PATHS OF LEGITIMACY: A SOCIOLOGY OF THE FIRST AMENDMENT
EXAMINING LEGAL CHANGE AT THE BOUNDARY
BETWEEN STATE AND SOCIETY

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by

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Abstract

by

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What political influences shape the outcomes of First Amendment lawsuits? What are the juridical effects of civil liberties litigation? What institutional forces shape individual rights of expression and dignity—and collective rights to challenge political authority? Contributing to the law and society tradition, and taking a Durkheimian perspective, informed by critical theory and Bourdieu, this study assesses the judicial management of liberty. The analysis develops a sociology of the First Amendment, tracing the political influences and institutional logics that shape judicial decisions and, conversely, the influence of First Amendment law on institutional logics and behavior in other spheres. The term paths of legitimacy is used to designate institutional associations in the public sphere by which disputes are resolved into rules of law by court and rules of law are converted into norms of practice. The project is organized by three liberties of the First Amendment—religion, speech, and assembly—and a range of case-based methods: discursive explanation; neoinstitutionalism and field theory; and legal geography. In the
first two parts of the study, it is shown that the juridical field is sometimes influenced by political codes, such as civil religion, a form of nationalism that governs the display of religious symbols in public; and, conversely, that legal categories influence the realm of civil liberties, for instance, media ethics, an area considered beyond regulation. In the third part, on the freedom of assembly and protest policing, competing hypotheses of the "negotiated management" of demonstrations and the political regulation of territory are examined. It is found that certain regulations of assembly are better explained by the global city thesis, urban differentiation, and political economy of place, than by negotiated management or state-offered legitimations—security needs after 9/11 and riot prevention. As the police turn toward zero tolerance, so do the courts in regulating the "time, place, and manner" of protest. Data examined are judicial opinions, institutional histories, and legitimation claims regarding the regulation of liberty, including the use of mass arrests and free speech zones during the presidential national conventions. Future avenues include examining paths of legitimacy in other areas of law.
To Robert and Elaine
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CHAPTER 1:
PARAMETERS OF STUDY

A political intention can be constituted only in one's relation to a given state of the political game and, more precisely, of the universe of techniques of action and expression it offers at any given moment….

Moving from the implicit to the explicit, from one's subjective impression to objective expression, to public manifestation in the form of discourse or public act, constitutes in itself an institution and thereby represents a form of officialization and legitimation. The production of politically effective and legitimate forms of perception and expression is the monopoly of professionals… The market of politics is doubtless one of the least free markets that exists.


1.1 A Map of Social Spaces

This study offers a sociology of the First Amendment. The empirical area examined is legal change in civil liberties—the realm of action that is beyond state regulation, under U.S. constitutional law. The study object is the cultural boundary between state and society, set in place by the First Amendment. We will look at changes in the boundary over time, from postwar U.S., to the presidential conventions in 2004. Within the time frame of 1945-2004, there are also instances of closer and wider examination, for example of certain conventions and of accelerations in the social fabric—the building of suburbs, shifts in communications technologies, and economic globalizations—as well as an extended look at religious freedom lawsuits through 2010.
A theory of legal dynamics will be presented and substantiated. The goal of the project is to present a series of maps that illustrate the institutional relationships within—and across—the fields of state and civil society. These relationships are the basis on which legal change occurs. These relationships are structural, in the sense that they exhibit enduring characteristics and constrain action; and cultural, in that they are constituted by values and norms of practice. The maps or figures will show the structure and values that animate the public sphere, at least in part. They will illustrate that part of the public sphere in which well-funded and well-organized disputes—about the limits of state action and protection of civil liberties—are pursued in public debate, and temporarily resolved in litigation. The debates are characterized by claimsmaking, and the lawsuits are punctuated by court opinions. The First Amendment is about the clash of absolute values. The conflict between national unity and religious pluralism, between free speech and privacy, and between security and liberty. Court opinions function as stopping points for the disputes, which recur in other forms, in other places, and in other lawsuits.

In the area of civil liberties, legal change sometimes results in new laws that protect civil liberties—and sometimes results in new laws that expand the scope of state action, and so reduce the realm of civil liberties. The two areas are mutually exclusive. The new laws are sometimes national legislative actions, but often take the form of court opinions, because the First Amendment constrains regulation by the U.S. Congress in the area of civil liberties. If a dispute—over the legitimacy of contested practices of a state actor, related to civil liberties—results in legal change, it is likely in the form of a court opinion. It is in court opinions that the limits of state action are articulated, and civil
liberties are—or are not—protected. Opinions are where legal change is effected and justified.

Before there is disputing, there are actions, practices, behaviors. The cycle is acting first, then disputing, then claimsmaking, and, sometimes, pursuing litigation to attain legal change. The cycle occurs in one place and time, and then repeats itself in another place and time. One dispute is temporarily resolved by a court opinion, and then a similar dispute about the clash of values starts the cycle over. Because the dynamic is cyclic, there are several points at which it might be said to begin—or to end. In this study, however, court opinions are considered the social location at which legitimacy contests over civil liberties stop—because it is in court opinions that disputes over legitimate state action are resolved, or "hardened," into law, at least temporarily.

1.2 A Theory of Legal Dynamics

The institutional process, or pattern, that is being mapped in this study is called the legitimacy-and-law dynamic. There is also another angle on the same process, termed the paths of legitimacy, which is outlined below, a bit further along in our discussion.

As stated, courts are at the center of a claimsmaking dynamic that starts with behaviors or practices, and sometimes ends with legal change. Courts at the center of the maps to be presented—theoretically, if not literally. The purpose of this study is to trace influences on the courts, and influences of the courts. When people think about the commonplace functioning of courts, these influences—on the courts, and of the courts—are not often considered or recognized. Even if recognized, these influences are generally not well understood. Courts are thought to stand apart, in some sense.
Let us discuss first the influences on courts. Generally speaking, courts are supposed to be beyond political influence, at least in an ideal world. As is commonly known, federal judges are appointed by presidents and confirmed by the U.S. Senate. So they are born into a highly charged, political environment. In contrast, state judges are selected in a variety of ways, sometimes by election. In either court system, once on the bench, judges are supposed to act for the public good, and fairly apply the law, rather than act on behalf a political faction or for political gain. This is the commonplace notion.

The type of judge most likely to resolve a case about civil liberties is a federal judge—because the First Amendment is federal law. But state judges also decide First Amendment cases. Although born in politics, federal judges are insulated, in part, from political influence, due to tenure. Because they have lifetime appointments, federal judges are expected to be less concerned about, or influenced by, the political. At the same time, judges do live in the social world. Are they influenced by the political sphere?

Some people might assume that courts act independently, or autonomously, from other social fields, such as the political sphere. Other people might assume that courts must be acting for political reasons—or that judges sometimes might be in questionable collaborations with law enforcement. Other people might think the answer depends on the case—or on the judge. If courts are beyond political influence in some circumstances, but under the sway of politics in other circumstances—sociological research is required to uncover and establish the political influences on courts, as a matter of social fact, and according to the variables and circumstances of how this influence works. This information is important to understanding the functioning of the U.S. government.
Looking in the other direction, let us discuss the influences of courts. Obviously, the courts make First Amendment law, even though the amendment says that the state shall not make laws regarding religion, speech, and assembly. Beliefs and behaviors in these areas are supposed to be beyond the reach of law. But there are First Amendment laws. There have been thousands of lawsuits in which the courts have made laws about civil liberties. These laws are found in court opinions. Generally speaking, the influence of these laws is thought to be limited to legal effects, meaning only the direct and intended effect of the laws. In contrast, the social effects of civil liberties laws are not always considered or understood. Sociologists study the social effects of law, but political analysts and legal scholars—and actors within other groups, including judges—often make unsubstantiated assumptions about the effects of civil liberties laws, when they consider social consequences. Sometimes lawyers and judges guess at the social effects of new civil liberties laws, including the possible effect on democratic practices, on economic behavior, and on the likelihood that members of the public will be able to exercise fundamental freedoms without state interference in the future.

For example, lawyers and judges sometimes discuss the possible "chilling effect" of a legal decision, meaning whether a proposed law or ruling will lead to less freedom of speech and assembly in the public sphere, because people will be afraid of gathering together and speaking out against the government. This is an important consideration when thinking about new regulations of speech and assembly, but lawyers and judges tend to use logic and other types of categorical thinking, instead of sociological data and analysis when thinking about chilling effects. They make assumptions about the facts,
and legal arguments about the outcomes or social effects of new law. Because this study is a sociological study, the social facts related to possible "chilling" caused by new laws regulating assembly—such as permit laws and other restrictions on the right to gather publicly—are considered, by examining data about the dynamics of the chilling effect.

The idea to think about, while reading these introductory comments, is that the law is not as independent and autonomous as generally believed. There are intended and unintended consequences of law and legal practices. The rules and logics used by lawyers and judges may "bleed" into other social fields and be translated into professional logics, such as logics of being a journalist—or an activist. By taking a sociological perspective on law, we are able to see that it is a dynamic, social field. Law intersects and overlaps with the rest of the social world, rather than standing apart and acting independently. Its relative autonomy is a source of cultural power, but law is not separate from the social world. After these few comments about the social effects of legal change, it is already clear that sociological research is required to uncover the specifics of the social influences—also known as "extra-legal" influences—of legal change in the area of civil liberties. This is an area in which the most basic rights of human beings are maintained.

In addition to the chilling effect, another of the extra-legal effects of First Amendment law to be examined, in this study, relates to the Speech Clause, rather than to both speech and assembly rights. In First Amendment law, there is a severely uneven balancing of commercial values and human dignity in the area of news publishing. Under the Speech Clause, courts give the journalism field nearly absolute freedom to publish invasive stories about private individuals—going so far as to provide a neat, categorical
schema that support or legitimate the commodification of individuals, as personalities or celebrities of the public sphere, even when the individuals do not seek the spotlight.

If a private person gets accidentally caught in the news cycle, the law is not likely to provide a remedy for his or her public humiliation, and journalists are very likely to publish invasive stories about him or her. The legitimation schema used by courts, and by journalism outlets, turn on differences between the public sphere and the private sphere. Under the "public figure doctrine," nearly anyone who becomes of interest to the public is deemed a public figure, and having that status means that privacy and dignity rights are greatly reduced. But we get ahead of ourselves. Legal nuances and doctrines are not that as important in this study as social effects. The subject of this study is the boundary between state and society, which shifts according to political influences on the courts, and the legal and extra-legal influences of new laws about civil liberties. The extra-legal influences of First Amendment law—especially legitimation schema that promote certain rights over others—will be uncovered in this study. The analysis will look not only at the law, legal categories and doctrine, but at social influences on law and social influences of law, specifically influences coming from the juridical field in the form of court opinions.

In this introduction, the first point of emphasis is that, because courts are a central location for legal change around civil liberties, courts are at the center of this study. If this study had another purpose, other institutions might be placed at the center of the public sphere—for instance, the media, the government, or social movements. But this study is about legal change in the area of civil liberties. Accordingly, courts are the focal point. The figures will illustrate, in part, institutional influences on the juridical field, and
of the juridical field, in the area of civil liberties law. In order to understand the position of the juridical field in the public sphere and the social world, two other professional fields are also highlighted, in addition to the juridical field and the journalism field. These fields are: the political field and the field of law enforcement.

In contrast to the juridical field, the field of law enforcement is part of the executive branch of the U.S. government. It includes all types of policing—not only city police departments, but also parks departments at the local level, and other administrative agencies at various scales. While there is no federal police force in the U.S., there are national police agencies, including the National Park Service, the Federal Bureau of Investigation, the Secret Service, and Homeland Security, to name a few.

The dynamics among state actors in the related fields of politics, policing, and courts are the theoretical center of the illustrations to be developed from data and presented for analysis. The maps will illustrate the dynamics of legal change in the area of civil liberties, by and across the fields of politics, policing, courts—within the state, and, also, by and across the field of journalism in the civil sphere. As discussed below, other civil society actors, specifically lawyers and social movements, are also important in the cycle of legal change in the area of civil liberties. This cycle is called the legitimacy-and-law dynamic.

1.2.1 The Legitimacy-and-Law Dynamic

The legitimacy-and-law dynamic begins with an innovative practice of a political official or police agency, and ends with a court opinion, if the public dispute over a question of civil liberties is well funded and organized, and so pursued to conclusion. The
pattern starts with a political official, or an official working in a police agency, deciding to expand the scope of state action, which necessarily reduces the realm of civil liberties. As mentioned, the two areas are mutually exclusive. Expansive state action reduces the realm of civil liberties, and expansive liberties limit the authority of the state.

For example, a mayor might announce that only certain groups—for instance, groups that are incorporated under state law, or groups that can post a bond, or can show proof of insurance, etc.—are eligible to participate in parades on city streets. Or, for another example, a police chief—or a parks commissioner—might begin implementing a new policy that limits the use of a public park to certain types of functions.

It is not suggested that political officials and police officers always start out with the intention of limiting civil liberties for particular groups and uses of public spaces. They may be thinking about other things, such as ensuring that a city avoids liability for injury, or making certain that a park is secure, free of violent crime, etc. These are important aspects of their jobs and legitimate considerations. They may be thinking about how to best exercise their legitimate power over territory and people, but the result is a reduction in civil liberties—in objective terms—because the two areas are mutually exclusive. In some of cases to be discussed later, political officials, policing agencies, and courts were thinking about limiting civil liberties for particular groups, such as African Americans in restaurants and travel terminals, during the era of du jure segregation—and for particular uses, such as the use of public campuses in the 1960s and 1970s, for student gatherings meant to protest the Vietnam war, because the protests were thought to be anti-American, and so forth. But, as the hypothetical examples and actual examples show,
regardless of intention, the innovative practices of political officials and law enforcement agencies generally relate to the use of public spaces, such as streets and parks, in ways that limit the possible exercise of civil liberties in those places. The innovative practices of mayors and police chiefs might also relate to places of public accommodation or travel—such as lunch counters and airports, for instance. The innovative practices might also relate to symbolic locations that are closely tied to public affairs, such as government buildings and grounds—the Capitol building, the United Nations building, or the area around a courthouse, a jail, a foreign consultate.

Even in small towns and small states, disputes over the clashing values of security and liberty arise. For example, the police chief of a small city, which happens to be a state capital, legitimately desires that the Statehouse Rotunda be safe and secure, but members of the public want to use the Rotunda for political participation. What if the Rotunda is used for Fourth of July celebrations, but political and policing officials refuse to allow its use for anti-war demonstrations? There are several problems here, but the point to realize, at this juncture, is that the innovative practices of political officials and police agencies sometimes limit the exercise of civil liberties in outdoor spaces.

This is sometimes called the problem of "speech out of doors," but the right of assembly in the First Amendment is not the same as the speech right. Leaving aside the legal nuances for now, let us call it the problem of speech out of doors. The legitimacy-and-law dynamic is a pattern description of a particular type of legal change: the legal resolutions offered to temporarily resolve of the problem of speech out of doors.
The pattern begins with an innovative practice of state actors. After the innovative practice starts, the second step is that the practice is contested by members of the public. These might include, for example, interest groups or factions, activists working in social movement organizations, lawyers, and other actors. These members of the public want to exercise their liberties in outdoor spaces.

The ensuing contest is sometimes well-funded and well-organized, meaning that there are sufficient resources—material and cultural resources, like office buildings, staff, money, and skills of communication—and sufficient political opportunities, such as sympathetic elites and political actors—that the challengers decide to pursue the dispute. If well-funded and well-organized enough, the dispute moves from the public sphere, and into the court, and vice versa, moving back and forth between the public sphere and the court. In this regard, and in the current era, the public sphere is mediated, meaning that it is located in both physical and mediated spaces, such as print and electronic publications.

In the legitimacy-and-law dynamic, if a grievance about civil liberties is strong enough, and the dispute—regarding a practice of political officials and policing agencies—is sufficiently well-funded and organized, then the dispute is debated in the mediated public sphere, in the form of legitimation claims. If well-funded enough, etc., the competing values and legitimacy claims in the dispute are brought to the courthouse. The claims are about whether the contested practices are—or are not—legitimate, meaning appropriate or worthy of law. Once in legal proceedings, legitimacy claims are translated into legal claims and legal logics. If the dispute is well-funded enough, etc., it is pursued to resolution in court. The cycle is completed with a court opinion.
To be sure, some court filings do not end in an opinion. A case might be settled out of court, or it might dropped, perhaps because the innovative practice was not invasive enough, the grievance was not strong enough, or the disputing parties in the civil sphere were not well-funded or organized enough—or were afraid of losing even more of their civil liberties and rights, due to the chilling effect of prior events, law-enforcement practices, and/or other lawsuits and criminal prosecutions.

If a grievance is not strong enough, or a dispute is not well-funded or organized, or if a challenger group lacks political alliances, or is subject to state repression, including for example in criminal prosecutions, then challenges are not likely to be
pursued to the point of a court opinion. Yet, for those disputes that are well-funded and well-organized—have political opportunities, can resist repression in order to challenge state authority, etc.—public debate occurs in the mediated public sphere. The initial dispute over state practices between a challenger and a state actor becomes a matter of public debate, characterized by legitimacy claims offered by each side of a dyad. If well-funded and well-organized, etc., the dyadic debate moves into court. (Even if not well-funded or organized at the time of the first restrictive state practice, sometimes political or social conditions change, in ways that lead groups or organizations to challenge long-standing practices, and bring the issues into the public sphere and eventually into court.)

Civil-liberty debates over state practices are carried out in the mediated public sphere and in the courts, and if well-funded, etc., are taken all the way through, to the point that a court opinion is issued, and a legal change results. This cycle, by which legitimacy contests become lawsuits that result in legal change about civil liberties, in the form of a court opinion, is the legitimacy-and-law dynamic. The disputes that go all the way around the cycle are only the "tip of the iceberg," because many grievances and disputes do not enter the cycle and complete it; however, if a dispute does not complete the cycle, it does not result in legal change in a court opinion, as defined in this dynamic.

The dynamic is about legal change in the area of civil liberties. This is type of social interactions being theorized. The dynamic is conservative regarding the number and types of disputes over state practices that are theorized. This study is not universal; that there is no grand theory offered for all types of grievances or legal mobilizations, but it is far reaching as to disputes that result in legal change in the area of civil liberties.
The theory presented here is partial, as will be the figures to be presented in the empirical chapters. The legitimacy-and-law dynamic is not a map of the entire public sphere and all possible contests between the state and civil society. Instead, this study will present a pattern description of what happens in the public sphere, across several social fields, including politics, law enforcement, media, and the courts, as well as social movements and lawyers, with regard to legal change around civil liberties. The theory of legal change presented—and in the empirical chapters and representational figures—is not a theory that explains all aspects of legal change. It is not a theory that explains the emergence of grievances or mobilizations, or their success. It is a theory of legal change in the area of civil liberties. Throughout this study, we are going to look at how the legitimacy-and-law dynamic results in legal change, regarding where the boundary between state and society is drawn under the First Amendment. Because the law is embedded in the social fabric, the changes are not purely legal. The boundary shifts due to social practices, professional logics, and claims-making, which take place in various social fields and in the mediated public sphere.

While courts are at the theoretical center of the maps to be presented, the primary concern of this study is the dignity of human life and the fundamental rights of human beings. At an abstract level, this study examines the perennial struggle between protecting human dignity and freedom, on the one hand, and maintaining political order, on the other. This is the clash of absolutes between freedom and order, between liberty and security. The central concern is the protection of human rights. But while the human person is of central concern, there is no analysis of individual actions in this study.
The analysis takes place at the level of social institutions. Actions or statements made by individuals are read in terms of their professions, and the social fields in which they reside. The representational figures, illustrating parts of the public sphere, to be developed in the empirical chapters, are about social institutions, not individuals. The term social institution can have different meanings. To be clear, social institution is defined as: a dynamic field of shared and professional logics, and patterns of behavior, in which actors make plans, and take strategic actions, in order to balance competing political, economic, and cultural values. When these professional logics are translated or transformed, within or across social fields, the pathways of transformation are the paths of legitimacy.

1.2.2 The Paths of Legitimacy

The legitimacy-and-law dynamic describes social action in the public sphere across multiple fields of social action. The term paths of legitimacy relates to social action within or across fields. Paths of legitimacy are defined here as: the directions of change, either within a field of action, or from one social field to another field, on which cultural values—such as legitimacy schema or professional logics—are translated, either by actors from one strata of a field to actors at another level in the hierarchy of the same field, or by actors working across fields, translating the logics of one field, the sending field, into the logics of another, the receiving field. When there is a questioned practice of state action, and social actors within a particular field must work through the legitimacy-and-law dynamic, their work of legitimation travels along the "causal arrows" of the paths of legitimacy. These pathways move across social structures, such as up or down a
hierarchy, or across professions from one field to another, but, importantly, the pathways also carry cultural information. That is to say, social actors carry cultural values within and across fields of action. During legitimacy debates in the public sphere, institutional logics are engaged to explain, or evaluate, behaviors that were once taken for granted. Actors first engage in natural-seeming, or normal, practices that match their professional logics and interests, but if questioned or challenged, then explain the reasons or rationales for their actions. Practices come before legitimation. When social actors, in a field, interact with actors from the other fields, there can be points of conflict, or "break points," at which actors are called upon to legitimate behaviors. When people have to work to legitimate their behaviors, they draw on the logics of action of their group or field or on related logics from adjacent fields. For example, when police interact with lawyers, in cross-institutional settings, both groups are using distinct logics, but also working to translate behaviors into the legitimated terminology of the other group. In so doing, the actors bring their own logics with them, and those institutional logics are carried across fields along the *paths of legitimacy*, from one field to the next.

The paths of legitimacy are directions of change that carry professional logics. For example, cultural values, such as professional logics of the police, are translated by actors in one field into the logics of another, such as lawyers or the courts. Thus, paths of legitimacy are analogous to what have been called "the dynamics of contention," or historically based, causal mechanisms (McAdam, Tarrow, and Tilly 2001).

The legal theory that is the contribution of this study builds on the dynamics of contention program, but works within the law and society tradition because the focus is
on the juridical field rather than state action or challenger action. The theory can be summarized in a two theses. The first thesis is that practices of state actors—including the related legitimacy contests and claimsmaking pursued by, and between, state actors, challengers, and others to support those practices—are the basis for legal change, following along the cross-institutional process of the legitimacy-and-law dynamic.

T1 In disputes over civil liberties that lead to legal change, state actors and challengers follow a pattern that starts with practices, then disputes and claimsmaking, and then court litigation that can result in new law that resets the boundary between legitimate state action and the realm of civil liberties.

At a high-level of institutional interactions, this legitimacy-and-law dynamic is occurring, and recurring. While theorized at a meso-level or institutional scale, it is highly abstract and general. Social behaviors in the mediated sphere and in courts are working across several social fields. It is repeated in different forms, within and across the different social fields. Constitutional litigation reaching a court opinion is the turning point, or stopping point, at which law changes. This is the point at which legitimacy claims become law. What was, at one point, a "grey area," or matter of debated legitimacy and legal uncertainty, becomes a legal fact, when the court issues its opinion.

Second thesis is that the paths of legitimacy are the arrows of change, on which cultural values—such as professional logics—are translated, either within a field, or from one field into the logics of another. The paths of legitimacy result in legal change over the long term, but also result in interpersonal resolutions, or group consensus, in the short term. The paths of legitimacy are structural in that they span the hierarchy of a particular
field, or move across different fields. They are cultural in that they carry values and norms of practice, and result in transformations of norms and professional logics.

In disputes over civil liberties that lead to legal change, state actors and challengers produce and reproduce hierarchical patterns within their own fields and across fields, in order to reach resolutions to questions of legitimate state action, on which paths of legitimacy, the norms of practice or professional logics of fields, are carried and transformed in social action.

If an institutionalized practice, new or old, is questioned, it is no longer taken for granted and requires legitimation. If legitimated, for example, in the form of a court opinion, it can return to the background as an acceptable, unquestioned pattern, until the cycle of legitimacy-and-law begins again, and social actors within their fields, and working with others in cross-institutional settings, exchange and develop their professional norms.

Contributing to the law and society tradition, and extending the dynamics of contention program, this study offers a partial theory of legal change in the area of civil liberties law. The theses stated above summarize knowledge gained over two years of assessing the social influences and effects of First Amendment law through extensive research. This report on the research conducted now offers, in summary form, a sociological analysis of the judicial management of liberty under the First Amendment.

It is argued that each social field, such as the policing field, or the journalism field, etc., uses distinct institutional logics when engaged in legitimation, and that those logics are transformed and sometimes converted in unexpected ways as the logics move along paths of legitimacy, within and across the fields.
As discussed in these opening remarks, this study develops a sociology of the First Amendment, tracing the political influences and institutional logics that shape judicial decisions and, conversely, the influence of First Amendment law on institutional logics and behaviors in other spheres, most particularly the journalism sphere and by inference, social movements. The theory of legal dynamics presented is limited in scope. It is a middle-range theory about the types of disputes and legal changes identified: juridical change in civil liberties law (Merton 1949).

To find out what political influences shape the outcomes of First Amendment lawsuits, this study examines data that reveal the institutional behaviors and logics of the political sphere. To find out the juridical effects of civil liberties litigation, this study examines data on the institutional behaviors and logics of the journalism field and, to a lesser extent, the social movements field.

1.3 Research Questions

The research questions are:

1. What political influences shape the outcomes of First Amendment lawsuits?
2. What are the juridical effects of civil liberties litigation? and
3. What institutional forces shape individual rights of expression and dignity—and collective rights to challenge political authority?

In answering these questions, this study looks at what are variously called in other studies, and within this study, cognitive schema, collective identities, or institutional logics, depending on the level of analysis and point of analysis. Both high-level, meso or
institutional analysis is presented here, and lower-level meso or institutional analysis. For example, the legitimacy-and-law dynamic is a high-level, meso description, taking place in cross-institutional settings, while the paths of legitimacy are a mid-level, meso description, taking place within a field or institution, or between two fields. Extremely high scales of analysis, in the macro-level, and extremely low level analyses, at the micro-level, are not presented here.

Assume that a social institution is a dynamic field of shared and professional logics, and patterns of behavior, populated by strategic actors, as discussed above. Based on this core definition, when the terms *schema* or *collective identity* are used, reference is being made to shared beliefs or logics of those actors. The *schema* are held within individuals, as the cognitive outlines or plans of action that have occurred before, and are likely to be repeated in the future. These are naturalized or normalized logics of action.

A *collective identity* is a shared understanding of members of a profession, social field, or other group, regarding the self and acceptable or legitimate behavior, from the perspective of being a member of the group. Collective identities are expressed in terms of appropriate roles or understandings about social roles and processes. What would a good police officer do? What would a competent judge do? What would an ethical journalist decide? Schema—that is, logics of action—are linked to collective identities. They are similar forms, found at different levels of analysis or research foci.

These cultural forms develop into logics of action, starting with individual-level, subjective motivations in the pursuit of interests, and continuing to repeating patterns, at the level of group-behavioral patterns, as *institutional logics*. 
The institutional logics are tied with practices—as practices come first in the legitimacy-and-law dynamic. According to Durkheimian theory, practices come before beliefs (1912). The understanding of a strategic actor about how to act and what to do is ingrained at some prior point in time, which is outside of the scope of this study. The logics of practice are naturalized, normalized, deeply held. Actors in the fields of politics, the police, the courts, and other fields know what it means to be a politician, a police officer, a judge. They have internalized the professional logics of their field.

As discussed in the opening section, above, regarding mapping the public sphere, the study object here is the *boundary between state and society*, and the goal of this project is to trace how that boundary changes. Therefore, the research questions are directed to this object. Further, it will be shown that there is a legitimacy-and-law dynamic, and that there are paths of legitimacy within and between the professional fields, on which cultural values are carried. These pattern descriptions become explanations of action, within the paradigm of multi-case narrative analysis (Abbott 1992). The cultural values that animate the cases and narratives analyzed in this study are the professional logics of actors within each field and translated across fields. These are individually held beliefs or *cognitive schema*, at one level of analysis, but are *institutional logics* or *collective identities*, at other levels of analysis.

Pursuant to Bourdieuan theory, these logics provide a structure to the field and motivate action within it, such that hierarchies result within a field. For example, there are elite journalists and tabloid journalists, each with distinct but related logics of action. There are also elite courts and low-level courts, which are engaged in similar but distinct
logics of judicial decision making. The hierarchies of a field bear on the possible positions that can be taken in each field. During legitimacy crises, and other dynamics of social change, there is movement of the cultural values from one field to another, along the paths of legitimacy, which movement results in the expression of corresponding cultural values in another field, again expressed in the form of practices and claimsmaking (Bourdieu 1981, 1983, 1990; Martin 2003; Benson 2006). Cultural values are carried on paths of legitimacy within and between professional fields.

In answering the research questions, a partial theory of legal change is offered, consisting of the legitimacy-and-law dynamic, and the paths of legitimacy. These constructs offer important theoretical insights. To detail these dynamics and mechanisms of legal change in civil liberties, this study will examine data, in the form of texts, in which actors discuss in their values and behaviors, that is, their beliefs and practices.

1.4 Data and Methods, Levels of Analysis

There are two primary types of data analyzed: first, court opinions, across a range of time periods and levels of court; and second, legitimation claims made by actors in various institutional fields, such as the law enforcement field and the journalism field. The legitimation claims reveal shared understandings, and points of conflict, in those fields and across those fields, especially with regard to contested practices.

The levels of analysis are meso-level, not macro or micro, but the meso-levels range from a high level of analysis, in cross-institutional settings, to lower-level, meso analyses of within field dynamics. The methods of analysis are discussed in detail in chapter 3 on case-based methods. The methods are all case-based: discursive explanation
The data on legitimation claims vary by the professional fields examined, including judges, journalists, and policing. The claims analyzed include the rationales stated by judges in court opinions, to justify their rulings about the regulation of religious freedoms, the regulation of outdoor protests or assemblies, and the regulation—or lack of regulation, to be more precise—of free speech. The claims analyzed also include claims made by journalists about the ethics of their publishing decisions. And third, the claims analyzed include claims made by police agencies, regarding the legitimacy of "protest policing tactics," that is, the policing strategies and methods used to control outdoor demonstrations or public assemblies.

When looking at the legitimations or rationales of the courts, there is limited legal analysis. Legal nuances are only discussed where relevant to the political influences on judicial outcomes, or relevant to the extra-legal influences, or social effects, of court opinions.

In this study, the court opinions are not analyzed for legal import, but instead as legitimation claims being by judges, expressed in terms of the professional logics of their field. These claims count as institutional texts. Many of the court opinions discussed are from minor courts, or only state minor or repetitive points of law—or were overruled, which means that the opinions have little value for current lawsuits or policy analysis. Their relevance is for historical and institutional analysis. Instead of looking at the court opinions to determine the law, on behalf of a client or a policy question, this study
analyzes court opinions to state the basic points of law (leaving nuances aside) to provide a foundation for social analysis. The social analysis relates to political influences on judge-made law and the extra-legal influences of judge-made law.

Court opinions are also read to uncover the logics of judicial decision making, as a professional field, and to locate legitimation claims made by actors in the juridical field. The legal opinions were also mined for historical summaries of the underlying disputes and contested practices, such as police actions during sit-ins at lunch counters during the civil rights era, for instance. The historical information contained in the opinions has been subjected to dyadic contests over contested interpretations, during the lawsuits. The historical information is useful in the comparative analysis of cases and outcomes, across time and space, in the legal geography in chapter 6.

In addition to the court opinions and legitimation claims made by actors within the fields of policing and journalism, this study also examines other types of historical evidence that instantiate the professional logics of actors in the various social institutions. These data include primarily historical works, but also the work of political scientists and sociologists, as cited in the empirical chapters for factual information.

All of these data are examined for content and theorized as text, meaning that the expressions, speech acts, and other uses of language by a particular speaker are thought to instantiate the discursive formations of the professional field in which a particular speaker resides. The professional logics discussed in historical texts are analyzed in terms of their causal functions along the paths of legitimacy.
Discursive formations—also called schema, norms, collective identities, and professional logics depending on the level of analysis and researcher foci—are here defined as: institutional, or meso-level logics carried within and between the social fields, by social actors, and transformed within and between the social fields, by actors.

The maps or representational figures to be developed, regarding each area of civil liberties, after data analysis, will not only show the directions of change on the paths of legitimacy, but also will detail the specific cultural values uncovered in the case narratives examined. These values are the discursive formations of the professional field being analyzed. Thus the figures reveal structure and culture.

In the data analysis, the paths of legitimacy are located, and are to be understood as a form of "causal arrow" indicating the diffusion and translation of schema, norms, collective identities, or logics of behavior, within and between fields. (See theoretical summary, above.) Even if the speaker, in a particular selection of data or text, is not consciously thinking about civil liberties, the expressions of the speaker can still be analyzed, sociologically, in relation to the institutional logics of action of the speaker's field, as those logics bear on civil liberties.

The professional logics considered in this study are those logics that bear on where to draw an appropriate or legitimate boundary between state and society, separating legitimate state action from the realm of civil liberties. For example, a police agency might have a logic of zero tolerance when it comes to civil disobedience, thus equating symbolic actions of protest with criminal or violent acts. Or, for another example, a judge might have a logic of blaming one or more of the groups and
individuals in the lawsuit before the court, rather than considering the sociological or structural influences that generate the social problem at issue in the case. These types of logics are translated from field to field, along the paths of legitimacy.

Let us turn now to describe the types of data and the locations of the data. The legitimacy claims examined were found in several archival locations. First, the legitimacy claims of judges were found in the judicial opinions. For the chapter on religious freedom (chapter 4), only U.S. Supreme Court opinions were analyzed, not other texts. Limited, but comprehensive legal research was required to locate all of the court opinions of the U.S. Supreme Court regarding the display of religious symbols in public places. There are only a few opinions in that category.

In contrast, for the chapters on speech and assembly, respectively, the data includes legitimation claims within judicial opinions—and legitimation claims located in other texts, such as news reports and historical accounts. Regarding the legal data analyzed in those chapters, extensive legal research was conducted to locate court opinions regarding the public figure doctrine and journalism ethics—for the chapter on free speech—and court opinions regarding protest policing tactics, protest permits and "time, place, and manner" restrictions—for the chapter on the freedom of assembly.

Regarding the regulation of speech, the legitimacy claims of journalists were found in news reports. Regarding freedom of assembly, as further described in an appendix, court opinions from all levels of courts and the entire postwar era, from 1945 to 2000 were retrieved and analyzed for repressive outcomes \(N=435\).
Regarding the regulation of assembly, the legitimacy claims of police agencies and city officials were found in news reports and in historical analyses, such as books about urban planning and policing.

Additionally, historical data relating to the fields of journalism and to policing were located in various archives, but primarily in secondary, historical accounts about the building of the suburbs in the postwar era, the acceleration of economic globalization in the 1970s, the shift to zero tolerance policing in the 1980s, the emergence of the Internet in the early 1990s, and other topics.

Additional data in the form of legitimation claims about the regulation of civil liberties in the area of freedom of assembly—specifically claims made by the New York Police Department about protest policing tactics used during the Republican National Convention, held in the city in 2004—were found in the internal, archival documents of the NYPD, which were produced during civil liberties lawsuits about the 2004 RNC (see NYCLU 2003, 2005; and list of documents in Appendix F). The documents were released publicly on the New York Civil Liberties Union website (http://www.nyCLU.org).

The lawsuits include: United for Peace and Justice v. Bloomberg, State Supreme Court, New York Count, Index No. 111893/04 (a closed case, challenging policing practices and tactics, namely denial of permit to hold protest in Central Park on eve of the 2004 convention, as a reasonable "time, place, and manner restriction"); and Schiller v. New York City and Dinler v. New York City, S.D.N.Y. Index Nos. 04 Civ. 07921 and 07922 (pending cases, challenging policing practices and tactics, namely mass arrests, detentions and fingerprinting during the 2004 RNC). There were also earlier, related
lawsuits, that are considered highly relevant in the 2004 RNC lawsuits. These are the lawsuits related to policing tactics used during the February 2003 anti-war protests in New York City: Gutman v. New York City, Stauber v. New York City, and Conrad v. New York City, S.D.N.Y. Index Nos. 03 Civ. 9162, 9163 and 9164 (pending cases, challenging policing practices and tactics, namely blanket searches without probable cause of a crime, and also the use of horses in large crowds, causing harm to protesters).

Because many of the 2004 RNC lawsuits are still pending, the court opinions are not yet available, but preliminary testimony and court opinions are available. There are other data, constituting legitimation claims about the 2004 RNC, located in the hearing testimony, deposition testimony, and documents produced in the lawsuits. Chapter 6 refers to publicly available facts and legitimation claims that were also made in deposition testimonies of NYPD officials (listed in Appendix E). It also refers to selected, archival documents publicly released in the lawsuits (listed in Appendix F).

Turning now to the relevance of the data to the research question and partial theory presented, the point of collecting and analyzing all of these types of data, located in the places described, is to understand how and why the cultural boundary between state and society, changes over time, under the First Amendment. These data bear on how and why the boundary between legitimate state action and civil liberties changes from postwar U.S., to the presidential conventions in 2004. (With regard to the religious display lawsuits, the analysis is carried through to 2010.)

As outlined in the opening sections, the purpose of this project is to trace the structural and cultural elements of public disputes, over civil liberties, that lead to legal
change. Public disputes, if contested at a critical level, are resolved into positive law with the issuance of a court opinion on First Amendment law.

For example, secondary histories of the police, as an institution having certain professional logics, are discussed in comparison with the archival records of the police department, and public facts confirmed in testimonies of NYPD officers. These data are compared—internal records, available histories, and legitimation claims made in litigation—to assess the values being expressed by actors in the policing sphere, internally and publicly. The logics of the policing field, once identified and theorized, are traced, as they may or may not be translated, and converted, into the legal categories and First Amendment discourses, and then, in turn, result in legal change in the area of civil liberties.

These discursive formations include the legitimation of protest permits in judicial opinions. These formations also include the creation of new legal categories, namely the "public forum doctrine," and the "time, place, and manner" rule, which are exceptions to the freedom of assembly. As discussed above, in the section on the research questions, the level of analysis is institutional, that is, a meso-level of analysis. As discussed below in the summary of juridical influences, these legal discourses are translations of policing logics, in particular the logics of zero tolerance policing into judicial outcomes.

Turning now to the methods used to analyze these data, the methods are case-based (Abbott 1992; Byrne 2009). They range from discursive explanation to historical analysis of legal outcomes in a legal geography, as briefly mentioned above. These methods are outlined in greater detail in the chapter on methods (chapter 3).
At this point, briefly stated, the method of analysis to examine the statements as institutional texts. Thus, statements made by officers in police agencies, by judges in the court system, by political officials working for cities, and by other individual state actors, are theorized as texts that express the shared beliefs, common practices, and professional logics of the relevant institution. The texts record the professional practices of the field in which the person works, including also hierarchical positions taken in those fields. For example, in the journalism field, legitimation claims are made by journalists, in the civil sphere: internally in their editorial rooms, publicly in their news publications, and in semi-privately in interviews published in trade magazines. These claims are examined as texts expressing and recording the logics of the professional field.

For another example, in lawsuits about the freedom of assembly regarding the practices of protest policing, legitimation claims are made in several contexts: internally in police agencies (data that is hard to locate), and externally in historical accounts such as books, in the mediated public sphere in news reports, and in lawsuits. These claims are examined as texts that record the practices and logics of the policing field.

The point, on this page of the study, is that institutional levels of analysis, and case-based methods of analysis, reveal a great deal of sociological information about the contours of the state-civil society divide. For instance, in disputes over police-protester interactions and about the contours of the freedom of assembly—sociological information is often invisible in at the micro-level of analysis. A photograph of police officers in riot gear, for example, with protesters yelling slogans and being hauled away, does not reveal anything about long historical shifts and institutional patterns of legitimation, at least not
immediately, or simply. As discussed in the chapter on assembly (chapter 6), several long-range, historical changes result in certain strategies used by the police during large-scale, urban protest events. The historical shifts are: urban differentiations in the political economy of place starting with the building of the suburbs in the 1950s, the shift to zero tolerance policing starting in the 1980s, and the changes in the presidential conventions from the postwar period to date. These changes are not visible in the photograph of protester-police confrontation, even if their social influence shows through.

Similarly, institutional levels of analysis reveal a lot of information about disputes over the freedom of religion and the freedom of speech, as detailed in the empirical chapters to follow. For all these reasons, the data and method of this study are texts analyzed as discursive formations, at the institutional level.

1.5 Social Fields, Actors, Dynamics

Before turning to the empirical analyses, some discussion of the social fields, the actors, and the dynamics that are studied in this project, is in order. This study of legal change will map the social fields, actors, and dynamics of action that result in legal change in the area of civil liberties.

1.5.1 State and Civil Society Actors

The emphasis is on two professional fields within the state—the courts and the police. These fields are examined to see how the state-society boundary is understood and managed by state actors in these fields. While the courts are in the judicial branch, the police are part of the executive branch, performing the function of enforcement on behalf
of the executive or political branch. Except as described below, other executive actors in the political branch are in the background. But the police are theorized as political actors.

