fences are being used more for political functions, then the government might not be able to satisfy the content neutrality of a permissible time, place, and manner restriction.

C. *Narrowly Tailored?*

In determining whether use of pens and fences are narrowly tailored time, place and manner restrictions, courts must consider whether these law enforcement tools promote a governmental interest of safety and security that would be “achieved less effectively absent the regulation.”¹²⁸ In fact, rather than acting as narrowly tailored methods to advance safety and security, pens and fences actually *compromises* demonstrator safety and the security of the public at large. In sharp contrast with narrow tailoring, the use of pens and fences may actually promote public unsafety and insecurity completely counter to the government’s asserted goals.

For instance, by placing people in a hostile environment in which they feel threatened and imprisoned,¹²⁹ the use of these pens and fences tends to send a message of intimidation by making “the demonstration appear dangerous to those who feel vulnerable to

125. Shaila K. Dewan, *After Gentler Tactics, a Peaceful Antiwar Protest*, N.Y. TIMES, Mar. 22, 2004, at B3.

126. See Vitale, *supra* note 3.

127. *Id.*

128. Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989); see also *supra* notes 88-97 and accompanying text (discussing time, place, and manner restrictions).

129. See BOGHOSIAN, *supra* note 9, at 59; see Alex S. Vitale, *Testimony Before the Government Operations Committee of the City Council*, at <http://home/earthlink.net/~alvgc/justice/id47.html> (June 16, 2004).

police action.”¹³⁰ Tension, anxiety, and fears are heightened, especially between participants and police officers, because pens and fences breed an atmosphere in which people feel like criminals.¹³¹ These pens and fences create an unpleasant atmosphere where protestors feel uncomfortable and create the impression that demonstrators are being held against their wills.¹³² In fact, many organizations intentionally keep their protest events small and do not apply for permits or contact the police departments regarding their plans to protest because of their desire to avoid the use of pens and fences altogether.¹³³ This failure to report protests leaves the police unprepared to deal with the situation and heightens tensions on both sides.

In addition, pens and fences are erected by law enforcement as a way of controlling protestors in a narrowly confined area where there is no freedom to move about, engage in dialogue, pass out leaflets, collect signatures,¹³⁴ or even leave quickly.¹³⁵ It is the inability to exit quickly that presents a particularly dangerous scenario. In an emergency, these pens and fences can actually present a safety hazard instead of preventing the hazard. Imagine if a person walked into one of these demonstration zones surrounded by barricades with the intent of detonating a bomb. The crowd would be unable to escape from this terrorist attack because they are surrounded by the barricades.¹³⁶ Unable to escape, the crowd would be in a panic, potentially causing further injury.¹³⁷ This scenario is as plausible as having a participant throw liquid or other debris at police officers or delegates, but is often overlooked or

130. Vitale, *supra* note 129.

131. *Id.*

132. See NYCPR Letter, *supra* note 3.

133. Stauber, 2004 U.S. Dist. LEXIS 13350, at *27-28.

134. NYCPR Letter, *supra* note 3.

135. BOGHOSIAN, *supra* note 9, at 59.

136. See Vitale, *supra* note 129 (“The heavy use of metal pens enhances the prospects of injury because if something were to happen to cause the crowd to panic, people have no way of getting out.”); BOGHOSIAN, *supra* note 9, at 58 (“There is the possibility of panic on the part of demonstrators who wish to leave the scene quickly but are trapped within the often tightly packed confines of the metal barricades.”).

137. Vitale, *supra* note 129.

ignored by those who argue that these law enforcement tools promote safety and security.¹³⁸

The goals of safety and security would be better accomplished if police departments participated in a dialogue with organizers and participants in the events. This dialogue could enhance safety without the use of pens or fences and would allow participants to move about safely and engage in the demonstration or parade as one voice uninhibited by police action.¹³⁹

As evidenced by the NYPD's handling of previous demonstrations, parades and events, it is not always necessary to use pens and fences in order to provide for safety and security.¹⁴⁰ In fact, the use of pens and fences was abandoned during a March 2004 anti-war demonstration after additional safety measures were taken to control the protest.¹⁴¹ Prior to the demonstration, the NYPD held a press conference to provide information to the public on how to access the event, posted information on their website about what route should be taken and dispatched sound trucks to provide information to people who were seeking to attend the

138. *Id.* Professor Vitale argued:

The NYPD is invested in a system of total control of demonstrations. This approach is an outgrowth of their commitment to the "broken windows" theory and its emphasis on eliminating disorder. The NYPD's actions at demonstrations indicate that it believes that any disorder at a protest event that is left uncontrolled will result in a major breach of the peace. They have taken it upon themselves to micro-manage every aspect of a demonstration in order to prevent this from happening. Ironically, It is exactly this attempt at micro-management and control that has led to escalations in disorder in the past.