Two types of executive-branch actors, to be examined in the background, are city officials—such as officials in New York City, who operate at both local scales and global scales—and park commissioners and other local officials, who issue permits to use public spaces. Also backgrounded are city officials, working in the other cities that also recently faced public disputes regarding large-scale protests. These include, for instance, city officials in Boston, Massachusetts, where the 2004 Democratic National Convention was held, and city officials in Philadelphia and Los Angeles, where the presidential conventions, Republican and Democratic, were held four years earlier, in 2000.

Other executive-branch actors in the state apparatus, operating at the national scale, are briefly addressed in the background. These are the political committees that manage the two permanent political parties in the U.S., the Republican Party and the Democratic Party. These committees are discussed, in the background, with regard to the presidential conventions, held every four years, that result in the nomination and election of the U.S. president. The presidential conventions are a critical location for the exercise of the freedom of assembly. There is no analysis of legislative actors in this study.

On the civil society side, the primary field examined is the journalism field. Two additional civil society fields are backgrounded: the fields of social movements and of lawyers. To be clear at the outset, the primary goal of the study is to produce an institutional mapping of the public sphere that is concerned with human dignity and human rights, but places the juridical field in the central position. This choice is made
because, under the design of the U.S. Constitution, the court is supposed to function as a check on the political branches (executive and legislative), and so is the guardian of civil liberties. Courts are the last resort for protecting civil liberties. Courts act as "the guardians of the guardians," meaning that they watch over other state actors, specifically political representatives who are supposed to act on behalf of the public in democratic settings. Accordingly, the empirical analyses of this study primarily focus on the institutional practices and influences of judges as social actors. (Existing scholarship on judicial decision making regarding civil liberties is outlined in chapter 2.).

The output or product of the study being a series of illustrations of the influences on the juridical field, and influences of the juridical field, with regard to the regulation of civil liberties.

1.5.2 Influences on the Juridical Field, from the Political

Regarding influences on the juridical field, there will be examination of the institutional-level influences from the political field that shape litigation outcomes. This is a movement across fields—from politics to law. While some scholars equate law and politics, there is a classic distinction between the two fields (Graber 2010).

There will be two cases examined in which political influences shape judicial outcomes. First, this occurs in the area of religious freedom, addressed in chapter 4, and second, this occurs in the area of freedom of assembly, addressed in chapter 6. Political codes, or at least economic interests, also shape the freedom of speech, addressed in chapter 5; however, that chapter focuses on influences of the juridical field (see below).
In the chapter on religious freedom, there is an examination of political codes used to justify state supremacy and authority over other values, for instance, the nationalism discourse known as civil religion, which asserts state authority over religious values or conscience. Civil religion is defined as a professional logic, or discursive formation, of presidents, and other state actors—especially executive and legislative actors in the political branches—which incorporates religious values and symbols into political discourse as a way of asserting state dominance (Rousseau 1762; Cranston 1968; Bellah 1967). Civil religion is a political code that promotes national unity and state supremacy, by evoking religious values and rituals, all the while managing complex issues of religious pluralism and tolerance—but not always to the satisfaction of competing factions, such as the deeply religious and the deeply secular.

Another set of institutional influences on the juridical field—again moving from the political field to the juridical field—examined are the political influences on judicial outcomes in freedom of assembly cases. As detailed in the chapter on assembly, there have been several, long-rang historical shifts that have changed the legal geography of the freedom of assembly. These are shifts in urban planning logics from the 1950s to date, the emergence of zero tolerance policing in the 1980s, and the changes in the management of election politics—particularly the presidential conventions once they started airing on television. These influences on the juridical field are discussed in the chapter on assembly, which covers the regulation of assembly in places such as parks, streets, and lunch counters. It is shown that bureaucratic repression is slowly replacing some forms of violent repression, in certain places and under certain circumstances,
particularly in well-controlled, large-scale, urban protests of the global era (at least in
democratic settings, such as the U.S.) The downward pressure of repression, on political
participation remains, but is less visible to the public eye because not visibly violent.

In addition to looking at these political influences on legal change, this study also
addresses movement across fields—law to journalism, as the logics of the juridical field
shape media logics and the production of news, pursuant to cultural and economic values.

1.5.3 Influences of the Juridical Field, on Journalism

Regarding influences of the juridical field, the emphasis is on one of the most
powerful fields in civil society and the protected realm of civil liberties—the journalism
field. How the logics of the juridical field influence media ethics is detailed in the chapter
on freedom of speech, chapter 5. (Other important fields exist in the civil sphere, but
these fields cannot all be addressed in the space of a single study. The institutional
mapping to be produced is partial for that reason, among others.)

The journalism field is a professional sphere that ranges in widely in its functions,
or purposes, within the community of institutional fields. Media outlets or journalism
businesses are often merely storytellers, distributing sensation and scandal—but,
sometimes, are watchdogs looking out for the public good. Their activities range from
publishing stories that entertain mass publics, on one end of the spectrum, to providing
indispensable, political critique, including investigative journalism that uncovers state
corruption and criminality, on the other end of the spectrum.

Journalists, discussed in the chapter on free speech, use a complicated mix of
economic and cultural logics to justify their publishing decisions, including questionable
publishing decisions, in accord with codes of professional ethics. These codes are formalized legitimations. They paradoxically mirror the legal categories devised in First Amendment discourses about the divisions between public and private spheres—even though the journalism field is the preeminent field in the realm of civil liberties, and an area that is ostensibly beyond the law, under the terms of the amendment. The division of public sphere from the private sphere, however, is often illusionary or a misrecognition used to mask power relations, as theorized in critical legal studies.

In mapping the influences of juridical logics on the journalism field, it will be shown how the logics of categorical thinking, false dichotomies between the public and private, and a tendency to blame the person rather than the social situation, are translated from First Amendment law, into the journalism field and into legitimations offered by journalists, in accord with the hierarchies of each field, the juridical and journalism fields.

1.5.4 Social Movements as (Background) Functional Rebel

Returning to the professional fields to be mapped, it might be said that the field of social movements is a profession. Social movements serve not a range of functions and purposes, as do journalists in the media field; instead, their function is challenging the state—including through nonviolent civil disobedience, a tactic or practice that is meant to draw attention to—in the public sphere, via ritual and performance—the failures of law to comport with its deepest values or underlying moral codes.

Arguably the field of social movements also should be analyzed in depth and given a place on the map of institutions, along with journalism actors on the civil society side, and the police, politicians, and judges, in the state fields. It is important to give
social movements a place on the map, in order to round out the dynamics by
acknowledging the important, functional role of movements in the public sphere. Placing
movements, in the illustrations of the public sphere produced here, would detail more of
the pertinent institutional logics and relationships that exist, in conflicts and negotiations
regarding the limits of state action, and the protection of civil liberties.

Yet there is great deal of empirical scholarship on social movements, their
formation and trajectories, in the sociology of law, particularly where that disciplinary
subfield intersects with the study of collective behavior and social movements, and in
political sociology. Thus, social movements are backgrounded in this study.

In the vast literature on mobilization, on activist behaviors, and on social
movement organizations, and on related specialty topics—such as protest policing and
legal mobilizations—there has been a strong foundation poured for locating social
movements in the social spaces of civil-liberty disputes and litigation. In this project—
creating an institutional mapping of the public sphere—additional empirical analysis of
movements would be worthwhile, but is not strictly necessary, due to the existing
scholarship and limitations of space. This study will not look directly at the institutional
relationships of movements and police, or movements and lawyers, or of movements and
media, because there is significant work in those areas of cross-institutional research.

The knowledge base is already broad and wide enough to fills in the blanks on the
mapping—or at least provide ample foundation for understanding. In this study, then,
social movements will not be directly analyzed. Their statements of legitimation and their
use of lawyers and the media will not be direct addressed.
Instead, this study will emphasize the political-economic influences on the courts and juridical logics, and the influences of First Amendment discourses on the journalism field as a core field within the protected realm of civil liberties. In this way, a new light can be cast on the shape of the public sphere, looking at courts and juridical logics, rather than directly at movements. The analysis of juridical logics will add to what we already know about the role of social movements as challengers of state authority.

Although social movements are backgrounded, the role of activists is theorized, in the background. Following Durkheim (1953) and Thoreau (1854), this study theorizes social movement organizations, and the activists within those groups, as functional rebels, who insist on the rights and duties of civil disobedience—a critical practice that highlights state failures, marks the legitimate boundaries of law, and forces the closure of the state, as separate from civil society. Durkheim states:

> We are not obligated to bend our heads under the force of moral opinion. We can even in certain cases feel justified in rebelling against it. It may, in fact, happen, that… we shall feel it our duty to combat moral ideas that we know to be out of date and mere survivals (1953: 16).

His point is that the law is not always right. As movement actors recognize, the law is sometimes at a distance from its own ideals—from the moral consensus or sensibilities of groups in civil society. In legitimacy contests over state practices, activists are functional rebels, who violate the law in the practice of nonviolent civil disobedience as a moral performance. These are critical pathways to legal change, making the law closer to what it should be or can be. Excessive political influence, especially in the regulation of civil liberties results in a chilling effect, shutting down this vital role of activists.
1.5.5 Existing Scholarship on Field Dynamics

Having asserted that there is significant work in the areas of institutional relationships between movements and police, and between movements and lawyers, and between movements and media, a few examples are in order. The study of media and movements is incredibly vast and cannot be summarized in a few pages. Regarding institutional relationships between movements and police, there have been several important studies in the specialty area known as protest policing. These studies examine, for example, the types of the situational threats perceived by the police during street protests (Earl and Soule 2006; Vitale 2007; Davenport and Soule 2009). These studies establish that the perceived threat of violence emergent at the street level corresponds to the use of force. Other studies show that policing is becoming more repressive, but not violent at large, anticipated protests—where police use neither negotiation or force, but instead a mix of surveillance and the strategic incapacitation of activists via preemptive arrests (Noakes and Gillham 2006; Gorringe and Rosie 2008).

Turning to another example, there have been many studies of movements and lawyers. These studies look at how movements use lawyers to attain new rights or the recognition of latent rights. Sarat and Scheingold (2006), for instance, studied the use of "cause lawyers" by social movements, addressing the topic of how activists employ lawyers to obtain civil rights and liberties. Other studies addressed movements to attain civil rights, women's rights, gay rights, and equal employment rights.

At the intersection of the sociology of law, and the study of collective behavior and social movements—as a subfield of political sociology—scholarship tends to focus
on legal mobilizations directed to civil rights (McCann 1994, 2004; Sarat and Scheingold 2006). Researchers in this area study the characteristics and effects of legal mobilizations around substantive rights, such as civil rights, employment law, and family law. They are less likely to study civil liberties and the juridical regulation of those liberties, the topic addressed in this study.

For example, McCammon, Campbell, Granberg, and Mowery (2001) examine how the first wave of the women's movement gained a constitutional amendment recognizing that women have a right to vote. Other legal mobilizations studied include: the Townsend movement for pensions (Amenta, Carruthers, and Zylan 1992); the civil rights movement that resulted in federal legislation (Morris 1981; McAdam 1982); the gay rights movement, which seeks ordinances specifying that sexual orientation is a protected category at law (Bernstein 1997); and legal mobilizations directed to obtaining equal employment opportunity (Burstein 1991). Elsewhere at the intersection between sociology of law and social movements, interesting work also has been accomplished about the processes of "legal framing" of rights, in the mobilization of legal categories as a way to express grievances (Pedriana 2006). Yet these studies do not look at juridical decision making in the area of civil liberties. The focus instead is on how police view social movements, what the police do to control protests, how lawyers work with social movements, or how movements engage law to obtain rights and advantages.

Within political science, scholars have examined changes in public opinion regarding civil liberties, in relation to historic events. Davis and Silver (2004) theorize civil liberties in the post-9/11 context, looking at shifts in public opinions regarding
tolerance for the exercise of fundamental freedoms. In a similar way, Robinson (1970) examines varying public opinions regarding tolerance for acts of civil disobedience, after the police riot at the Democratic National Convention in Chicago in 1968. But again, these studies do not examine how political influences shape the juridical field, or how the courts regulate civil liberties, including changing the scope of civil liberties, such as assembly freedoms. These studies do not ask whether juridical decisions on civil liberties are being influenced either by historical events or public opinion, but instead ask what beliefs or events are shaping public opinion regarding civil disobedience.

Because these topics—public perceptions of civil disobedience, street level interactions between police and protesters, and the use of lawyers by movements—are reasonably well covered in the literature, these trajectories, by and between activists, police, and lawyers, are referenced only tangentially. This study relies on existing scholarship regarding these interactions. There is no detailed analysis of street level interactions of protesters and police, or analysis of other social movements questions—such as the differential success of legal mobilizations and the use of cause lawyers. There is no analysis of how movements use the media; however, there is analysis of how the state uses media to shape perceptions of threat in the months before anticipated protests.

Looking at protest policing from the institutional level of analysis, this study takes another angle on the topic of threat. Here we will look at the ways that the police and cities work together, at the institutional level, and within the state apparatus, to develop a perception of threat in the general public sphere, related to anticipated street protests, both far in advance of the protests and afterward protests occur. This work of state actors
to legitimate future and past uses of repression is termed the "licensing of repression" (Davenport 2007). By looking at the meso-level, it is possible to see that the perceptions of threat posed by protest—both physical threats of violence and cultural threats to the status quo—can be altered by strategic action within the state, and by the state in the mediated public sphere.

These briefly summarized studies and concepts, some of which will be expanded on, in the pages that follow—establish that key relationships exist between the police officer's perceptions of threat and corresponding levels of social control exercised by the police officers during street protest; and, also, between historical events and public tolerance civil disobedience. In contrast to earlier studies, this project looks not at the street level dynamics, but at the institutional logics. For example, this study examines the juridical codes used by judges, as state actors, to manage the expression of pluralism in public spaces. This study also looks at the legal categories used by judges to legitimate the nearly absolute right of free speech, and the institutional logics of zero tolerance policing that have influenced courts in the regulation of dissent in public places.

1.5.6 Lawyers as Brokers between State and Society

Looking across the fields of state and civil society, there is a fifth professional field—mentioned but not expressly addressed—that is important to the mapping project: the field of lawyers. Lawyers have one foot in civil society and one foot in government, both in politics and law (Graber 2010). Lawyers are brokers, translating the professional codes of other fields, such as movements and the police, into legal fields such as the juridical fields. Lawyers bridge the gap between state logics and non-state logics.
In this study, lawyers are viewed as brokers along the sensibilities of the authors of *Dynamics of Contention* (2001). There McAdam and coauthors theorize that *brokerage* is a social mechanism (Hedström and Swedberg 1996; Gross 2009). Thus, lawyers act as "travelers" between state and society, or as brokers between two networks or groups, delivering messages and altering alignments of competing values between the two fields. In this role, they translate the logics used by their clients (often activists) into juridical logics, and argue for the maintenance of a boundary between state and civil society, under constitutional law. In particular, civil liberties attorneys working for the American Civil Liberties Union and related organizations, perform a vital brokerage role. Even though they argue for the state-society boundary, civil liberties lawyers also create and maintain intersections between the *legal field*, which is in part a field of the state, and also is part of the field of social movements, in civil society and challenging the state.

In sum, the fields, dynamics and actors to be mapped in this study are: police, courts, lawyers, activists, and journalists, with emphasis on the courts as the central player, and the activists (importantly) operating as functional rebels in the background.

**1.6 Weberian Principles, Neo-Durkheimian Perspective**

In this project, a Durkheimian position is taken in the analysis of social problems of consensus, conflict, and pluralism. By Durkheimian position, it is meant that the position taken is collectivist. The assumptions of a bare-boned, methodological individualism, supposedly proposed and adopted by Max Weber, are rejected. At the same time, the strategic agency of individuals is acknowledged as a baseline source of innovation in practices and norms, as Weber explained.
Certainly, individuals are the prime example of a pure case, because individuals are "biologically irreducible," but individuals are not the only case in social analysis (Abbott 1992: 63; Byrne 2009). Neither are aggregates of individuals the only type of case, nor are jurisdictional entities, such as counties and national states, the most natural cases. In fact, Sassen questions the "caseness" of the national state (Sassen 2006). Casing, or theoretical selection of cases for this study, is discussed in chapter 3 on research design.

In this introduction, it stressed that the professional fields or institutions to be mapped are understood as emergent realities—that is, as social facts having independent existence and force, over and above individual-level, or aggregate of individual-level, effects. Several Weberian principles and processes are also adopted here, as a baseline for this partial theory of legal change, within the law and society tradition. Yet the dominant perspective taken in this study is not Weberian, but Durkheimian.

Although this project is Durkheimian—or rather neo-Durkheimian, it is also is Bourdieuan. The theoretical approach also incorporates the insights of critical theory and the political economy perspective, but breaks with strictly Marxist arguments of historical materialism, as did Pierre Bourdieu, on the ground that culture has relative autonomy.

Weber's theory of how practices become norms, and eventually harden into law, is accepted as a description of the foundational process, happening at the baseline, or micro-level of interactions, that undergirds the institutional level analyses of this study. In *Economy and Society*, Weber outlines three possible theories for how law changes. First, there is the implausible (or ghostly) theory that something in the nature of a folk spirit, or
"change in the direction of the wind," results in new norms and new laws. This theory is unsatisfactory because of its post-hoc, or backward-looking, stance. Once a change happens, the theorist can point to the change itself as explanation for its own existence, but there is little explanatory power.

Second, there is the theory that an external change in conditions—such as a structural realignment, exogenous to the setting studied—results in the production of new norms and laws. This theory improves over the first, but externalizes the things on which it needs to focus. And third, there is the theory of legal change that change is emergent at the level of subjectively motivated individuals, who choose their behaviors to suit their interests (1922: 750-55). Of these views, Weber preferred the third. A similar view is adopted here.

The micro-level interactions of subjectively motivated individuals, operating within social spheres or institutions, are the baseline source of new practices—especially contested practices. This study also accepts—as real—social facts, emergent at a higher level, within a stratified reality. The study focuses analysis at a higher level than individual, as discussed, above, in the section on data, methods and level of analysis. Social facts located at the meso-level include the collective beliefs and discursive formations discussed earlier.

This collectivist view, generally speaking, is Durkheimian, but Weber also accepted collectivism—at the very least, he accepted the social force and elective affinities of collective beliefs and identities. Indeed, in his famous essay (1930), Weber suggests that collective identities, based in religion or conscience, resulted in a new form
of capitalism. He theorizes that innovative beliefs and practices in the religious sphere were translated into, and altered, the practices of capitalism.

On reflection, what Weber suggests, with regard to the emergence of new norms and laws, is essentially a collectivist process. When discussing the emergence of new norms and the creation of law, Weber offers the following pattern description of the legitimation pathways—occurring at the micro-level first, but then emerging in forms of consensus. First, habits start to be experienced by the individual as binding norms, then the norms become recognized in a *plurality of individuals*; then the norms become a consensus of expectations in a collectivity, which norms eventually require coercive enforcement; and so, eventually, there is transformation from norms or convention, to customary law, to formal law (1922).

This is his sociological theory of legal change, centered on the subjectively motivated individual. Weber made clear that his view of legal change, from individuals through formal law, is a pattern description, not a causal explanation (1922). Although his description is that individual agents, in the aggregate, are the source of law, the description also appears to accept the social forces exerted by consensus formations at the level of collectivities. Rather than debate the ontological issues of a difference between aggregates of individuals and emergent collectivities (having a separate, ontological existence)—and the differences between pattern descriptions and explanations—let it be assumed, in this study, that collectivities and other types of social facts exist, and exert social force, both enabling and constraining, over and above the force of individual action.
For example, activists form groups, which form into social movements and social movement organizations. These movements and organizations are collectivities that serve as functional rebels in the public debates over public policy and over civil rights and liberties. These collectives question majority rule; resist excessive regulation; and eventually, with the help of lawyers and judges, lead the way to changes in the formal law. By this process, the law is often improved, in that law becomes more closely aligned with shared beliefs and practices. These changes in law relate to substantive rights (such as civil rights of non-discrimination and equal protection) and to civil liberties.

Taking a Durkheimian perspective, the collectivities within a larger society, serving as functional rebels at the meso-level, act as checks on the moral code or underlying beliefs of the wider society. This source of legal change is critical to the growth of the social unit. Durkheim rejected analytic individualism, or methodological individualism, which ignore the force of collective agents and of social facts, including the law as a social fact. For a more in-depth discussion of Durkheim's break with analytic individualism, Taylor (1973) provides the context for understanding the Durkheimian perspective on deviance, crime, civil disobedience, and functional rebels. The neo-Durkheimian theories adopted here are outlined in chapter 4 on the regulation of religion, and the Bourdieuan theories are outlined in chapter 5 on free speech.

To summarize a few of the introductory points already made, the goal of this project is to map the relationships and associations by and between the fields within the state and the fields within civil society. The competing logics in each profession studied here are neither purely cultural nor purely economic, because both cultural values and
material values have social force. Further, as just explained, a neo-Durkheimian perspective is taken, incorporating insights of contemporary theorists, including Pierre Bourdieu. The empirical chapters to follow will build a map showing structure and cultural values in some of the social spaces in the mediated public sphere that influence the boundary between legitimate state action and civil society.

1.7 The First Amendment as Clash of Absolutes

Because this is a study of the First Amendment, it is a study about the clash of absolutes. When we think about the First Amendment, it is usually in absolute terms. The amendment provides for freedom from state interference, in fundamental areas of social life, including beliefs, practices, and challenges to political authority. It creates a realm of civil liberty in which the state—whether the police, an executive, or a court—cannot tread. It says in absolute terms that there is a right to free speech and freedom of religion, and to peaceable assembly. By its plain terms, it sets a boundary between legitimate state action and civil liberties, because it says that the state can "make no law" regarding these fundamental areas of life. U.S. Const., amend. I (1791).

Understanding—and upholding—the absolutes and the idealism of the amendment is critical. There is right to free speech and a right to assembly. These are absolutes under the amendment. In practice, people and groups must demand their freedoms, in terms of absolute rights, in order to resist the general tendency of the state to infringe on the protected realm of civil liberties. But in everyday life, this type of "rights talk" often fails to acknowledge that there can be a clash of rights (Glendon 1993). Social scientists and theorists must do more than discuss fundamental rights as absolutes. They
must do more that discuss fundamental rights in the abstract. The First Amendment states an ideal that must take form, in material and practical effects—or the ideal will not be realized. One paradox of the First Amendment is that its absolutes must be maintained as truths of law, and demanded in the pursuit of the ideal, but within actual social spaces, including physical places such as parks and streets—the ideal is unlikely. There is always law of one type or another, infused into the social world. There is even law in frontier spaces and borderlands. Sociologists, in contrast to activists, lawyers, and philosophers, need to do more that offer philosophical musings—or participate public contests about the ideal. Accordingly, This study will use sociological rigor and discipline, to study the pursuit of the ideal. The first step is examining actual situations or cases, in comparative analysis.

1.8 Offending the Spirit of the First Amendment, Boston 2004

The empirical puzzle that started this project was a severe limitation on the right of assembly in a critical, democratic space: the presidential national convention. The case—actual situation engaging a clash of First Amendment values—arose in the winter of 2004, in a historic city, Boston, Massachusetts. Boston is known for its timeless locations and legendary stories of freedom, in the pursuit of lofty, democratic ideals. The locations include the original Liberty Tree, and the stories include the original Tea Party.

In the winter of 2004, months before the convention, police agencies and activists were negotiating the terms of the anticipated social control needed for the anticipated protests, which were expected at the upcoming Democratic National Convention. The Boston Police Department floated a plan that would require protesters attending the
convention apply for permits to stand in a metal cage, known as a "free speech zone," far away from delegates. The police said that nothing would be decided for months and that they were open to input from the protesters ("Convention Plan Puts Protesters Blocks Away," *Boston Globe*, February 20, 2004).

This was not the first time that a "free speech zone" or "demonstration zone," which activists call a "protest pen," was used at a presidential convention, but it was surprising in its physical design—and its legitimation in the courts. The parties could not agree on the use of the protest pen, and so a lawsuit was filed and a court opinion issued, *Coalition to Protest the Democratic National Convention v. Boston*, 327 F. Supp. 2d 61 (2004). The court ruled that the pen offended the spirit of the First Amendment *but nevertheless compiled with the First Amendment*. The court said that the protest pen was likely unsafe, was an offense to the spirit of the First Amendment, but that it was *not unlawful*.

It was this empirical puzzle—a court opinion that considered free speech zones and decided that they both offend and comply with the First Amendment—that lead to this study regarding the professional logics of legal change in civil liberties law. The study was later expanded to be about not only assembly, but also speech and religion. When unraveling these empirical puzzles about judicial legitimations, it was not enough to look at the protests through the lens of social movements theory. Drawing on another subfield, the law and society tradition, provided important perspective. Social movements theory was insular in the sense, within the specialty area of protest policing, it examines primarily the micro-level interactions between protesters and police, and not the historical
and institutional processes that produced the free speech cage. Scholars in social movements tend to focus on the state and the protesters, seeing the free speech zone in a similar way to the photographs of police in riot gear, discussed above. Instead the long-range historical shifts, and pathways of legitimation, within, between, and among the many professional fields that produced the cage. These historical shifts relate much more broadly to the institutional changes within the political economy of place, as shown in chapter 6 on the freedom of assembly.

Later that summer, in 2004, the New York Police Department used capture nets, blanket or mass arrests, and long detentions to sweep the streets during the Republican National Convention. Rather than seeing those protest policing tactics as emergent from situations on the ground during the RNC, it is important to look at related cases of several conventions and test competing hypotheses regarding the common historical shifts and paths of legitimacy that produce these protest policing tactics at the conventions.

Because of the influence of law on these protest policing outcomes, a sociolegal analysis is required to understand the legitimation of protest pens, capture nets and other tactics. The puzzling use of "free speech zones" or "protest pens" during the presidential national conventions was the starting point of this research. In a general way, these policing tactics and reading the case law read to simple questions. How can it be that the free speech zone both offends the spirit of the First Amendment, but also complies with the First Amendment? What explains why the use of free speech cages outside of the presidential conventions is legitimated by the courts? How is it legitimated by the police? By the general public? How do these legitimation claims in the public sphere influence
the courts? To answer these questions, which were, over several months of preliminary analyses, later refined into the research questions (presented above in section 1.3), it was decided a sociology of First Amendment dynamics had to be developed. This plan lead to the creation of a series of map, or series of representation figures, based on social research, outlining the structures and cultures of dynamics in the mediated public sphere that structure the boundary between legitimate state action and civil liberties.

The proposed use of a protest pen to hold the demonstrators outside of the presidential convention in Boston was the very embodiment of the clash of absolutes, between security and liberty. Were the protesters going to be free to engage in collective action? Or were the streets going to be locked down in conditions of law and order? When time had run out and it was too close to the convention to negotiate the matter any further, the dispute and public debate turned to the courts. In an emergency court hearing, the local federal district court held:

A written description cannot begin to convey the ambience of the DZ [Demonstration Zone] site… it is a sensibility conveyed in [famous] etchings …[called the Fanciful Images of Prisons. It is a grim, mean, and oppressive space … a forest of girders that obstruct sight lines… Let me be clear: the design of the DZ is an offense to the spirit of the First Amendment. It is a brutish and potentially unsafe place for citizens who wish to exercise their First Amendment rights. But, given the constraints… and the BPD's [Boston Police Department's] reasonable safety concerns..." Coalition to Protest the Democratic National Convention v. Boston, 327 F. Supp. 61, 67 (2000).

Next, although not to be expected from the tone of the judge's opening remarks, the court said that protest pen was legitimate under the First Amendment. To understand how and why a federal court would legitimate the use of protest pens, a broader analysis of
legitimation strategies around changes in First Amendment law was required. That analysis is accomplished in chapters 4 and 5, regarding religion and speech.

Following those analyses, a geographic analysis of First Amendment lawsuits and the political economy of place was completed, in order to explain the current protest policing tactics. In these tactics, cages, capture nets, and mass detentions have been considered acceptable ways to regulate peaceable assembly under the First Amendment, which prohibits state action infringing on peaceable assembly. The analysis, to meet requirements of social research must be set in a context and include competing hypotheses. In this instance, the hypotheses are the "negotiated management" thesis and the global city thesis, which are introduced below (see, section 1.8.2). These theories offer varying levels of explanatory power regarding a common problematic in sociolegal studies, the problem of law in action, law on the books.

1.8.1 Law in Books, Law in Action

The Boston case presents a hard case, in which the ideal of a law is not met by the practice. The outcome in the Boston lawsuit is an example of the "law on the books" failing to match "the law in action." The gap between the law in action, law on the books was first explained by jurist Roscoe Pound (1910). It is this problematic—between formal law, and law as practiced—that, gave the both the Legal Realist tradition, and the Law and Society tradition, their foundation (Friedman 1986; Carrington and King 1997).

This study looks at current protest policing tactics within the context of state regulations across all three clauses of the Amendment, focusing on the problem of law in action, and law on the books—when the law recognizes a right, but does not provide the
means to enforce it, or instead apparently uses policing efforts to infringe on the right, as in the Boston case of the 2004 DNC, and the New York case of the 2004 RNC. Another way of expressing this problematic is to ask: What explains gaps between the law's ideal and its actual manifestations? The difference between ideals and practice is one type of problem regarding differences between law on the books and the law in action.

In the sociology of the First Amendment, the two perennial problematics are the same or very close. The law on the books states an ideal, while the practice, or law in action, sometimes falls far short. The law in action, in these cases of protest policing, includes judicial opinions, as texts recording the historical changes in law and the instantiation of discursive codes shaped by political interests, as well be uncovered in the empirical chapters.

To understand what social forces brought about the judicial outcome in the Boston regarding the law of protest policing, we must look beyond the theories of social movements about protest policing, and into history of law, and the political economy of place, including the discursive formations of politics that bring about legal change in the area of civil liberties. We must investigate law in action and law on the books.

1.8.2 Beyond Social Movements Theory

The practice of peaceable assembly is a law and society topic not often studied by law and society scholars. It is more often studied by scholars of social movements and collective behavior. Within social movements theory, one prominent explanation of protest policing is that called "negotiated management." This hypothesis is compared with a competing hypothesis, a global city hypothesis, in the chapter on assembly, in
order to see what theory better explains the use of protest pens and capture nets. The negotiation management theory is that, before the violent protests outside of the presidential national convention in Chicago in 1968, the police were likely to use "escalated force" to control street demonstrations, but after that watershed event, the police and protesters started to work together and to agree on the parameters of protest. This is a consensus theory.

According to the negotiated management thesis, after the 1960s there was a new respect for First Amendment rights within policing agencies, and so increased tolerance for some forms of civil disobedience, in exchange for a reduction in violence (McPhail, Schweingruber, and McCarthy 1998; McCarthy and McPhail 2005). According to this explanation, the 1990s is an era of "negotiated management," in contrast to the 1960s which was an era of "escalated force" (McPhail, Schweingruber, and McCarthy 1998).

In the initial article, McPhail and coauthors attribute the shift—from escalated force to negotiated management—to several factors: political fallout of the urban riots of the 1960s, including the national commissions on violence after those riots; police training initiative; and the development of an elaborate permit system for demonstrations, monitored by the National Park Service. McPhail and colleagues also acknowledge that the U.S. Supreme Court issued several important opinions on the regulation of assembly and the "public forum," which divides places into categories (public/nonpublic), but they do not elaborate on the judicial action (c.f. McCarthy and McPhail 2006). In sum, they argue, the federal government was "instrumental in developing and disseminating new strategies" to police agencies and ushered in the negotiated management (1998: 54).
In a later article making similar arguments, they state their important assumption that police agencies and activists are purposive actors (McPhail and McCarthy 2005). In that article, McPhail and McCarthy take the position that protest policing interactions are fluid and unfolding at the micro-level. They also say that purposive actions taken to achieve the goals of the police and the protesters are "seldom taken in a stable, routinized environment, particularly if other actors are present" (1005: 14). This is a valuable insight, because protest is often not stable or routine. Yet, protest policing is not emergent at the ground level. Moreover, scholars, taking a conflict perspective, argue that protest in the global era is characterized by strategic incapacitation through mass arrests, rather than either escalated force or negotiated management (Gilliam and Noakes 2006, 2007).

As argued in chapter 6, and developed there, greater insight into the management of protests is gained through a law and society analysis, looking at the meso-level, and considering such questions as why the courts began to use a public forum analysis in the first place. The freedom of assembly might involve routinized and scripted activities—even if street protest is disruptive in many cases and does not appear to be routine. As explained by Oliver and Myers (1999):

Experienced event organizers, police, and reporters are more like members of an improvisational troupe: the script is not fixed, but the players have worked together before, they follow general guidelines, and they can predict each other's actions. Most public events—often even the majority of protests—have permits, and the organizers and police jointly agree upon the time, place, and manner of the event. Even in unpermitted disruptive protests, experienced protesters and police often negotiate the terms of the event, agreeing on what conduct will and will not result in an arrest (Oliver and Myers 1999: 43).
Indeed, many aspects of protest policing are routinized through the permit system and the other legal requirements. Of those requirements, one of the most innocuous sounding is that assemblies are subject to reasonable "time, place, and manner" (TPM) restrictions, which can be enforced, under the First Amendment, to safeguard public areas. These TPM restrictions are contrasted with restrictions based on content, meaning restrictions based on the content of what the protesters have to say. As shown in chapter 6, however, TPM restrictions, taken in the aggregate can become a form of zero tolerance policing in which there is no legitimate place to protest, because all of the times and places are being used or reserved for social functions other than dissent.

The use of TPM restrictions is a long-term trend in the law, that has institutional effects on social movement practices. While social actors from the various fields work together to plan a protest and to complete an ongoing protest in scripted ways, it is important to realize that a lot of the routinization and institutionalization of protest takes place in locations other than the street, such as courtrooms and police-department conferences rooms.

These state actions, occurring within the professional spheres of the state, influence protest policing outcomes. The state—whether the strong arm of the police officer or the logical authority of the judge—has superior bargaining power in negotiations with demonstrators. According to critical theory and professional logics, actors within the state likely would prefer to have protest be as routinized and predictable as possible, in order to maintain public order and national unity.
Negotiated management, as a theory, or simply a description of conditions, is repeated in work by scholars in a variety of fields, including criminology and other disciplines that do not examine protest directly. For instance, scholars in the National Research Council, in a comprehensive study of policing, focused on issues of organized crime, terrorism, torture, surveillance, police corruption, and other matters. When it came to protest policing, these scholars repeated the view of leading movement scholars—that protest policing is characterized by negotiated management (National Research Council report, *Fairness and Effectiveness in Policing*, 2004: chapter 5).

Critical criminologists, political scientists, and movement scholars are rightly focus on issues of violence and state criminology. There is critical scholarship being accomplished on state criminology (Chambliss 1989; and Barak 1990); and on violence in U.S. history (Gurr 1989), as well as on the unlawful surveillance of activists (Cunningham 2004). Yet there are unanswered question regarding the validity of the negotiated management thesis, as a description of conditions, much less an explanation of policing outcomes. The research question is whether the negotiated management thesis explains all types of protests, for instance large-scale protests. This question was raised by Gillham and Noakes (2006), and is addressed here in chapter 6.

1.9 Organization of Chapters, Summary of Findings

This project is organized by three clauses of the amendment, religion, speech and assembly. In each empirical chapter, only one particular, ideal-type of case, arising under each clause—and taking place in physical spaces such as parks or streets—is addressed. Sets of similar cases, selected purposively, are analyzed using comparative, multi-case
narratives analysis of institutional processes (Abbot 2009). In summary, we look at three social problems—or clashes of absolutes—in serial order, following the three-part form of the First Amendment. We start with religion, then move to speech, and finally to assembly, which is the culmination of the First Amendment rights.

First, in chapter 4, we look at the clash between freedom of religion and freedom from religion. The typical case is the commonly recurring dispute about placing religious symbols in public places, such as parks and courts. The particular question of that chapter is: *What political influences shape the outcomes of First Amendment lawsuits?* (Research Question No. 1, above.) In that chapter, only U.S. Supreme Court cases are addressed, rather than lower court opinions. The judicial data is examined, as text, to locate the exogenous codes, if any, influencing outcomes.

It is found that the political code of nationalism, or civil religion, influences outcomes in the religious-display cases. This is not a statement about *how* or why nationalism influences First Amendment law, but a statement of *what* influences First Amendment law. The implications of nationalism on First Amendment values are drawn out in the conclusion to this study, where avenues of future research are discussed.

Second, in chapter 5, we look at the clash between the freedom of speech and the individual right to privacy and dignity. There, the typical case is the commonly recurring dispute about individual people who are accidentally caught up in the news. The analysis looks at how one case of this type of dispute, the case of a baseball fan who was humiliated in the mediated public sphere, after an accident at a Major League Baseball game. This case is compared to similar cases of "involuntary public figures," from before
the Internet, to eliminate the Internet as a necessary cause of this type of clash of rights. The particular question of that chapter is: *What are the juridical effects of civil liberties litigation on individual rights of expression and dignity?* (reading together Research Question Nos. 2 and 3, above.) It is found that juridical logics of categorical thinking and the separation of public and private spheres—logics that tend to favor political and economic elites—influence journalism ethics in structured ways that mimic the structure and logics of the courts. This is not an explanation of why political-economic values influence and structure the legitimations of courts and journalism outlets, but instead a showing that these values actually do influence courts and the media. The implications of political-economic logics on First Amendment values are drawn out in the conclusion.

In chapter 6, we look at the clash between security and liberty in disputes over protest policing, such as in Boston in 2004, and ask this key question: *What political influences shape the outcomes of First Amendment lawsuits regulating assembly?* First, a legal geography is developed, showing that public assembly is increasingly contested, rather than being agreed upon. Over the decades of the 1960s to the 1990s, there may have been negotiated management somewhere, but there were also increasing numbers of disputes over assembly, decade over decade, across all U.S. regions. In a legitimacy-and-law dynamic, these disputes entered the courts, and the courts legitimated an increasingly bureaucratic repression, using such constructs as "time, place, and manner" restrictions and categorical analyses of what counts as the "public forum." Second, two historical shifts in the production of place that might explain that trend are outlined using secondary sources: (1) massive building in the postwar years resulted in differentiations of place
between city and suburb, and coincided with the formation of mediated spaces, known as media events, for instance televised conventions; and (2) the emergence of zero tolerance policing, which strictly regulates urban spaces and equates any type of disorder, including civil disobedience, with violent crime. It is argued that these trends in the production of space have been translated into juridical discourses regulating assembly. The juridical outcomes extend the new differentiations of place (physical, mediated, and political) in ways that match the logic of zero tolerance. The courts use categorical logics that divide public and private in regulating urban spaces, so there are few places left for dissent (even though courts sometimes maintain liberties). The "time, place, and manner" rule and public forum categorization are regulations that approach zero tolerance, as policing logics are translated into judicial outcomes. Under these laws, one location after another, and one use of space after another, is de-legitimated as not the right time or place for dissent—until there are few places left for dissent. As theorized by Sassen (2006: 330), one logic of late globalization is to concentrate economic control in major cities and organize urban territory to support vast distributions of power. Building on her work, and the work of Gillham and Noakes (2006) and Davenport and Soule (2006) in questioning negotiated management, a theory of the new political economy of place is developed. Looking at trends in the differentiation of place and zero tolerance policing, we extend the global city thesis, and what Sassen calls "Territory-Authority-Rights" (TAR) meaning configurations of political space, to give an account for judicial regulations of assembly.

At this juncture, we have two steps: discuss the history of the amendment (chapter 2) and methods (chapter 3). Then we can turn to the empirical analyses.
CHAPTER 2:
THE FIRST AMENDMENT AND LEGAL CHANGE

2.1. The First Amendment as Text and Historical Achievement

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
U.S. Const., amend. I (1791). The amendment appears to be a random list, but it is more than a collection of unrelated rights.

The type of rights listed in the First Amendment are known as civil liberties, because they set a limit on government action and designate a realm of freedom protected from governance by state actors. The protected realm of civil liberties is a social space in which government actors required to refrain from interfering with human interactions, such as expressive conduct in public discourse (the individual right to speech), and actions taken to effect political change, including gatherings of people that include collective action (the collective right peaceable assembly and petition the government).
Civil liberties are only asserted against government actors and cannot be asserted against other actors, such as employers or spouses.

Civil rights, in contrast, are rights asserted against the government and other actors, such as employers (but not usually against spouses). Civil rights can also be
asserted against owners of places of public accommodation, such as hotels and restaurants because they operate in commerce that is properly regulated by the government. The legal nuances are not important in this study. It is important that civil rights are about discrimination based on race, gender, and other categories of difference. The subject of this study, however, is civil liberties. The right not to be governed.

The questions and values debated in the area of civil liberties span many social settings, including religious beliefs and practices; the dissemination of news publications, claimsmaking and statements of opinion in public discourse; and street protests intended to challenge political authority and demand change. In some cases, the dignity or integrity of an individual human is involved, in other cases the dignity or integrity of a group.

These settings, and the values they instantiate, are vitally important to the quality of human life. According to the First Amendment, these values and actions are in the realm of civil liberties, meaning they are for the people to determine, by and for themselves, without government control. The First Amendment provides that the government must not make law regarding these settings, values, and topics, which are left, by constitutional mandate, to the decision making and actions of the people, whether as individuals (in the sense of liberal, political philosophy) or as groups. Matters of conscience, of truth and opinion, and of public gatherings and collective political action are in the realm of civil liberties, a social space not to be managed by the state. All of these ideas, and more, are found in the text of the First Amendment, which contains only 45 words but includes invisible meanings (Tribe 2008).
All of the human rights so far mentioned—the various rights of social groups and individuals to be free from the power of government, as listed in the First Amendment—were recognized before, often long before, in other rights-related documents. For instance, as is commonly known, in the 13th century, the Magna Carta expressly limited the powers of the King of England and required that he openly acknowledge civil liberties, including the separate authority of the church, as opposed to the authority of the state. This is uncontested history. Early recognition of the freedom of religion is reflected in the First Amendment's first two clauses on the establishment of religion and the free exercise of religion. Under the Establishment Clause, the government cannot establish a state religion, while under the Free Exercise Clause, the government cannot interfere with religious expression; however, the meaning and parameters of the two religion clauses have long been debated (Garry 2004; Neuhaus 1984).

For another example, in Declaration of the Rights of Man, which was published in 1789 during the French Revolution, provides that sovereignty (meaning political power) resides in the nation, not in the king. The Declaration also states that all men are born and remain free, and that free communication of ideas and opinions is one of the most precious of the rights of man. As matter of historical change, it marked an end to a conception of kings or political leaders as divine authorities, whose rule over their subjects had been considered arbitrary and absolute in Hobbesian terms. Because it was part of the French Revolution, of course, the Declaration of the Rights of Man came after the Declaration of Independence, which was part of the earlier American Revolution.
Signed in the city of Philadelphia in 1776, the Declaration of Independence provides that all men are created equal and endowed with unalienable rights; that to secure those rights governments are instituted by men; and that governments derive their power from the consent of the governed.

The First Amendment, despite its many important predecessors and successors, remains a central text—if not the central text for understanding civil liberties. It is widely believed that people do have the unalienable right to be free, even in places where they are not free, but instead subject to tyrannical rule. The essential freedom of human beings is both a matter of idealism and a social fact, not only in the U.S, but also in other countries or nations where aspects of First Amendment law and practices have been adopted or modified. Krotoszynski (2006) offers an interesting study of the First Amendment in cross-national comparison.

It is also true that political authorities do infringe on the individual and collective freedoms. The issue is when and how does the boundary change, between governance and civil liberties change. The social dynamics of this shifting boundary, marked by paths of legitimacy and discursive change, is the object of this study, as outlined in chapter 1.

In the two hundred and twenty some years since it was written, the text of the First Amendment has become essentially unchangeable. It is now a sacred text, as is the text of the constitution, despite arguments for amendments that spell out rights and liberties and government procedures that form the "invisible constitution" (Tribe 2008; Antieau 1995; Vile 1994). Even though text itself cannot be changed, its meaning has changed. In public debates that turned into lawsuits, and lawsuits that were resolved by
court opinions stating rules of law, the text of the Amendment has changed in meaning in
the way the text is understood as law, and in the social practices considered legitimate.
This process of legal change, especially the dynamics of public disputes, regulatory
efforts, and court opinions, forms the empirical base of this study.

The theoretical constructs of the legitimacy-and-law dynamic and the paths of
legitimacy were presented at the beginning of chapter 1, to provide a framework for the
reminder of the study. It was also stated that the goal is to map the institutional logics
leading to legal change in the area of civil liberties and develop a sociology of the First
Amendment. Here the topic is the text and history of the amendment.

2.2. Misleading Words, Law as Social Text

Before going further, it should be pointed out that the unchangeable text of the
First Amendment has one important misnomer and at least one misleading distinction.
The misnomer is found in the word Congress, which originally meant the entire
government, to the founding fathers, and is now still understood to mean "the
government." It is without dispute that the meaning now includes not only Congress, but
the entire federal government, including agencies in the executive branch, a shared
understanding that is in accord with original understanding. The term Congress also now
includes government actors in the separate states, and in city, county, and other local
governments of the U.S., such as police officers and park commissioners. These lower-
level government actors are important to a sociology of the First Amendment. It is often
lower-level officials that engage in regulatory efforts. Local police agencies and park
commissions regulate public spaces where people want to exercise their civil liberties.
The one, misleading distinction is found in the phrase: "the freedom of speech, or of the press." Nowadays only a small distinction is made between speech rights and press rights. This legal distinction is made when a defendant to a lawsuit is considered a "media defendant." Due to technological innovations in communication technologies and the methods for distributing communications, the difference between a member of the media and a member of the public is increasingly blurred. Nowadays, the concept of a "media defendant" is increasingly elusive at law; however, nuanced, doctrinal distinctions of law, at that level of particularity, are better left to legal scholarship. This is a sociological study, and so legal details about the elements and requirements of claims and defenses made at law are beyond the scope of this study.

Rather than analyzing legal doctrine, endogenously as if law were a separate sphere that acts independently—without regard to social interactions and practices, this study examines law as a social text embedded in, and intersecting with, other social fields, such as politics, journalism, and policing. This sociology of the First Amendment takes up questions of the political influence on regulations of public display of religion (chapter 4); questions of legal influences on the civil liberties realm of journalism ethics (chapter 5); and the freedom of assembly and protest policing (chapter 6). In each empirical chapter, the focus is legitimacy claims made by courts and other actors regarding the scope of state action.

Having made all of these preliminary points about the text and hinted at the outline of the empirical analyses yet to come, it is already clear that an interesting contradiction has not been well elaborated about First Amendment practices. If the text
provides that the government "shall make no law," regarding religion, speech, and assembly, how can it be that so many court opinions have been issued, creating many rules of law regarding the scope of civil liberties? The amendment provides that the government shall make no law. This appears to be absolute prohibition, by the plain meaning of the text. Many argue and believe that the amendment is absolute, or nearly so, but in the public disputes that become lawsuits resulting in legal opinions—in the legitimacy-and-law dynamic outlined in chapter 1—the observable reality is that the government makes many laws about civil liberties. Judges, who are government actors, make rules when they interpret the First Amendment.

In truth, many types of government actors, not only courts, but also legislators, city officials, police officers and others, define the scope of civil liberties everyday, and often the scope is defined more narrowly in favor of the government. Generally speaking, the government has superior bargaining power in negotiations with actors from civil society. The resistance of people, both individuals and groups, is characterized by contesting and maintaining the boundary between government action and human freedom, and sometimes pushing back on where the line is drawn. Government legitimacy, or mandates to act, are drawn from the consent of people, as sovereign, according to basic, democratic theory (Dahl 1980, 2002); thus, even as bureaucratic systems of the government grow into the realm of civil liberties, there is a cyclic dynamic by which tolerating popular resistance and dissent is necessary for democratic states to maintain power.
Federal legislation infringing on the civil liberties of the First Amendment is not unheard of, but it is less common that local legislation, such as city and county ordinances limiting the free expression and freedom of assembly. It is local police agencies, especially city and county officials, many of whom are not elected by the people, who write many of the legal regulations that limit civil liberties and extend government regulation. Local laws push the scope of government regulation further into the realm of civil liberties. When the people contest the boundary and disputes are taken into the public sphere, and, ultimately, into litigation, then the courts, usually federal judges, determine where to draw the line between legitimate government regulation and protected civil liberties.

This study provides sociological analysis of court opinions as social text. These opinions are written by judges who interpret the First Amendment, under constitutional guidelines, and determine the lawfulness and legitimacy of claims made by local-level authorities. These other state actors include city and county officials, police officers, and park commissioners, who enact and enforce the local regulations that effectively decrease the social space for freedom. This study traces changes in the social text of the First Amendment, including institutional logics and the diffusion of these logics across professions in public disputes, which ripen become lawsuits that produce court opinions.

2.3 Cycle of the Democratic Idea in Three Parts

Based on what logics do government actors, such as judges, city officials, and the police gain more ground for state action, in the regulation of matters of religion or conscience, and speech, and assembly? Because the two spaces are mutually exclusive,
gaining ground for state action necessarily reduces the realm of civil liberties. What values are asserted these disputes and lawsuits? What social structures (that is, enduring characteristics of communities and places), shape the possibility of having a civil liberties dispute, so hotly contested that reaches a court opinion? Are these disputes more likely in the city or in the suburb? How are civil liberties to be exercised by people in social interactions? And how much governance is excessive?

These many concerns animate this study, which looks at local regulations of public spaces, the recurring patterns of First Amendment disputes pursued in public sphere debates about civil liberties. In this study, court opinions as a social text, that is produced as the outcome of contested public disputes. If a dispute reaches the court, and the litigation is contested to the point of reaching a the court opinion, the opinion is a stopping point, however momentary, regarding that public debate over legitimate state action. If a series of court opinions are stopping points making ultimate statements about what is or not legitimate in a time and place, then what are the legal effects of the body of opinions, on legal consciousness? Legal consciousness is shaped by law; this is a shared consciousness that is legally grounded, and works as a collective norm of appropriate social behavior (Silbey 2005).

How does First Amendment discourse influence the areas of social life that the First Amendment is supposed to leave alone? Based on an informed understanding of the plain text, the First Amendment is a political or cultural device, intended to address three types of social action—religion, speech, and assembly—and to separate those types of action from excessive governance. While clearly intertwined, the three actions are
distinct. Before showing the distinctions and relations of these rights, some preliminary definitions of terms is required.

First, *religion* refers to beliefs and practices related to beliefs. Another term for the type of action called religion is *conscience*. Therefore, the first type of action is religion/conscience.

*Speech* means freedom of expression, including spoken words as in conversations or public meetings, or printed words, as in either the classical "press," meaning newspapers and pamphlets, and now, also, electronically printed texts. Speech also includes other kinds of representations and symbols, including, in some case, expressive actions, such as burning a draft card or a U.S. flag. As mentioned, according to shared and uncontested interpretations, *press* now includes those who create or distribute a variety of digital or electronic publications. The legal and social distinctions between journalists and audiences are fading, due to innovations in communication technologies that increasingly allow people to publish widely, either in one-to-one communications or in one-to-many communications. (At the same time, as shown in chapter 5, journalism maintains a professional logic as a field of work.)

*Speech*, as mentioned, has come to include various forms of conduct, or what is called "speech-plus-conduct" in law. Flag burning and burning draft cards, for example, involve no words or overt symbols, but are as expressive conduct equivalent to speech. *U.S. v. O'Brien*, 391 U.S. 367 (1968) (draft cards); *Texas v. Johnson*, 491 U.S. 397 (1989) (flag burning).
Assembly means gatherings of people, including gatherings that might lead to disorder in the street or other public disruptions. There is dispute over when a peaceable assembly becomes unlawful and what point it becomes a riot.

The right of association has been "read into" the amendment, and is an implied, but established right in the invisible constitution" (Tribe 2008). This was a ruling of the court in *NAACP v. Alabama*, 357 U.S. 449 (1958). Similarly, the right of travel or movement, within and out of a state, is an implied, but established right. *Kent v. Dulles*, 357 U.S. 116 (1958); *Aptheker v. Secretary of State*, 378 U.S. 500 (1964).

In contrast, the right of assembly is in the plain text of the amendment. Assembly rights are closely aligned with the right of petition, which is linked in the text to assembly.

Based on these definitions and clarifications, the text of the amendment, assuming it could be rewritten, would say:

Government actors [at all levels of government] shall make no [excessive] laws regarding the establishment of religion, meaning conscience, prohibiting the free exercise of religion, abridging the freedom of speech [including spoken or printed words, and expressive or symbolic conduct], or the right of the people [to form associations, to move freely about the U.S. and to] peaceably to assemble [in collectivities], and to petition the government for a redress of grievances.

According to Burt Neuborne, professor of law and New York University School of Law, the First Amendment is intentionally structured and organized around the life cycle of a democratic idea.
[The idea] begins in the recesses of individual belief, is communicated to others through speech and press, provokes collective action through assembly and association, and finally matures into public policy through formal interaction with the political branches [in the presentation of petitions or demands for new law]. It is no coincidence that the textual rhythm of the First Amendment moves from protection of internal conscience in the religion clauses, to protection of individual expression in the speech clause, to broad community-wide discussion in the press clause, to concerted action in the assembly (and implied association) clause, and, finally, to formal political activity in the petition clause (Neuborne 1999: 1069).

Neuborne comments that no other manifesto of rights in the Western tradition has the organizational clarity of the First Amendment, which he sees as a road map to democratic action. The order of the clauses is not accidental, he argues, but instead is significantly related to the patterns of democratic process in social interaction. The rights are not a mere collection, but are organized around the life cycle of democratic action.

The First Amendment is an ordered set of rights—indeed a recipe, outlining the life cycle of democratic deliberations, decision making, and behaviors that allow for maximum freedom in social life. The three primary rights—religion, speech, and assembly—create and monitor the extent to which the rule of law may legitimately infringes on human freedom.

2.4 Why the First Amendment? Union and Pluralism

The First Amendment is about both unity and pluralism. Its acceptance as sacred text is a point of national pride, but its themes are pluralism and tolerance of difference.

The First Amendment is the first of many sets of rights in the Bill of Rights, which lists also the right to bear arms in Second Amendment, the right to be free from
unreasonable search and seizure (Fourth Amendment), the right of due process and right against self-incrimination (Fifth Amendment), the paired rights to a speedy trial and to opportunity to confront witnesses (Sixth Amendment), and the related prohibitions against excessive bail and against cruel and unusual punishment (Eighth Amendment).

As important as these other rights are, the First Amendment contains the most treasured values of the United States as nation, state, and nation-state. It presents the road map or pathways, for enjoying freedom and avoiding excessive governance. It is important to study the First Amendment because it is statement of absolutes values and principles, which allows people to understand, and act in ways that ensure, that there is a limit on government action. It outlines and protects not only individual freedom to believe what one wants to believe in the recesses of the heart (religion/conscience), but also the expression of beliefs and opinions (speech and press), and the gathering together of human beings in collectivities to challenge state authority (assembly/petition).

Political debate and contentious politics take place not only in words, printed texts, and symbolic action, but also in public assembly. Law professor Timothy Zwick (2009) makes a convincing argument that speech on the Internet, including dissenting opinions, cannot replace assembly, an embodied experience. The amendment provides a vehicle for liberty, marked in part by free expression related to matters of faith or religion or conscience or consciousness, but also matters of political philosophy, public order, and good governance. Not only is it internally ordered, it is the first of the amendments to the Constitution because it provides a grounding for all of the other liberties and rights.
Even so—or perhaps because so—the amendment is marked by contradiction and paradox. The very expression *First Amendment* reveals its paradoxical nature. A thing that is the *first* thing is not often also an *amendment* to something else. That is to say, the phrase is itself oxymoronic, producing a single meaning from two incongruous terms. Interestingly, the name of First Amendment reveals something about its history. It is a history of contradictions between unity and pluralism, which are still captured by the text of the amendment and disputes about its meaning.

### 2.5 The Initial History of the First Amendment

After gaining independence from Britain in 1776, the North American colonies were operating under the Articles of Confederation, but there were ongoing conflicts among the separate states with regard to the characteristic powers and functions of a political authority or nation-state, such as building roads and levying taxes. To address these concerns, brewing for over a decade since the Revolution, a group of delegates met in the summer of Philadelphia in 1787 with the express purpose of revising the existing Articles. As is well known, the goal soon became designing an entirely new government for the emerging nation, which once was just so many colonies turned into burgeoning territorial states.

The Constitution designed in Philadelphia that summer was the product of a peaceable assembly, of the type later envisioned by the First Amendment. Yet the drafters saw no need to list civil liberties in a bill of rights. The text of the Constitution was supposed to be the outline for federal government that would united the colonies as states, or separate sovereigns, within a single governing body. It would be a federal
system, in that the separate states would be *sovereign*, meaning legitimate locations for the exercise of political authority. The first three articles of the Constitution explain the duties and powers of the three branches of the federal government: Article I bears on matters of Congress or the legislative branch; Article II explains the Presidency or the executive branch; and Article III relates details of the Supreme Court or the judicial branch.

The U.S. Supreme Court is an independent judiciary with the power to check actions taken by the two political branches, the legislative and the executive. The independent judiciary now includes also the lower federal courts and the state courts of various types. The Constitution, federal laws made pursuant to it, and treaties between the U.S. and foreign nations are the supreme law of the land, under the Supremacy Clause in Article IV. According to political theory, the court acts as a guardian over the democracy (Dahl 1989, 2002; Zurn 2007: chapter 2; Vile 1994).

In theorizing the proposed form of federal government, some of the founding fathers did not believe that a Bill of Rights was necessary. And so the Constitution was drafted without a list of rights, focusing instead on the structure and powers of the federal government. Those who did not believe in listing the civil liberties were known as the Federalists. Among their number were Alexander Hamilton and James Madison, who famously thought that the civil liberties and rights of the people to self-governance were inherent and well understood, such that no textual statement of rights was required. Their exercise of freedom in conducting the convention seems to indicate they were correct; however, the Anti-Federalists, including, as is well known, John Hancock, Samuel
Adams, Patrick Henry, and others, believed that the proposed, central government threatened civil liberties, and that a serious risk existed that the sole executive or president might become a tyrannical king. Fear of the executive, especially a sole executive, was strong, in view of the recent, revolutionary history of the time.

The view of the Anti-Federalists was republican, in the sense that the power of the sovereign or political authority had to remain at the local level—meaning, at the time, at the level of the separate states. The idea of the popular sovereign sited in the separate states has come to mean that popular sovereign is at the level of individuals and social groups. Eminent constitutional scholar Laurence Tribe comments that one historical trajectory of constitutional law is recognition that civil liberties are not well protected by governance in the separate states, as sovereign, but instead must be returned to the lower level of individual and groups, as sovereigns in their own right (Tribe 1999). This concern is even more pressing as federal power, especially executive power, grows, and powers of the separate states decrease (Sassen 2007; Crenson and Ginsburg 2007).

According to uncontested history, the Anti-Federalists believed that the seat of sovereignty must be located in the states, where the people would manage and monitor their own democratic process and create and maintain their own rule of law. They did not believe that checks on executive power in constitutional provisions about the judicial and legislative branches would be enough to prevent tyranny, by the president as executive, or by majorities against minorities and dissenters. The Federalist position, expressed by Madison in *The Federalist No. 10* was that a well designed central government, or union, would guard against the problem of factions causing disruption. He defined a faction as
"a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens" (*The Federalist*, No. 10: 48).

Because of the strong opposition to the Constitution and the possibility that it would not be ratified, adding a Bill of Rights became the lynchpin of the Massachusetts Compromise that eventually lead to ratification of the Constitution. This compromise, ultimately leading to the formation of a new nation, was considered final when Massachusetts ratified the Constitution in February 1788. As is well known, Massachusetts ratified because the Constitution was going to include a Bill of Rights. At the time there were still other states yet to follow suit and ratify, but follow suit they did.

Based on this brief review of an uncontested history, it is evident that the United States was forged on the values and concerns about the design of a democracy—about national unity and the reconciliation of competing interests—that were themselves openly contested during public debate and political assemblies. The debate was characterized by divisions between those who thought civil liberties and human rights were inherent, because freely exercised, at least by themselves as elites—and those who thought that the government could not be trusted not to become excessive. The debate between the Federalists and Anti-Federalists is the classic problem of unity and pluralism. The problems of national unity and tolerance of pluralism remains a theme of First Amendment, as seen in this sociology of the First Amendment in the chapters to come.

It was debated whether the structure of checks and balances, outlined in the first three articles of the Constitution, would be sufficient to protect against tyranny,
especially tyranny of the president as sole executive—or whether had to be a express statement in a bill of rights, outlining the civil liberties of the people and the limitations on government. When the Bill of Rights was written by James Madison, he placed first on the list of amendments that set of ordered rights that limit valorize human freedom and check government action across the spheres of conscience, expression, and assembly.

2.5 Dividing State from Society

The intended function of the First Amendment can be depicted by a simple box divided by a line (Figure 2). On one side is the power of the government to govern, make laws on various topics, enforce law, etc., and on the other is the realm of civil liberties, where government actors cannot tread into matters of conscience, expression, and assembly.

Figure 2. Government action divided from civil liberties
In the empirical chapters of this study (chapters 4 to 6), the social relationships that animate this figure are going to be mapped, with increasing complexity, in order to show how state and civil society intersect and are embedded in one another. As discussed in chapter 1, the purpose of this study is to map how boundary setting between state and society shifts in the legal change around civil liberties. The theoretical goal of this project is mapping discursive changes across fields, that is, the diffusion of perceptions, values and decision making across groups or fields, from courts to media, for example, and within fields, from police to courts.

In other words, this figure will become less abstract, and the relationships between state and civil society, and within the state, as bearing on civil liberties law will be detailed. Figure 2, as it stands is an abstraction, presenting state as neatly divided from and entirely separate from society; however, the law is embedded in social action, both in practices that are governed directly by law, and those that reveal the social effects of law, such as professional practices mimic legal logics, and/or forms of legal consciousness that shape beliefs about right action and available remedies for harm Nielsen (2006), for instance uncovers the legal consciousnesses, that vary by class, race, and gender regarding free speech rights in public spaces.

As this study unfolds, the diagram of figure 2 will become less abstract and empirical findings about the relationships between fields within the state and between state and society will be mapped. Where the line is drawn, between state and civil society, is the subject of debate and litigation regarding the scope of legitimate government action. The line running down the middle of the box represents the settled
rule of law in First Amendment jurisprudence. How the line shifts is a matter of the *paths of legitimacy* negotiated and contested within and between social fields (see chapter 1).

*Settled law* is defined here as the aggregate of the written and unwritten law regarding the amendment (Tribe 2008; Vile 1994). The written law is the controlling rule of law, such as codes or statutes, as well as case law or court opinions. The written law is hierarchical because some codes, such as the Constitution itself, are supreme or controlling over contrary codes; and some court opinions, such as Supreme Court or appellate decisions are controlling over other, contrary opinions in the lower courts, under the Supremacy Clause of the U.S. Constitution.

The unwritten law is the customary, but *settled law*, meaning the body of widely accepted practices. The written portion of the settled law is often called the "positive law," in jurisprudence and legal circles. The positive law does not mean that it is good, or preferable, only that it is observable and recognized as real or prevailing. It might be argued that there are many unwritten or customary law in the positive law. This type of argument is advanced by Tribe regarding the invisible constitution. Using this terminology, *positive* has the same connotation as positive social science, the study of observable, measurable realities. Here, the settled law of the First Amendment, as it changes and takes different forms will be examined: both written and unwritten law, and both formal law and informal law, in the legal consciousness or collective beliefs and logics of policing and journalism.

The straight line down the middle of figure 2, which represents the positive law, is not a straight line in social life. It wavers over time and space, as the positive law varies
over time and space. There are vast disagreements about the content of civil liberties law. Therefore, the line wavers with various interpretations, offered in public disputes and in the lawsuits that well-funded, dyadic public disputes become. These interpretations are about where to draw the line between permissible regulation and impermissible, or illegitimate, infringements of civil liberties. The contours of the boundary line between government action and the realm of protected civil liberties have been interpreted by lawyers and judges in courtrooms and elsewhere, and also by competing interest groups, local officials, police officials, and activists.

When, where, and how that line varies and wavers—as the law of the First Amendment changes over time, space, and across social groups and across the legal consciousnesses of individuals and groups—is the topic at hand. Examining what is legitimate government action, or an impermissible infringements of civil liberties, contributes to shared, sociological understandings of legal change and stability. Thus, a sociology of the First Amendment is a worthwhile addition to the sociology of law. It will also contribute to the base of scientific knowledge regarding how social movements lead, or do not lead to political change, because of government repression.

2.7 Mapping Law and Legitimacy

The First Amendment is ultimately about legitimacy. But what is legitimacy? It is a multi-dimensional term, but might be simply defined as the grey area or penumbra around the positive or settled law. And yet, does legitimacy describe an action, an actor, a thing? All three? What is legitimate government action? What is a legitimate law? Who are legitimate decision makers? How much authority does the government have over the
people? Who are the people? Are the people coextensive with a nation? A nation-state? And conversely, how much authority do the people have over their government in a democratic order, such as the United States, the case at hand? Are democratic governments are legitimate when and if they are operating by consent of the people, as sovereign. Does the consent continue into forms of representations, express or implied? If so, then how can law—in particular the law of civil liberties, and the process for changing civil liberties law through judicial review, in the *legitimacy-and-law dynamic* (figure 1)—be used to limit the scope of government action? Protect a realm of civil liberties that is beyond the reach of the government? What types of things can be legitimate—laws, beliefs, practices, events? Are historical events de-legitimating, as in the use of recent events of terrorism or civil unrest and disorder to justify increasing social control and the corresponding reduction of civil liberties? These questions lead to more questions, not answers, which is why sociological analysis of First Amendment discourses, or law as text, is required—not merely philosophical or jurisprudential analysis (see chapter 1).

The amendment has a deceptive clarity, in appearing to neatly divide the realm of state action from the realm of social action or civil liberties. But is it actually possible to divide government action, law, and politics from social life? Figure 2, although an excellent starting point, contains two flaws that must be acknowledged. Once a sociological lens is used to illuminate the contours of the First Amendment, another of its central contradictions comes to light.
First, figure 2 is flawed because government action and law are never actually separate from the realm of civil liberties. Government action, including the enactment of positive law in codes and cases, is properly instituted and legitimated by social action. There is social action within the state. The government is not monolithic whole, bearing down on the people. The government is made up of people who adopt different roles and take part in professions. These professions, as outlined in the section of "fields, dynamics and actors," include the policing profession, the legal profession, and the juridical field, as well as the political branches, executive and legislative. What a police officer believes and does, is not the same as what a park commissioner, a city mayor, a federal judge, or any number of other government actors does. Each profession within the state has its own logics, which are sometimes diffused to other professions, but always with a translation or conversion appropriate to the neighboring profession.

Similarly, in the realm of civil liberties, there is legal consciousness (Silbey 2005; Nielsen 2006), derived from positive law and legitimacy contests in the grey area that surrounds positive law. Legal consciousness is what people think about their rights. People acting the civil sphere often conform to laws that are not in their best interest, because of the influence of laws acting through legal consciousness, collective identities and shared beliefs. The law, although often conceived as an autonomous realm—powerful and separate from other spheres of social life—is embedded in social life, including individual identities, and collective identities and cognitive schema.

Second, figure 2 is flawed because there are no actors, no dynamics, and no events depicted, only abstractions: "the Government," and the "Realm of Civil Liberties."
To understand the boundary between state action and civil liberties, figure 2 will be brought to life. In the following chapters, this basic map, showing two social spaces will be filled in, with observable details about concrete actors and specific events, including not only historical events but also claimsmaking events.

Once social behaviors and social groups brought into the analysis of First Amendment laws, and our conception of the social spaces becomes more complex, including the trajectories of public disputes and litigation across professions and institutional arena, in the form of *paths of legitimacy* (see chapter 1), then the line of positive law starts to waver—between what is considered legitimate government action and what is considered in the realm of protected, civil liberties. There starts to be a grey area in which the contours of legal rights and obligations are not a matter of agreement, but instead conflict and argument. It is then possible to map how conflict and consensus are intertwined. The grey area is the area in which there is debate over what is legitimate.

![Figure 3. Government action and the penumbra of contested legitimacy](image)

**Figure 3.** Government action and the penumbra of contested legitimacy
The grey area of contested legitimacy represents conceptual disagreements about where to draw the line of positive law. One group or profession holds certain beliefs and other groups or professions hold other beliefs. The solid line designates the settled law, about the difference between when the state is acting legitimately and the spaces in which the people are rightfully free from governance. The grey area also represents the social space in which public claims are made, in speech acts and contentious politics, about the right to engage in public assembly. Finally, the grey area is where legitimacy claims are made, and where there is the possibility of legal change, as conflicts become consensus, and consensus regarding points of legitimacy hardens into law (Weber 1922).

In this study, the term paths of legitimacy is used to designate the directions by which these disputes, including claims and protests, move from one profession to another as cultural values are transformed and groups work to resolve disputes into a consensus of expectations, and then into rules of law, and, conversely, rules of law are converted into norms of practice. This is a modified version of the theory of legal change proposed by Weber (1922), as outlined in chapter 1. It is modified, as outlined in chapter 1, in accord with a collectivist understanding and a Bourdieuan, critical theory about the that practices lead to change in accord with competing material and cultural interests.

Paths of legitimacy occur in the penumbra as a social space. Paths of legitimacy means those directions, within and between professional fields, in the form of "causal arrows" which carry the decision-making logics of each profession. As the logics are translated or diffused both within groups, and from group to group, the result is legal change in the law of civil liberties. Within the grey area, where there are contests over the
law of civil liberties, the legitimacy of state action is contested by actors. *Legitimacy* is the right word for these contests because it literally means "worthy of law," according to standard dictionary definitions. What is *legitimate* is considered worthy of being law or *becoming law*.

To study the paths of legitimacy, this study takes up one type of civil liberty at a time: religion, then speech, then assembly. Within each type, a particular dilemma of competing values is examined empirically, by looking at law as text, as well as historical texts, news articles, and other data. The point is to see how the spheres of state and civil society interpenetrate—and yet remain separated. For example, the First Amendment sparks recurring debates about the expression of religion in public areas, such as parks and courthouses, in which groups debate the meaning of the religion clauses in the display of religious symbols such as nativity scenes and the Ten Commandments.

Similarly, there are debates about the conflicts between freedoms of speech, on the one hand, and the dignity of the individual, on the other, in lawsuits regarding defamation of persons accidentally brought into the public spotlight, who become fodder for consumption in the mediated public sphere. Here, the examples include private people simply doing their job or pursuing leisure time, who become involuntary subjects of news coverage.

Does the First Amendment protect any and all speech about such private persons in the public sphere, even if harmful to the dignity of a human person? An example here is the case of Richard Jewell, the security guard who located a bomb at the 1996 Atlanta Olympics, but who was later vilified by the media and blamed for planting the bomb.
There are also recurring debates about the impossibility of having both security and liberty—each in absolute terms—during protests, such as marches and rallies, held for the purpose of challenging political authority and existing policy. Following their own institutional logics and collective identity, the police, and federal and city officials, think that erecting "free speech zones"—cages in which to hold protesters—and conducting mass arrests and detainments are legitimate ways to maintain nearly absolute order and prevent disruption, under the logics of zero tolerance policing. The courts sometimes legitimate these measures, even though they offend the spirit of the First Amendment, as discussed in the Boston case, outlined at the end of chapter 1.

The courts never completely resolve these perennial questions of the First Amendment. Yet the courts must appear to do so. It is the profession of judging that requires answers to social problems that give the appearance that the law has maintained continuity and stability (Posner 2008; Keeton 1990: Higgins 1981). In this way, cases are not often overruled, but endless categorizations and manners of "distinguishing" one case from another are offered in judicial opinions (Posner 2008: 45). According to law professor Robert E. Keeton, judging is a profession that requires commitment to reasoned choices, candidly explained (1990). He explains that the "rational way" to judge is to identify characteristics of cases and categories of cases, but admits that the logics used do not always include access to reliable data, such as statistical data on cases settled, etc. (Keeton 1990: 201).

After a public controversy reaches a court, and, if not settled or dropped before judicial resolution, then the court reaches its decision. There is a general sense of
resolution, even if there is dissatisfaction with the ruling, but before much time passes, new controversies arise under the First Amendment because it is about clashes of absolute values that will never be entirely reconciled.

The key debates renewed regarding the three types of civil liberty: religion, free expression, peaceable assembly. Public debates are become well-funded and organized dyads, turn into lawsuits over these democratic values, and if pursued to conclusion, become judicial opinions that function as "stopping points," even though the debates continue, in a cyclic dynamic known as the legitimacy-and-law dynamic (see figure 1).

Why the debates continue is one of the (many) empirical puzzles considered in this study. In short, the argument here is that the objects of legitimacy claims—namely actors, actions and things, including laws, beliefs, practices—are continually contested because it is in the nature of security and freedom to be at odds. The choice between security and freedom can never be entirely resolved. The state promotes law and order. In the realm of civil liberties, the freedom to change and to act without authority is pursued. This freedom is acknowledged by legitimated, democratic states, but is not favored by the state, because it tends to run against state interests in national unity and particular policies, including policies of war and economic behavior.

Many scholars have theorized that public debate is the nature of a democratic society. Indeed, the process of debate about law and order, and its periodic resolution by an independent judiciary is itself a democratic value (Dahl 1989, 2002). These values and concerns are captured in the text of the First Amendment, in just a few words, and in Article III of the Constitution that outlines the power of the U.S. courts.
The thrust of this study is that questions of legitimacy, and the competing logics of different professional groups about what is—or is not—legitimate, form a grey area around the rule of law. In the penumbra of legitimacy, legal change is possible and sometimes emerges, following a baseline of subjectively motivated interests, but also the structures and culture of collective, social facts.

Legitimacy debates in the public sphere are the site for legal change. Contrary to existing theories of legal change, launched in the fields of philosophy and jurisprudence, the law does not emerge from either an ideal state, a realm of unchanging forms, a pure theory, an ultimate norm, a categorical imperative, or even a state of nature. This is true, even if law reflects the strongly held ideals of groups of people about the nature of human life. Instead, the positive or settled law emerges from debates over legitimacy. If the boundary between government action and civil liberties is expressed in "hard law" or the law written in the legal books, when public opinions change over what is legitimate, so does "law on the books," or the positive law, change to match public opinions.

Changes in First Amendment law are the product of social processes that occur in the penumbra, or grey area, around the positive law of the First Amendment. This processes can be represented by causal arrows, or paths of legitimacy running through separate spheres and across spheres, with each sphere representing a profession.

Similar paths of legitimacy likely play a part in legal changes in other areas of law, but those types of legal change are beyond the scope of this study. The following figure shows where some of the paths of legitimacy are, within the state and across the state-society divide. The hexagon represents the issuance of a court opinion in the
legitimacy-and-law dynamic, where influences on the court become law and in turn influence civil society actors.

Figure 4 does not represent all of the paths of legitimacy by and between these fields of action, or social spheres. The figure only represents, in a general way, some of the pathways to be examined in this study. The figure will be made more specific as the study progresses. In fact, some of the relevant pathways are not shown here. For instance, the path of legitimacy from the political sphere to the juridical field is not shown. In chapter 3, it will be established that discursive formations—specifically the civil religion
a code of national unity—influence juridical decisions. This path of legitimacy, running from the political sphere to the juridical field, needs to be added to Figure 4. Codes of national unity do influence juridical decisions in the area of religious freedom cases, as discussed in chapter 3.

Also, the path of legitimacy from the juridical field to civil society will be made more specific in chapter 5, which looks at influences of the juridical field on the journalism field, as a primary field in civil society. The journalism field is a more specific field of action than "civil society," as here represented.

This figure does show the brokerage role of attorneys, in the cross-directional arrows between state and society. Figure 4 also shows that influence of the policing field, as a field of state actors on the juridical field, another field of state actors. This pathway from the policing field to the juridical field is carried by, or brokered by, government lawyers, in the legitimacy-and-law dynamic.

This pathway is shown running from the field of government lawyers, through the policing field, and to the juridical field, at the point of stopping, or issuance of a court opinion (represented by the hexagon in figure. 4).

This study is about political influences on the juridical field and about influences of the juridical field on the civil sphere. These cross influences result in changes in the boundary between legitimate state action and the realm of civil liberties. It is in the penumbra of legitimacy, legal change is sometimes emerges, following a baseline of subjectively motivated interests. By tracing those influences we can begin to see a pattern of legal change that has reduced the scope of civil liberties and human dignity in the U.S.
Before going further in development of a pattern description regarding legal change, a statement of a theory of legal change, grounded in classical sociology, is required.

2.8 A Neo-Durkheimian Theory of Legal Change

In the sociology of law, questions about legal change still start with classical sociology, even though scholars in the law and society movement have said that sociolegal studies necessarily moved away from classical analysis, after analysis of the "law on the books, law in action" problematic became of central concern (Seron and Silbey 2004: 33). The neo-Durkheimian theory of legal change offered in this study, regarding change in the area of civil liberties is built on the Weberian foundation discussed in chapter 1, and brings together Durkheimian theory and critical analysis.

Within classical sociology, Durkheim said that law is the ultimate social fact, the expression of the deep moral code of a society. He rejected analytical individualism and focused on the collective beliefs of a culture, expressed in its positive law as the ultimate social fact (Durkheim 1895; 1912; see also Taylor 1973). For Durkheim, social facts were emergent, objective realities existing at the collective level that had dimensions greater than the sum of the consciousness and behaviors of individuals in a group (1895); social facts are not uniform, but instead range from moral codes and formal laws, to the operation of emotion within a social gathering, to the cultural transmission of values and social understanding through education (Lukes 1982b). Social facts both constrain and enable behavior.

As discussed in chapter 1, Weber saw law and legal change through a lens of methodological individualism and the agency of persons. Weber emphasized the
subjectively motivated actions of purposive actors, who took steps to change law to their advantage (Weber 1922). The legitimacy of laws and of leaders, he argued is based on the ongoing, emergent consensus of self-governed. States, Weber says, are defined by their exclusive monopoly on violence and coercion, but need legitimacy to avoid use of coercion (1922). States, in the expression of political authority, come to rely on legitimacy and legal rationality for power, rather than the repeated use of violence and coercion which is considered the sign of a weak state (1922; see also Tilly 1990).

For his part, Marx theorized that legal change deriving from economic interests, as the "superstructure" of law reflects changes in the means and relations of economic production (Lukes 1982b). Critical theory is useful to understand civil liberties law, because the exercise of civil liberties so often takes place in public spaces, particular urban spaces that are shaped by economic forces. For Marx, economic interests were determinative of nearly every type of social change. Yet both Durkheim and the contemporary, critical theorist that informs this study, Pierre Bourdieu, question the extent to which economic interests are determinative. Their theories are outlined in chapters 4 and 5, but need be briefly stated here.

Durkheim theorized that law was the outward symbol of the moral code, for instance in the area of contract law, which is based on moral understandings. He rejected the idea that people were bound by a social contract that gave management of social relations and sovereignty to the state—because without the moral cohesion of a social group such as a nation, the agreement to be bound to contract laws, or a representative sovereign, would not be upheld.
According to Durkheim, material interests change and economic exchanges alone are not enough to bind people together (1893). Likewise, Bourdieu also broke with economic determinism and theorized that cultural interests within particular fields of endeavor, in the pursuit of symbolic capital, prestige, and other possessions, are not reducible to economic interests even if they concur with economic capital (Thompson 1982). Bourdieu, in his essay on the political field, questions whether the monopoly over the production of law could be maintained with economic power alone. He argued that for masses to give up sovereignty to a representative—or to a permanently formed political party that is in control of representation and the election of representatives—the masses had to be dispossessed of economic and cultural power, while those in political power wielded cultural resources and symbolic power over them (1981).

When taking a neo-Durkheimian perspective that incorporates Bourdieuan analysis, it is necessary to interrogate the interrelations of economic and cultural forces, in ways that advance on Marxist analyses of social production—but do not forget the problematics of control over the means of production, economic and cultural.

Adopting and extending these theories of legal change, this study addresses trends in the state's tolerance for the exercise of civil liberties and maintenance of human dignity. Have judges started to narrow the freedom of assembly after Seattle? After 9/11? Did they do so after the 1968 DNC? Or are these events used to legitimate the existing practices? What are legal rationales do the courts use to find that restrictions on liberties are lawful? What are the extra-legal influences on judicial decisions? To answers these questions—and the research questions posed above, case-based methods are required.
CHAPTER 3:

CASE-BASED METHODS AND LEGAL CHANGE

The law and society movement sits a rather narrow ledge. It uses scientific method; its theories are, in principle, scientific methods; but what it studies is a loose, wriggling, changing subject matter, shot through with normative ideas. It is a science...about something thoroughly unscientific."

—Lawrence Friedman, "The Law and Society Movement"
(1986: 764)

3.1 Scientific Approaches to the Study of a Normative Field

In classical sociology, Durkheim, Marx, and Weber theorized how law changed, at a macro-level of analysis, during the shift into modernity and rise of an industrial society. Bourdieu offered a critical synthesis and extension of those theories of legal change. In this study, we are developing not a comprehensive theory about legal change, but a middle-range theory about legal change, in postwar U.S., in the area of civil liberties. Merton (1949) suggests that middle-range theories about a specific range of phenomena, defined as a set of related cases, are likely to advance sociological knowledge. The era being studied, from 1945 to the 1970s to early 2000s—depending on issues of periodization—is characterized by a shift to information services and to postmodern ideologies. It does not have to be characterized by a shift to postmodern analyses of social phenomena. The rigor and reliability of scientific methods still matter, even if the subject matter are normative, or about failures of modernity, or the normative in postmodern perspectives. Multi-case narrative analysis, as proposed by Abbott (1992)
requires systematic analysis. Coming within the law and society tradition, this study uses several types of multi-case narrative methods to study a specific area: changes in civil liberties law and the influences of juridical law on the civil sphere. In the law and society tradition, the study object is often a field or discourse marked by normative assumptions, as so clearly expressed by Friedman (1986) in the opening quotation, above. And yet, the study must proceed from hypothesis to analysis, to conclusion, or from grounded analysis to generalizations, and in these ways, avoid adopting the normative assumptions of the field of discourse studied. In legal scholarship, understandings of legal change are self-referential, or self-generating, meaning that legal scholars (other than law and society scholars, that is) rarely consider the social forces influencing law. Instead they see law as autonomous and independent—powerful over all of the other social fields. Law is a discourse that contains normative assumptions about its own power. It is may be relatively autonomous, but sociological analyses of the legal field must proceed in accord with scientific methods to study the normatively charged subject matter of legal change.