Id.

139. *Stauber v. City of New York*, Nos. 03 Civ. 9162 to 9164, 2004 U.S. Dist. LEXIS 13350, *18-31 (S.D.N.Y. July 16, 2004), *clarified by* 2004 U.S. LEXIS 14191 (S.D.N.Y. July 27, 2004), *injunctive relief granted in part denied in part*, 2004 U.S. LEXIS 14192 (S.D.N.Y. July 27, 2004). The demonstration of March 20, 2004 shows that additional measures can lead to a peaceful co-existence between police and the protestors.

140. *See supra* notes 129-130 and accompanying text.

141. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *20-21.

event.¹⁴² The NYPD found that the March 20, 2004 demonstration took place without major incident¹⁴³ even though over 40,000 people attended the event.¹⁴⁴ No officers were reported injured and the protest actually ended an hour early.¹⁴⁵

Clearly, the goal of protecting the safety and security of participants and the general public can be achieved when pens and fences are not used. The March 2004 demonstration showed that increased communication with the public prior to a large event can better ensure the safety and integrity of a demonstration because participants are more informed, less intimidated, and more willing to peacefully participate in the democratic process.¹⁴⁶

The infrequent use of pens and fences worldwide suggests that they are not the best means to deal with crowd control or traffic alleviation, nor do they aid with ending congestion caused by a demonstration. Rather, “[a]llowing the crowd to flow in a natural way is the safest form of crowd control.”¹⁴⁷ Pens and fences actually cause congestion because of their bottlenecking effects¹⁴⁸ and because they prevent the free flow of traffic that is critical to ensuring a timely response to an emergency situation.

In fact, using pens and fences is not a common practice in many cities around the world, including those cities with a history of terrorism and political violence, such as Tel Aviv, Belfast, and Madrid.¹⁴⁹ Furthermore, other cities that have hosted major

142. *Id.* at *19-20; see Michael Wilson, *Police Release Ground Rules for Antiwar Demonstration*, N.Y. TIMES, Mar. 20, 2004, at B3.

143. While there were no major incidents during the event, there was a single incident in which medical attention was delayed slightly due to the congestion from the demonstration. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *21. In the opinion of this author, that was a small price to pay in order to have a First Amendment demonstration free of the oppressive use of “holding pens.”

144. *Id.* at *20-21. Reverend Kooperkamp, one of the plaintiffs in this case who also attended the March 20, 2004 demonstration, learned about the March 20 event and how to access the event from the NYPD’s website and had no problem gaining access to the event.

145. Dewan, *supra* note 125.

146. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *19-21.

147. NYCPR Letter, *supra* note 3.

148. *Id.*; see Vitale, *supra* note 28.

149. See Vitale, *supra* note 129.

demonstrations such as London, Rome, Barcelona, and Sydney have not used these metal barricades as a security measure¹⁵⁰ and have reported no significant problems with security or crowd control even though demonstration pens were not used.¹⁵¹

D. Ample Alternative Channels of Communication?

In addition to compromising safety and security, the use of pens and fences also does not leave open satisfactory alternative means of communication. Because “[a]n alternative channel is not sufficient [when] the speakers are not permitted to reach their intended audience,”¹⁵² then it is hard to imagine how placing a protestor inside an opaque holding pen could still allow an ample alternative channel of communication. The pens and fences do not allow expressive activity because they affect the quantity of the expression by the participants. Not only is the practice unsafe, intimidating, and tense, but the use of pens and fences also “divide[s] the protestors into discrete groups, and space[s] them out in sections separated by large gaps.”¹⁵³ Leslie Brody, an attorney who has represented several groups that have held demonstrations, and Leslie Cagan, the national coordinator for UPJ, have reported that once the police department declares the pens full and closed participants are not allowed to enter, even as they begin to empty.¹⁵⁴ Participants are forced to seek out an open pen, which is often further away from the original demonstration site,¹⁵⁵ thus “break[ing] up the flow of the demonstration, affect[ing] the tenor and spirit of the message and demonstration, and mak[ing] the

150. *Id.*

151. *Id.*

152. *Serv. Employee Int’l Union v. City of Los Angeles*, 114 F. Supp. 2d 969, 972 (C.D. Cal. 2000) (citing *Bay Area Peace Navy v. United States*, 914 F.2d 1224, 1229 (9th Cir. 1990)).