To develop this partial theory outlined in chapter 1—the legitimacy-and-law dynamic and paths of legitimacy—this study engages social-scientific methods, rather than postmodern narrative analysis. First, either grounded analysis of data must lead to generalizations about the range of phenomena studied, or hypotheses and theories must be posed, and where feasible, those theories need to be tested against competing theories, and revised, to reach conclusions that may not final or complete, or even widely generalizable, but are improvements over existing explanations or descriptions. To meet the standards of a scientific study, the constructs of the legitimacy-and-law dynamic and
the paths of legitimacy are proposed. These theories of legal change in the specified area will be tested against multiple, related cases found in empirical data. The empirical analyses (chapters 4, 5 and 6), are scientific examinations that detail the paths of legitimacy that run within and across social fields. All of the methods used were multi-case narrative approaches or case-based methods.

In the next three chapters, cases are going to be examined in the areas of religion, speech and assembly—but the term case, has not been defined, and needs to be. A theoretically grounded definition of case is important so that the casing—the theoretically justified choice of one type of case or another—and the comparative choices made in this study can be evaluated and replicated in future studies (Ragin 1989; Ragin and Becker 1992; Byrne 2007).

At the most basic level, a case, in a law and society analysis, might mean the case brought into court, that is, a lawsuit or piece of litigation. Or case might refer to the court's opinion; however, a single lawsuit can generate multiple court opinions, so that use of the term in both senses can be misleading. Other meanings of case might be the unit of analysis in a sociological study—such as a nation-state, in comparison with other nation-states. A case might also mean an instance of a much larger category or range social phenomena, in philosophical or logic terms—for instance, the case of a protest permit being denied, as an example of the larger category of state repression, which can range from torture and disappearances, to bureaucratic regulations of civil liberties such as permit denials.
Looking at the legal meaning of a *case*—meaning a lawsuit brought into court—sociological analyses of legal cases can yield sociological knowledge about legal change, in particular the legitimacy of judicial decision-making. The cases are not merely lawsuits or court opinions, but instead the traces of social conflicts that reached the point of well-organized and well-funded public disputes over clashing values and so were brought into court. Multi-case narrative analysis of legal cases can yield findings about the trends in law and the influences on and of the juridical field.

Before explaining the range of ways in which the task of case-based analyses of legal cases can be accomplished, let us first summarize the existing theories of legal change and the legitimacy of judicial decision making, in the area of civil liberties and more generally. The earlier summary of classical theories of legal change were general in that judge-made law was not this focus. We turning now to focus on the juridical field, and narrow the literature review to the topic of the legal change related to the legitimacy of judicial decision making. This summary will show some of the pitfalls of examining the legitimacy of judicial decisions, either at the level of individual judges or aggregates of individual judges. It will also highlight some of the core issues in the scientific study of a normative field, or field that organizes morality. The literature review will illuminate *the need for case-based research at the meso-level*, to examine the legitimacy of judicial decision making and legal change in the specific area of civil liberties.

3.2 Theories of Legitimate Judicial Decisions and Civil Liberties

There is a belief, among scientists and the general public alike, that courts might be improperly influenced by political considerations, when deciding legal cases. These
political influences are expected to come from elected officials, or from the law enforcement field, or from economic elites. In the literature, empirical analysis about political influences, and the legitimacy of judicial decisions, tend to center on individual judges and their biases, or on aggregate studies of litigation outcomes or case outcomes. It is argued, here, that a meso-level of analysis will likely reveal new information and sociological knowledge, not developed in studies of individual outcomes, or aggregates of individuals outcomes. In order to reach the meso-level of analysis, an understanding of existing knowledge about legal change and the political influences on judges, is worthwhile. Once this information is in hand, we can turn to a discussion of case-based methods and meso-level analyses of legal change using narrative, case-based methods.

The following sections summarize, first, philosophical theories of legal change, judging, and judicial bias, in the discipline of jurisprudence; second, theories of legal change and judging in the discipline of law; and, third, social science literature on judicial biases, especially political and religious influences on judicial decision making.

3.2.1 Sociological Jurisprudence and the Common Law

Sociological jurisprudence is a school of thought developed in the United States in the 1920s, by jurists Oliver Wendell Holmes and Roscoe Pound. It became legal realism, which later became the law and society movement (Friedman 1986). A legal realist view is defined against a legal formalist view. Under a formalist view, judges apply the law to facts and reach results by combining factual analysis with legal reasoning (Keeton 1990; Freeman 1994: chapter 15). In recent literature, there has been a push to move beyond the formalist-realist divide, and to consider the political influences
on judging in more innovative ways (Tamanaha 2010)—but for now, the divide is still strong, especially across disciplines. That is to say, lawyers and legal scholars are likely to look at law in formalist terms and to legitimate legal change from within the law, rather than look at social influences. In contrast, law and society scholars tend to look at social influences on legal change.

According to the tenets of sociological jurisprudence, empirical analysis of what courts actually do is required, rather than thinking about what courts are formally supposed to do. (Freeman 1994). In contrast to the formalist view, a legal realist accepts that legal cases are not always decided by judges "simply," or mechanically, applying the prevailing law to the facts of a case. Legal realists acknowledge the considerable discretion—and the influence of social factors—that shape judicial decisions.

In a famous article written by Pound, the simplistic application of existing law to new cases brought before courts, is criticized as a failure of law, and belief in such a system is a failure to understand judicial processes. In the article, Pound uses mechanical jurisprudence to refer to the robotic application of existing laws to decide new cases, without regard to social consequences (Pound 1908).

Taking the realist view a step further, the critical perspective is also defined against formalist conceptions of legal change. In critical theory, formal law—and the use of formalist analyses of legal categories and rules to reach decisions having social consequences—is a shield, or a mask, used to hide the power wielded by judges and their elite biases. Thus, a great deal of critical legal studies, within the legal academy, and critical sociology in the social sciences, works to deconstruct the formalist view of law
and reveal the exercise of power, usually considered illegitimate in some way or because of consequences, especially consequences of inequality. The general idea is that judges decide cases according to their own biases, especially elite biases that reproduce inequalities.

More generally, and from within the legal realism tradition, the notion is that judges decide cases according to the prevailing religious or political milieu, or their own personal, religious and political commitments. Again, the implication is that the judges are, in some way, acting improperly when they dispose of cases in ways that employ religious and political reasoning. For legal formalist, however, the law is self-referential and topics of social concern can be, and should be, managed from within the legal sphere.

Before adopting a position—formalist, realist, or critical—let us think about the common law tradition, for a moment. How do the perspectives on a sociological jurisprudence connect with the common law tradition? In the common law tradition, cases are decided using reasoning by analogy, for the most part. Every legal case is different on its facts. But cases are decided according to categories of rules. The rules are organized by facts, such as whether there was a bad intention, whether there was a fraudulent statement, whether there is a certain amount of damages, etc.

Sometimes these categorical rules, about social facts, are organized into comprehensive legislative programs, such as the Civil Rights Act of 1964; however in the area of civil liberties, legislative acts are relatively rare. It is more likely that cases are decided in accord with the common law, that is judge-made law. In judge-made law, if a case is more analogous to one category of behavior (because of the level of intention,
fraud, damage, or other facts, etc.), then to another category of behavior found in existing case law, then the rules of the prior cases in the more relevant, or closely tied, category are supposed to be applied to the case before the court, and aid the court in reaching its decision. But if another line of precedent is more analogous, on the facts, then the rules of those cases should be applied.

The problem is that some cases, by their particular facts, lend themselves to the exercise of *judicial discretion* in the interpretation of the facts and the law. These cases include the unusual case or "hard case," that leaves open a wide area of for judicial discretion. The use of discretion might lead to the improper application of personal biases—or to the use of regional, cultural considerations or perspectives that a judge might encounter in daily life—in deciding the outcome. Thus, individual level or locally situated biases can enter the legal process and effect court decisions.

If a case is hard, or if analogies to the facts in the case, when compared to existing other cases, run in different directions, the judge is still asked to judge (Freeman 1994: chapter 15; Songer and Ginn 2002: 301; Ashenfelter, Eisenberg, and Schwab 1995: 262). Even if a case is not hard or usual, the judge is still asked to judge, or decide outcome.

Garden-variety cases—cases that easily fall into existing legal categories or rule sets—might be resolved by *mechanical jurisprudence*, it appears. But two problems of jurisprudence arise here. First, garden-variety cases may or may not be that common. It is possible that garden variety cases are rare, that no case is typical, and that new consideration and issues of social consequence are presented in every case. Secondly, what is considered typical is a normative consideration and so biases, both individual and
geographically local, might still enter into the decision-making process and shape outcomes.

So it is evident that judges in both hard and garden-variety cases are likely to use discretion. If it is accepted as a social fact that judges use discretion in deciding most cases, the concern or fear is that judges will abuse their discretion and consciously or not use personal or regional biases and normative considerations to decide cases in ways that are unfair or continue inequalities, etc.. If a case is wrongly decided, due to a failure to follow precedent in mechanical jurisprudence, or a failure of reasoning, or the engagement of personal and regional biases, there are appellate processes and higher levels of courts.

The appellate courts, operating at an elite level, are supposed to correct the mistakes made by lower-level courts, but the elite courts are populated by elite judges. Because of this reality, it is possible that economic consideration, or political-economic considerations might still cause bias in the appellate courts. In other words, the "haves" win legal battles over the "have nots" (Galanter 1974). Using jurisprudential analysis alone to think through the issues of legitimate judicial decision making can only take us so far. Philosophical discussions about the common law, about typical cases, and about political-economic leanings of elite judges, are limited because they are based in logic and assumptions about facts, when data is required.

In the social sciences, some of these concerns and assumptions are carried into the analysis, but at least there is the use of a scientific method and empirical data. The overall question addressed in the scientific analysis of judicial outcomes is whether a judge
might or does decide cases in line with extra-legal factors, meaning religious or political considerations, rather than the mechanical application of law to fact, which would be a purely legal analysis. The use of extra-legal factors might be conscious or unconscious, but it is likely to proceed in accord with the professional logics of judging and the advanced legal consciousness of particular judges. Thus, a sociological understanding of the professional logics of judging is required in the scientific analysis of legitimacy in juridical field.

Based on initial impressions, mechanical jurisprudence might seem the preferred option, over the use of extra-legal factors by courts in decision making. Mechanical jurisprudence seems normative—and more likely to be fair, but on analysis it rarely exists and is may not be fair. It may perpetuate inequality and prevent legal change. Let's consider the possibilities.

In the category of atypical cases, or cases that are not easily decided as garden variety cases, there is a lot of discretion, and so judges might use extra-legal factors illegitimately to decide cases and shape social consequences. Even in typical cases, there is the possibility of a judge deciding a case illegitimately, in that the judge might offer the appearance of categorical reasoning and express seemingly appropriate rationales, in order to legitimate outcomes (illegitimately) that are unfair or not in line with existing law. The thought is that when juridical outcomes are not based on the mechanical jurisprudence, of existing law to the facts of a case, then there is a likelihood of unfairness or unfortunate social consequences, to the use of extra-legal factors, such as personal or regional biases of the court, to determine outcomes.
But this possibilities do not show that mechanical jurisprudence is the preferred option. If mechanical jurisprudence were the standard or norm, rather than some other process of judging, then there would be no legal change. Existing inequalities would be reproduced.

Whether judges reach the correct or just decision, in their use of the professional logics of judging and discretion, is an important area of research. It is important, both as a matter of positive social science and critical theory, to determine what shapes juridical decisions from outside of the legal sphere. If there are extra-legal factors, what are they? Can appellate judges correct the improper use of extra-legal factors? If so, how so?

According to the well-known mandates of the trial and appellate process under U.S. law, trial courts are given the "benefit of doubt," that is, their use of discretion or exercise of judgment will not be reversed unless clearly wrong. For example, in the class action lawsuit brought by a "class" or group of women, against Wal-Mart for employment discrimination, the certification of the class of plaintiffs—the largest in U.S. history—was reviewed by the appellate court in San Francisco, under an abuse of discretion standard, meaning the appellate court would not consider the question anew, but whether the trial court decided it within discretionary bounds (Dukes v. Wal-Mart Stores, 2010). The issue was thus changed from whether women employees are a proper class, to whether the trial court considered the underlying question within the bounds of existing law and the exercise of appropriate discretion.

Because of the abuse of discretion standard, law proceeds more slowly and trial courts are given more authority, and are expected to be successful, when it comes to the
work of mechanical jurisprudence and/or judging cases in accord with professional logics and discretion. Normatively or according to the logics of the juridical field, judges are supposed to use a combination of existing law and discretion. Reversal on appeal is the exception, at least when it comes to federal trial court opinions (Ashenfelter et al. 1995).

More federal trial cases are not reversed than are reversed. It is not likely that the federal appellate court will reverse the trial court. At the same time, trial courts seek to avoid the embarrassment of reversal and so work to following existing precedent. Trial court opinions treat cases as if they are garden variety and apply the law in mechanically ways while appellate courts are more likely to effect legal change by engaging in logics and factors that extend beyond the existing precedent.

This social dynamic creates a field hierarchy within the juridical field, that creates the possibility of slow, reasoned, legal change—but nevertheless juridical outcomes tends to favor elites (Galanter 1974), because elite actors are more likely to pursue cases through the appellate system. The point to emphasize here is that mechanical jurisprudence is a partial norm. Within the study of sociological jurisprudence and the common law process, legal change is both expected and legitimated in the court systems, from the trial to the appellate levels. This is a well known jurisprudential fact. Legal change in the common law system is expected to involve the use of judicial discretion.

3.2.2 Legal Understandings of Civil Liberty Shifts

In the discipline of law, the study of legal change—the legitimacy of judicial decisions, and the course of shifting civil liberties—is often confined to jurisprudential analysis. From within the legal field, judging is consider to be a matter for professional
logics and standards, such as the abuse of discretion standard and other legal guidelines, rather than a matter of sociological analysis. Lawyers and legal scholars focus on tracing legal change from within the legal sphere. They are less likely to ask about the social influences on judging or on how the law changes because of social influences. If those questions are asked, the answers still come from within law and logic, including assumptions about the way the social world works, or about sociological contexts, rather than engaging in sociological data analysis. From the view of legal scholars and practicing lawyers, once the judge-made law changes, then it is the most current law, in a place, that is relevant—not so much the history of law or its long-term trajectory.

The legal field, in general, is self-referential. By this, it is meant that the law considers the law itself as the autonomous source of legal changes and uses its own logics to understand legal change. The notion is that lawyers and judges make law, not ordinary people or "social forces." Within the discipline of law, the primary type of analysis is doctrinal. A doctrinal analysis asks what the law is and what it should be often, with a client's interest in mind—rather than examining the social forces that influence court decisions, and or asking about the sociological effect that court decisions have (Goldsmith and Vermeule 2002; but see Heise 2002 and Suchman and Mertz 2010 on trends within empirical legal studies, new legal realism, and judicial decision making).

For example, Perrine (2001) offers a doctrinal analysis—or "purely" legal argument—about why First Amendment law should have afforded the protesters in Seattle in 1999, at the World Trade Organization (WTO) meetings, with more protection from the city's emergency order of a "no-protest zone."
During the WTO meetings in Seattle in 1999, protesters were well-organized and able to disrupt the meetings. Following what many described as one of the most massive examples of civil disobedience in U.S. history—and others called a police riot or the "Battle in Seattle," the city issued a "no-protest zone" rule, in the form of an emergency order. The order prohibited people other than WTO officials and related persons from going into a 25-block area. People who worked in the area were allowed, if they did not have anti-WTO buttons or clothing or signs (*Menotti v. City of Seattle*, 2005). With the emergency order, city officials and the police department were able to regain control of streets around the meetings.

In Perrine's legal analysis, there was a failure of legal regulation to meet doctrinal goals and first principles. His analysis was not a sociological analysis or case-based analysis of social change. In a similar vein, Baker (1984) critiques the use of parade permits as illegitimate forms of state repression, from a legal perspective; and Boghosian (2004) also critiques the use of the no-demonstration zone in Seattle, taking primarily legal views of the question, rather than looking for social patterns or asking about social forces that bring about these types of legal action in the regulation of space and political dissent.

Within the discipline of law, the analysis is not always purely doctrinal. In the trade literature, or "popular sociology" and histories written by lawyers, there is analysis of social factors. There have been several important books by lawyers about the loss of civil liberties in times of peril, such as after the terrorist attacks in September 2001 or during wartime (Dershowitz 2002; Sarat, ed. 2004a; Stone 2004; Zwick 2009). These
books that provide a social context and historical understanding of legal change not elsewhere found. Unfortunately, though, some the legal scholarship on civil liberties and legal change lacks sociological analysis grounded in the scientific method. Lawyers writing about civil liberties and legal change may be discussing social change, but they do so often without rigor analysis of empirical data.

For instance, in *Speech Out of Doors*, law professor Timothy Zwick (2009), paints an interesting, historical picture of the freedom of assembly and the regulations of outdoor demonstrations in the U.S. He makes an important "death by a thousand cuts" argument, about the need to preserve First Amendment liberties, in the face of severe reductions of civil liberties in outdoor spaces. He outlines the history of when and how the courts decided to start categorizing different types of places as different types of "public forums" in the 1980s (2009: 52-53), but he makes strong assumptions about what social forces are influencing these reductions in the freedom to assemble. His assumptions turn on an understanding of judge-made law as the self-moving source of legal change, rather than as a social product that reflects historical and institutional influences. His book looks at social factors, but is not sociological (even though he does refer to work by Erving Goffman and others about behaviors in public spaces).

In *Speech Out of Doors*, Zwick lists a variety of likely causes for the legal change and loss of liberties. He summarizes the commonplace, or everyday, understandings of those social forces, such as urban planning, which have resulted in a loss of public spaces. But he does not ask critical theory questions about why urban planning is heading in the direction of extreme differentiations of place. Instead, Zwick looks at judicial
decisions—on what are public spaces, and what are not public spaces, under the public forum doctrine—as an independent source of legal change. Working within the legal field, he likely sees the juridical field as autonomous and powerful, as lawyers are generally taught to do. He does not question the legitimacy of judicial decisions or the social influences that result in new legal schema or frameworks for decision.

He gives a legal or doctrinal analysis of the judicial decisions that categorize certain types of places as "non-public" or "public forum," or "limited public forum," and suggests that those decisions are the reason why there is a loss of public spaces for dissent. In this formalist view, judge-made law on the public forum is its own self-moving cause, rather than a social consequence. The law is the reason for social change, not the result or reflection of social change in the organization of public spaces. Zwick does not ask what political forces are influencing the creation of these court opinions, which result in the loss of public space—forces that include the political economic interests in shaping physical spaces for the functions of work and leisure, but not political participation and dissent, or marginal existences, such as homelessness.

For analyses of those dynamics, legal geographies are required, engaging legal cases as social cases. Here there is important work accomplished by social sciences looking at law as a product of social forces and an influence on social equalities and inequalities. For examples in this vast area, there is the work by Ellickson (2001) on panhandlers, skid rows, and public space zoning; the work of Nielsen (2000, 2006) on public harassment, gender and racial discrimination, legal consciousness and the First Amendment; and the work of Loïc Wacquant on urban outcasts (2008).
As has been emphasized in these sections of the method chapter—regarding legitimate judicial decisions and legal change in the area of civil liberties—Zwick and others in the legal field see examples of public unrest as the *cause* of reduced freedoms in later instances, in line with state legitimations. They see legal decisions as self-generating causes of change, rather than reflections of social or institutional logics. Zwick's book makes an important contribution to the study of the loss of civil liberties, but sociological analysis are required to flesh out the patterns of institutional change, especially political influences that have changed the character of political assemblies, the respect for human dignity, and understandings about the legitimate uses of public space. The legitimacy of judicial decision making and new schema for decision making regarding public spaces and human dignity have to be viewed in the context of historical changes that influence the juridical field, rather than accepting court decisions as a self-generating force of change. For instance, where did the "public forum" and "public figure" standards (to be outlined later) come from? Did the courts generate these public-private distinctions that regulate human liberty, on their own? Or are there political influences that promote the division of the social world into public and private spheres?

As discussed later in this study, there are political influences on juridical outcomes, which influences operate through the legitimacy-and-law dynamic. For instance, state actors in the policing field tend to offer a certain types of legitimations of future proposed repressions—such as the use of "free speech zones" or mass arrests at political assemblies. These legitimations are based on earlier cases of unrest or crime, including terrorist acts that are *not* clearly tied to peaceable assembly; or they are based
on equating acts of crime, such as violent crimes, with nonviolent civil disobedience, in the larger category of violations of law. In this second type of legitimation, zero tolerance policing is pursued to rid the world of violations of law, regardless of type of violation, nonviolent civil disobedience, and petty crime, such as jumping turnstiles are equated with violence and destruction. In the first type of legitimation, by pointing generally to earlier examples of dissent, civil disorder, and crime, police officials are able to equate all types of law breaking. Based on that equation, zero tolerance policing is legitimated, and police officials argue that future regulatory repression is necessary.

In a similar way (although perhaps not consciously), when Zwick analyzes the government shutdown of Seattle in 1999, during the World Trade Organization meetings—a shutdown accomplished with the use of emergency "no demonstration zones"—he takes the position that Seattle is a good reason for legitimating subsequent restrictions on assembly. There is no consideration that the shutdown in Seattle might have been a consequence of previously legitimated reductions in civil liberties. Or that the unrest in Seattle was a function of earlier disposessions of sovereign participation by the people in relevant political assemblies, for instance as theorized by Bourdieu (1981).

As discussed in chapter 6 and supported by data in an appendix, the presidential national convention—one of the most important political assemblies in the U.S. process—has shifted in ways that exclude public participation and dissent. Activists argue that other national and global assemblies have likely shifted in similar ways. Activists, for example, argued that the WTO meetings are used to determine the course of economic regulations and control national-level laws in ways that are non-representative.
These forms of globalization, and other shifts in the political economy of place, may be causing legal changes. But legal scholars tend to see judge-made law as a self-generating reason why the political economy of place is changing.

Returning to the summary of purely legal views on legal change, as discussed in this section, we see that purely legal analyses or doctrinal considerations are of limited sociological value, unless combined with sociological analysis. The books and articles that look at legal change in civil liberties, in ways that self-referential, fail to provide either an adequate pattern description or causal analysis of legal change, in the form of judge-made law regarding civil liberties. Sociological analyses alone, however, are also not fully satisfactory. Sociological analyses, including political science studies of legal change also fail to account for legal change regarding civil liberties, because the doctrinal shifts are too far backgrounded, and because public opinion measures, or other social factors, are considered in the absence of law.

For instance, in important works on the right to use public spaces, social scientists have not addressed the legal changes directly to see what historical influences and political influences are shifting judge-made law on civil liberties. Legal cases are considered examples of when there have been reductions in civil liberties, but the influences on the juridical field are not traced.

For example, in his book, The Right to the City (2003), Don Mitchell provides an invaluable history of the political influences and interests that seek to exclude marginal persons and dissent from public spaces. In a similar book, Social Justice and the City (1973, revised in 2008), David Harvey argues that there are strong social forces creating a
political economy of place that excludes and dispossesses many people and groups. Neither book, however, directly examines how these social forces are shaping doctrinal change in the area of civil liberties. In contrast, this study traces the paths of legitimacy from the political sphere to law and vice versa.

3.2.3 Social Science Research and Judicial Bias Studies

Having looking at the doctrinal analyses of law, and at the works on law and social science variously combined, we turn now to social science research on the topic of judicial bias or failures of legitimacy. In the social sciences, influences on the juridical field are studied by scientists working in a number of distinct disciplines, including political science, and, within sociology, the sociology of law and of religion.

In the sociology of law, there is a tradition of studying the external influences on judicial decision making (Epp 1999)—and a related tradition of studying judicial appointments and their possible influence on case outcomes (Dubois 1986). The studies and data collections, generally speaking, emphasize the highest level of the courts, rather than the everyday law processed in lower-level courts in the juridical field (Galanter 1974). For instance, Clayton and Gillman's volume (1999) on new institutionalist approaches to judicial decision making is limited to U.S. Supreme Court decisions. Also, recent database collections are on the U.S. Supreme court or appellate court opinions (see Epstein and Knight 2004: 172 for a summary of new collections).

In the discipline of political science, there is an known as "judicial bias" or "judicial attitudes," which looks at judicial backgrounds and attitudes, based on public information regarding individual judges and their political and religious commitments, as
well as demographic characteristics. In this area, there has been work on whether
personal characteristics of Supreme Court judges, such as age, sex, religion, and political
experience, are correlated with their appellate voting records (Tate 1981; Ashenfelter et
al. 1995; Hunter and Price 2001). Tate's study was of appellate judges, but the
Ashenfelter study was more comprehensive and addressed trial court decisions—going so
far as to code the outcomes for level of difficulty, such as whether a case was typical, and
of the garden variety, or required higher levels of discretionary and doctrinal analysis by
the court.

Ashenfelter study is superior for several reasons. First, the Ashenfelter researchers
included in their data both the lawsuits resolved by settlement and the lawsuits resolved
by published opinions, thus capturing the full range of court-monitored resolutions and
eliminating a type of selection bias that might obscure the use of discretion regarding the
subject of the suit. Second, the lawsuits analyzed by Ashenfelter and colleagues as cases
were graded according to a scale of factual and legal difficulty, as mentioned—with the
theoretical understanding that the more-difficult cases involved a greater likelihood that
the judge would use discretion, or expansive interpretations of law and fact, in deciding
the case. Third, the Ashenfelter researchers used cases (meaning lawsuits) that were
assigned randomly to judges, in order to avoid potential selection biases in dockets where
judges have a say in cases assigned.

Ashenfelter and colleagues found that courts (that is, individual trial court judges)
are likely to employ their own values regarding what the law should be. They theorize
that using judges engaging in value judgment is not improper or illegitimate. As
sophisticated analysts of the federal courts, they argue that using judgment is precisely what it is hoped that the courts would do—as it is appellate court’s mandate to judge, and to decide questions of law (Ashenfelter et al. 1995; conversation of author with UCLA law professor and legal scholar, Eugene Volokh, April 30, 2007).

As Ashenfelter et al. and Prof. Volokh (a well-known First Amendment scholar) make clear: finding statistical significance in the outcomes of close cases, which are tied to the politics or religion of the individual judge, "is not self-evidently disturbing"—because it is legitimate for the judge's worldview to dominate competing sources of decisional factors, including trivial factors (Ashenfelter et al. 1995: 262-63). In other words, having the judge's worldview and cultural competence (instead of what he or she ate for breakfast) influence the case outcome is not a problem. In fact, that is legitimately what the court is supposed to be doing.

Other scientists, in the field of sociology of religion, have taken less sophisticated looks at judicial bias or attitude. In the sociology of religion, as a subfield discipline, scholars look at whether extra-legal variables, such as the judge’s religion and politics, influence the outcomes of cases at the trial level, for example in cases about the regulation of religious speech cases (Blakeman 2006 and 2005; Blakeman and Greco 2004; Yarnold 2000). In the legal cases selected for analysis by these religion scholars, the outcomes of the cases are statements, by trial courts, that can be expressed in the form of win/lose propositions or dichotomies—stating whether a particular type of religious speech is allowed by the law, or not allowed, in a particular time and place. The Blakeman studies use logistic regression, which looks at dichotomous outcomes.
As interesting and important as the work of Yarnold (2000) and Blakeman (2006) in the sociology of religion—because they engage trial court opinions as sociological cases, broadly conceived, they nevertheless fail to account for the realities in the practice of law. Their work does not exhibit a deep appreciation of the litigation procedures they are studying. They employ general understandings at best—or plainly mistaken understandings, at worst—about pre-trial procedures, and the processing of laws and facts by jurists, in the U.S. courts. For instance, the procedure known as "summary judgment" is misconstrued in Blakeman's work, but these nuances are beyond the scope of this study. The point here is that subdisciplinary work on legal change is often blinded by the limitations of the subdiscipline. Although Yarnold, for instance, places her study of judicial bias in the legal realist tradition, she does not address the realities of law with sophistication. Quantitative methods, such as logistic regression, are useful for understanding the baseline or legal geography of change, across time and place. But it necessarily will not address ambiguities of legal cases, which turn on facts, law, and judicial discretion, and sometimes on nuances of procedure, as outlined above. Certainly the methods are incredibly valuable, as long as limitations are acknowledged. Other methods, such as case-based, discursive analyses, reveal other social insights.

Looking at the findings of these judicial-bias studies, rather than their limitations, important insights are gained. It certainly makes intuitive sense that religious speech lawsuits would reveal the influence of extra-legal variables, such as religion and politics—in dichotomous outcomes—because the subject matter of religious speech litigation is conceptually related to religious and political trends. But, as Tate explains, at
least as early 1980s, political scientists were coming to agreement that the "background studies" of judicial behavior were unsatisfactory, because researchers were not able to establish strong links between the backgrounds of particular judges and their decisions in cases (but see Ashenfelter et al. 1995). Instead, scholars establish that personal attributes of judges are of "limited explanatory power" (1981: 355; Epstein and Knight 2004). These insights have not yet filtered into the sociology of religion, as the current analyses of that subfield still maintain, based on faulty premises about legal procedure, that judicial bias influences legal change in religious liberties, in ways that are illegitimate.

When it comes to the regulation of civil liberties, scholars, even those ostensibly working in the realist tradition, continue to argue that extra-legal variables—including the politics of individual judges and local religious demographics—have a significant influence on case outcomes, even if courts so "mechanically" apply the law, as the first order of business (Blakeman and Greco 2004; Yarnold 2000). In these studies, the use of political considerations is considered troubling or wrong (but see Ashenfelter et al. 1995).

In summary, the overarching research question in these studies is whether judges decide cases according to political and religious biases, local conditions and trends, and political and religious ties—or "purely" on legal factors, as a formalist would argue. The findings are mixed, and may have a lot to do with philosophical assumptions, levels of legal sophistication, and methodologies. The realists try to look at social factors, the formalists emphasize the autonomy of law, and the critical theory analysts focus on whether it is proper, or improper, for the judges to use extra-legal factors, when in some instances, it is exactly the moral compass of the judge that is required.
3.2.4 Social Science Methodology and Position in this Study

This study takes a position in the philosophy of social science in accord with realist and sociological jurisprudence analysis, regarding whether it is ever possible to judge a case in a purely legal way; however, it must also be acknowledged that the juridical field proceeds by its own lights. These logics must be studied and understood, on their own terms, as the first step of understanding juridical change in sociological terms. The juridical sphere sees itself as autonomous, especially from politics; thus, the dynamics of the juridical field are shaped by that internal logic. An additional, important point is that the outcomes of the juridical field are multivalent. The outcomes of the juridical field include direct legal effects, meaning the effect of people and groups actually following the law as published and as it changes; and the outcomes also include indirect or social effects, including intended or intended social consequences, some brought about by changes in legal consciousness.

The law, including juridical law, is not entirely autonomous. Juridical change is also indeterminate, as debates continue over what forces shape the exercise of judicial discretion. Yet the professional logic of judges includes an implicit assumption that the field is independent, rational, and formal (with judges following precedent as required), as well as dominant over other spheres. Even with these formalist and realist assumptions in mind, critical theory is necessary to assess when the patterns of juridical change tend to favor one interest, such as political-economic elites, over other interests, such as the interests of dissenting groups to participate in democratic ways, and marginal groups to have a voice or life in public spaces. While it is not true that judges should never exercise
discretion, or a moral compass, it is also true, based on the arguments outlined here, that judges may sometimes engage their own professional logics that might incorporate political influences and discursive codes promoted by elites in other sphere, in ways that do not afford the best outcome for dissenter and marginalized groups. These patterns are perhaps best illuminated when examined at the meso-level, in institutional analysis, as opposed to studies pitched at the level of aggregates of individual outcomes.

One way to advance existing knowledge is to move into the study of legal cases, as legal cases, combined with sociological analysis of legal cases, as *sociological cases*—or instances of a particular social problem. Taking a meso-level view is likely to advance knowledge about legal geographies related to civil liberties exercised in public spaces.

### 3.3 What is a Case (Revisited)?

In the introductory pages, it was said that the unit of analysis in this study is the case. It was also emphasized that the case takes various forms, at different levels of abstraction and empiricism. In this chapter, these basic points are be elaborated, and the competing conceptions of a case, as legal case and sociological case were explored.

The primary threads of this study were outlined in the introductory chapters, including the study object, the goal of delivering a map of social spaces, and the framework for analysis, namely the legitimacy-and-law dynamic and the paths of legitimacy. The method of examining discursive formations *as text* was discussed, but the particular methods of each chapter were not described. The theoretical issue was also not explored: what is a case?
As discussed in chapter 1, and in opening sections of this chapter on methods of studying legal change, we saw that a "case" takes various forms, at different levels of abstraction and empiricism. At a high level of abstraction, there is the ideal-type case of a particular clashes of absolutes, for instance the "case" of religious freedom versus freedom from religion. Or the case of liberty versus security in freedom of assembly cases. But this ideal form of the "clash of absolutes" can only exist in empirical settings and subject to social conditions. The ideals of the First Amendment are only actualized in practice. Other meanings of case include the legal case, or the lawsuit, or legal opinions issued as court opinion, or "cases." Finally a case can be an instance of a larger phenomenon, along a scale of abstractions, from clashes of absolutes, liberty versus security, to area of empirical study, such as state repression, that can include different cases, such as torture cases or bureaucratic repression cases. All of the foregoing analysis leads to more question about what it means to identify a case in sociological research. This is a particularly important, methodological and theoretical consideration in law and society research.

Ragin and Becker (1992) published a groundbreaking, edited volume, *What is a Case?* that addresses the titular question and theoretical practice of casing, that is, selecting cases with scientific methods and goals in mind. In that volume was an article by Andrew Abbott (1992) on the use of multi-case narratives to examine and reveal the patterns of social behavior—in contrast to work that is intended to study a subset or sample of cases in order to generalize about the population.
Abbott's discussion of the method of using multi-case narratives to examine and reveal the patterns informs the methodological choices made in this study. The methods used in this study are not the selection of cases in the dominant paradigm of sociological research, that is case selection on random samples from a population of all such cases. This sample and population research is much more likely to generate findings that are generalizable to categories of behavior, that is to the population being studied, for instance, all people in the U.S., or for instance, all nations in the U.N systems.

But, as Abbott argued, other methods are useful for other purposes, such as the identification of patterns in cases, using a smaller number of cases purposively selected. The study of patterns in smaller numbers of cases is allows for the study of ambiguity in social decisions, rather than a reliance of seeing all choices across a population in terms of a similar or uniform patter of rational action, whether by individual people or by other cases, such as nation-states. Accepting the obvious reliability and worth of sample and population studies, he suggested that other studies, using multiple cases, could take other valid, scientific approaches. These are not cases studies, as generally understood, but instead multi-case narrative analyses that produce pattern descriptions, depending on how the concept of case is defined and used in the study. This type of work is not entirely new, of course, as many classical sociological work are multi-case narrative analyses that produce pattern descriptions, including Durkheim's (1912) *The Elementary Forms of the Religious Life* and Weber's (1930) *Protestant Ethic and the Spirit of Capitalism*.

Durkheim drew on cases of primitive religion to detect patterns of practices and beliefs, and Weber drew on histories of religious action, in one sphere as a case, to trace the
elective affinities that the religious behaviors caused or influenced in another sphere as case, the economic sphere.

Take, for example, the "case" of when groups want to place religious symbols or artifacts in a public place. This is the example, or "case" used in the chapter of this study (chapter 3) on religion and nationalism. The term case here means an example or ideal-type of case illustrating a clash of absolutes, between national unity and tolerance, including the removal of an established religion from the state filed, on the one hand, and pluralism or freedom of expression in the exercise of religion, on the other hand. The case-based question of that chapter is: What discourses influence juridical decisions in cases about placing religious symbols in a public place, such as a park or courthouse managed or operated by the state? This is a restatement of the first research question of this study: *What political influences shape the outcomes of First Amendment lawsuits?*

In the chapter, the term *case* is used not in the sense of a case that is part of a random sample of a population, but a case that is an ideal type of a social problem, purposively selected to illustrate the social patterns or field dynamics of that problem the problem of both accommodating religious expression and removing it from the public sphere. Moving to a lower level of abstraction, there is also the more particular "case" of this type of problem, the problem of religious displays in public parks, this more particular meaning of "case" are the individual lawsuits or legal cases, brought by groups against cities in disputes about putting religious symbols in a park. Each particular case is an instantiation of an ideal-type case containing a clash of absolutes. Table 1 illustrates the casings and levels of abstraction in a sociology of the First Amendment.
TABLE 1

LEVELS OF CASING IN A SOCIOLOGY OF THE FIRST AMENDMENT

<table>
<thead>
<tr>
<th>LEVEL OF ABSTRACTION</th>
<th>TYPE OF CASE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Extremely High</td>
<td>Unity versus pluralism</td>
</tr>
<tr>
<td>High-Middle</td>
<td>Ideal type social problems</td>
</tr>
<tr>
<td>Middle</td>
<td>Religious freedom lawsuits</td>
</tr>
<tr>
<td>Low-Middle</td>
<td>Disputes over religious displays in parks</td>
</tr>
<tr>
<td>Low</td>
<td>Lawsuits or opinions</td>
</tr>
</tbody>
</table>

In this study, a range of case-based methods are used to address a range of cases having distinct levels of abstraction. A sociology of the First Amendment is about the case in which there is a clash of absolute values, for instance religion/conscience. At the highest level of abstraction, this is the case of unity versus pluralism. At the lowest level, this is the case of a court opinion making legal change as a stopping point in the legitimacy-and-law dynamic. For another example, in the study of freedom of speech, the highest level case is the clash between free speech or privacy; and the lowest level case is the lawsuit about a claim of defamation or invasion of privacy. In this study of all three types of freedoms (religion, speech, assembly), a range of methods—all of them, in one way or another—including multi-case narrative analyses were used to develop a sociology of the First Amendment.
The range includes a range of types of court opinions, from only studying U.S. Supreme court cases in chapter 4, to the study of trial and appellate court decisions in chapters 5 and 6. Chapter 5 looks at a very narrow type of legal case, only the "involuntary public figure," which is a categorical exception to the rule known as the "public figure doctrine." (This doctrine sets the difference between privacy rights enjoyed by public figures, limited public figures and private people.) Chapter 6 looks at a broader range of case, trial and appellate, but on a larger terrain of law, not a single exception to a rule in a single doctrine, but more broadly across a range of laws used to regulate assembly, including public forum law and "time, place, and manner" exceptions under those laws. The goal of the juridical field and judging logics was to balance the right of assembly, or civil liberty, against competing values of security in public spaces.

The multi-case narratives are different in the type of discourse analysis used, and the range of data on actors and fields outside of law that are addressed. In chapter 4, only legal cases are analyzed, and correlated to the code of national religion, as specified in sociological articles. In chapter 5, we travel outside of the legal field and look at journalism data and logics, found in the legitimation claims made by journalism outlets. In chapter 6, we look at policing logics found and expressed in policing data and in pending lawsuits.

In all of the empirical chapters, doctrinal analysis is offered in order to "get the patient on the table." In the analysis of the legal cases, the law is explained because answering the questions of what is the law today? and what was the law before? is necessary to establish the existence of legal change, before addressing the patterns of
legal change. The doctrinal analysis is groundwork that must take place before an examination of political or social influences on judge-made law. The legal cases are considered as sociological cases, or examples of a type of social problem (see Table 1).

The range of multi-case narrative methods is as follows. In chapter 4, on the freedom of religion, discursive explanation is used to locate an underlying code that animates the court opinions on the display of religious representations in public places such as parks and courthouses. In chapter 5, on speech, neoinstitutional theory and field theory are used to explain positions taken by publishers regarding controversial news publications.

In chapter 6, on the assembly, the first two methods are extended. The chapter offers a legal geography of places where assembly is contested in the public sphere and in litigation, leading to court opinions. Chapter 6 goes outside of the juridical field, looking at public sphere legitimations made by police officials, and internal documents of police officials. The chapter moves into historical-institutional analyses of the professional logics of police, including the emergence of zero tolerance policing, and into analyses of legal cases, as evidence of sociological trends in the regulation of assembly.

Having looked at the long-term trends, and influence of policing logics on juridical logics, a closer look, or particular casing is offered. The end of the chapter examines the regulation of assembly at the presidential national conventions, as a critical example of public assembly and bureaucratic regulation of outdoor spaces. The range of methods, case levels, and types of data, in all three empirical chapters, is summarized in this table.
TABLE 2

A RANGE OF MULTI-CASE METHODS

<table>
<thead>
<tr>
<th>CHAPTER</th>
<th>METHOD</th>
<th>FIELDS</th>
<th>DATA</th>
</tr>
</thead>
<tbody>
<tr>
<td>4</td>
<td>discursive explanation</td>
<td>Juridical field, as shaped by political</td>
<td>U.S. Supreme Court cases and sociological articles and books</td>
</tr>
<tr>
<td></td>
<td></td>
<td>considerations</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>field theory and institutional analysis</td>
<td>Juridical field, as internally shaped and as influenced the journalism field</td>
<td>Legal cases across a range of courts on a narrow legal exception, and social disputes over privacy (never brought to court) as well as journalism legitimations made in the public sphere</td>
</tr>
<tr>
<td>6</td>
<td>legal geography</td>
<td>legal field, as shaped by political-economic forces in the regulation of space, and by policing logics in zero tolerance</td>
<td>Legal cases across a range of courts on a broad area of doctrine(s), related to assembly rights; and policing history and policing claims of legitimations made in the public sphere; and presidential conventions as cases of policing logic</td>
</tr>
</tbody>
</table>

3.3.1 Discursive Explanation

To locate what political influences shape the outcomes of First Amendment lawsuits in the ideal typical case of religious speech cases, discursive explanation is used in chapter 3. The method is to analyze the court opinions not for legal import alone, but for dichotomous outcomes (was the religious display allowed or not?) and to identify the legitimation claims made to support the outcomes. The outcomes in these cases can be expressed as win/lose propositions of whether the religious display was allowed, or not.
In a grounded way, during the analysis of the legitimations offered by the Supreme Court, it soon became clear that the legitimation used in this sort of legal case all turned on a common discourse, which was identified as civil religion, a nationalism code that promotes national unity, while acknowledging pluralism. This identification was based on prior, sociological study of the sociology of religions, the history of secularization, including the emergence of the civil religion.

The discursive explanation in the chapter points to how the legitimation claims express an underlying code. The chapter also addresses implication of the use of that code, as a social influence on juridical outcomes; and the chapter addresses theoretical implication of assuming there is a single code at use. Other studies that engage discursive explanation include: Pacifici-Wagner's (1994) *Discourse and Destruction: the City of Philadelphia versus MOVE*; and Richman's 2010 (*Courting Change: Queer Parents, Judges, and the Transformation of American Family Law*). Richman, for instance, outlines the implications of law’s indeterminacy and then examines judicial decisions that rely on changing and ambiguous definitions of parenting in family law.

Pacifici-Wagner does not limit herself to a single field. In *Discourse and Destruction*, Pacifici-Wagner examines the logics used by different state actors, within the single case of a violent episode in Philadelphia. She traces the patterns in which discourses of the state, and various bureaucracies of the state, vary. The variations in collective identity and schema for decision making in the case made it difficult to legitimate the use of violent repression, as each field turned the problem over to the next. (A similar type of cross-field analysis is accomplished in this study in chapters 4 and 5.)


3.3.2 Neoinstitutionalism and Field Theory

In chapter 5, on the freedom of speech and the individual right to privacy and dignity, the *casing* is of the recurring disputes about individual people who are accidentally caught up in the news, regardless of whether these cases end up in court. The analysis looks at how one of this type of dispute, the case of a baseball fan who was humiliated in the mediated public sphere, after an accident at a Major League Baseball game. The baseball fan never brought a lawsuit, but if he had, he would have likely been found to be an involuntary public figure, or private person who has limited rights under the First Amendment to sue for invasion of privacy or infliction of emotional distress.

In this chapter, the casing is comparative, in ways that the first empirical chapter was not. First, the chapter looks at a *range of court levels* to identify patterns up and down the juridical field. It is found that there is a ladder of cultural competence (cultural capital), which can be see as a hierarchy of professional logics of juridical field. Second, this method is comparative across fields and actors, as juridical logics and hierarchies are compared, cross-institutionally, to logics of decision in the journalism field. It is found that the media ethics "mirror" the hierarchy of the juridical field. Third, the chapter is comparative in that the baseball fan case, a case of an involuntary public figure from the Internet era, is compared to similar cases from before the Internet.

The purpose of the cross-case comparison is to eliminate the Internet as a *necessary* cause of this ideal type of conflict. The Internet cannot be blamed for the scapegoating of private persons in the mediated public sphere, even if the Internet accelerates that process.
The particular question of that chapter is: Does the law influence legitimations in the field of journalism, which is a version of the overarching question stated as research questions Nos. 2 and 3. *What are the juridical effects of civil liberties litigation on individual rights of expression and dignity?* (see page 19). Neoinstitutional theory is similar to field theory, as discussed and detailed in chapter 5. There are numerous other studies that engage neoinstitutional and field theory analysis, as cited in chapter 5.

**3.3.2 Legal Geography, Urban Trends, Policing Logics**

There are many ways to accomplish historical-comparative analysis, and many types of historical-comparative analysis. The methods, known under the rubric of comparative historical analysis, are not limited to the study of nations as a case, even though that is the use within the field of political science.

The third method in this study is comparative and historical, and also a multi-case narrative analysis, but best described as a "legal geography." *Legal geography* is the study of how law is constructed or located in places, and how law defines the production of space, either in cultural or political-economic terms. Some legal geographies, such as the legal geography in chapter 6 of this study, combine two sociological views of law: law as discourse and law as power, but in the context of geography or *spatial analysis* (Delaney, Ford, and Blomley 2001). In the legal geographies, researchers move past idealizing the judge-made law as an expression of legal reasoning or formal discourse. Instead of accepting the normative image of judge-made law, which the juridical field authorizes, scholars engaged in legal geography consider law as a political institution, in parallel to the legislature (Clark 2001). In this study, a legal geography of the freedom of
assembly is offered. This is an apt method since assembly is about physical gatherings in physical spaces. Here, the legal geography starts with categorical variables (repression, 1/0) and types of places controlled, before looking more closely at legitimation claims.

The data collected for the legal geography are judicial opinions regarding when and where assembly lawsuits arise (see chapter 1, section on data and methods, and see Appendix C). The regulation of assembly can take different forms, but typical cases are about "time, place, and manner" (TPM) restrictions on protest, and the use of protest permits (usually called parade permits). At first, using online database searches only, a limited number of legal cases were uncovered. The original database searches collected approximately 200 cases, but in order to find all of the available cases or reach a near-universe of the type of case being examined, the original database searches was expanded. A more complete search was conducted, using both online and library resources, to get as many of these court opinions on protest permits and TPM restrictions as possible—and fill out the story of what happened in police regulation and court legitimation of bureaucratic restrictions on protest, in such locations such as lunch counters, schools, streets, government buildings, and other public places (Appendix C).

After extensive legal research was conducted to locate a near-universe of cases on questions of protests permits and TPM restrictions on assembly in U.S. law, the number of cases, meaning court opinions, was over four hundred (N=435). These court opinions were coded dichotomously for repression, yes for repression coded as (1), and (0) otherwise. There was also qualitative coding of the cases, for the location type of the protest (abortion clinic, airport, government building, park, sidewalk, street, etc.), rather
than the location of the court. The geographic location of protest was identified by uniform county codes or ANSI codes, as well as county name and state. The cases were addressed in this way as legal cases, and also as sociological cases—or examples of disputes in the legitimacy-and-law dynamic. The cases were then placed in their historical context, by decade and regional location within the U.S., to assess patterns in the legal changes around freedom of assembly, with respect to the categorical variables of repression (1/0) and type of location (abortion clinic, airport, etc.). In this way a baseline, legal geography was developed regarding the regulation of assembly in postwar U.S. The baseline establishes the judicial trend to be explained.

The individual opinions were also read for the rationales, or legitimation claims offered by judges to support the outcomes reached, but detailed reports on these legitimations would be too space-consuming to include in this study. Where these legitimations were not purely legal, but drew on social or moral considerations, they were examined to see what political codes or values were expressed. Some of these legitimation claims are reported, in connection with the policing logics. This was the use of discursive explanation methodologies, combined with historical-comparative analysis in the form of a legal geography.

To connect the legal geography, or statement of judicial trends, with the political field, an outline of the professional logics of the policing field was developed, using historical and sociological resources, as well as litigation data, referring to selected internal documents from the New York City case from archival research (as described in chapter 1 on data and methods). The policing logic was linked to the juridical outcomes
in which more and more locations were regulated. In this comparison, policing logics were traced along a path of legitimacy (defined in chapter 1) from the law enforcement field as a political field, to the juridical field, as shown in Figure 4 above. In this way, it was possible to see connections between the cultural values of the policing field, as translated across fields, and changed from a policing logic to a juridical logic, and outcome.

Next, competing hypotheses are stated, and tested against the data, to determine if either the negotiated management thesis (outlined in chapter 1)—or a more critical thesis, found in the study of global cities, and political territories (Sassen 1991, 2006), is the better account of patterns detected. Thus, chapter 6 is comparative in many ways that the first two empirical chapters were not. (It is also more general in its overview of legal change, and operates at a higher level of analysis.) The alternative theories are themselves comparative, as one based in a consensus assumption (negotiated management) and the other in conflict or critical theory (global cities and territories).

To assess the competing theories, first, the legal geography ("the patient on the table" or patterned trends in law) is used as an assessment tool. Did the baseline pattern reflect a consensus of negotiated management—or does the pattern of increasing disputes over protest policing of territory point to a conflict dynamic? The data, because limited to legal cases that reached court opinion, was not a statement of the entire field of regulating assembly. There could well be negotiated management in some times and places, but using the legitimacy-and-law data, it is possible to see that the negotiated management thesis does not account for the regulation of assembly. There are too many conflicts over
assembly, more than 400 in four decades; and there are increasing numbers of conflicts, decade over decade. The analysis in the chapter supports a conflict theory, based in the policing of space and emergence of global cities, as a better account of the regulation of assemblies, at least when those regulations are contested, rather than negotiated.

Next, cases of assemblies around the presidential conventions (2000-2004) were examined, including efforts of state actors to license or legitimate policing tactics in advance of the 2004 Republican National Convention held in New York City, in the media and the courts. The New York case is an ideal typical case of the global city, and a global city that was instrumental in the emergence of zero tolerance policing. For historical comparison, the presidential conventions of year 2000 are also considered, to eliminate 9/11 as the necessary cause of intensive enforcement at the conventions. This closer look, moving not across time or across field, but instead into a single case or small set of cases—is a movement into a lower level of meso-level analysis.

The year 2000 conventions were held in Philadelphia and Los Angeles in a post-Seattle 1999, but pre-9/11 context, with different legitimacy-and-law outcomes. As mentioned, this last comparison is a test of the commonplace notion that the 9/11 attacks were a necessary cause of changes in the policing of protest in urban spaces. This commonplace idea is similar to the idea that the Internet caused a shift in media ethics, addressed in chapter 5. In both cases, it is found that long-range, historical shifts were also important to understand and describe the patterns of field dynamics uncovered.
CHAPTER 4:
RELIGION—NATIONALISM AND TOLERANCE

While no one would mistake a court for a church, nonetheless the court's "religious" functioning is unmistakable.

—— Hammond (1996: 356)

4.1 Protecting Pluralism in the Park, 1985-2010

This chapter takes up the religion clause of the First Amendment. Here we examine the cultural contradictions inherent in dividing state from society, when the state actors look to manage religious pluralism expressed in public places. After analyzing the legal outcomes in the cases about disputes over the display of religious symbols in public places, such as parks and courthouses, it was discovered that a good place to start the analysis of these types of cases is elaboration of Robert Bellah's civil religion thesis. Restating the civil religion thesis becomes a doorway to examining more thoroughly the contradictions within legal discourse and within legal consciousness—around the social phenomena of religious displays in public places, such as parks and courthouses. The civil religion is a nationalist code that places the state in the supreme position, over religion.

Civil religion is defined as a professional logic, or discursive formation, of presidents, and other state actors, especially executive and legislative actors in the political branches, which incorporates religious values and symbols into political
discourse as a way of asserting state dominance (Rousseau 1762; Cranston 1968; Bellah 1967). It is a political code that promotes unity, centered on state supremacy, by evoking religious symbols (Rousseau 1762; Cranston 1968). This unity is maintained in the management of complex issues of religious pluralism and tolerance. As will be suggested here, through the use of sociological logics and ideal-type groups, the regulations of pluralism in the area of religion and conscience may not always to the satisfaction of competing factions, such as the "deeply religious" and the "deeply secular," as idealized factions within the U.S. civil sphere.

In addition, it is critical to address the classical sociology text on religion and solidarity, Emile Durkheim's (1912) *The Elementary Forms of the Religious Life*. In lawsuits over the display of the Ten Commandments and nativity scenes in public spaces, the U.S. Supreme Court enters rulings that appear contradictory and ambiguous; however, apparent contradictions in the legal discourse can be clarified with reference to Bellah's (1967) 'Civil Religion in America' and Durkheim's (1912) model of cultural consensus from *The Elementary Forms of the Religious Life*.

Together with neo-Durkheimian accounts, these theories explain the dynamics of building national solidarity, while managing religious pluralism. This is the abstract conflict between unity and pluralism. In First Amendment lawsuits over religious displays, the Court does not resolve cleavages between secular and religious groups, but instead reaches a democratic unity over the sacralized value of tolerance, which is expressed in terms of a civil religion that everyone might be expected to tolerate—even if they might not tolerate doctrinal expression of religion in the public square. This value of
tolerance arguably finds its highest expression in the civil religion and a lower common
dominator, as we are all members of the same nation (so long as those excluded from
citizenship are not considered). Implications are drawn from this analysis that bear on
secularization, and nationalism.

Bellah's (1967) article, "Civil Religion in America," is a story about the discursive
formations of nationalism, as these formations move from political philosophy and
jurisprudence, into the realm of the collective conscience or legal consciousness (as
above defined) in other social spheres. It will be shown in this chapter that the discursive
formation known as civil religion is used by juridical actors to decide cases about
religious freedom. Thus influence of the political on the juridical field is not at the level
of "judicial background" as addressed in studies looking for the personal biases of judges
(see chapter 3). It takes place at the level of professional logics, being transformed from
politics, into judicial outcomes, at the institutional level.

In the U.S. Supreme Court, in cases about the display of the Ten Commandments
and nativity scenes in public spaces, decided between the early 1980s to 2010, the Court
enters rulings that appear contradictory. In one case, the Court finds that the display of a
nativity scene is constitutional, Lynch v. Donnelly (1985), but, a few years later, the Court
finds that a nativity scene is not constitutional, County of Allegheny v. ACLU (1989). If
dichotomous coding of these outcomes were attempted, the analysis probably would not
be able to uncover ambiguities and discursive explanations that explain the variation in
outcomes. What values and dynamics lead to these contradictory outcomes? Why do
these cases keep recurring, if the Court is resolving the issues? Is the Court resolving the
underlying conflict of values that generate these cases? Why does one case head in one
direction, while the other makes an apparently opposite ruling about a similar disputes?
Answers to these questions come quite easily, if neo-Durkheimian theory is used to
examine the legal discourse.

Based on the premise that the collective consciousness and collective identities
are real, and the corollary proposition that these social realities exert actual forces (see
chapter 1), a Durkheimian take on the religious-display cases reveals that the juridical
outcomes are not as contradictory as they first appear. The Court, in exercising its
cultural authority over the U.S. democracy, as nation-state, has to manage a range of legal
consciousnesses, which dispersed across groups or factions holding various identities.
This vast pluralism—both legal and religious—is unified by a code of democratic
consciousness, derived from liberal political philosophy. This code forms a collective
identity held at the highest level of salience and lowest level of commonality. National
unity exists at this high level of legal consciousness, and (most) everyone is a citizen or
member, but many, distinct legal and religious consciousnesses remain in the civil
sphere, located in different collectivities, each with its own definition of the sacred.

The contradictions in the religious-display cases are accounted for by Durkheim's
(1912) model of cultural consensus from *The Elementary Forms of the Religious Life*, as
extended by neo-Durkheimian arguments. Durkheim's model explains not only consensus
and solidarity, but their opposite: conflict and division. Contradictions in the legal
discourse become consistencies under the code of a civil religion, per the accounts of
civil religion and its purposes, given by Jean-Jacques Rousseau (1762) and Bellah (1967).
4.2 First Amendment Tensions in the Religion Clauses

The first two clauses of the First Amendment to the United States Constitution are: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const., amend. I (1791). The first principle of civil liberty in the U.S. is religious liberty. Under the Establishment Clause, the government cannot establish a religion, but under the Free Exercise Clause, the government must allow for the free exercise of religion. There is a tension between separating church and state, on the one hand, and tolerating the exercise of religious practices, on the other.

For example, in the religious-displays lawsuits, the dilemma is whether to avoid or allow the public display of religious symbols. If a government entity does not allow for the display of religious symbols in public spaces, such as parks or courthouses, then it is preventing the free exercise of religion. If the government entity does allow, or worse yet sponsors, the displays—then expensive and protracted litigation is likely to ensue. Thousands of legal opinions, law review articles, and items of news commentary have been published regarding whether the First Amendment requires, at one extreme, a strict separation of church and state, or, at the other extreme, government accommodations of and aid to religious expression—or, as a middle alternative, state neutrality and tolerance regarding religious exercise (Garry 2004; Neuhaus 1984).

There is no way to adequately to review this literature in a single book, much less a single chapter of a study. The range of issues includes school prayer, the Pledge of Allegiance, and other practices, but the focus here is on the religious-display cases.
The U.S. Supreme Court's decisions in the religious-displays lawsuits make plain the persistent cleavage between groups that hold deeply religious and deeply secular commitments. These groups are theorized as ideal types of groups that likely exhibit variation in actual groups. Taken as a whole, as actual groups, even if assessed in the aggregate, the two groups do not share a collective identity regarding religion. One group is deeply religious, including for example the doctrinal religions "of the book," Muslim, Judaism, Catholic, and some variety of Protestant faith. These doctrinal religions do not share the same views of on conscience as those groups have deeply secular commitments, but across those two broad cases in the U.S., the members do share the national identity of being American, an identity that does take on religious dimensions, according to the civil religion thesis.

The most recent religious-display case to reach the U.S. Supreme Court is Salazar v. Buono (2010). In that case, the Court might have considered the religious display question, but did not. The question was whether the First Amendment prohibits the display of a cross on land that was once owned by the federal government. The Court skirted the constitutional issue. The display of the cross in the Mojave National Preserve, since at least as early as the 1930s, was intended to honor U.S. soldiers who died in foreign wars. The cross was mounted without government permission. Nevertheless, Frank Buono, a National Park Service employee, filed a lawsuit in 2001, objecting that the religious display was unconstitutional.

During the journey of the case to the Supreme Court, a land transfer was effected, giving the Veterans of Foreign Wars (VFW) ownership of the land. A lower court ruled
that the land transfer to VFW was calculated to avoid compliance with an order to remove the cross. The U.S. Supreme Court, however, decided the best course was to send the case back to the lower court to reexamine the property question.

*Salazar* is unusual in that property law became more important than First Amendment law. The issue of the display of a religious symbol remains in the case, as *Salazar* continues to wind through the courts (as of the initial versions of this chapter). Moreover, *Salazar* is only the most recent of many lawsuits about religious displays. The cases are a persistent subject of national debate in civil and legal spheres in the U.S.

Between the *Lynch* decision in 1985 and the *Salazar* decision in 2010, six additional religious-display lawsuits reached the Court. Although the Court has issued numerous legal opinions in religious-display lawsuits, its rulings are not internally consistent. The Court seems to be repeatedly failing to resolve cleavages between the deeply secular and deeply religious group(s).

The Court itself is painfully divided, as the nine justices combine, in different configurations, to issue contradicting opinions regarding the constitutionality of religious displays. Yet legal outcomes become consistent, once seen through the lens of Bellah's civil religion thesis.

On analysis, nearly every case turns on whether the display celebrates civil religion as opposed to doctrinal religion. Read together, the legal consciousness expressed in these lawsuits is a unified belief system that valorizes the democratic value of tolerance. This value promotes national unity in the face of religious pluralism. The legal outcomes paradoxically both fuse the secular and religious—and separate the sacred
and profane. Indeed, the legal discourse brings to the foreground competing definitions of the sacred. Is the sacred object the glory of a shopping display, erected in a business district during the holidays (*Lynch*)? Or the miracle of Christmas at the heart of the Christian faith (*County of Alleghany*)? Or is the sacred object something else entirely?

In accord with the civil religion thesis (Rousseau 1762; Bellah 1967), the sacred is the *nation*, as a collective representation of public order. The U.S. democracy, defined for these purposes as a social space of tolerance, is the sacred. As Gellner stated, in his work on nationalism: "Durkheim taught that in religious worship society adores its own camouflaged image. In a nationalist age, societies worship themselves brazenly and openly, spurning the camouflage" (1983: 56).

Gellner explains, however, that nationalisms in industrial society are not the same as religions in primitive society. For Gellner, the point of difference is that industrial society worships itself in a manner that transforms the folk culture. While nationalist ideology claims to be defending folk cultures, in reality, it forges a high culture and builds up a mass society (1983: 58, 124).

As clear from the following analysis—a neo-Durkheimian analysis of the religious-display lawsuits—the U.S. democracy, as nation-state or cultural space, enjoys more authority than either doctrinal religion or secular beliefs. The legal discourse in the religious-display cases, once seen in Durkheimian terms, quickly becomes consistent and understandable, not contradictory or ambiguous.

The democratic value of tolerance and legal process, among other values, form a cultural code that divides sacred from profane. But the sacred is defined as tolerance and
national unity, while the profane is any other definition of the sacred. The legal consciousness or national unity expressed in the religious-display lawsuits is unifying at the expense of competing understandings of the sacred. The Court's rulings enforce the civil religion, which tends to be a secularizing force, because it does not allow for the expression of doctrinal truths, as those are understood in the religions of the book, for example. In these lawsuits, the type of religious symbol or collective representation that may *lawfully* be presented in public spaces are representations that fuse secular and religious expressions—and separate the sacred space of democratic unity from the profanities of both doctrinal religion.

The legitimacy and law dynamic, then, is that groups want to express doctrinal religion in public spaces, but those in deeply secular groups, or groups promoting a different version of civil liberty, do not want to see those expressions sponsored by the state, which leads to recurring disputes. These disputes enter the legitimacy and law dynamic and are pursued to court resolutions or instances of legal change around civil liberties, as discussed in chapter 1.

### 4.3. Legal Discourse and Durkheim’s Model of Consensus and Conflict

Durkheim's (1912) model of consensus building and solidarity from *Forms*, has enduring value for explaining not only religious phenomena in pre-modern, monocultural settings, but also political contention and legal outcomes in modern, multicultural disputes. The model was meant to explain how religious authority, as a form of cultural authority, is created and maintained through repeated rituals. The model also explains on how multicultural conditions generate recurring disputes, for instance
national lawsuits over the display of religious symbols in city parks. The model accounts for why these lawsuits disputes recur every few years, why they are not entirely resolved by judicial process, and how the judiciary nevertheless maintains national unity in the face of religious pluralism. The legitimacy and law dynamic for these lawsuits can be depicted in this way.

Figure 5. Legitimacy-and-law dynamic, in religious-display cases

This legitimacy-and-law dynamic can be understood in neo-Durkheimian terms. Using ethnographic evidence collected by others, Durkheim argues that, in simply organized
societies, religious practices occurring in physical co-presence tend to solidify collective beliefs and create shared symbols. In turn, the practices, beliefs, and symbols lead to solidarity. The practices also create bonds that define a society or collectivity. Because this model is about collectivities sharing a common religion, it is surprising to see that the model is useful for the analysis of multicultural disputes in complex and modern societies, where there are a plurality of religions—and a range of doctrinal religions to less truth-bound religions—and few religious practices in shared, physical spaces. Instead of commonly held beliefs and solidarity, there is disagreement and division. A doctrinally grounded religious group, for example Pentecostal Christians, might want to place a cross in a public space. Or a Catholic group might expect to see a nativity scene in the park at Christmastime. There may even be disputes over the use of such terms as "Christmastime" or "the holidays," by and between the deeply religious and the deeply secular

But opposites are closely connected; multicultural conflicts resolved by law are analogous to cultural consensus bound up with religion. Consensus is matched by conflict, law by religion, the sacred by the profane, the state by civil society.

Durkheim argues that symbolic practices must be repeatedly performed in shared spaces with others to build a cohesive collectivity that is defined against the profane or mundane aspects of everyday life. In *Forms*, Durkheim offers his famous definition: "A religion is a unified system of beliefs and practices relative to sacred things, that is to say, things set apart and forbidden—beliefs and practices which unite one single moral community called a Church, all those who adhere to them" (1912: 42).
It might be thought that this classic of sociological analysis, which looks at primitive religions as its data, might have little to offer regarding political conflict. Tilly (1981) is not the only political sociologist to reject Durkheim's model of conflict and consensus based on the sacred-profane dichotomy. Others also question Durkheim's usefulness for explaining political conflict (Traugott 2010; Sewell 2010; Deflem 2007). In fact, after reading earlier drafts of this study, a professional colleague commented that Durkheim's theories were not even valid for understanding modern religion, because of new forms of pluralism and contention. Another colleague commented the Durkheim's model could never be used to understand modern conflicts, because it was about consensus. This argument limits the value of Durkheim's work to the elementary forms to the elementary form. It limits an understanding of conflict to conflict, and does not seem the connections between consensus and conflict.

In contrast, the argument here is that Durkheim's model is useful for understanding civil liberty as challenged in First Amendment disputes. Although many political sociologists discount the usefulness of Durkheim for understanding contention, an expanded reading of Durkheim's model is useful to explain the U.S. Supreme Court as cultural authority in a multicultural setting.

By multicultural settings, reference is made to single territories or spaces in which several collectivities, each with its own cultural understandings, coexist. Multicultural settings can be physical places such a park, or imagined spaces, such as a nation-state. A multicultural setting can be as large as the U.S., or as small as window display.
By cultural authority, reference is made to dominant, discursive formations that organize meaning-making for large populations. Cultural authority is taken for granted, naturalized or institutionalized, and not the subject of revolution or violent dissent.

Per Durkheim, cultural authority is sustained by shared practices, which, in turn, lead to shared beliefs. While religious rites are sometimes incorrectly understood as mechanical or material operations, they are the embodied practice of disciplining the consciousness (Durkheim 1912: 422).

Solidarity refers to the social bonds, ties, or relationships, or feelings about those bonds, which arise from the practices and beliefs; collective conscience refers to shared or collective beliefs and identities. A collective identity is an individual’s cognitive, moral, and emotional connection to the larger community, category, practice, or institution of which he or she is a part (Polletta and Jasper 2001; see also earlier discussion in this study).

In an extension of this model, the shaping of a legal consciousness is here included in this Durkheimian analysis of the multicultural setting. Social scientists working in the law and society tradition have developed a significant body of work on legal consciousness, as a social fact and a collective identity that exerts causal force. (Nielsen 2000; Silbey 2005; McCann 2006). In modern parlance, the collective conscience becomes collective identities, plural—because of the multicultural setting.

Collective representations refers to the symbols, signs and objects that embody the shared beliefs, for example the democratic code. For Durkheim, solidarity arises because a certain states of consciousness are common to all members of a collectivity
In the premodern religious rituals, there was co-presence in physical spaces, which produced a collective effervescence or energy, directed to, and maintained in, the collective representations, yielding, the collective conscience. While this element might be missing from a lawsuit pursued in the mediated public sphere, on a national scale, there is a shared imagined space of the nation-state. This is the space that Gellner thought was the basis of seeing the nation as the new religion. In the U.S., the nation-state is produced not only in physical spaces, but also through public debate. Durkheim (1912) emphasizes that social solidarity is the outcome of practices that lead to the collective conscience. The outcome variable is cultural authority. Ritual actions build collective consciousnesses and solidarity, which then influence the production of cultural authority.

Again, by extension to the modern condition, ritual action can include legal rituals, engaged in by members of a polity within national spaces that are imagined, rather than the subject of a physical co-presence. It is the cultural authority of a collectivity that provides worthiness to its adherents and punishes its deviants. Cultural authority proscribes boundaries of inclusion and exclusion. A collectivity is defined by cultural authority; cultural authority defines and bounds a collectivity. The question becomes: where is cultural authority located?

In Bellah's analysis of the civil religion in America, he refers to the separation of church and state, saying "the principle of separation of church and state guarantees the freedom of religious belief and association but at the same time clearly segregations the religious sphere, which is considered essentially private, from the political one" (1967: 42). He argues that the division does not deny a religious dimension to the political
sphere. Rousseau (1762) makes explicit that the political sphere must be the common point of social commitment with devotion is directed to the democratic nation. The cultural authority is taken from the religious sphere and transferred to the nation.

4.4 The Religious Display Cases: Reindeer Plus?

Over the last twenty-five years (1985-2010), no less than eight lawsuits over the display of religious symbols in public places reached the U.S. Supreme Court. This means there is a new opinion regarding religious displays every three to four years, not counting the Pledge of Allegiance cases and the school prayer cases, which are freedom of religion cases, but not about the placement of religious displays in public.

The opinions in the religious-display cases offer no standards or guidelines for cities or public officials to use when determining whether a religious display should be avoided or allowed. One commonsense solution for cities, then, would be to refrain from displaying religious symbols altogether, thereby avoiding any litigation. But as is evident from a trip to any American downtown, during the winter holidays, or to any courthouse throughout the year, many state actors, including city officials, present religious displays to the public.

The displays are a complex fusion of sacred, doctrinally oriented religious expression and secular representations of the "holiday spirit." This is because fusing the doctrinally sacred and generally secular is most likely to meet with Court approval or comport with legal consciousness, as established in the discursive analysis, below. At first glance, Court opinions in the religious-display lawsuits seem wildly contradictory. Many cases have a multiplicity of majority and dissenting opinions that are truly
ambiguous, if only internally, as different combinations of the nine judge join in opinions that argue for opposite results. The Court nevertheless manages to maintain national unity by emphasizing tolerance and legitimate process.

The earliest of religious-display lawsuit is Lynch v. Donnelly (1984). In Lynch, the Court addressed whether First Amendment principles prohibited the city of Pawtucket, Rhode Island from sponsoring an exhibit of a nativity scene, together with a Santa Claus house and reindeer, in a display located in the heart of the city's shopping district, even though it was a privately owned park. The majority opinion states that the nativity scene did not violate principles regarding the separation of church and state because there is a secular purpose in celebrating Christmas. The court states:

Whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums (465 U.S. at 683).

This legal pronouncement might sound bizarre to the deeply religious, clearly wrong to the deeply secular, and probably "just about right" to the deeply tolerant. The court said that the secular purpose in celebrating Christmas was a matter of national tradition and pointed out that the holiday was recognized by Congress as a National Holiday.

But these legal pronouncements did not end the discussion. The Lynch ruling was interpreted to mean, as a practical matter, that if a city adds a reindeer to any collective representation having a doctrinally religious meaning, then the display would be secular enough, that is, a sufficient fusion of secular and sacred, to be constitutional. This later
became known as the "reindeer plus" rule in generalized legal consciousnesses.

Following along on the legitimacy-and-law dynamic, the legal opinions was a stopping point, but the practices and claimsmaking continue, as shaped by the court ruling.

There were two dissenting opinions in *Lynch*, offering a number of different and contradictory arguments. The *Lynch* decision appears to fail, in its attempt to resolve persistent questions about the separation of church and state. But, on analysis, the opinion reveals a specific and unified legal consciousness about what counts as a sacred object—and what is an acceptable combination of sacred and the profane. These underlying distinctions, organized by cultural collectives, are outlined in the Table 3.

**TABLE 3**

SOCIAL GROUPS AND BELIEFS ABOUT THE SACRED AND PROFANE

<table>
<thead>
<tr>
<th>GROUP TYPE</th>
<th>(a) PROFANE REALM</th>
<th>(b) SACRED OBJECT</th>
</tr>
</thead>
<tbody>
<tr>
<td>(1) Deeply Religious</td>
<td>Sinfulness</td>
<td>God, Transcendence</td>
</tr>
<tr>
<td>(2) Deeply Pluralist</td>
<td>Majority or exclusionary collective representations asserting doctrinal or hegemonic beliefs and practices</td>
<td>Nation, or tolerance, multiculturalism, and diversity, as located in national unity</td>
</tr>
<tr>
<td>(3) Deeply Secular</td>
<td>Majority or exclusionary collective representations asserting hegemonic beliefs and practices</td>
<td>None, but freedom from the profane (as defined in boxes 2a and 3a)</td>
</tr>
</tbody>
</table>
Rather than separate the sinful from the Godlike, the Court separated the tolerant from the exclusionary. The civil religion is expressed by separating away from the *sacred object of the nation-state* anything that is exclusionary (box 2a). Tolerance in the religious-display (box 2b) is favored and allowed, but separated out are groups asserting doctrinal religions, which are truth-bound religions, in that they require internally exclusionary and hegemonic beliefs and practices, as a "tyranny" of particular religious consciousness.

The paths of legitimacy in the *Lynch* case, as a typical religious display case, can be depicted in this way:

![Diagram of paths of legitimacy in the Lynch case](image)

Figure 6. Paths of legitimacy in the *Lynch* case as typical
A few years after the *Lynch* case, the high court again considered the religious display of a nativity scene in a courthouse, in *County of Allegheny v. ACLU* (1989); however, this time the court ruled that the nativity scene *did* violate constitutional principles because it sent an unmistakable message that state promotes Christian praise to God. The majority opinion held that the crèche, placed by religious society within a courthouse, violated the Establishment Clause (see box 1b). The state, in its display of the nativity scene, did not simply celebrate Christmas as a cultural phenomenon (see box 2b). In contrast, the Court in the same case also held that another display—this one of a menorah, next to both a Christmas tree and sign with civic slogan saying that the city salutes liberty—was a visual symbol of a holiday having a secular dimension, and so did not violate the Establishment Clause. There were four additional opinions of the court, but the legal outcome was clear.

The fusion of what is generally considered the religious and secular, that is representations falling into box 2a, are expressive of the national, civil religion. This religion separates from the public sphere any collective representation of doctrinal religious symbols, which are considered as profane (boxes 2a and 2b). The code of civil religion can be traced in the *Alleghany* decision: "As observed in this Nation, Christmas has a secular, as well as religious dimension" (492 U.S. 579).

In later cases, the Court ruled that the Ten Commandments were *not* constitutionally displayed in a Kentucky courthouse in *McCreary County v. ACLU* (2005), but were constitutionally displayed on the grounds of the Texas state capitol in *Van Orden v. Perry* (2005).
In McCreary County, the Ten Commandments display was modified, after the lawsuit began, to include new images, including other historical documents presented as legal precedent and the title "Foundations of American Law and Government." These modifications meant to bring the religious symbol in line with legal requirements that it represent statehood, law, or nation, rather than doctrinal beliefs of a particular religion. The changes were also meant to indicate that the displays were educational and so constitutional. The Court found that the Ten Commandments display, especially when considered in light of the evidence of the various statements of purpose made by the government, did violate the Establishment Clause. The court's ruling made a clear division between secularized versions of the Ten Commandments—that celebrate law and are allowed in government buildings—and sacred versions of the Ten Commandments, which are not allowed, because not integrated into political or legal representations of the nation-state. This example, from the text of the opinion, illustrates the point:

[We do not hold that] "a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures; there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion (545 U.S. at 874, emphasis added).

In a footnote, the Court also acknowledged another depiction of Moses in the U.S. Supreme Court building, but again emphasized that Moses was in the company of secular
figures, and so integrated into a display about law, not religion (545 U.S. at note 23). The ruling in *McCreary* was based on the government's purpose in displaying the Ten Commandments. Since the display at issue was predominately religious, it was an endorsement of religion, and did not have a secular purpose. In contrast, displays of Moses as secular lawgiver are acceptable in the public place, because they strip Moses of his role in doctrinal religions of the book; as such Moses becomes just another representations of state sovereignty, and the state is given cultural authority, not doctrinal religion. In McCreary, the Court was not swayed by the attempt to secularize the Ten Commandment with the changing statements and alternations in the display, which were meant to reach legal standards.

There was also a dissenting opinion in *McCreary*, to the effect that publicly honoring the Ten Commandments is indistinguishable from publicly honoring a single God, who is interested in human affairs. This sounds strangely like the God invoked by president Kennedy, the citations presented by Bellah in his 1967 essay. The dissent in McCreary argued that honoring an interested God could not be reasonably understood as government endorsement of a religious viewpoint. The dissent believed that the Ten Commandments should have been allowed, because of "the democratically adopted disposition of current society," even though recognition of the single God might marginalize two groups, those holding to non-monotheistic religions and devout atheists. Understanding the tolerant middle ground, not to be a doctrinal religion, but instead the group of most people in the U.S. who presumably want to be "able to give God thanks and supplication as a people and with respect to national endeavors" (545 U.S. at 900,
emphasis in original). This group—whether it exists a coherent social group or not—is the middle fraction that takes God to mean the God of the civil religion. This is the God of *national endeavors*, not a God of transcendental being and purpose.

In the next case in which the Court was asked to resolve an issue of religious displays in public, *Van Orden*, the display was a large granite monument on grounds of Texas state capitol featuring a non-sectarian text of the Ten Commandments. Other features of the display were the American flag, and the Greek letters Chi and Rho that represent Christ. The plaintiff in the case was Thomas Van Orden, who reportedly described himself as a religious pluralist and on that ground opposed the display. The Court held that although the Ten Commandments are of religious significance, they also have an undeniable historical meaning. The Court pointed out that the placement on state grounds is more passive than placement in a classroom, which would be unconstitutional. Other opinions in the case stated different perspectives, including that the monument recognized the role of religion in history and that placement of the monument indicated that the government intended the nonreligious aspects of the Ten Commandments to dominate. The *Van Orden* court stated: "We [must] neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage" (545 U.S. 683-84.)

The *McCreary County* and *Van Orden* decisions were easily ridiculed by in the mediated public sphere, in commentary that emphasized the apparently contradictory outcomes. The cases also might be confusing to a public official pondering whether the
Ten Commandments can be displayed and what additional elements are required to reach the "reindeer plus" standard. But when seen in terms of the division of sacred and profane required by the civil religion, the cases are clearly ringing the same note.

Majority or exclusionary collective representations asserting doctrinally hegemonic beliefs and practices—which might lead to collective effervescence of a purely religious nature, and give religion its own public culture—are not allowed in the public sphere, while a fusion of religious and secular representations are. And so it becomes apparent that the cases are Bellah's civil religion thesis and Durkheim's extended model of cultural consensus and conflict are quite useful in explaining the political dynamics of building national solidarity while managing religious pluralism.

In First Amendment lawsuits over religious displays, the Court does not resolve cleavages between secular and religious groups, but instead reaches a tentative, national unity over the sacred values of tolerance and neutrality. God is invoked, in ritual and symbol, to protect the nation, not assert divisions between groups within the collectivity, defined as nation. The collective representations that once belonged to religious authorities are incorporated into the national religion. The value of tolerance finds it highest expression in the civil religion, with America as nation-state or imagined space, as the sacred object.

In addition to the four cases discussed thus far, the Court also issued an opinion about religious displays in *Capitol Square Review and Advisory Bd. v. Pinette* (1995). There the Klu Klux Klan’s display of a cross was found to be protected speech, protected from exclusion in the public space around the statehouse in
Columbus, OH, where other religious displays, Christian and Jewish were permitted (a Christmas tree and a menorah). *Capitol Square Review*, while sounding more directly under the Speech Clause, than the Establishment Clause and Free Exercise Clause, is aligned with the religion clause cases. In *Capitol Square Review*, the Court again emphasized the need to secularize religion and make nation or the national unity the sacred object. *Capitol Square Review* follows the reindeer rule, albeit if more controversially. The court stated that if both private religious beliefs and private secular beliefs are allowed, if they remain private. The remaining type of speech, public speech tolerant of a civil religions, presumably is the only expression allowed in public. The Court stated: "Private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression" (515 U.S. at 759).

The cycle of legitimacy and law was traveled again in 2001, when the Court produced internally contradictory opinions in another case, *City of Elkhart v. Books* (2001). This case was also about whether a display of the Ten Commandments should be allowed in a public space. While earlier court opinions offered stopping points, the clash of absolutes was not resolved, and the renewed public dispute, in a dyadic form, was well-funded enough and well-organized enough to makes its way to court opinion. The contested practices (step one of the legitimacy-and-law dynamic) was placement of the religious symbol, which provoked response and a set of competing legitimacy claims regarding the positive law of the First Amendment (step two of the legitimacy-and-law dynamic).
The issue was whether the Court would even hear the case. The decision was
denial of the writ of certiorari, which means that the case was not heard by selection
of the Court. Justice Rehnquist was concerned enough to issue a dissenting opinion
on the writ of certiorari, which is rare when the Court does not hear the case. His
opinion states: "I would grant certiorari [rule that case be heard] to decide whether a
monument which has stood for more than 40 years, and has at least as much civic
significance as it does religious, must be physically removed from its place in front of
the city's Municipal Building" (532 U.S. at 1063). As the justice made clear, a
symbol that is a fusion of the civic and religious signs belongs in the public sphere.