153. *See* NYCPR Letter, *supra* note 3.

154. *Stauber v. City of New York*, Nos. 03 Civ. 9162 to 9164, 2004 U.S. Dist. LEXIS 13350, *26-27 (S.D.N.Y. July 16, 2004), *clarified by* 2004 U.S. LEXIS 14191 (S.D.N.Y. July 27, 2004), *injunctive relief granted in part denied in part*, 2004 U.S. LEXIS 14192 (S.D.N.Y. July 27, 2004).

155. *Id.*

demonstration appear to be smaller and less unified than it is.”¹⁵⁶ Additionally, time spent seeking out an open pen or fence is time spent away from the protest.¹⁵⁷ Due to limited space, many demonstrations where pens and fences are used limit the number of participants who can be involved.

Moreover, separating and limiting the number of demonstrators can negatively affect the appearance and the content of the message because the sheer number of participants conveys a message to the audience about the importance of an issue.¹⁵⁸ If a person passing by a parade or demonstration sees relatively few participants, the passerby may walk away believing that the reason for the parade or demonstration is unimportant or that it only affects a few people. And, of course, potential participants may avoid attending the demonstrations and parades either because they are unable to find an open pen or are fearful of how the demonstration will be handled by the police.¹⁵⁹

As mentioned above, these concerns have caused many organizations to keep their events small or avoid registering with the police.¹⁶⁰ In addition, demonstrators with disabilities and medical needs cannot participate in the protest because special accommodations are not usually made for participation.¹⁶¹ Even if the government allows the protest to take place, participants are usually scattered about, often blocks away from their intended audience. One must wonder: what good is a protest if the participants are unable to reach the audience they most hope to make aware of their position? With the use of pens and fences, law enforcement makes the protest meaningless, stripping away effective expression and, as a result, denying participants their basic First Amendment rights.

The use of pens and fences also prevents participants from

156. NYCPR Letter, *supra* note 3.

157. See *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *12-13; see also Vitale, *supra* note 129.

158. BOGHOSIAN, *supra* note 9, at 60.

159. See *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *12-13; see also Vitale, *supra* note 129.

160. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *28.

161. BOGHOSIAN, *supra* note 9, at 59; see NYCPR Letter, *supra* note 3.

engaging in a dialogue with the intended audience. The participants are often sequestered from their audience, unable to pass out literature, collect signatures, or engage in other grassroots organizing.¹⁶² In some instances, the participants are not even able to walk onto the sidewalks next to the demonstration pens and fences without being questioned by the police and possibly arrested.¹⁶³ Many participants are afraid to leave the demonstration pens for fear that they will be prevented from returning to the area and separated from family and friends.¹⁶⁴

As illustrated above, the use of pens and fences by law enforcement is neither narrowly tailored to serve a significant governmental interest, nor does it leave ample alternative means of communication available to protestors and demonstrators. As shown by the NYPD's handling of the March 2004 anti-war demonstration, there are clearly more attractive alternatives that are less intrusive on the fundamental right to assemble. Due to this infringement of protestors' First Amendment rights, courts should find that pens and fences are outside the allowable realm of time, place and manner restrictions and instead constitutes an impermissible prior restraint on First Amendment rights by law enforcement.

CONCLUSION

Freedom of assembly and speech are critically important constitutional rights that ensure our capability to redress grievances and engage in political discussion. During the summer of 2004, amidst a feverish political climate, protestors found their rights to protest against the government fettered by the use of barbaric interlocking metal barricades and mesh covered fences. The use of pens and fences that establish "free speech zones" during political protests, rallies and marches have recently become an all-too-

162. *Coalition to Protest the Democratic Nat'l Convention v. City of Boston*, 327 F. Supp. 2d 61, 68 (D. Mass. 2004).

163. *See Stauber*, 2004 U.S. Dist. LEXIS 13350, at *12-17; *see also* Vitale, *supra* note 129.

164. *Stauber*, 2004 U.S. Dist. LEXIS 13350, at *15; *see* NYCPR Letter, *supra* note 3.

common police practice aimed at silencing, intimidating, and deterring demonstrators from exercising their constitutional rights. As long as law enforcement officials continue to use such pens and fences, there will be an infringement on First Amendment rights of assembly and speech. Given the oppressive and chilling effects such pens and fences have on protestors, who have no freedom to move about, engage in dialogue, pass out leaflets, collect signatures, or even leave quickly, there is no way that their use can be reconciled with existing First Amendment precedent.