As all of these cases and their evocation of the civil religion illustrate,
Durkheim's classical model is useful for understanding multicultural disputes, to the
extent that the disputes are resolved by judicial action in a stable, democratic state.
(See Appendix A for a table summarizing the legitimation claims made by juridical
actors in the religious-display cases.) The model, combined with the civil religion
thesis, clarifies how multicultural conditions generate recurring disputes. Across the
three cultural collectives depicted in Figure 6, above, there are likely many interest
groups who fall between the cracks, such as those holding both religious and pluralist
views. The figure does not directly correspond to actual social groups, including
multicultural groups, that exist in the U.S., as an empirical or historical matter, such
as Native Americans, African Americans, Asian Americans, Amish Americans,
fundamental Christians, Mexican Americans, orthodox Jews, and others, who are the
multicultural reality of U.S. history (Takaki 1993).
Instead the three cultural collectives, depicted in Figure 6, are ideal types of interests groups holding distinct objects as the sacred (see discussion in chapter 3 on cases and casing). It could well be true that many actual social groups and individuals would fall in the deeply pluralist category and overlap with one of the two more-extreme positions in this depiction, because doing so promotes the possibility of their co-existence in the multicultural setting. Empirically it is very likely that the three positions are overlapping categories along a continuum, not strictly divided groups. The ideal types are useful to show how the model of consensus accounts for religious-displays claims that enter the legitimacy-and-law dynamic.

Because of the different definitions of the sacred object in these conflicts, as the disputes enter the mediated public sphere, actual social groups in the dispute can become polarized and express the viewpoints of ideal-type interest groups. In this way, each side is likely to make its own interpretation of the legal outcomes in the religious-display cases. Groups at the religious extremes are likely to be appalled at the forced fusion of religious and secular representations in the expression of a civil religion—because God is understood to serve nation, while doctrinal beliefs and practices are relegated to the private sphere. Groups at the secularist extremes are likely to appalled that any collective representation of a religious solidarity is thrust upon them by the state in public spaces, in violation of the "wall of separation." But because of the varying interpretations across the continuum, the conflict over religious displays in public places has a nearly constant source of renewal.
The following figure illustrates the values that are carried on paths of legitimacy in this institutional dynamic.

![Figure 7](Figure.png)

**Figure 7.** Values carried on paths of legitimacy in the religious display cases

The path from the deeply tolerant group or deeply tolerant (upper right-hand side) carries the value of nationalism, or nation as sacred object, to the political sphere, through the mediated public sphere and devout libertarians. Although it cannot be depicted in a two-dimensional figure, the political sphere in this dynamic is infused in the public sphere. The political field feeds into the juridical field the value of nation as sacred object on the path of legitimacy from the political into the juridical field, where the value is translated and processes in juridical terms, in the form of ambiguous outcomes, which feed back into the religions sphere. Because of the practices of the doctrinally religious, which emphasize a different point of consensus-building—not the nation but a particular, transcendent God, for instance—the cycle starts over with a conflict between practices.
and the civil religion code. This conflict generates anew a similar dispute in a different location.

The Durkheimian model explains solidarity or consensus building and also explains conflicts between multicultural groups, meaning religiously multicultural. The model accounts for why these cultural disputes recur every few years in the U.S., and why they are not entirely resolved by the Court, in the eyes of distinct groups in the plurality. Actors in the juridical field work to maintain national unity, in line with the civil religion, but they do so in the face of religious pluralism and vitality. By promoting the civil religion, nationalism is placed in the position of cultural authority and religious is privatized or taken out of the position of ultimate cultural authority. The legal discourse, at first ambiguous and even static, starts to represent the unfolding dynamics of establishing a cultural authority in the nation-state. In these cases, the U.S. democracy maintains solidarity across a large, multicultural collective. The decisions might be confusing at one level, but there has not been a failure to state a rule, which is the rule of nationalism.

4.5 Public-Private Religion and the Implications of Nationalism

Durkheim's classical model regarding cultural consensus explains the recurrence of religious-display lawsuits and also accounts for the quasi-ritualistic manner in which they result in the peaceful concession of a national unity. This unity is achieved, according to the code of the civil religion, at the conclusion of each successive lawsuit in the mediated public sphere. Several implications may be drawn from this analysis, which implications bear on key debates in secularization and nationalism theory. Within
secularization theory, there is a stalemate over whether religion is becoming less significant in modernity. This is the central prediction of secularization theory, as refined over many years. The prediction is neither right nor wrong. Evaluating its worth depends on context and level of analysis. Looking broadly, there are decreases in measurable aspects, such as weekly attendance (Hadaway, Marler, and Chaves 1993; Bruce 2002). Still, no one contends religion can be reduced to pew numbers. There are increases in expression: evangelicalism (Hunter 1983; Smith, C. ed. 1998), new religious movements (Hunter 1987), and seeker religions (Roof 1999).

Religion has become more particular and exclusive, however, in response to the confrontations of multiculturalism and religious pluralism. This is observed in the formations of subcultural identities and bounded-faith communities in the U.S. (see, e.g., Smith, C. 1998). In this institutional dynamic, religious groups work to create boundaries between themselves and the larger collective.

Further, religion is more generalized. Here we see the development of individualized practices and loosely held beliefs—as predicted by Durkheim—which turn on the self or personal versions of a collective conscience. These manifestations different manifestations, not only the civil religion (Bellah 1967), as often mentioned (although it is extremely collectivist, not individualized). The theory is that loosely held beliefs help people avoid internal contradictions, between God and nation. Other examples include: Golden Rule Christianity (Ammerman 1997); and varieties of morally therapeutic, individual value systems or "the conscience," and seeker religions (Davies 1990; McNamara 1992; Roof 1999; and Smith, C. 2005).
Within the religious sphere, there are many ongoing and significant transformations happening at many levels of analysis and heading multiple directions. At the societal-level, though, the religious sphere exhibits less power than it may have enjoyed at points in the feudal past, or under a Hobbesian theory of divine monarchy ruling absolutely over its subjects. In the West, democratic politics are secularized. The secular trend is enforced by legal discourse promoting civil religion over any particular display. Leaders now rule over citizens, not subjects, or so it has been said. This historical shift, dividing political rule from religious authority, gives empirical support, if not the initial impetus, to secularization theory. Yet again, at the macro-level religion continues to exert extraordinary influence over political and economic behavior (Weber 1930; Casanova 1994; Jenkins 2003).

The overall trends and countercurrents are not what is most interesting about religious transformation in modernity, rather it is a specific political thrust, which is to say that religion is private, while government action and/or group actions in the public or civil sphere are, or should be free—from religion. Attempts to force a public/private binary, or state/civil society binary, on religious expression is a source of repeated conflicts not well considered by secularization theory. Instead, it has been established that secularization is flawed and overextended in numerous ways (Hadden 1987; Dobbelaere 1999; Gorski 2000; Gorksi and Altinordu 2008).

What the analysis of the legal discourse of the religious-display lawsuits contributes to the understanding of secularization is simple. Cultural contention has a renewing sources in multicultural difference, and that the U.S. nation, as sacred object,
enjoys more cultural authority than religion. This is the argument outlined by Chaves (1994). The nation, for example the secular courts, have more cultural authority than religion. The civil religion puts the nation into the sacred location, while doctrinal religions are taken out of the public square.

As the analysis of legal discourse about nationalism and religious symbols illustrates, the profane-sacred binary of civil religion is not the same as a government-civil society distinction, nor the public-private distinction. Civil society is not private, while state action is public. In fact, further analytic precision is needed to complete a Durkheimian analysis of the legal outcomes in the religious-display cases. The public sphere is not the same as the civil sphere (Calhoun 1993: 390-92); and the civil religion in the U.S. (Bellah 1967) is more profound, and not the same as, ceremonial deism, such as pro-forma prayers opening legislative sessions (Epstein 1996).

The Court in *Lynch* was not pursuing a division of church and state, but instead articulating the fusion of religious and political required by the civil religion. More specifically stated, the civil religion is not about honoring free exercise of a doctrinal religion or the nonestablishment of religion to satisfy secular interests. Instead, the civil religion stands as its own sacred-profane binary that places the polity in the sacred location. This placement has implication for nationalism theory. And the dominance of the state, including state supremacy logics within judge-made law, has implications for the chilling effects of civil liberties regulation on challenges to the state (see chapter 6).

Within nationalism theory, there is recurring debate over whether a nation-state requires a historical past or can be constructed anew without a feudal past (Smith, A.,
The U.S. democracy, as nation-state, has no feudal past and was built on waves of immigration, but nonetheless developed a strong sense of nationalism, even if that nationalism includes, at high level of salience, the values of pluralism and tolerance. The U.S. is religious and secular, depending on measures and contexts. For these reasons, the U.S. might be a poor choice for investigating the value of Durkheim's model of cultural authority. Other nation-states have nationalisms that are clearly cast in terms of a shared antiquity and ethnicity, whether entirely invented or partially given, while the U.S. nationalism has neither. By the same token, the U.S. case demonstrates that a nation can be built without a shared antiquity or ethnicity, and instead with a civil religion. This is a point that bears on the debate in nationalism theory regarding whether a nation must be built on an ancient past. It does not have to be. A civil religion, such as that developed in the U.S., is sufficient to maintain consensus.

What are the implications for democratic theory of the judiciary, once it is established that the juridical field maintains national unity in the face of pluralism by promoting the civil religion? The first implication is that legal discourse, even if at first ambiguous and even static, at least sometimes represents the application of an underlying code. The code can have the function, if not the purpose, of establishing cultural authority in the nation-state. This is a political purpose and the code is political, coming from the political sphere, as fused with the mediated public sphere (see figure 7).

In the religious-display cases, the U.S. democracy maintains solidarity across a large, multicultural collective because the juridical field enforces a rule that
nationalism must remain superior to the expression of any other belief in the plurality. These institutional relationships bring, to the fore, three related questions. First, what are the theoretical concerns regarding the argument that the religious-display cases are "merely" the application of a larger discourse or discursive formation? Secondly, how does a social science researcher properly identify such a code or codes, and analyze how that code changes over time and across social fields? Third, what are the chilling effects of a state supremacy logic in the juridical field? The first question, about easily applied codes is addressed in the next section. The second question, about methods for identifying codes and tracing the process of change in discursive formations across social or professional fields is addressed in chapter 5, on neoinstitutional analysis and field theory. The chilling effect is discussed in chapter 6.

4.6 Theoretical Concerns of the Easily Applied Code

In Alexander and Smith's (1993) proposal for neo-Durkheimian studies, the authors suggest that the sociology of culture turned away from the study of values because of the "problem of idealism." This problem arises because concrete statements of values in sociological research often are analytic constructs of the scholar-observer; thus, the values theorized are not empirically linked to the cognitive processes of social actors, nor to the actual dynamics of specific groups and organizations.

In part to remedy the problem of idealism, Alexander and Smith propose that cultural studies proceed according to a new premise: that civil discourse is organized by a binary code of the sacred and profane. They explain that complex discursive formations consistently take the form of sacred-profane binaries, which are constitutive, cultural
systems that structure reality and enable evaluative tasks by social groups. In strategic action, the interpretative analogies made by social actors, to the underlying or deep code of the sacred and profane, are not futile gestures to sterile signs.

Rather, the enactment of sacred-profane binaries "sets off the good from the bad, [and] the desirable from the detested" (1993: 157). Cultural theorists adopting Alexander and Smith's program can overcome the problem of idealism by examining cultural dynamics in terms of an active discourse about good and evil—or discursive formations regarding democratic versus anti-democratic values. In this way, social scientists can develop causal explanations that give culture an independent and autonomous position. This theoretical choice, Alexander and Smith say, is an improvement over Bourdieuian and other theoretical choices, which give cultural only relative autonomy as a social force. Those types of analyses, Alexander and Smith argue, privilege structural determinants and tack on a cultural analysis that reduces meaning and meaning-making to the filling of an empty container, with any necessary value required to support the structural explanation (see discussion of Bourdieuian theory in chapter 5).

Their article presents its own theoretical problem, however; the problem of multiculturalism. When a multicultural setting is considered, rather than a condition of monoculture or cultural hegemony, seeing all of civil discourse in terms of a sacred-profane code may not enhance interpretation of the social action. By definition, in a large, complex and modern society, with a plurality of religions and secular perspectives, there is no general consensus of belief regarding what is sacred and what is profane. Instead of collective representations in the form of shared symbols that express sacred-profane
codes, there are a plethora of symbols and conflicting codes. Instead of solidarity across a common group, there are multiple, overlapping, and distinct groups, organized by categories of difference, preference, and taste. Distinct groups exist via collective identities, both embodied and contested at the personal level. Groups in a multicultural setting, then, do not gesture to the same set of sacred and profane objects in their disputes over public goods.

Acknowledging the problem of multiculturalism in Alexander and Smith's proposal, another set of theorists propose, instead, a "cultures's structures" approach to the study of meaning. In a well-known critique of Alexander and Smith's proposal, Battani, Hall and Power (1997) do not deny the existence of a sacred-profane code, but instead point out that the sacred-profane code is one of many codes. They argue that the premise of a single code, in the form of a sacred-profane binary, is an invalid premise. They assert that the neo-Durkheimian proposal does not promote the scientific development of cultural sociology, but instead leads to analyses that "gloss meaning through an easily applied code" (1997: 784). Battani et al. also emphasize that social action is undertaken by actors in historical context, not in alignment with pre-existing structural codes that themselves produce meaning.

While their critique is overdrawn—because Alexander and Smith also recognize the importance of interpretative events and actor's strategies—Battani and colleagues contribute a valuable methodological suggestion. They suggest that cultural sociologists examine the myriad ways in which social actors "interpret, rework, and even misrepresent the variety of meanings" that emerge as debate unfolds in the public sphere.
Building on this suggestion, it is worthwhile to avoid the assumption that there is one sacred-profane code, or that the sacred-profane code is but one of many codes or discursive formations. By examining the wealth of codes, including their possible incoherency, the researcher engaged in a multi-case, narrative analysis (Abbott 1992) may be able to provide an adequate pattern description of an area of social action.

Another fruitful way to understand public-sphere disputes, as they proceed in a multicultural setting, is to return to Durkheim. There are many sacred-profane codes at work, when and especially where there is no monoculture or elementary form. In a multicultural setting, there are many codes, but one dominant code is the sacred-profane binary, and it is not commonly defined by all groups.

Durkheim would likely agree with this proposition. Contrasting the monocultural or elementary form to the modern or complex form was one of his central purposes in writing *Elementary Forms*. While political sociologists tend to discount the usefulness of cultural explanations, Durkheim's model of consensus, combined with the insights of the civil religion thesis and neo-Durkheimian theory, is also useful for explaining multicultural politics. Cultural explanations provide an elegant account for political conflicts over clashing religious values.

As demonstrated in the next chapter on the clash of absolutes, between free speech and personal dignity or privacy, in the age of electronic publishing, cultural explanations also provide a useful way of understanding law's influence in spheres of action that are meant to be free from legal effects.
4.7 Paths of Legitimacy, Between Conflict and Consensus

Having established through a methodology of discursive explanation (see chapter 3 on methods) that there is an underlying code animating legal opinions on the First Amendment, it is possible, now, to return to the conceptual map that divides the realm of legitimate government action from the protected realm of civil liberties. Accepting that there is both conflict and consensus between and with social groups, how can our understanding of the paths of legitimacy, or the movement of values that influence legal change and reset the boundary between state and society, be improved? As seen in figures 6 and 7, in this chapter, the map separating state from society becomes more than a conceptual map, and in fact a map of social spaces and dynamics, when groups are inserted, and the paths of legitimization traced from one institutional location or field to another.

Assuming that the conflicts and consensus over the display of religious representations in public are ideal typical of First Amendment disputes that are resolved by reliance on underlying codes, such as nationalism and tolerance, or as to be discussed in the next chapter, what is the structural organization of these legitimations?
CHAPTER 5:
SPEECH—COMMERCE AND DIGNITY

5.1 Placing the Public Figure in the Public Sphere, 1964-2003

Grace Kelly, the average American girl who married a prince and later died in a tragic car accident, is often quoted for having said that the freedom of the press works in a way that there is not much freedom from it. What she likely meant was that being a public figure, a position she knowingly chose, was uncomfortable and invasive of privacy and dignity, in many ways. In this chapter, we look not a public figures, but at private people, who have stepped out in public, for instance attending a baseball game or working a job as a security guard of a public stadium, but never asked to be the topic of news. The time period covered is 1964 to 2003, a time of accelerations in communications technology that changed the fabric of postwar U.S. Under the tenets of free speech, however, the dignity and privacy of these people are destroyed in the mediated public sphere. Sometimes the emergence of the Internet is blamed for this phenomenon, in commonplace ways. "Blame it on the web!" and similar public sentiments is a way to disregard and misrecognize the social dynamic, which is structured by the First Amendment.

Legitimations about the clash of values under the First Amendment often take the form of blaming an historical event, such as the emergence of the Internet, or the 1999 police riot in Seattle at the WTO meetings, or the 9/11 terrorist attacks. These
commonplace legitimations are interesting to study, because they hide the underlying institutional dynamics of the legitimacy-and-law dynamic.

In the last chapter, it was shown that—by looking at court opinions alone, together with the code of civil religion identified by political theorists and sociologists—that court opinions reflect the interests of the political field. This runs counter to the notion that politics and law are independent spheres, a classic distinction that is questioned by realists in the law and society tradition and by critical theorists (Graber 2010). In that chapter, court opinions about religious displays in public parks were shown to express the code of nationalism and tolerance known as civil religion. The movement of cultural values start with disputed practices in the public sphere of groups that want to see doctrinally religious symbols in public spaces (step one of the legitimacy-and-law dynamic).

But the dominant movement was not from the religious to the political, that was the step that started these recurring disputes over religious displays. Instead the movement of values was dominated by political interests expressed in a code of nationalism, which promotes unity at the expense of pluralism. The movement of values, along paths of legitimacy, was from the political sphere into the juridical field. It was established that political field influences the juridical field and the outcome of cases regarding the clash of opposing values, by placing national unity and consensus over pluralism and the expression of conflicting views.

This chapter establishes the opposite proposition: that juridical logics influence the discursive formations of other social or professional fields. This chapter looks at how
juridical logics shape outcomes of ethical disputes in the journalism field, even though by
the terms of the First Amendment, the press is left to structure its own field of endeavor.
This chapter provides an empirical analysis of court opinions in the area of defamation
and privacy. This is an area of law that changed dramatically starting in 1964. The
chapter relates that body of law, and doctrinal statements of formal law, to Internet-era
problems, or "law in action," regarding the commodification of private people who
becomes public figures—involuntarily—in scandal-driven, or sensational news. The
primary case addressed is the 2003 case of scapegoat or person scorned by the larger
community. In particular, the scapegoat case from 2003 is the story of a young man who
went to a baseball game, made a mistake that influenced the outcome of the game, and
was later vilified on the Internet.

This humiliation occurred despite the public discussion of his possible claims
regarding privacy or dignity as a human being. The baseball fan did not go to court (he
wanted privacy and was not well funded). The primary case analyzed here is not a
lawsuit, but a case informed by legal consciousness (see chapter 3 on casing and chapter
1 on legal consciousness).

The central tension addressed in the case of the baseball fan, and in the larger
body of law on defamation, is whether the First Amendment, as a matter of civil liberty
that is to enjoyed by "the press," provides a large exception to other laws, particularly tort
laws protecting dignity rights. (Tort law is the law of civil wrongs against a person or
entity, such as defamation, in contrast to criminal law, which is the law of wrongs against
the collectivity of the state.) The dignity rights include the right to privacy, reputational
rights governed by the law of defamation, and the right not to be the subject of intentional or negligent infliction of emotional distress. These are rights governed by tort law.

This chapter shows how legal categories—or frameworks for decision, developed in the juridical field under First Amendment—influence the legitimation of controversial news stories, published by actors in the journalism field. The legitimations offered by actors in the journalism field are hierarchically arranged according to the status, cultural capital, and economic capital of the publisher, and, as it turns out, this hierarchy matches hierarchies of juridical logics expressed in court opinions. In the case law on defamation and First Amendment, the courts offer differential expressions of cultural capital and economic logic, which vary according to judicial hierarchies.

The structural of the juridical field, located in its case law, expressing differential points of cultural capital and economic logic, is matched in the journalism field, which also expresses differential types of cultural capital and economic logic, in conflicts and over defamation claims and free speech rights. There is no single code (Saussure 1916; Levi-Strauss 1974), but instead an organization of legitimations that indicates the diffusion of values between two institutional fields. Does the law influence legitimations in the journalism field, which are supposed to be independent of law and decisions of media ethics? It turns out that the law does structure the organization of media ethics, in ways not fully explained by the possibility of a micro-level interaction, such as a lawyer telling a journalism outlet how to legitimate its choice to publish invasive stories.

Once the influence of law on media ethics is established, two paradoxes are uncovered, which result from types of legitimations for invasive storytelling, offered by
news producers. Although the journalism field is ideally left to structure itself, under the
text of the First Amendment, news organizations make decisions that are not entirely
autonomous from law.

The diffusion of First Amendment logics from the juridical field to the field of
news production pushes journalists to accept, as if taken for granted, such incongruous
positions as the belief that what can be published, should be published. Because of the
influence of legal discourse, the norm of free speech is conflated with ethical standards of
newsworthiness. This diffusion process is recursive, however, as the law incorporates
newsworthiness standards into its First Amendment jurisprudence. In this chapter, it is
established that the paths of legitimacy are not endogenous to law as an autonomous
field, but, instead, move back and forth between government action and the realm of civil
liberty.

The paths of legitimacy are cross-causal, in that social forces influence law and
law influences social behavior, even in the realm of civil liberties, where professions such
as journalism are left to structure themselves. Legal consciousness, based on legal codes
or rules for decision, tend to structure the journalism field and likely other fields as well,
a likelihood explored with empirical analysis of influences of policing logics on juridical
logics, in chapter 6 which covers the freedom of assembly.

Here is the story of the scapegoat from 2003 which has been purposively selected
to examine the paths of legitimacy in freedom of speech cases. In October 2003, a young
man went to a Chicago Cubs baseball game and accidentally got involved in the workings
of the game. After he and other fans reached up to catch a foul ball hit into the stands, his
hand tipped the ball away from a Cubs player who was jumping to make a catch. The fan
did not commit spectator interference because he did not reach into the field of play. But
after his public mistake, the game turned in favor of the visiting Florida Marlins. It was
an important game for the Cubs, who were in a World Series bid. The hapless fan was
pelted with garbage, threatened with violence, and eventually escorted from stadium by
security guards. He quickly became the subject of thousands of harmful publications in a
variety of media (see Appendix B for a list of news articles regarding this storyline).

Under constitutional exceptions to defamation and privacy torts, the majority of
the publications were *lawful*—even if offensive to reputation, invasive of privacy, and
injurious to dignity. But many of the news organizations publishing stories about the fan
violated ethical standards expressed in the professional canons of journalism. These
standards caution against harming private persons who involuntarily become news
subjects (Society of Professional Journalists 1996). Individual reporters, expressing a
form of legal consciousness, suggested that the best way for the fan to recover from
harmful media coverage would be to embrace his status as a celebrity and make
commercials or public appearances.

Actors in the journalism field, including news organizations, media-ethics
reporters, and Internet journalists, offered a variety of legitimations for their questionable
decision to name the fan and expand the scope of coverage about him to the limits of free
speech law. The legitimations were as curious as they were varied. Some organizations
offered no explanation. Other legitimations took tautological or illogical forms: such as
arguments that the story *should be* published because it was *already* published—or
should be published because it was a good story. The legitimations elided distinctions between what should be published and what can be published, but did not rely on purely economic factors for decision-making. The idea of what makes a good story was also important.

As will be explained below, the storytelling logic offered by news organizations matches the "newsworthiness exception" to tort recovery for invasions of privacy and dignity. The exception to tort law is found in First Amendment case law, as expressed in the lower level courts. The newsworthiness exception is both normative and descriptive about what constitutes a legitimate news story (Shapiro 1962). What is of interest to the public is a legitimate or worthy story. Newsworthiness under the law, defined as the extent to which a story is considered a topic of legitimate interest to the public—is an exception to rights of recovery in privacy lawsuits. In cases decided under the newsworthiness exception, the courts reason that recovery for invasions of privacy must be denied. The point is that what constitutes legitimate interest in a news story is beyond the domain of juridical decisions because that would cross the boundary between state action and the realm of civil liberty, under the First Amendment.

In the story about the baseball fan, other news organizations offered legitimations that did not expressly refer to law, but again evoked legal standards, especially the public figure doctrine from US constitutional law. Here, in a twist of logic, news organizations and ethics commentators argued that because the fan issued a statement asking to be left alone, it was appropriate to cover his story, because he had stepped into the spotlight. This form of legitimation matches legal schema from an elite-level of judicial decision
making. It was offered by high-ranking news organizations and commentators in the
journalism field. In contrast, the storytelling logic, or newsworthiness test, was used by
mid-tier publishers. Other organizations and observers blamed harmful publications about
the fan on the pressures of Internet publishing. Thus the hierarchies of legitimation in one
field matched the hierarchy of the other field.

Because the Internet poses financial and technological challenges to print media,
it influenced decisions to name the fan and publish stories about him. Both the Chicago
Tribune and the Chicago Sun-Times reversed initial decisions not to name the fan, after
his identity and other information about him were published on the Internet.

Legitimations offered by the news organizations to justify publishing decisions
about the fan did not entirely rely on financial and technological factors. The Sun-Times
pointed to a mix of cultural and economic factors, while the more elite Tribune used
legalistic or categorical reasoning, saying that the fan had stepped forward and became a
voluntary news subject when he issued a statement. The legitimations of the news
organizations reveal a diffusion of legal values, or discursive formations, into the field of
news production. From a legal standpoint, the use of the public figure standard to
understand what happened to a private person—whose actions in the public sphere
consisted of going to a baseball game and then later being asked to be left alone—is
puzzling. The baseball fan was a private person who became an involuntary public figure.
Yet, in the sociological analysis below, it is shown that the use of a public figure standard
by the elite news organizations can be accounted for, with a Bourdieuan analysis of the
hierarchies of legitimation used by news organizations.
The nearly absolute privileging of speech over privacy at law yields two paradoxes in the production of news. First, organizations justify ethics violations by mimetic use of legal fictions, converting the standard of lawful speech into claimsmaking about *laudable speech*. Second, reporters suggest that more publicity is the proper remedy for invading privacy, translating the legal privilege of speech over privacy into a puzzling norm.

Does law influence the legitimation of news? This chapter examines a variety of legitimations offered during ethics debates about news stories in which private persons became involuntary public figures, in order to show that the paths of legitimacy are traced beyond the sphere of law and into the profession and practices of journalism, a sphere that is thought to be beyond law. Although this chapter is about the story of the baseball fan, other news stories about involuntary public figures are also examined, in order to address a range of theoretical issues about the ways in which legal discourse structures the legitimation of news.

It is established that the variety of legitimation statements offered by news organizations are not random, but instead are match the institutional hierarchies and legal logics of the juridical field. Some media outlets offer no legitimation, while others make tautological arguments based on a story's inherent value or newsworthiness, and still others draw on legal schema that turn on whether a person has voluntarily entered the spotlight. This hierarchy of legitimations in journalism field matches the hierarchies of expressions in the juridical field, which is organized according to differential levels of cultural capital in legal analysis. Not only do news organizations array themselves in
parallel with variations of cultural capital expressed in judicial hierarchies, the law also works to normalize and justify offensive speech in the mediated public sphere.

Yet, to be clear, the juridical logics do not expressly reflect the hierarchies of legitimation in media decision making. Instead judges tend to present their opinions and rationales for decision in categorical, logical, or rule-based form, even where deferring to another professional field. As discussed in the section on language and legal discourse, in chapter 2, there is an important difference between the presentation of an opinion that uses definitive voice and the actual decision-making process or rationales used by a judge. This difference, even if not patent or stated in the text, can be systematically analyzed by looking at the language used and rationales offered, to detect relationships with codes, logics, discursive formations or expressions of cultural capital that have diffused into law from other fields. In the next chapter on policing logics and juridical logics, the question of whether the legitimations used by police agencies are expressly reflected in juridical logics and presentations of decisions—or whether there is a difference between a judge's presentation of decision and his or her reliance on underlying discursive formations adopted from another field.

In this chapter, the systematic analysis of whether legal frameworks are being used in the journalism field, to justify news decisions, leads to a general, theoretical inquiry regarding when and how constitutional law influences the legitimation of news. When navigating the space between what can be published lawfully, and what should be published, are news organizations influenced by law?
The First Amendment—according to the plain meaning of the text—leaves the press to make its own decisions. But is the journalism sphere left to structure itself? Based on rule of law that requires a differentiation of the social spheres, commonsense, or a naturalized ideology regarding the operation of law, might dictate that the law has no influence on the production of news as a distinct field of cultural production; however, the commonsense perspective can be rejected. If the forces shaping social practices were identical to common sense, there would be no need for social science (Terdiman 1987). It is argued here that law actually permeates the journalism field, pursuant to a sociolegal understanding of law as culture.

5.2 First Amendment Tensions between Speech and Dignity

In the United States, free expression is nearly absolutely privileged, even as against the privacy and dignity concerns of private people who are harassed in public places (Nielsen 2006), or private people who are accidentally drawn into sensational new stories and find themselves the subject of invasive news reporting. The First Amendment provides a minimum level of protection against speech that is injurious to state or private interests. Otherwise, speech is allowed, in instance in which it is to the cultural and economic advantage of the speaker, regardless of the person about which the speech is targeted. This creates a floor under which very few types of speech are placed, because deemed unlawful.

Above the floor, there is a vast social space for open discussion or, in other words, a wide range of speech and expressive conduct deemed lawful, including many types of harmful speech. The only exceptions to First Amendment protection are obscenity, child
pornography, speech inciting imminent lawless action, true threats of harm, and offers or agreements to commit a crime; in the U.S., the state does not prohibit virtual child porn, hate speech, flag burning, or ideological conversations about overthrowing the government—expressions that are elsewhere prohibited on the basis of harmful content or outcomes (Greenawalt 1980; CRS Report to Congress 2004; Krotoszynski 2006; Rosenfeld 2008; see also *U.S. v. Cassel*, 2005, and *Planned Parenthood of Columbia/Willamette v. Am. Coalition of Life Activists*, 2002, on true threats). Even for speech that is protected by the First Amendment, some regulation is lawful if pursued in accord with legal standards.

According to Rosenfeld (2008), the U.S. stands apart from other Western democracies in giving constitutional protection to hate speech, so long as it does not incite violence. Hate speech, harassment, and many other forms of harmful speech are in the protected zone above the First Amendment floor, in the zone of ethical negotiations. As outlined by Krotoszynski (2006), many other countries limit free speech more narrowly, in favor of personal dignity. For example, in Canada speech that degrades women is regulated. Legal scholars and journalists also recently grappled with the narrower protection of speech in France, where the sale of items that bear Nazi symbols is prohibited, to support other cultural values, specifically respecting the nation’s collective memory of war (Laprès 2002).

In the U.S., free speech and expressive conduct are protected by US constitutional law, except for the few unprotected categories. In theory, freedom of expression in the U.S. is regulated only by morals or the market, not by the state. First Amendment case
law, however, does influence the media field. The law directly influences journalism decisions through rule making. In addition discursive formations produced in the legal sphere indirectly influences social behavior in journalism field through the diffusion of legal rules indelibly marked by juridical practices.

5.3 Theoretical Concerns of Cross-Causal Analysis in Law and Society

As far it has been shown that the political sphere influences the juridical sphere through the operation of the code of civil religion (see chapter 4). In this chapter, the empirical analysis will show that the juridical field, influences the journalism field, because of the reciprocal diffusion of legal categories and rules developed in First Amendment discourse. It is important to address the theoretical concerns of finding a reciprocal or cross-causation between a field of law and a social field.

Two perils exist when using law as an independent factor to explain practices and legitimations in another field (Saguy and Stuart 2008). First is the risk of tautology, in which legal schema are seen as reflections of cultural values and, in turn, cultural values are explained as the result of legal schema; second is challenge of demonstrating a diffusion of legal categories and frameworks for decision across social institutions (for example from the juridical field to journalism). In light of these risks, Saquy and Stuart recommend moving beyond a paradigm of cause and effect in the study of law's impact. They point to a collection of theories about legal diffusion, including path dependency, policy feedback, and endogeneity, that are used by scholars working to specify the impact of law on social institutions (Pedriana and Stryker 1997; Edelman, Uggen, and Erlanger 1999; Savelsberg and King 2005).
Later, comparable advances in theorizing legal impact is made by Schoenfeld (2010), who addresses the "translations" of law that take place when legal claims and outcomes move in and out of the litigation field, and into the political or legislative field; and by Halliday and Carruthers (2007), who examine the recursivity of law and values, in the globalization of norms of bankruptcy and insolvency. In this chapter, we will explore the recursivity of practices and parallel hierarchies of the juridical field and journalism field, using Bourdieu's model of fields. This model is quite useful for explaining sociolegal dynamics.

5.4 Bourdieu's Model of Fields, the Translation of Practices

To develop a theoretical argument regarding law's influence on other fields, and continue the work of mapping the public space, this chapter engages field theory, as articulated, in various essays, by Pierre Bourdieu (1977, 1987, 1991, 1995). Field theory is used to account for how news organizations draw on legal logics, to legitimate their publishing decisions regarding controversial news stories. The legal logics are values that travel on the path of legitimacy from the juridical field to the journalism sphere.

This chapter extends field theory to the sociology of news, particularly the legitimation of news, building on earlier work of cultural sociologists in the U.S. and abroad, who apply field theory to understand the dynamics of journalism (Benson1998, 2006; Benson and Neveu 2005; Couldry 2003; Marlière 1998; Hesmondhalgh 2006). Moreover, this chapter further develops existing theory on the interplay of law and other fields of endeavor, such as politics and religion, addressed in the preceding chapter.
The paths of legitimacy from the juridical field to the journalism field can be depicted in this way, showing the journalism field as a subfield of the mediated public sphere. The grey area is the area in which legitimacy is debated in the legitimacy-and-law dynamic.

![Diagram of paths of legitimacy from the juridical field to the public sphere.]

**Figure 8.** Paths of legitimacy from the juridical field to the public sphere

In this mapping, we are looking at the influences of the juridical field on another field, instead influences of the political field on the juridical field. But it should be acknowledge that the juridical field is likely influenced by logics of the journalism field. It is theorized that there is cross-causation, or reciprocal social influences, running both from law and to law. The paradigm used is not a cause-and-effect model, but instead the tracing of a process or a path by which legitimacy claims are mirrored across fields.

Using the field-theory approach, researchers look at meso-level dynamics between the journalism field and other fields of cultural production, including the legal or
juridical field. Benson (1998), a pioneer in this line of study, cataloged early work connecting journalism to other professions: journalism and philosophy (Pinto 1994); journalism and law (Lenoir 1994); and journalism and medicine (Champagne and Marchetti 1994).

Benson calls for media sociologists and other scholars to draw on field theory when explaining journalism practices (Benson 1998, 2004, and 2006); however, the sociology of news has not moved far beyond a long tradition of scholarship that examines how editors decide what counts as "news." This tradition, generally known as gatekeeping studies, is set at the micro-level of analysis (Molotch and Lester 1974; Lester 1980; Reisner 1992; Clayman and Reisner 1998; Shoemaker, Eichholz, Kim, and Wrigley 2001; c.f. Galtung and Ruge 1964; Gans 1979; Bennett 2004). The micro-level lens reveals the particulars of how news editors reproduce institutional norms; however, it leaves unexplored the influences of other domains, such as law and technology, on newsmaking. Because this study looks at the legitimation of news production at the meso-level, it becomes possible to assess how legal values influence the legitimation of news, and to examine the social implications of First Amendment values.

Field theory, as articulated by Bourdieu, provides a method for analyzing cultural data at the interorganizational level, in cross-institutional analysis. Although the theory was developed in the French context, it can be profitably applied to the U.S. case to examine how news organizations decide questions of newsworthiness, under the influence of a legal system that allows for nearly absolute freedom of speech. As outlined above, in the U.S., free expression is nearly absolutely privileged, even as against the
privacy or dignity concerns of private people who are harassed in public (Nielsen 2006),
or private people who are accidentally drawn into sensational new stories and find
themselves the subject of invasive reporting.

For U.S. news organizations, balancing free speech and dignity is a recurring
ethical problem—not so much a legal problem. Thus First Amendment scholars
recognize the irresolvable nature of the conflict and scrutinize how the force of words is a
problem for democratic discourse (Schauer 2001; Lee 2001; O'Neill 2002; Adkins 2004).
The First Amendment provides a minimum level of protection against speech—or a floor,
under which few types of speech deemed unlawful or not protected.

Above the floor, there is a open social space for speech and expressive conduct
considered lawful or protected, including harmful speech. It is in this social space that
legal change occurs, in the legitimacy-and-law dynamic. This social space is located in
the gray area of penumbra of legitimacy discussed in chapter 2 on the sociology of the
First Amendment, and represented in several figures, including figure 8, above.

Although the figure presenting the penumbra of legitimacy is a conceptual map, it
can be converted to a social mapping by tracing the paths of legitimacy that move from
the field of law to other fields or professions in social dynamics within and between
social groups. Field theory provides an avenue for exploring this social space, and for
understanding how the logics of one field, such as law, are diffused into another, such as
journalism. According to field theory, each distinct domain or sphere of human endeavor
is likely to reproduce norms of behavior found in adjacent or dominant spheres—and to
translate those beliefs and practices into their own terms (Bourdieu 1996; Coudry 2003).
Institutional actors operating outside of the legal sphere are likely to translate legal schema, or frameworks for decision, in ways that combine with the logics of their own domain.

As theorized for Schoenfeld (2010), translations of law from one field to another can lead to paradoxical outcomes. She found, for example, that prison rights litigation, intended to reduce the problems of mass incarceration paradoxically leads to building more prisons, once the litigation outcomes are translated into the political field.

In his seminal 1987 article, Bourdieu (1987) develops a field theory of the juridical field. There he makes explicit several important differences between French and U.S. law, but for purposes here, those legal and political nuances are bracketed—only the U.S. juridical field will be addressed. In looking at the U.S. juridical field, important connections can be made between field theory, a child of France, and its counterpoint in U.S. social theory, neoinstitutional theory (Meyer and Rowan 1977; DiMaggio and Powell 1983, 1991; Edelman, Higgin, and Erlanger 1999). For instance, Edelman and colleagues show that civil organizations strive to construct responses to law that are enabled by rational myths or ideologies of rationality—stories about appropriate solutions that are themselves modeled after legal frameworks. In turn, the courts recognize and legitimate those organizational structures that mimic the legal form (Edelman et al. 1999); this type of recursivity in the development of law and norms is further elaborated by Halliday and Carruthers (2007).

Another important connection can be made between field theory and U.S. theories of legal consciousness. According to legal consciousness scholarship, the use of law is
often unconscious at the level of the social actor, but collective beliefs and practices, taken for granted at the individual level, nevertheless bear the imprint of law. Legal consciousness varies by group and along social hierarchies (Ewick and Silbey 1998; Nielsen 2000, 2006). Indeed, according to Halliway and Carruthers (2007), the recursivity of norm making and lawmaking are implied in theories of legal consciousness.

To advance these insights, this chapter demonstrates that field theory can shed a bright light on the parallels between the juridical field and the journalism field, as culture's structures. Legal values are diffused into other realms of institutional behavior, even when the First Amendment leaves a field to structure itself. Field theory includes a number of critical constructs useful for the analyses of behavior at the meso-level: habitus, capital, and field. According to Coombe (1989), field theory, or a theory of practice, provides theoretical constructs, such as habitus that allow for new insights into the study of institutional behavior, including studies of legal consciousness (1989: 109-110). Instead of seeing institutional influences on individual thoughts and practices as a form of structural constraint, Coombe says, field theory recognizes that legitimating practices are often experienced as empowering, if given in fact cognitive form, but are more often misrecognized or beyond conscious consideration (see also Bourdieu 1987).

In his work on the juridical field, Bourdieu provides sociolegal scholars with a blueprint for understanding legal action as both subjectively motivated and structurally constrained. Law is both as a site of struggle, and a field of power itself capable of reproducing inequality (Bourdieu 1987; Coombe 1989; Hagan and Levi 2005). More
recently, the use of field theory as a meso-level lens in the sociology of journalism is a promising trend, as researchers develop knowledge about cultural production in the journalism field (Benson 1998, 2006; Benson and Neveu 2005; Couldry 2003; Marlière 1998; Hesmondhalgh 2006).

When articulating field theory, Bourdieu broke with political-economy theory, which generally sees law as yet another economic obstacle—and theorizes law as nearly determined by economic interests. Bourdieu accepts the dominance of economic forces, but emphasizes also the effects of relatively autonomous cultural forces. Field theory recognizes the complex interplay of economic and cultural values.

In his *Outline of a Theory of Practice* (1977) and elsewhere, Bourdieu presents the three related concepts of *habitus*, *capital*, and *field*, which provide for dynamic understanding of how social actors—taking certain positions in a field of endeavor such as a professional practice—engage in the reproduction of cultural hierarchy. The fields of power and position-takings are structured by relations, practices, and beliefs, including unarticulated understandings about what is possible or legitimate. To apply this theory and clarify law's impact on journalism values, a few definitions and elaborations are required.

*Habitus* is disposition. It is the habitual, patterned way of understanding and acting that is structured by an actor's position within a field, and his or her trajectories within the field, such as emerging and declining, growing stronger or growing weaker. An actor's positions and trajectories are dynamic, but may be expressed in static terms of dyadic opposition: newcomer versus established player, and prestigious organization
versus illegitimate organization. Benson (1998: 467-68) explains that there is another, important dynamic in journalism of the "old" and the "new," that is, between established media players and the new entrants to the profession or market. These new-old dynamics reproduce cultural hierarchies in journalism, but also allow for strategy and agency in position taking. Within an actor's habitus, understandings about what is possible or legitimate are so deeply ingrained that coercion and express orthodoxy are not required (Terdiman 1987; Wagner-Pacifici 1994). Bourdieu states: "It is because subjects do not, strictly speaking, know what they are doing that what they do have more meaning than they know" (1977: 79).

A *field* is a social space characterized by a particular practice, such as a profession. Fields have their own operating logic or working consensus, which influences, but does not mechanistically determine, how meanings are interpreted and decisions are made (Martin 2003; Couldry 2003). Through the analysis of the autonomous logics of distinct, professional practices, field theory explains the construction of professional values and the perpetuation of power via cultural hierarchy. Each field of production—whether law, media, science, or another field—has its own autonomous logic that is measured in levels of cultural capital and correlated levels of prestige (Bourdieu 1977, 1983, 1995; Benson 2006).

The concepts of *habitus* and *field* allow sociologists to bypass debates about structure and agency, because an actor's position is shaped by the field, and conversely, the field is structured by the positions and trajectories of the actors who reproduce the field, in accord with habitus and differential levels of cultural capital. The third concept
of practice theory must also be included in the analysis: *capital*, which takes various forms (Bourdieu 1986). Of most importance for this study of free-speech values is *cultural capital*, or know-how, which can be simply defined as competence in a field of production; it is not learned in school and must be activated in the field (Bourdieu 1977: chap. 4).

*Cultural capital* is knowledge and ability, regarding not only the consumption of goods and services, but also the best practices for creation of goods and services in a field of cultural production (Bourdieu 1983, 1986; Holt 1997; Lizardo 2005). Using field theory analyses, sociologists examine the way that cultural values, even those most apparently disinterested in economic gain—for example, art for art's sake, legal precedent, and newsworthiness—are tied to the reproduction of economic and cultural inequality. The values of cultural production that appear *most disinterested* in achieving economic gain are the values that maintain the autonomy of the field and organize the hierarchy of positions that can be taken in it.

A field's autonomy is measured, in part, by an ability to exclude competing logics intruding from other fields, such as the capacity of an art museum to make its own aesthetic judgments, by evoking art for art's sake, and to reject the demands of its financial sponsors (Fraser 2001). Or the capacity of the journalism field to reject any value other than truth telling or storytelling.

According to Bourdieu, the internal logic of a field, or "rules of the game," travel between two poles of influence: political economy or the pole of economic capital, on the one hand, and cultural capital, or the cultural pole, on the other hand. The operating logic
of each field (such as law, academia, journalism, etc.) is shaped by relative distance from the poles, political-economic and cultural. When a field is situated closer to the political-economic pole, market powers are dominant over a field logic; when closer to the cultural pole, the autonomous power of the field are dominant (Benson 1998, 464-67; 2006, 189-90). There are no rigid procedures about how to apply field theory concepts—or even what its concepts are. Precisely which spheres of activity, institutions, or professions constitute a field remains an open question, and a subfield is called simply a field (Benson and Neveu 2005). This is because, for Bourdieu, the topology of fields is not so much a social structure as it is an analytic approach to examining data, such as the meso-level influences on collective actors and their behaviors (Couldry 2003, 24). The boundary lines and hierarchies of the various fields are not as important as understanding that, in each field, there is a distinct set of values and practices, particular to that field of endeavor. Field theory "posits an enveloping gravitational field that we can neither see nor measure except via its effects" (Martin 2003, 5).

5.5 The Public Figure Cases: Stepping into the Spotlight?

The historical data addressed in this chapter provide an empirical basis for understanding the negotiation of boundaries between the state and society—and between the values of free speech and human dignity. The historical data are news stories about involuntary public figures (IVPs). These are private people whose personal lives or public mishaps unfortunately become the subject of sensational news stories. IVPs can be understood as accidental public figures, as opposed to intentional public figures, who chose a life in the government or in media spotlight.
Although the focus is on IVPs, to limit variation in the specifics of the journalism ethics at issue, this chapter offers an important extension of field theory and the social-scientific understanding of legal change, because it shows how the domains of law and journalism intersect, along the path of legitimacy. This chapter uses a two-part research design. First, there is an examination of the law itself, on a question of media ethics, the problem of the IVP. Second, the chapter, unlike chapter 4 on religious freedom, looks beyond legal discourse and texts, and into the field of journalism. Here, the legitimation claims of journalism outlets are analyzed to address questions of position taking and the structure of the field. Finally, purposive selection is used to compare the story of the baseball fan to similar news stories about IVPs from before the emergence of the public Internet.

News stories about IVPs typically involve those drawn into the criminal justice system, especially juvenile criminal defendants, but these stories also can involve private people who are drawn into the public eye in other ways, such as adults who are the subject of criminal investigations, but not yet arrested or charged; victims of crime; persons involved in public mistakes, scandals, or accidents; and bystanders, such as witnesses and co-workers, who happen to be present when tragedy or scandal strikes. For example, the air traffic controller on duty when a plane crashed into the Potomac River in 1982 was deemed an IVP, because of his role in a public event (Dameron v. Washington Magazine, 1986). Other than criminal defendants and suspects, the primary categories of IVPS are scapegoats (especially those involved in public mistakes, scandals, or accidents) and alleged victims of sexual assault or rape.
To locate the law governing IVPs, legal research was conducted in two areas: federal court opinions directly addressing the problem of the involuntary public figure, and state court opinions discussing the newsworthiness exception. The law examined is from the 1970s and later. The legal data reveal two ways in which judges resolve the problem of the IVP: the "newsworthiness test" and the public figure doctrine.

Generally speaking, the federal courts use legal frameworks focus on categorical rules, rather than subjective, descriptive, or normative determinations. The "newsworthiness test," which is subjective and confuses descriptive and normative considerations (Shapiro 1962) was for that reason not appealing to the elite courts. The U.S. Supreme Court rejected a newsworthiness test for interpreting First Amendment law (as will be outlined below). Instead, in the second way of resolving the problem of the IVP, the Supreme Court developed instead the public figure doctrine.

Some lower-level federal appellate courts and state supreme courts, in contrast, remain comfortable using the simpler, newsworthiness test to limit recovery to IVPs who bring tort litigation. The story of the baseball fan, which first presented the empirical puzzle that initiated this study, raises this question: how can journalism actors assert a public figure argument about a man who simply went to a baseball game? Thus, the first part of the methodology is to conduct a multi-case narrative analysis (Abbott 1992), and determine the history of the legal doctrines of the newsworthiness test and the public figure doctrine.

Next, other IVPs stories were analyzed, to compare patterns of decision and legitimation across cases from before the Internet. The pre-Internet stories are: (1) the
story of Richard Jewel, a security guard accused of placing a bomb at the 1996 Atlanta Olympics; and (2) the story of Kennedy-Smith rape trial of 1991, in which the alleged victim appeared on TV during trial with an alternation or "blue dot" in front of her face. The purpose of selecting two additional IVP stories was to build a set of comparative cases, while maintaining a number of stories that still allowed room for meso-level analysis of the details of legitimation patterns. All three of the IVP cases are examples of the same recurring media-ethics problem, but the stories vary in theoretically important aspects. The cases, or new stories, from before the Internet era were selected, as a check on whether the Internet entirely altered legitimation patterns and patterns of picking up news stories from tabloid publishers, comparing the gatekeeping era of newspapers operating before the Internet, to Internet era, in which gatekeeping arguably is not as easily accomplished. It is a commonplace notion to "blame the Internet" for the humiliation of private persons in the mediated public sphere, but this pattern of behavior existed in cases from before the Internet. Therefore, the Internet is not a necessary cause (Mill 1943), or at least multiple causation is implicated. The pre-Internet stories are used as checkpoints only, with summary analysis of the controversies and legitimations.

For each IVP story, this chapter looks at what the field-level actors offer as reasons for decisions to publish. Taking those legitimations at face value, but tracing the paths of legitimacy, this chapter links the legitimations used to the positions of the actors in the field, and makes links between the legitimation statements and legal reasoning about IVPs. The analysis is aimed at tracing the legitimacy-and-law dynamic through the grey area, in which it is not clear what behaviors are legitimate, on the way to a court
opinion. Because this data analysis looks directly at actual statements of legitimation in
to theorize patterns of legitimation, there is no slippage between what is theorized
and what is measured. This chapter produces trustworthy results regarding the paths of
legitimacy from law to journalism, as an important example of a legal effect of First
Amendment jurisprudence.

The empirical analysis in this chapter can be replicated in the study of similar
publishing controversies. Using data on other social problems, scholars can look to see if
similar translations of values exist between hierarchies of legal frameworks of decision,
and the legitimations used by other institutional actors taking hierarchical positions in
other professions (in addition to journalism). Because field theory emphasizes the
empirical analysis of autonomous logics and cultural capital or competency, it is useful
for explaining the social construction of professional values, for example, the construct of
newsworthiness, at law and in journalism. Field theory illuminates a path of legitimacy,
the diffusion of legal values from the sphere of law, to the field of journalism, where
legal consciousness is a legal effect of First Amendment laws and values. Field theory
explains professional practices in terms of the in-field logics of the accepting field (here,
the journalism sphere) and cross-field dynamics diffused from the sending field (here, the
juridical sphere).

Absent standards of what is a legitimate news story, there would no profession of
journalism (Gans 1979; Tuchman 1978; Schudson 1989, 1996). Newsworthiness
decisions are at the heart of the journalism profession because, obviously, news producers
produce news. For journalists, autonomous power is derived from practices of truth
seeking, and avoiding harmful coverage of persons involuntarily the subject of news (Society of Professional Journalists 1996).

Because *newsworthiness* is the touchstone of the profession, paying attention to news values is a matter of practicing journalism for journalism's sake, in the way that paying attention to esthetic values is practicing "art for art's sake." Professional journalism associations circulate codes of ethics that state how to determine what is counts as news—or is newsworthy, meaning legitimate news. There are numerous codes, but the core values do not vary significantly. At the top of the list are: (1) uncovering truth or truth-telling, and (2) protecting people, such as crime and accident victims, from the harms caused by invasive publications (Associated Press n.d.; Society of Professional Journalists 1986). In practice, these two primary values come into conflict.

While print media is under severe pressure, for example, due to the emergence of technology, such as the public Internet in the early 1990s, the disruption or crisis can have an important influence on decision making. Because Internet news and information is free to consumers and constantly updated, the print media face tremendous challenges, including the acceleration of the news cycle, shifts in gatekeeping practices, and financial crises in maintaining advertising and circulation revenues. But the acceleration does not change the basic pattern description of these legitimacy cycles.

The changes to the print media are brought home by the loss of major city newspapers across the U.S., including for example the *Seattle Post Intelligencer* which became an Internet-only publication, after nearly 150 years in print. Other signs of the print-media crisis are layoffs and bankruptcies. But technological change or financial
considerations of Internet competition do not entirely explain newsmaking decisions. This is because of autonomous values located at the cultural-capital pole in the journalism field: newsworthiness values. The Internet is undeniably changing the way in which news decisions are made. Yet theories of institutional stability and change predict a measure of consistency in the patterns of legitimation that span the pre- and post-Internet eras.

It is hypothesized, based on field theory, that there likely remain a hierarchical ordering of news organizations; each organization uses different forms of cultural capital to legitimate decisions on questions of newsworthiness. According to field theory and neoinstitutional analysis, the journalism field would not be completely flattened by technological change or financial crisis. Instead, the cultural capital of the journalism field or its ideologies of rationality (Edelman et al. 19996) provide a structure of positions.

It is further hypothesized that the cultural capital of the juridical field is used to maintain status hierarchies in the journalism field, while in crisis—whether the crisis is brought by Internet competition or simply tabloid competition, which existed long before the Internet. Because of the impact of law on the journalism field, news organizations maintain status positions, through the expression of legitimations that mimic legal hierarchies. Despite the technological, financial, and cultural pressures of Internet publishing, legitimations of the news continue to expression cultural hierarchy.
5.6 Certain Logics of the Juridical Field

The First Amendment law reveals a number of key characteristics of judicial-decision making in the constitutional arena, especially in the area of the legal rights of private persons who are drawn into sensational news stories. The juridical field is shaped by several logics, or cultural competencies, that are so transparent to legal actors in the profession, that they are not often considered or questioned. The logics have become commonsensical or naturalized. When these logics are questioned, legal scholars are sometimes upset or disturbed, because questioning the logics of the field is disruptive to their collective identity and legal consciousness. The questioning of juridical logics makes legal scholars look into topics they do not consider in the realm of possibilities. Discussing these logics is disturbing to legal professionals because doing so calls into question their assumptions of authority and autonomy.

The first logic is a preference for rule-making. Every case makes a rule, even First Amendment cases, which are based on a text that provides a boundary for where regulation ends and interaction free from law begins. This is the hard line of positive law in the figures depicting the separation of state and society. The First Amendment provides that the state shall make no law abridging the freedom of speech, but First Amendment cases nevertheless make rules, offering legal schema or frameworks for decision that become constitutive of other social domains. This first logic is expressed in the practice of rule-making, as an autonomous power of the courts.

The second preference of the juridical field is for logically consistent rules across arguably similar cases. This cultural capital or competency takes its form in the practice
of analogical and categorical reasoning. In the common law tradition, analogical reasoning sometimes devolves into finding consistencies across cases discontinuous as to key variables, although similar as to other key variables. Through the use of legal fictions, \textit{factual discontinuities are glossed over} and consistencies emphasized. Legal fictions render the dissimilar similar.

The third logic of the juridical field is that frameworks for decision tend to cast blame on one of the parties, instead of acknowledging the complexity of collective behaviors. This norm of U.S. law arises from Article III of the U.S. Constitution that requires courts to consider cases and controversies, rather than general, social problems. Overall, the three juridical logics lead to a hierarchy of legal frameworks in First Amendment law, with the federal doctrine of the public figure at the highest level of competency, and the state-law doctrine of the newsworthiness taking the lower position as a competent, but less elegant rule, expressing lower level of cultural capital and prestige.

\textbf{5.6.1 Elite Status and the Public Figure Doctrine}

The First Amendment provides that the state make no law regarding the freedom of speech and press; however, rule-making is the cultural capital or autonomous, authoritative practice of the courts. While conceivable as a matter of factual possibility, it is not conceivable, as a matter of cultural power, that the US Supreme Court would make no law about the freedom of speech.

In \textit{New York Times v. Sullivan} (1964), the Court presented a framework for decision regarding free speech about a government official. The Court held that
government officials are lawfully open to personal attack, because criticizing the state is a central purpose of the First Amendment. Although the concept of the *public figure* had been discussed in an earlier case, *Hazlitt v. Fawcett Publications* (1953), the rule regarding public officials was first stated in the *New York Times* case.

Over the years, the public figure doctrine has been applied to all of the three claims for injury to dignity: defamation, infliction of emotional distress, and false light invasion of privacy. Legal nuances of these torts and exceptions will not be outlined here, in order to focus on the sociological analysis. But, simply put, under the public figure doctrine, recovery for dignity torts is not barred: instead, recovery is more difficult to obtain because of a higher burden of proof. The doctrine is used to enforce the constitutional privilege of free speech. It does so by requiring plaintiffs who are deemed public figures to show *actual malice* on the part of the defendant publishers. Actual malice, under *New York Times*, is not bad intent, but a legal construct, defined as intentional falsehood or reckless disregard for the truth. Plaintiffs deemed public figures have to show intentional falsehood, or at least recklessness, by the defendant publisher.

Using analogical reasoning in the *Gertz v. Robert Welch* (1974), the Court expanded the *New York Times* rule to express a rule about *public figures*. In *Gertz*, the Court again exhibited a preference for rule-making, as the expression of its autonomous powers, over the option of ruling that the court would make no law regarding the freedom of speech. In *New York Times* and *Gertz*, in lieu of accepting an ideal limit on state action, the Court devised frameworks for decision that make the Amendment an exception to defamation claims. The *Gertz* case devised the public figure doctrine as a
legal construct similar to the *New York Times* rule about public officials. Moreover, the *Gertz* case introduced the legal fiction of the involuntary public figure. This fiction allowed the law to maintain consistency across apparently similar cases. The public figure doctrine is meant to divide—strictly and neatly—the public and private spheres. On the one side, there are public officials and public figures, who have a higher burden of proof in establishing dignity claims under the First Amendment, and, on the other side, are private figures who could recover for defamation and other dignity torts in the usual way. The doctrine contained the germ for failure. No comprehensive legal solution could resolve the recurring social problem of balancing two important and contradictory human rights: privacy versus freedom of expression.

![Diagram](image)

Figure 9. Involuntary public figures on the public-private divide
In figure 9, the involuntary public figure, represented by the triangle, is located in the private sphere, but due to the operation of a legal fiction, is thrust from the private sphere and into the public sphere, as it bleeds into the private sphere. Journalism ethics prohibit news coverage that harms these types of news subjects, but under legal discourses there are several ways to legitimize the coverage of their personal lives and mishaps.

In separating the public and private, the Court created a legal fiction that bypassed the variable of voluntary/involuntary. In Gertz, the Court held that a private person becomes a public figure by purposefully stepping into the media spotlight or public sphere. The person deemed a public figure has limited recovery for claims of defamation and other dignity torts. This result is equitable, the Court reasoned, because public figures intentionally step into the limelight. Moreover, once in the public sphere, these public figures enjoy greater access to media outlets, which enables them to contradict negative publicity.

These two criteria provide a rational basis for distinguishing between voluntary public figures and private figures. The other possible variation, the involuntary public figure, is glossed over by a legal fiction. The Gertz Court ruled that involuntary public figures also would have to meet the higher standard of New York Times, as if they had stepped voluntarily in the spotlight. The court also said that IVPs were relatively rare.

The public figure doctrine did more than expand on the idea of the public official from New York Times. The rule in Gertz also replaced an earlier proposed, legal solution of the problem of privacy versus freedom of speech. In Rosenbloom v. Metromedia
(1971), decided a few years before *Gertz*, the U.S. Supreme Court stated a rule that based the level of First Amendment protection on whether there was public interest in the *subject matter* (that is, the topic area) of a news publication. The *Gertz* opinion, in effect, overturned *Rosenbloom*. In accord with the dominant and highest forms of cultural capital in the juridical field, the *Gertz* Court rejected the *Rosenbloom* analysis because a subject-matter test is neither logically elegant nor categorical.

Under the cultural preferences of the juridical field, *Rosenbloom* did not appear to cleanly resolve the conflict between speech and privacy. Instead, *Rosenbloom* acknowledges that newsworthiness can be descriptive, rather than normative, and essentially turned over the court's authority and autonomy to the journalism sphere.

The *Rosenbloom* Court said that if there were publications of sensational news that responded to, or gained, widespread public interest, there was no privacy right left because of the freedom of speech. The presumed worth of the story legitimates itself. Stories may be published without tort liability because they are considered worthy, which can mean important or simply interesting, even scandalous or sensational. Legal logics, however, prefer rule-making, not acknowledgments that other fields have their own forms of relative autonomy. Acknowledging that sensational stories can be their own justification for publication is not an elegant or logical rule of law: bootstrapping as it does, a rule of law from mere facts. The highest levels of cultural competence in the juridical field would not sanction a rule of law that has the facts simply justify themselves. Instead the highest courts would more likely provide a categorical analysis.
The acknowledgment in *Rosenbloom* was rejected by *Gertz* Court, in favor of the categorical rule, dividing public from private, as outlined. Extending again the *New York Times* rule, the *Gertz* Court reasoned that public figures are analogous to public officials and also categorized involuntary public figures along with other public figures. The discontinuity along the involuntary/voluntary variable was overcome by the legal fiction that privileged the public/private variable. Because legal logics also require a level of blame on the part of the losing party, the *Gertz* court replaced the *Rosenbloom* framework with a categorical rule that blamed the victim for stepping into the limelight.

The Court in *Gertz* held that the plaintiff, an attorney named Elmer Gertz, was not a public figure, even though he was counsel in a high-profile homicide case. The import of *Gertz* here is not the holding or outcome for a particular party, but the often-cited commentary in Justice Powell's decision on IVPs:

"Hypothetically, it may be possible for someone to become a public figure through no purposeful action of his own, but the instances of truly involuntary public figures must be exceedingly rare. For the most part those who attain this status have assumed roles of especial prominence in the affairs of society" 418 U.S. 345 (1973).

The *Gertz* Court said public figures invite attention. Justice Powell concluded by rejecting Justice Brennan's ruling in *Rosenbloom*, which extended the *New York Times* rule to cases about news stories about private persons, simply because the story was in the public interest. In *Gertz*, Powell ruled that extending the *New York Times* standard to defamation of private persons, only because the news was of public interest, would abridge, to an unacceptable degree, the legitimate state interest in compensating private
persons for libel. The problem with *Rosenbloom*, was that if a subject-matter test were used, then any topic of public interest would be protected from privacy and dignity claims. The tort of invasion of privacy would be eliminated for all practical purposes. By extending the public figure test, the *Gertz* court moved the point of analysis from the *subject matter* of the news, to the *subject* of the publication—that is, to the person. People who became a public figure are to be blamed for what happens in the media, even in the rare case of the IVP.

### 5.6.2 Economic Forces and the Newsworthiness Exception

According to field theory, the same level of abstract evaluation of the quality or elegance of a legal rule—as an expression of cultural capital—would not be used in courts of lower prestige, such as the state courts. Instead, mid-tier actors in the juridical field would likely acknowledge that state action is limited by the First Amendment. This is precisely what we find in the newsworthiness exception.

Under tort law, newsworthiness is an exception to defamation claims. If a publication becomes a topic of general, public interest, then a plaintiff who claims to be injured by a publication can rarely succeed under the dignity torts. The newsworthiness exception drives a truck through the primary rule of law that people can (or ought to be) protected from injurious publications. In applying the exception, the construct of *newsworthiness* is used as both a descriptive term—meaning that someone has voluntary or involuntarily become the subject of matters of public interest, including sensational news—and normative term, meaning that there is a professional assessment of the legitimacy of the news by journalism actors (Shapiro 1962; Adkins 2004).
While the law of the public figure and the newsworthiness exception are distinct, the facts that give rise to an IVP case and to the newsworthiness exception are not distinct. The newsworthiness exception is more often used by appellate courts, at middle levels of the federal system, and in the state court system. In *Gilbert v. Medical Economics* (10th Cir. 1981) and *Shulman v. Group W. Productions* (Calif. 1998), the courts held that judges do not act as the superior editors of news producers, and that judges will not engage in editorial second-guessing, so long as the information covered in the news publication is connected to a topic of public interest. The *Gilbert* and *Shulman* courts might have ruled that the plaintiffs had become IVPs, but instead these mid-tier courts used the newsworthiness exception to decide the cases.

In *Gilbert*, the plaintiff was a doctor in private practice who became involved in a controversy over medical licenses. The *Gilbert* court ruled that the plaintiff's private life became a matter of legitimate, public interest. In *Shulman*, the plaintiffs, a mother and son, were injured when their car careened off the Interstate 10 in Riverside County, California. Their rescue was broadcast on television, including audio recordings made by a nurse that captured the mother's spoken comments of agony, while in the nurse's care, including the mother's concern over whether she was dreaming, followed by statements of a desire to die, once she understood the gravity of the accident. The *Shulman* plaintiffs objected to having the media turn their private lives and experience of tragedy into a matter for public consumption.

Under *Shulman* and *Gilbert*, however, if there is but a tangential inference connecting private information to a topic of public interest, a privacy claim will fail. This
is the newsworthiness exception. On analysis of a IVP case, the categorical solution offered in *Gertz* devolves into the newsworthiness exception and the *Rosenbloom* test. The *Gertz* rule is based on a public/private dichotomy: the rationale is that a private person has intentionally stepped into the spotlight. Under the newsworthiness exception, the outcome turns on a connection between the story and a topic of public interest. This, of course, is the *Rosenbloom* test.

5.7 Certain Logics of the Journalism Field, a Scapegoat Case

The constructs of field, capital, and habitus illuminate the legitimations of news in the journalism field. Legitimations offered by news organizations reflect the hierarchy of legal frameworks for decision. The solutions to invasion of privacy offered by individual journalists show how deeply ingrained the free-speech privilege has become in U.S. culture and legal consciousness. Drawing on their individual dispositions (legal consciousness or *habitus*), many individual journalists suggested that the best remedy for invading privacy is more publicity.

In the opening narratives of this chapter, the mishap of a baseball fan in October 2003, when he accidentally influenced the outcome of a baseball game, is described. After this mistake, the fan was vilified in the media. On the Internet, digitally altered photos were published showing the fan being assassinated; his business card, including his e-mail address, was offered for sale on the trading site eBay, as were t-shirts displaying pictures of him next to Osama Bin Laden; also available for purchase on eBay were decals showing the fan's name being urinated on; another Web site published a story claiming the fan was murdered twenty-seven times by being shot, stabbed, poisoned,
drowned, and suffocated (see Appendix B for a summary of news articles). But the humiliation was not limited to Internet blogs and scandal sheets, many mainstream news organizations joined in the scapegoat frenzy.

The *Chicago Sun Times* published an investigative piece about the fan's hobbies and activities in high school, extending the scope of coverage beyond the fan's mishap, and into any available detail of his life story from years before. NBC's *Today* show participated in a staged explosion of the baseball at Harry Caray's restaurant in Chicago in February 2004. Nearly two-thousand stories were published about him, turning his very life into a public spectacle, even though his only intentional act was reaching up to catch a ball. Because of ethical concerns, reporters and media watchers published articles about the newsworthiness of stories about the fan.

News organizations offered a variety of justifications for their publishing decisions. Their legitimations did not draw expressly draw on law, but reflected legal schema, including the legal fiction of the IVP from the Supreme Court cases, as well as the newsworthiness exception. Initially, the *Chicago Tribune* and the *Chicago Sun-Times* did not identify the fan because of concerns for his safety. Both papers later identified the fan by name and distributed personality-profile stories about him—following identification of the fan by an Internet tabloid, *The Smoking Gun*, during the first twenty-four hours after the accident. Internet publishing appears to be at least the proximate cause of the changed decisions over media ethics. Despite requests for its reasoning, the *Smoking Gun* never offered legitimation for its "outing" the fan. This failure to offer legitimation is in accord with its position as a tabloid, or lowest-tier publisher.
In contrast, at the highest tier of field of production, the Chicago Tribune offered a statement of legitimation to explain why it changed its decision. After its initial article was updated on the newspaper's Web site and published in print, naming the fan in contradiction of its earlier decision, the Tribune said it named the fan because he issued a statement (Appendix B: Janega 2003). At the mid-tier of the field, the Sun-Times never explained the editorial change in its own pages. But, a few days later, the Sun-Times editor told a media reporter that identifying the fan was acceptable because his name was available online (Appendix B: Haysom 2003). The Wall Street Journal, in an outsider story about the media ethics from another market, also pointed to the Internet as a relevant factor, saying the story was fueled by an accelerated news cycle (Appendix B: Lieber 2003). Media-ethics reporters engaged a variety of logics.

Howard Kurtz of the Washington Post, arguably one of the highest level newspapers in the US, said news outlets traditionally withhold the names of whistleblowers and sex-crime victims. He questioned why a hapless spectator, against whom physical threats were made, should not get the same deference (Appendix B: Kurtz 2003).

Columnist Bob Steele of the Poynter Institute, however, took the Tribune position, an elite position drawing on high-level legal schema, rather than a statement of journalism ethics for journalism's sake. Steele said when the fan stepped forward and made a public statement, the issue of whether to name him became moot—and it became appropriate for journalists to identify the Fan and "reflect on the tenor of his remarks" (Appendix B: Steele 2003).
While none of the news organizations or media-ethics writers expressly referred to law, Internet journalists openly debated legal questions. Waxy.org, a technology and culture Web site, asked whether the fan's story presented a privacy issue, questioning whether the fan became a limited public figure by appearing in a public place and trying to catch a ball. Waxy.org also asked whether the Sun-Times article presented a privacy issue. Another Web site, Dead Parrot Society, posted questions about whether a private person can become a public figure involuntarily and if so, that transformation would make publishing his name defensible, even if in poor taste.

The initial decisions by the Sun-Times and the Tribune to limit coverage were based on the public threats of violence against the fan. Later explanations refer to Internet pressures, or the fact that the fan issued a statement, in reliance on legal schema. The fan's statement, however, was a short apology and request to be left alone (Appendix B: Bartman 2003). It did not meet either of the two rationales that support the public figure doctrine: a voluntary step into the media spotlight or ongoing access to media sources to refute falsehood. A later request by the fan that any proceeds from the publicity be donated to a favorite charity was not reported. This failure to cover later statements indicates that the argument of the Tribune and the Poynter Institute about the fan's step into the spotlight may have been mere legitimations.

In the aftermath, the Sun-Times used a tautological argument about newsworthiness that mimics the legal test in Gilbert and Shulman, the newsworthiness exception. In contrast, elite publishers insisted in absolute allegiance to media ethics, or at least the use of high-level legal schema, the categorical analysis of the public figure
doctrine. Variation in the legitimations offered to explain publishing decisions in the story of the baseball fan demonstrate how First Amendment law shapes behavior in a competitive field of cultural production. When determining newsworthiness in the case of the baseball fan, news organizations relied on different cultural values, based on their relative positions in the field of production.

Mid-tier producers did not use legalistic frameworks. The Sun-Times is of relatively lower prestige, compared to the Tribune, but nevertheless is a mainstream producer of news. It is expected that the Sun-Times would offer some legitimation of its choices. The managing editor of the Sun-Times told his reporters, who thought the paper’s decision to publish stories about the Fan would ruin his life, that decision should be based on the fact that the fan became "the center of an incredible news story" (Appendix B: Kurtz 2003). This argument, offered by a less powerful actor in the field, competing for the attention of the public, rejects the cultural values and prestige of higher-tier journalists, who might decide to avoid the scoop and seek instead long-range credibility by not publishing the name, or if they do publish the name, offer a legitimation that expresses high levels of cultural capital.

Mid-tier journalists, such as the Sun-Times, use a lower level of journalism values assessment, one that seeks to balance competing values of truth-telling and avoiding harm to persons who are involuntarily the subject of news. They do not rely solely on economic considerations to legitimate decisions, even if economic considerations, such as competing with Internet tabloids change their decision calculus. The Sun-Times editor offered a storytelling logic based on a descriptive interpretation of newsworthiness,
saying: "It [was] the biggest news story in town and this is Chicago" (Appendix B: Strupp 2003). His use of a storytelling logic appears both to draw on the cultural capital of journalism and, contradictorily, move toward the opposite pole, the economic capital pole, under Bourdieu's theory of practice. The institutional logic turns on the "sell factor" of the story, but invoke also the story's inherent value. Thus, mid-tier claimsmaking in the journalism field mixes together cultural values and economic considerations in the way that mid-tier decision making acknowledges the descriptive and normative nature of newsworthiness decisions.

According to the Sun-Times, the editors discussed the issue, and came down on the side of publishing the fan's name, even though the decision was not unanimous (Appendix B: Strupp 2003). The Sun-Times defended the decision to go to the Web with the fan's name, arguing that anyone who wanted to identify the fan could have found out as quickly just as the Sun-Times who he was, because the fan's picture was being replayed on television (Appendix B: Haysom 2003). This comparison to the practices of other media outlets is an example of within-field competition as a critical force influencing journalism decision-making. As predicted by field theory, professions such as journalism are sites of struggle that often include within-field dynamics, such as following the decisions of lower level actors including TV and tabloids.

The more powerful actor in the field, the Tribune, originally held off from naming the fan, but changed its position, with reference to the fan’s brief apology. The Tribune never referred to law, much less to Internet publications. After being blamed for ruining a World Series bid, the fan "did everything in his power to stay out of the spotlight"
Under severe pressure to react, the fan issued a 180-word statement, asking that the negative energy being vented towards his family, friends, and him be redirected elsewhere. The fan did not present this brief statement himself: instead, his brother-in-law read it over the phone to a TV reporter. According to the report, the Fan's parents’ house looked "like the scene of a crime," where there was an ongoing standoff with a fugitive from the law. The TV report includes audio of the apology being read by the brother-in-law. The statement says the fan had his eyes on the ball and did not see the MLB player trying to make the catch.

After this apology, buried in a request to be left alone, was read on the news, the Tribune decided that because of the fan's public statement, the initial question of whether to name him had become moot. In this way, the Tribune indirectly evoked the legal standard of the public figure doctrine, including the categorical division of public and private, and the tendency to blame the person. The Tribune took the position that the fan stepped into the spotlight, even though the step taken by the Fan was about as forced as can be conceived.

The Tribune’s construction of newsworthiness thus inverted the logic of the legal rule, which was meant to divide injured parties into two categories, public and private. The use of a legalistic framework, which sets the First Amendment floor not an ethical goal, is paradoxical when used to legitimize the use of invasive, harmful speech, turning what is of questionable ethics into something appropriate. The paths of legitimacy in and through the juridical fields and the journalism field can be mapped in this way:
According to Bourdieuan theory, the higher levels of economic and cultural capital evince distinct logics, in contrast to the lower levels. Those actors in a field with high levels of cultural competency can express disinterested values, such as distinctions between public and private, while lower-tier actors are more likely to express the economic considerations, mixed with cultural considerations, as in the logic of storytelling and the "sell factor" of a sensational story (Benson and Neveu 2006). These variations of economic and cultural capital, in which elites can mask their economic interests in expressions of cultural capital, are a pattern of behavior and inequality that will come up again in chapter 6, regarding economic and political influences on the development of public forum law in the regulation of assembly.

The paths of legitimacy are represented in this figure, showing how certain logics are maintained at different levels of the field. It is important to emphasize, however, that
the logics of law are *translated* or converted into the logics of journalism. The actors in the journalism field are not simply applying legal advice. It may be that they have legal advice, but the categorical thinking is adopted and transformed into their own field, in terms of news values, not legal liability. The production and understanding of what counts as news is the cultural value that gives the journalism field its relative autonomy from economic determination (not rule-making which is the professional logic of judges).

As discussed in the next two sections, the hierarchy of the juridical and journalism fields lead to paradoxes, as logics are translated from sending field into the receiving field, and law shapes the legitimation of news.

### 5.7.1 First Paradox in the Legitimation of News

The position-taking of the *Tribune* and of the Poynter Institute reveal an interesting paradox that results from the legitimation of news using First Amendment frameworks. News organizations justify ethics violations by mimetic use of legal fictions that convert the standard of merely lawful speech into claimsmaking about worthwhile speech. Not only did the *Tribune* engage in this paradoxical form of legitimation, so did the elite Poynter Institute. When the *Tribune* updated its Web site on the evening of October 15, 2003, to add the fan's name, it included this note: "The *Tribune* did not identify the fan earlier today on this Web site or in Tuesday’s print edition. The newspaper is publishing his name now because [the fan] issued a statement that explained his actions and apologized" (Appendix B: Janega 2003, updated). This legalistic logic was offered only in public discourse, however; in a later interview, intended for a journalism audience, the *Tribune* admitted its editors thought that withholding the fan's
name had become futile and recognized that, by following the story being published by other media, the newspaper was following no standard at all (Appendix B: Rhodes 2003).

Coming full circle, Sun-Times editor Cooke told Kurtz he thought the Tribune’s purported rationale, or in Bourdieuan terms, position-taking, was mere posturing. Cooke said: "The Tribune is now dabbing its perfumed hanky at its mouth and saying, 'We can name him now because he’s put out a public statement'" (Appendix B: Kurtz 2003). In making this comment, Cook recognized that the high-tier publisher was using moral rhetoric to legitimate a questionable decision, yet still maintain an elite position in the field of struggle. Through the use of moral reasoning in public, the elite organization expressed cultural capital and maintained prestige in the field.

The legitimations offered in fan's story exhibit variations in the expression and maintenance of cultural capital organizes the journalism sphere, with "pure" or disinterested ethics used at the very highest and distant levels, as in the Washington Post's use of quasi-legalistic frameworks. Also, another high tier publisher in the field or marketplace, he Tribune, used categorical reasoning to sanctify decisions to exercise the fullest extent of First Amendment freedoms, despite harm to persons, while mixed cultural and economic logics used by mid-tier publishers such as the Sun-Times.

5.7.2 Second Paradox in the Legitimation of News

This study also reveals a second paradox in the legitimation of news that results from the diffusion of cultural capital, or knowledge, from the sending field, the juridical field. At the level of individual journalists or individual-level legal consciousness, I found
that journalists generally believe, as a matter of habitus, that media-related injuries are best remedied by more storytelling, that is, by free speech exercised to its fullest legal extent. Reporters tend to think that invasive publications that turn someone into an IVP are best concluded with a celebration of celebrity. The injury caused by free speech is remedied by more speech, more publicity. Because of how embedded the free-speech values are in individual dispositions or legal consciousness of those in the journalism profession, many reporters are literally not able to see the downside of media coverage.

Many journalists believed the Fan should embrace celebrity for his own economic gain. This shows that the within-field logic of actors in the journalism field is to promote storytelling, as a central, cultural value, having worth in and of itself, without regard to economic gain by the news organization. The method for the fan to recover, several reporters argued, would be to take part in a media event. Journalists nearly uniformly said that invasions to privacy are cured by more publicity. One journalist suggested that the fan throw out the first pitch in Game 1 of the World Series (Appendix B: Brennan 2003). Another suggested the fan be given season tickets to baseball (Appendix B: Defede 2003).

Another writer suggested the fan take part in a public parade (Appendix B: AP 2003). Still another writer said he should have a statute erected in his honor (Appendix B: Steinberg 2003). Another reporter invited the reclusive fan to the Super Bowl (Appendix B: Greenfield 2004). The editor of the Sun-Times said that the fan probably would seek get "a book deal and a Visa ad" (Appendix B: Rhodes 2003). A Canadian reporter said he thought the fan would "live long and prosper" as an urban folk hero (Appendix B:
Again and again, the idea that more and more storytelling, and more and more publicity, is the best solution to invasions of privacy indicates the extent to which free speech is privileged within the cultural dispositions of journalists.

Reading the first and second paradoxes of news legitimation together, it becomes evident how the nearly absolute privileging of speech over privacy is a deep constitutive force in journalism, as a field of cultural production in the U.S. The cultural capital of the legal field, including not only privileges, but also its schema or frameworks for decision, shape not only the hierarchy of news organizations, as they take positions through statement of legitimation, but also (1) the institutional logics used by organizations to invert harmful speech into worthwhile or acceptable speech, and (2) the consciousnesses of individual journalists which tend to give speech the highest value and saliency over any other concern.

5.8 Blame it on the Web? Pattern Consistency in Pre-Internet Cases

By comparing pre-Internet and Internet-era decisions made by news organizations in stories about IVPs, it is possible to check whether news organizations were influenced by competition from tabloid publishers, during the pre-Internet era, in ways that are qualitatively similar to the way that media-ethics problems are being handled after the Internet.

The pre-Internet cases are addressed summarily here to show that a similar pattern of behavior, that of high-level journalism outlets following other media outlets, particular tabloids, in the exercise of the fullest extent of free speech rights. This pattern existed long before the Internet, even if accelerated by the Internet. The media decisions in the
pre-Internet stories about IVPs show, without more, that there is general consistency in how newsworthiness decisions are made across the Internet and pre-Internet eras.

In the Richard Jewell case, his identity as a possible suspect in the Olympics bombing was revealed by *Atlanta Journal-Constitution*. Following that revelation, NBC News announced that, according to speculation, investigators had enough evidence to charge Jewell. In the following days and weeks, mainstream journalism outlets published many stories offering celebrity-style coverage of Jewell as a person, portraying him as a first-responder who had hero syndrome, that is, the need to create a possible danger only to save people from it. This personality-profile coverage violated ethical values of truth-telling and the protection of persons involuntarily drawn into the news, because Jewell was never charged (see Appendix B).

Again the Washington Post took the highest road. In an article asking for a return to traditional ethics, Geneva Overholser, a media-ethics reporter for the *Post*, said that Jewell did seek the spotlight, but not as a suspect, but instead as a person who found the bomb. Thus, he deserved media deference.

This position-taking by the *Post*, during the pre-Internet era, is consistent with its position taking in the story of the fan, during the Internet era. Overholser argued: "at what juncture should a newspaper refuse to deal with a story because journalism ethics dictate that suspects are not named prior to any legal action?" (Appendix B: *Washington Post*, August 4, 1996).