Before September 11, 2001, the Ninth Circuit stated that “enjoining or preventing First Amendment activities before demonstrators have acted illegally or before the demonstration poses a clear and present danger is presumptively a First Amendment violation.”¹⁶⁵ Since September 11th there has been an increase in law enforcement regulation of, and presence during, political demonstrations as well as a greater judicial propensity to allow infringement on protected liberties. As a result, modern courts seem more willing to allow regulations that dispose of the possibility of unlawful conduct *before* it happens rather than dealing with illegal activity *as* it happens.¹⁶⁶ Furthermore, the courts seem willing to accept the notion that violence is not merely a possibility at protests and demonstrations, but a guarantee.¹⁶⁷

Certainly, a court could find that the protection of demonstration participants and insurance of public safety and security is a significant governmental interest that justifies the use of pens and fences. While protecting public safety and providing security have long been considered legitimate and significant government interests,¹⁶⁸ these interests are not a blank check for the government to infringe upon protected liberty interests. Quite simply, “[t]he government cannot infringe on First Amendment rights on the mere speculation that violence *may* occur.”¹⁶⁹

165. *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1997).

166. *See Stauber*, 2004 U.S. Dist. LEXIS 13350; *see also Coalition to Protest the Democratic Nat'l Convention*, 327 F. Supp. 2d 61.

167. *See Coalition to Protest the Democratic Nat'l Convention*, 327 F. Supp. 2d 61.

168. *Id.* at 77-78; *see Stauber*, 2004 U.S. Dist. LEXIS 13350, at *75-76.

169. *Serv. Employee Int'l Union v. City of Los Angeles*, 114 F. Supp. 2d

Demonstrators must act illegally or pose a clear and present danger before a government official can prevent First Amendment activities.¹⁷⁰ Government use of pens and fences at present ignores this presumption and as such can only be characterized as an unconstitutional prior restraint.

In this post September 11th world, law enforcement officials can argue that almost every police practice is designed to promote the governmental interest of safety and security. However, “when First Amendment concerns are involved a court ‘may not simply assume that [a decision by officials] will always advance the asserted state interests sufficiently to justify its abridgement of expressive activity.’”¹⁷¹ By maintaining that pens and fences protect the safety and security of the public, law enforcement departments have prevented protestors from fully participating and engaging in the political and demonstration process¹⁷² even when there is no evidence of impending violence or terrorism.¹⁷³ While the threat of terrorism is real, so is the threat to our way of life from excessive security. Concerns about security should not be used to deter, limit or prevent peaceful assemblies and speech.¹⁷⁴

Despite the courts’ deference to police departments, the use of demonstration pens and fences infringes on a demonstrator’s right of assembly and right of free speech because it is not reasonable or narrowly tailored to further significant governmental interest. Police department’s full discretion in deciding whether to use these tools demonstrates that the regulations, or lack thereof, governing the use of pens and fences are not nearly narrowly tailored enough under the Constitution. As shown by the March 2004 demonstration in New York, cities can take steps that are more narrowly tailored than the use of pens and fences to alleviate safety concerns and protect the general public. This demonstration

966, 971 (C.D. Cal. 2000) (citing *Collins v. Jordan*, 110 F.3d 1363, 1373 (9th Cir. 1997)) (emphasis in original).

170. *Id.* (quoting *Collins v. Jordan*, 110 F.3d 1363, 1371 (9th Cir. 1997)).

171. *Olivieri v. Ward*, 801 F.2d 602, 606 (2d Cir. 1986) (quoting *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488, 496 (1986)).

172. *Coalition to Protest the Democratic Nat’l Convention*, 327 F. Supp. 2d at 68; see Vitale, *supra* note 129.

173. See Vitale, *supra* note 28.

174. *Id.*

illustrates that police departments have more viable options that promote security and safety in more productive and protest-friendly ways.

Moreover, the use of pens and fences has been shown to prevent citizens from participating in the political process by limiting the number of participants allowed within these barricades, failing to accommodate the needs of people with disabilities, and preventing people from engaging in a dialogue with other participants, government officials or passersby. Clearly, this shows that the use of pens and fences does not leave open ample alternative channels of communication. The use of these pens and fences is an unconstitutional modern-day “prior restraint,” where unbridled discretion is left in the hands of a few officials. Therefore, our courts should sharply limit their use in order to preserve crucial First Amendment liberties.