In the other pre-Internet case, the Kennedy-Smith case, the identity of the alleged rape victim was made public by a tabloid publisher, *The Globe*. Again, NBC News
followed with its own report, in which it tried to legitimate its publishing decision with a reference to the tabloid report. The elite journalism outlets following the lower-tier journalism outlets, in order not to be defeated by economic competition, but the legitimations are expressed in terms of the value of the news, a cultural competency, even where the ethics are blamed are lower tier actors. Later, the identity of the accuser was revealed again by an elite newspaper, the *New York Times*, in a celebrity-style sketch that expanded the scope of coverage to her life history (Appendix B: New York Times, April 17, 1991).

The "laddering" of stories, from the bottom of the field, through the mid-tier and then to the elite players, as different outlets follow one another's publications is not unique to the Internet era. Because of the failure of an elite to maintain higher standards in the Kennedy-Smith case, the *Times* story was widely considered to a shocking breach of ethics. Although published by an elite, national paper, the story included references to how the accuser's illegitimate child and stated that she had been picked up by Kennedy Smith, in a bar that she frequented (*New York Times*, April 17, 1991).

In a tersely worded correction published nine days after its sketch piece, the prestigious paper did not retract its decision to reveal the name, but instead said that readers many have believed the paper was challenging her account, but that the news organization was drawing no conclusions about the allegations of the complaint (*New York Times*, April 26, 1991).

The pre-Internet stories are critical illustrations that there is no qualitative shift with the advent of the Internet, only an acceleration. News organizations faced
competitive pressures from below, even before the technological and financial crisis of Internet publishing. It cannot be maintained that the Internet is the necessary cause of ethical failures in every case of an accidental public figure or IVP. In both pre-Internet and Internet-era stories, news organizations face struggle in the field of production, but use varying levels of cultural capital to maintain the structure of the field in legitimate terms.

5.9 Findings Based on Juridical and Journalism Logics

Through examining legitimations made in controversial news stories, this chapter locates the institutional logics of media decisions in the U.S., as indirectly influenced by the legal frameworks of the First Amendment, activated in accord with cultural and economic hierarchies. News organizations offer legitimations that do not refer directly to law, but nevertheless vary in ways that reflect the hierarchy of legal frameworks. The cultural capital of the legal field is constitutive of status hierarchies in the journalism field. The influence of legal frameworks on the journalism sphere produces several results, including the legitimation of harmful speech in ways that vary by positions held.

Moreover, the influence of law as culture (Schoenfeld 2010; Halliway and Carruthers 2007) produces two paradoxes. These are: (1) the paradox of converting the standard of merely lawful speech into claimsmaking about laudable speech; and (2) the paradox of translating of the legal privilege of speech over privacy into a puzzling norm that maintains that more publicity is the proper remedy for invading privacy. The end result is that political economic interests are masked by categorical thinking and the values of each sphere. At the same time, individual rights of dignity are shaped by these
institutional forces, economic and cultural, that lead to the commodification of individual persons as objects for market consumption.

Status positions in a field are measured by levels of cultural capital or prestige, which are mutually re-enforcing. News organizations that draw on legal schema to legitimate editorial decisions are expressing and maintaining status in the field. Different media outlets enjoy different levels of prestige that are not directly tied to economic capital. The *Smoking Gun* might be profitable, but it does not enjoy prestige. As Bourdieu argues, prestige is measured in accord with nonmarket values, such as art for art's sake, or journalism for journalism's sake. These expressions of inherent worth might appear disinterested, but are focal points for the reproduction of inequality, including economic inequality and the inequality of those who do not wield power in journalism markets, the hapless news subject for instance, or other marginalized persons. News organizations that avoid the scoop and seek prestige through the use of traditional ethics maintain higher levels of prestige by marking boundaries around what is considered legitimate news.

The differential levels of prestige are reproduced, and contested, in statements of legitimation about newsworthiness. High-tier producers avoid stating market concerns, but instead express abstract news values, as inherently worthy practices, in and of themselves. High-tier organizations also express legalistic frameworks for decision, which are used to rationalize the organizational failures to follow traditional ethics. Moreover, consistent patterns of decision-making, while disrupted by the Internet, do not shift completely in analysis of pre- and post-Internet stories. Across both eras, actors in the journalism field use cultural values to balance competing values of truth-telling and
avoiding harm to persons who involuntarily become the subject of news. The balance of harm, unfortunately favors commercial speech over personal dignity, in areas of news coverage that do not appear to advance democratic quality (one of the rationales for allowing freedom of speech).

Mid-level actors express and reproduce hierarchies of prestige. They rely on expressions of cultural capital that are correlated with their relative positions in the field of production. The legitimations offered for news reveal the diffusion of legal logics. Because legal frameworks and categorical rules have diffused across institutions and entered the journalism field, media legitimations reflect legal hierarchies.

Elite journalists are more likely than mid-tier journalists to evoke legalistic standards. This practice at the higher tiers of the field results in an interesting paradox. In using First Amendment rules, about what is merely lawful, to form legitimations about what constitutes a *worthwhile publication*. News organizations are engaged in a translation of legal understanding that changes the expected outcome (Schoenfeld 2010). In fact, we seen an inversion of legal meaning. What was supposed to protect privacy and also provide a higher standard for public figures to defeat the freedom of speech, also includes the commodification of individuals, private persons, in the meaning of public-private categories’, translated into news values.

A second paradox, revealed by the analysis of stories in the case of the fan, is that individual reporters share a common habitus that leads them to believe that more publicity is the remedy for harmful publicity. In sum, the two findings of this chapter are: (1) that newspaper use a range of legitimation strategies to justify newsworthiness
decisions; and (2) that the range of legitimations in the journalism field parallels cultural hierarchies in the juridical field. Categorical logics are matched by descriptive logics, as actors in both fields work to legitimate outcomes. The paths of legitimacy are structured by professional fields, as civil society fields mirror the structure of the juridical field, even though fields of liberty, such as journalism are supposedly beyond the reach of law. The outcomes of organization of legitimations can sometimes mask economic interests in the terminology of professional logics, especially the public-private distinction.

5.10 Paths of Legitimacy from Juridical Field to Civil Liberties

To conclude this chapter and the discussion of the Speech Clause, the primary point will be emphasized: Even though the First Amendment *ideally* leaves the journalism field to structure itself, the journalism field *actually* is structured by First Amendment values. News organizations express a range of legitimations that parallel the legal discourse. At the highest tier, there is the highest expression of cultural capital, where newsmaking legitimations are based on legal fictions supporting elegant schema, in the sense of news for news sake, eschewing economic concerns (although financial considerations do play in). At the mid-tier, news producers openly express a mix of cultural and economic interests, which is somewhat crasser. At all levels, economic considerations have a determinative value, masked as they are in cultural values.

Based on the empirical analysis of the chapter on speech, the mediated public sphere can be mapped, generally, as in figure 11.
The symbol A represents the political sphere, including economic elites; B represents the juridical field, shaped by political-economic discourses (including state supremacy logics) and C represents civil society groups—the journalism field, religious field, and likely the field of movements or state challengers (see chapter 6). In this chapter, it was established that elite, juridical logics of categorical thinking and the separation of public and private spheres—two logics favor political and economic elites—structure the field of journalism in ways that result in the commodification of the individual. Do these logics also shape collective rights? How does the categorical logic of public-private influence the freedom of assembly?
CHAPTER 6:
ASSEMBLY—NEGOTIATED MANAGEMENT AND GLOBAL CITIES

Assemblages promoting exclusive authority over a territory cannot be confined to a sovereign state. While this may be self-evident to historians, in the social sciences, there has been a sharp conflation of these two. It is yet another indicator of what has come to be referred to as the methodological nationalism of the social sciences.


6.1 Placing Protesters in a Pen? A Wider Look at Boston 2004

The protest policing tactics that regulate the freedom of assembly take place in the national context of the U.S., but are shaped more distinctly by the logics of cities and political organization of space. Sassen (2006) questions whether cities must be seen as subordinate to nations—and whether nations are a natural case or even the best scale for analysis of territorial politics. This chapter looks again at the protest pen built outside of the presidential convention in Boston, 2004, but not at the micro-level. Instead, this pen or "free speech zone" is theorized as the product of a political economy of place. A theory of the political economy of place is developed—regarding the city and city-suburb, work-home differentiations, and regarding new mediated spaces, including televised, media events—tracing historical changes in the production of space that occurred during the massive building projects in the postwar era (Jacobs 1961; Lefebvre 1974).
The trends in judge-made law, over many years and across all regions of the U.S., mean that there are fewer and fewer places considered legitimate locations for protest. There may have been negotiated management in some places and times, but in many places and increasing over time, there have been public contests over the freedom of assembly that were pursued to the point of litigation and issuance of court opinions. As argued in this chapter, the protest pen in Boston is not a thing that emerged out of nowhere or out of micro-level interactions. Instead it is the manifestation of larger-scale trends in the production of space, including zero tolerance policing, in which every type of place is defined out of the realm of contentious politics, so that only a small place—in fact an iron cage—is left in which to house those who still chose to dissent.

Earlier in this report, it was said that the questions of legitimacy, and the competing logics of different professional groups about what is—or is not—legitimate, form a grey area around the rule of law. This is the thrust of the study: the competing logics and complementary logics of the professions organize physical and social spaces, even social spaces within the realm of civil liberties. The protest pen used in Boston 2004 is the visible symbol of the exclusions and inclusions that the sociology of the First Amendment produces. This exclusions and inclusions are produced by cultural logics that travel on the paths of legitimacy.

According to the partial theory of legal change advanced in this pages, the grey area is where legitimacy contests occur; it surrounds the positive or hardened law of civil liberties (see figure 3, on page 85). In the penumbra of legitimacy, beliefs and perceptions, about whether legal change is possible, are developed. These beliefs are tied
to practices that follow professional logics, but also include subjectively motivated interests, which become innovative actions, and develop into new discursive logics within a field—according to the premises of Weberian, Durkheimian, and Bourdieu perspectives on legal change, as outlined in chapter 2 (section 2.8).

Building on those insights and developing a theory of legal change around civil liberties, the heuristic of the paths of legitimacy is offered in this study. The paths of legitimacy are cross-institutional, and also move within fields. The paths are where transfers of values—or norms or evaluations of practices—move through social spaces, linked to beliefs and existing practices. In the grey area where law is not solid—meaning not yet determined or subject to change—different groups, organized into professions, work through the conflicts over liberty and competing conceptions of legitimacy, in their own practices, and public contests, which, if well organized and funded, lead to new judge-made laws about human rights. Having explained the partial theory of legal change in the early chapters—the theory just summarized—it was shown in chapters 4 and 5, exactly what values travel over the paths of legitimacy (within and between spheres) and shape legal outcomes, with regard to religion/conscience and speech/expression.

For instance, in the political and juridical fields, there is a common logic of state supremacy—and an elitist tendency to organize social life in terms of public and private, which only appear to be disinterested categories. The logic of federal supremacy began in early America as a way of forging a nation out of competing sovereigns, in the form of the separate states (see chapter 2, sections 2.4 and 2.5). There is an ongoing struggle for popular sovereignty in face of national unity; however, now the competing sovereigns are
individuals and collectivities in the civil sphere, rather than the separate states (Tribe 1999). Individuals and groups resist state authority in order to maintain freedoms.

The public-private divide is a cultural evaluation used to manage the state-society boundary, at the elite levels within law and media. For example, the logic of dividing public officials, from private people, was first intended to improve the quality of democratic speech, and allow news publishers to criticize public officials—while still allowing the courts to protect the privacy of individuals who were not voluntarily in the public eye. The long-range development of the professional logics of judge-made law and journalism practices, however, is shaped by dominant economic logics that result in inequalities. As Bourdieu explained (see chapter 5), there are both political-economy logics and cultural logics; while the cultural logics are relatively autonomous, it is often the case that political-economy logics dominate or overtake the cultural logics, such as core values within a field. Thus, the public official standard became the public figure doctrine, which brings private persons into the media spotlight, in ways that have little to do with democratic debate—and more to do with selling newspapers. The freedom of speech, extended too far, became a way to commodify human beings and resulted in a loss of privacy and human dignity, as shown in chapter 5. This loss is legitimated by a public-private distinction at the highest levels of the fields—both media and law.

The legitimations are expressed in terms of the core value of the respective fields, not in economic terms. Legitimations in the journalism sphere are expressed in terms of what "counts" as news, and legitimations in the juridical sphere are expressed in terms of an elegant, categorical rule, which can be uniformly applied in later cases, in categorical
ways, rather than in ways that merely "follow" the shifting norms of civil society. The public-private distinction, as a rule for social organization—however formal or rational it may seem within each profession—results in inequalities. Legal decisions on the classification move in different directions across the divide (see discussion of assembly below, where the public sphere is shrinking, not gaining in size, as it is in speech), but nearly always in the favor of elites, who have the resources (economic and cultural capital) to manage the fields of media and law—and define what counts as "public" or "private," in ways that are likely to control behavior of the less advantaged to their disadvantage. Non-elite groups and individual people have less access to management in the fields of media and law, which are the primary fields of power. According to one scholar these fields are the "meta-capital" fields (Couldry 2003).

Similarly, the state supremacy logic can lead to inequalities in expressions of conscience. According to the court cases on the display of religious symbols, the symbols and practices of the doctrinal religions are to be removed from public spaces, in accord with juridical logics, by which elite courts follow the code of the civil religion and support the national as the collective conscious or collective conscience. The code of civil religion, as a discursive formation, promotes national unity over the expression of any one form of pluralism, as shown in chapter 4.

The logic of nationalism, once it travels on paths of legitimacy in a legitimacy-and-law dynamic, results in social conditions in which the dominant public expression of conscience becomes the use of generalized religious symbols, combining history and nationalism with watered-down religious representations. The legal requirement that
these various symbols be combined, in order to be legitimate, means that the public spaces become more and more about *celebrating nation and history*, in secular terms, than any particular form of pluralism. This social fact was established by analyzing the legitimations offered by the U.S. Supreme Court in every case it decided regarding religious displays in outdoor spaces. In the opinions, *nation* is given hegemonic position over and above other expressions of conscience and forms of collective unity or cultural authority. The ascendancy of nation, supported by public ritual, promotes a unity based in nationalism, over pluralism or the expression of distinct belief systems, even while the legal codes express the nationalism preference as a form of toleration.

Both the supremacy of the nation, and the public-private distinction, mask the economic benefits to elites in the exclusions that these constructs promote. Linking together these cultural values—state supremacy, the promotion of national unity, and the public-private distinction as elite rule for social organization—a powerful dynamic is developed, and carried on the paths of legitimacy, within and between fields. When organized horizontally, across fields, these cultural values lead to the production of laws that limits liberty for marginalized groups, but support certain elite interests in organizing spaces for favored economic and cultural production.

These values are also organized, vertically, up and down fields, in accord with professional logics. At highest levels, *categorical logics* are used to make decisions and legitimate practices and outcomes, while at the lower levels of a field, more *descriptive logics* are used. These descriptive logics mix economic and cultural values. The highest level logics are expressed as capital cultural, in terms of the core values of the field—
such as elegant rule-making, or determining what counts as news—but economic interests are not entirely absent from high-level logics. When organized vertically, but moving across spheres horizontally, nationalism and public order lead to reduced civil liberties, as the law tends to limit public assemblies, as will be shown in this chapter.

6.2 The Mapping that Remains

In this chapter, we will bring these initial mappings of the sociology of the First Amendment forward, into a study of how juridical logics influence collective rights to liberty, instead of individual rights. Instead of discussing beliefs or expressions, as in earlier chapters, here we will discuss the collective right to a freedom of assembly, and how that right is, or is not, limited by the practices of protest policing. The research question addressed in this chapter is: what institutional forces shape the collective right to challenge political authority? At issue are two competing hypotheses—which may both be true, in that they might simply describe different times and places. On the one hand, there is the negotiated management theory, arguing that protest-policing tactics shifted from escalated force to police-protester agreement, on the terms of anticipated demonstrations. This theory is outlined in chapter 1 (section 1.8.2). In contrast, other scholars argue that the use of violence depends on the threat perceptions of police, on the ground in different settings that have to be parsed out, rather than cast into an aggregated narrative of progress (Davenport and Soule 2006; Vitale 2007). Further, Gillham and Noakes (2006) argue that neither escalated force nor negotiated management explain the regulations of large-scale, globalized protests that take place in urban environments.
To develop a theory of the political economy of place that gives a better or more complete account of current protest policing tactics, this study extends the global city thesis—and what Sassen calls a model of "Territory-Authority-Rights"—to look at the institutional forces shaping the juridical regulation of assembly. This study builds also on the insights of Davenport, Soule, Gillham, Noakes, and others who question whether negotiated management can be used as a broad descriptive of policing strategies. By looking at influences on the juridical field, and influences of the juridical field, this study contributes to existing knowledge regarding the regulation of assembly and the legitimation of protest policing tactics.

In this chapter, we look at the clash between security and liberty in disputes over protest policing, such as in Boston in 2004, and examine the political influences that shape this type of outcome in First Amendment lawsuits. In plain terms: how did it come to be that the courts would find that an iron cage that offends the spirit of the First Amendment also complies with the amendment? The answer to this question, first posed in chapter 1 (section 1.8) is not found in micro-level interactions of the negotiation between protesters and police, nor in their interactions on the street. Instead, institutional analysis is required, including an application of field theory to investigate the translation of political interests and policing logics, into the juridical field. But to accomplish that task, first there has to be a summary of the actual patterns of juridical outcomes regulating assembly. Has there been more disputes or less? More repression or less?

To complete these tasks and this inquiry, the first step is a legal geography, showing the actual patterns of outcomes in disputes that became lawsuits regarding
assembly in the U.S., during the postwar years (1945-2000). Next, we summarize two converging, historical shifts in the political economy of place, using secondary sources. First, there is the massive building of the postwar years that resulted in differentiations of place between city and suburb, and between home and work, changing the perceptions regarding the legitimate use of spaces. This building coincided with the formation of new, mediated spaces that resulted from the widespread distribution of television sets and other forms of communication. These parallel shifts in the production of space meant that, for politics, some events became televised events or "media events," rather than real-time events. For instance, presidential conventions became more of a show, than a working meeting (see Table 10). Second, there was a shift from community style policing to zero tolerance policing, which strictly regulates urban spaces and equates any type of disorder, including civil disobedience, with violent crime. It is argued that these two, converging trends influence juridical discourses regulating the freedom of assembly.

Over the decades of the 1960s to the 1990s, there may have been negotiated management of protests in some locations, but there also were increasing numbers of disputes, decade over decade, as outlined in the legal geography and tables below. Building on these data, the global cities thesis is modified and extended in a way that it can be related to the "hands-on" regulation of territory by political forces, namely the protest policing of street demonstrations. The modified global cities thesis is compared to the negotiated management thesis, to see which gives a better or more complete account of the collected data on juridical regulations of contested assemblies in the postwar years. In the final analysis, it is argued that the global city thesis, informed by the history of
urban planning, changing perceptions of space, and policing logics, provides an improved understanding of protest policing, as shaped by juridical outcomes.

The goal of this chapter is to explore the possibility that conflict-based theories of the political economy of place, and the political regulation of political spaces, are at least as relevant to legal change in the area of civil liberties, and protest policing, as are consensus-based theories, such as negotiated management. In this chapter, individual court opinions are not covered by extensive, discursive explanation, as in earlier chapters, in part because there are over 400 lawsuits. Instead, this summary of the key logics being used by the courts will suffice, in order that we can focus on the sociological analysis. As detailed below, the courts have legitimated an increasingly bureaucratic repression. To do so, the courts use two constructs, "time, place, and manner" (TPM) restrictions and categorical analyses of what counts as the "public forum."

The TPM restrictions, in the aggregate, result in fewer and fewer places being considered legitimate for protest. The public forum doctrine—a way similar to the public figure doctrine—works to designate what places are public, and which are nonpublic. Yet, under the Speech Claus, the mediated public sphere is getting larger and under the Assembly Clause, the realm of outdoor public spaces where civil liberties can be exercised is shrinking. More public figures, fewer public fora. Private people can be forced into the media spotlight under the public figure doctrine; outdoor political participation can be removed under the public forum doctrine. If a place is deemed public, then a protest may be legitimate or lawful, but if deemed non-public or a limited public forum, then courts may determine that assembly can be regulated and repressed.
The summary of the findings of this chapter are: (1) that certain regulations of assembly—the innovative tactics of protest policing—are better explained by the modified global city thesis, than by the negotiated management theory; (2) that the innovative tactics of policing, work in conjunction with judge-made law that legitimates those tactics. The juridical outcomes are reflections of the urban planning logics of postwar building and the logics of zero tolerance policing from the 1980s. Translating those political-economic interests and logics into the juridical sphere, the courts are tolerating less and less disorder (read: freedom), even as some courts maintain civil liberties in principle. Finally, the modified global city thesis is a better account, or pattern description, of current policing tactics than are state legitimations—security needs after 9/11 and riot prevention.

The data examined in this chapter are judicial opinions, institutional history of zero tolerance policing, and legitimation claims regarding the regulation of liberty, made by the New York Police Department, with regard to the planning and execution the mass arrests that later occurred during the presidential national convention held in New York in 2004. Documents related to the internal planning were publicly released (Appendix F). (Methods and data are outlined in chapter 3, section 3.3.3 and in the appendices).

In the first part of the chapter, a legal geography of court opinions, by U.S. region and decade is presented and analyzed. Then the historical accounts of postwar building and the emergence of zero tolerance policing are provided. Next competing hypotheses are outlined and compared. Finally, the legitimacy-and-law dynamic regarding the presidential convention held in New York in 2004 is examined, with special regard to
practices and claims by police agencies, before the convention, which fell into a pattern of "licensing repression" (Davenport 2007). In that pattern, police agencies attempt to give themselves permission to conduct planned repressions, using the media and the courts, while activists, using lawyers as brokers, also go to court to assert rights of civil liberty, both before and after the assemblies.

The recurring dynamics of contested and litigated assemblies, from after the end of World War II to the year 2000, as outlined in the tables below, have resulted in shifting regulations of assembly, that are more and more repressive.

And so, having examined the sociology of the First Amendment as it shapes the liberties of beliefs and speech in the preceding chapters, we turn to assembly. By taking a wider angle lens, and looking again at the protest pen in Boston, we see that it is not likely that the idea to use a protest pen emerged at the micro-level, or was part of an improvisational work between the police and protesters. These are important interactions, and locations of innovation. Yet existing theories of protest policing may not fully account for all types of protest policing, even though the theories are descriptive of some types of protest policing. Important dynamics also happen at the institutional level.

The protest pen was part of negotiations between civil liberty attorneys and the city of Boston, but it was not a balanced negotiation, as the state had superior bargaining power. Moreover, the cultural logics of state supremacy, elegant rule-making and the division of public from private—all worked to the disadvantage of those who wanted to engage in outdoor gatherings intended to challenge state authorities. The protest groups in Boston never agreed to the protest pen and never used it. The protest pen in Boston,
however, is a symbol of the current condition of protest policing, and a point of *material instantiation* or realization of legal trends, the "law in action," meaning the juridical outcomes interpreting the First Amendment. Taking a wider look at the freedom of assembly, we see that this freedom was contested in hundreds of lawsuits regarding street protests during the postwar era in the U.S. There are over *400 lawsuits* in which legitimacy contests over assembly rights have resulted in a court opinion about assembly.

This fact alone brings into question the theory of the negotiated management, and the legitimation of protest policing tactics on singular historical events. If there are that many disputes that are well funded enough and well organized enough to reach court and litigation is pursued to the point of a court opinion, the story of progress, that police and protesters came together and agreed to work out the details of anticipated protests, and did so more and more as time went on, does not seem to be an accurate tale.

As theorized in chapter 1, the court opinions in these lawsuits are *stopping points* on the legitimacy-and-law dynamic. They are stopping points because it is in court opinions that civil liberties law change, following on social practices and claimsmaking in the penumbra of legitimacy. The court opinions, as temporary resolutions of recurring problems, reveal broad trends in the regulation of civil liberties regarding territory or physical space—as the law shifts the line between state and society, either deeper into the realm of civil liberties, expanding state power, or into the state, expanding the realm of civil liberties. The political regulation of territory is where civil liberties are most seriously at stake, because open air challenges to state authority and to existing policies are more likely to alter legitimacy perceptions regarding existing leaders. The realm of
civil liberties is mutually exclusive with the realm of state regulation, so the more physical space the government can control, the more power it has.

![Diagram](https://via.placeholder.com/150)

Figure 12. The paths of resistance and regulation

As illustrated in figure 12, the primary paths of legitimacy between the state and society are the paths of regulation and resistance. One the trend found in the reading of the 400 court opinions, however, is that the courts and scholars tend to *reduce assembly rights* and turn them into *speech or belief rights*, a trend that works to reduce the scope of civil liberties. This is a superior way to reduce civil liberties because speech is less effective and more easily transformed into commercial uses and commodification. For example, the appellate courts in the Boston case suggested that speech on the Internet is an alternative to street protest.
This type of legitimation, based on mediated speech, is expressed increasingly over the years by courts considering questions of assembly (Appendix C). The court in Boston was considering whether the proposed pen—referred to in the case as a demonstration zone or "DZ"—allowed for the activists an opportunity for expression.

The fact that the issue was framed in terms of expression rather than assembly and petition shows the extent to which speech rights have swallowed assembly rights (Black Tea Society v. Boston, 2004). In the analysis of TPM restrictions on the assembly as expression, the court considered alternative modes of communication. The court also considered the arguments of activist groups that the DZ did not provide access to delegates, because it was beyond the sight and sound of delegates, and pamphlets could not be distributed:

We disagree with that premise: the DZ did provide an opportunity for expression within sight and sound of the delegates, albeit an imperfect one. There are, moreover, two other pertinent considerations. First, although the opportunity to interact directly with the body of delegates by, say, moving among them and distributing literature, would doubtless have facilitated the demonstrators' ability to reach their intended audience, there is no constitutional requirement that demonstrators be granted that sort of particularized access. Second, we think that the appellant's argument greatly underestimates the nature of modern communications. At a high-profile event, such as the Convention, messages expressed beyond the first-hand sight and sound of the delegates nonetheless have a propensity to reach the delegates through television, radio, the press, the internet, and other outlets. On this record, then, we cannot say that the district court erred in concluding that viable alternative means existed to enable protesters to communicate their messages to the delegates (378 F.3d at 13, emphasis added).

According to a critical perspective, "mere speech"—for instance electronic speech that is not widely distributed or understood, and other forms of speech that include no
conduct—does not have the same challenging effect as outdoor protests. This type of social fact is difficult to prove conclusively, and is likely to be contested because it has a normative ring. But the critical and informed view is that direct challenges, of human gatherings in public spaces—engaged in speech, plus conduct, and building forms of social solidarity other than nationalism—are more challenging and de-legitimating of a current state, national unity, nation-state, political leaders, and current policy, then are conversations in weblogs (Durkheim 1912; Tilly 2004, 2008; El-Haj 2009).

6.3 The Legal Geography of Assembly, 1946-2000

In this chapter, we start with a "legal geography," which is a multi-case analysis of how law is located in places, and how law defines the production of space. (For a more detailed definition of legal geography and description of the method, see chapter 3, section 3.2.3.) Because of the "space" restrictions, or page limits of this study, there is not room for extensive discursive explanation of the over 400 court opinions for legitimation claims, as in the chapter on speech, which offered discursive analysis of fewer cases. An extensive, discursive analysis of these cases is proposed as one of the future avenues for this research (see chapter 7).

Here we focus on a few categorical variables to build the geography. The main variables in the geography are: (1) repression, and (2) type of place. These are the what and where of contested assemblies, which must be described before looking at the how and why. We also coded the exact county and uniform county codes, in anticipation of future research, but instead of looking at county level variables, we have cataloged the court cases into a regional geography, which allows for a spatial analysis of the regulation of political
space over time (Delaney, Ford, and Blomley 2001). The regional geography reveals a juridical trend of increasing bureaucratic repression.

Legal geography is an appropriate first step, because the right of assembly is about physical gatherings in physical spaces. The data collected for the legal geography are judicial opinions regarding when and where assembly lawsuits arise (Appendix C). The regulation of assembly can take different forms, but typical cases are, as mentioned, about "time, place, and manner" (TPM) restrictions on protest. There are also many cases about protest permits or parade permits and about whether a location is a public forum. In the history of juridical regulation of assembly, judges uses these various legal constructs, to find that one location type after another, and one use of space after another, is not a legitimate time or place for dissent—until, in the aggregate, there are few places left for dissent. The court opinions were coded dichotomously for repression: repression was coded (1), and (0) otherwise. The cases were also coded for location type of the protest (abortion clinic, airport, government building, park, sidewalk, street, etc.).

The legal opinions for this legal geography are summarized in full in Appendix C, so other scholars can have access to the data, replicate findings, and explore additional avenues of research. A total of 435 court opinions were uncovered for the time period from 1945 to 2000, including both federal and state cases and both trial and appellate decisions. Table 4, on the next page, makes clear the regional and decade-by-decade variation in legal battles over assembly, from 1945 to 2000.
# TABLE 4

REGIONAL AND TIME VARIATION IN ASSEMBLY LAWSUITS, 1945-2000

<table>
<thead>
<tr>
<th>Decade</th>
<th>Region</th>
<th>Number</th>
<th>Repressive</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1940s</td>
<td>Northeast</td>
<td>3</td>
<td>3/3</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Southeast</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>Midwest</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>West</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>3</td>
<td>3/3</td>
<td>3</td>
</tr>
<tr>
<td>1950s</td>
<td>Northeast</td>
<td>6</td>
<td>3/6</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>Southeast</td>
<td>2</td>
<td>1/2</td>
<td>3</td>
</tr>
<tr>
<td></td>
<td>Midwest</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td></td>
<td>West</td>
<td>1</td>
<td>1/1</td>
<td>2</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>9</td>
<td>5/9</td>
<td>9</td>
</tr>
<tr>
<td>1960s</td>
<td>Northeast</td>
<td>22</td>
<td>14/22</td>
<td>92</td>
</tr>
<tr>
<td></td>
<td>Southeast</td>
<td>57</td>
<td>31/56</td>
<td>92</td>
</tr>
<tr>
<td></td>
<td>Midwest</td>
<td>8</td>
<td>3/8</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>West</td>
<td>5</td>
<td>2/5</td>
<td>5</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>92</td>
<td>50/92</td>
<td>92</td>
</tr>
<tr>
<td>1970s</td>
<td>Northeast</td>
<td>39</td>
<td>18/39</td>
<td>100</td>
</tr>
<tr>
<td></td>
<td>Southeast</td>
<td>26</td>
<td>18/26</td>
<td>52</td>
</tr>
<tr>
<td></td>
<td>Midwest</td>
<td>23</td>
<td>10/23</td>
<td>38</td>
</tr>
<tr>
<td></td>
<td>West</td>
<td>12</td>
<td>9/12</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>100</td>
<td>55/100</td>
<td>100</td>
</tr>
<tr>
<td>1980s</td>
<td>Northeast</td>
<td>53</td>
<td>36/53</td>
<td>94</td>
</tr>
<tr>
<td></td>
<td>Southeast</td>
<td>18</td>
<td>11/18</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>Midwest</td>
<td>16</td>
<td>10/16</td>
<td>16</td>
</tr>
<tr>
<td></td>
<td>West</td>
<td>7</td>
<td>3/7</td>
<td>7</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>94</td>
<td>60/94</td>
<td>94</td>
</tr>
<tr>
<td>1990s</td>
<td>Northeast</td>
<td>62</td>
<td>40/62</td>
<td>137</td>
</tr>
<tr>
<td></td>
<td>Southeast</td>
<td>26</td>
<td>22/26</td>
<td>42</td>
</tr>
<tr>
<td></td>
<td>Midwest</td>
<td>34</td>
<td>26/34</td>
<td>68</td>
</tr>
<tr>
<td></td>
<td>West</td>
<td>15</td>
<td>10/15</td>
<td>6</td>
</tr>
<tr>
<td></td>
<td>TOTAL</td>
<td>137</td>
<td>98/137</td>
<td>137</td>
</tr>
</tbody>
</table>

**Totals**

|          | Northeast | 186     | 114/186   | 435   |
|          | Southeast | 129     | 83/129    | 435   |
|          | Midwest   | 82      | 49/82     | 435   |
|          | West      | 38      | 25/39     | 38    |
|          | TOTAL     | 435     | 271/435   | 435   |

**Notes:**
- **Northeast** (1) includes Connecticut, Delaware, District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New York, Pennsylvania, Rhode Island, and Vermont;
- **South** (2) includes Arkansas, Alabama, Florida, Louisiana, Georgia, Kentucky, Oklahoma, Mississippi, North Carolina, South Carolina, Tennessee, Texas, and Virginia;
- **Midwest** (3) includes Kansas, Illinois, Indiana, Iowa, Michigan, Missouri, Minnesota, Ohio, Nebraska, and Wisconsin; and
- **West** (4) includes Arizona, California, Colorado, Idaho, Montana, Nevada, Washington, Oregon, Utah, and Wyoming. (Alaska and Hawaii are not included.)
As Table 4 shows, there was an increase in the number of legitimacy-and-law dynamics around civil liberties, decade over decade, that resulted in court opinions, with a small drop in the 1980s. The rate of repression in these legitimacy contests is over 50% (271/435 = 62%). It is not known if the areas without these lawsuits experienced repression or negotiated management; however, it is clear that in some locations, protest was highly contested, and increasingly regulated. Table 4 establishes that the region of the country matters. Because place matters, it may not be a good idea to lump together all narratives about assembly across the U.S.. Consistent with the civil rights era, there was a surge in repressive activities and lawsuits ending in state repression in the South in the 1960s, which dropped off in the 1970s. Interestingly, the centrality of a global city is also evident in the legal geography. The first three court opinions over assembly regulations were all repressive, and all three took place in New York City (see Appendix C).

Let us look at three decades only to focus on the negotiated management era. There are over 300 opinions on assembly in 1970-99. Next, 44 opinions about protest regulation in Washington, DC—because of the symbolic reasons that protest occurs there and regulatory powers in the Capitol—there are just under 300 cases (Table 5).

**TABLE 5**

**NUMBER OF REGULATORY OPINIONS BY DECADE, EXCLUDING DC**

<table>
<thead>
<tr>
<th>DECADE</th>
<th>DISPUTES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1970s</td>
<td>91</td>
</tr>
<tr>
<td>1980s</td>
<td>76</td>
</tr>
<tr>
<td>1990s</td>
<td>115</td>
</tr>
<tr>
<td>Total</td>
<td>282</td>
</tr>
</tbody>
</table>
As Table 5 shows, there was an increase in disputes over assembly that entered the legitimacy-and-law dynamic and resulted in court opinions, decade over decade, with a small drop in the 1980s. This indicates that the negotiated management narrative is likely an incomplete account of protest policing over the time period. Table 6 presents frequency counts for types of place, repressive outcome (y/n), and percentage repressive.

**TABLE 6**

FREQUENCY COUNTS FOR TYPES OF PLACE AND REPRESSION RATES

<table>
<thead>
<tr>
<th>PLACE</th>
<th>NUMBER</th>
<th>REPRESSIVE</th>
<th>% REPRESS</th>
</tr>
</thead>
<tbody>
<tr>
<td>Abortion Clinic</td>
<td>33</td>
<td>29</td>
<td>88%</td>
</tr>
<tr>
<td>Airport</td>
<td>11</td>
<td>4</td>
<td>36%</td>
</tr>
<tr>
<td>Auditorium, public</td>
<td>5</td>
<td>3</td>
<td>60%</td>
</tr>
<tr>
<td>Beach</td>
<td>1</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Campus, public</td>
<td>21</td>
<td>12</td>
<td>57%</td>
</tr>
<tr>
<td>Church</td>
<td>1</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>Fairgrounds, public</td>
<td>6</td>
<td>3</td>
<td>50%</td>
</tr>
<tr>
<td>Forest, national</td>
<td>5</td>
<td>4</td>
<td>80%</td>
</tr>
<tr>
<td>Government building</td>
<td>3</td>
<td>2</td>
<td>66%</td>
</tr>
<tr>
<td>Grounds, public</td>
<td>13</td>
<td>11</td>
<td>85%</td>
</tr>
<tr>
<td>Hospital</td>
<td>4</td>
<td>4</td>
<td>100%</td>
</tr>
<tr>
<td>Lunch counter</td>
<td>1</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Military base</td>
<td>6</td>
<td>4</td>
<td>66%</td>
</tr>
<tr>
<td>Near business</td>
<td>2</td>
<td>2</td>
<td>100%</td>
</tr>
<tr>
<td>Near church</td>
<td>4</td>
<td>2</td>
<td>50%</td>
</tr>
<tr>
<td>Near embassy</td>
<td>3</td>
<td>3</td>
<td>100%</td>
</tr>
<tr>
<td>Near government bldg.</td>
<td>6</td>
<td>5</td>
<td>84%</td>
</tr>
<tr>
<td>Near police station</td>
<td>1</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>Near prison</td>
<td>1</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>Near residence</td>
<td>21</td>
<td>16</td>
<td>76%</td>
</tr>
<tr>
<td>Near school</td>
<td>3</td>
<td>3</td>
<td>100%</td>
</tr>
<tr>
<td>Park</td>
<td>18</td>
<td>14</td>
<td>78%</td>
</tr>
<tr>
<td>Post office</td>
<td>2</td>
<td>2</td>
<td>100%</td>
</tr>
<tr>
<td>School, public</td>
<td>7</td>
<td>4</td>
<td>57%</td>
</tr>
<tr>
<td>Shopping Mall</td>
<td>7</td>
<td>3</td>
<td>43%</td>
</tr>
<tr>
<td>Street</td>
<td>86</td>
<td>47</td>
<td>55%</td>
</tr>
<tr>
<td>Theater</td>
<td>3</td>
<td>2</td>
<td>66%</td>
</tr>
<tr>
<td>Other</td>
<td>6</td>
<td>2</td>
<td>33%</td>
</tr>
<tr>
<td>Totals</td>
<td>283</td>
<td>180</td>
<td>64%</td>
</tr>
</tbody>
</table>

*Note:* the category "other" includes a company town, a construction site, an abandoned railway track, a polling place, and the water in San Francisco Bay.
TABLE 7
TYPES OF PLACES REGULATED AND PERCENTAGE REPRESSIVE

<table>
<thead>
<tr>
<th>Place</th>
<th>Number</th>
<th>Repression</th>
<th>%Repression</th>
</tr>
</thead>
<tbody>
<tr>
<td>Church</td>
<td>1</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>Hospital</td>
<td>4</td>
<td>4</td>
<td>100%</td>
</tr>
<tr>
<td>Near business</td>
<td>2</td>
<td>2</td>
<td>100%</td>
</tr>
<tr>
<td>Near embassy</td>
<td>3</td>
<td>3</td>
<td>100%</td>
</tr>
<tr>
<td>Near police station</td>
<td>1</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>Near prison</td>
<td>1</td>
<td>1</td>
<td>100%</td>
</tr>
<tr>
<td>Near school</td>
<td>3</td>
<td>3</td>
<td>100%</td>
</tr>
<tr>
<td>Post office</td>
<td>2</td>
<td>2</td>
<td>100%</td>
</tr>
<tr>
<td>Abortion Clinic</td>
<td>33</td>
<td>29</td>
<td>88%</td>
</tr>
<tr>
<td>Grounds, public</td>
<td>13</td>
<td>11</td>
<td>85%</td>
</tr>
<tr>
<td>Near government bldg.</td>
<td>6</td>
<td>5</td>
<td>84%</td>
</tr>
<tr>
<td>Forest, national</td>
<td>5</td>
<td>4</td>
<td>80%</td>
</tr>
<tr>
<td>Park</td>
<td>18</td>
<td>14</td>
<td>78%</td>
</tr>
<tr>
<td>Near residence</td>
<td>21</td>
<td>16</td>
<td>76%</td>
</tr>
<tr>
<td>Government building</td>
<td>3</td>
<td>2</td>
<td>66%</td>
</tr>
<tr>
<td>Military base</td>
<td>6</td>
<td>4</td>
<td>66%</td>
</tr>
<tr>
<td>Theater</td>
<td>3</td>
<td>2</td>
<td>66%</td>
</tr>
<tr>
<td>Auditorium, public</td>
<td>5</td>
<td>3</td>
<td>60%</td>
</tr>
<tr>
<td>Campus, public</td>
<td>21</td>
<td>12</td>
<td>57%</td>
</tr>
<tr>
<td>School, public</td>
<td>7</td>
<td>4</td>
<td>57%</td>
</tr>
<tr>
<td>Street</td>
<td>86</td>
<td>47</td>
<td>55%</td>
</tr>
<tr>
<td>Fairgrounds, public</td>
<td>6</td>
<td>3</td>
<td>50%</td>
</tr>
<tr>
<td>Near church</td>
<td>4</td>
<td>2</td>
<td>50%</td>
</tr>
<tr>
<td>Shopping mall</td>
<td>7</td>
<td>3</td>
<td>43%</td>
</tr>
<tr>
<td>Airport</td>
<td>11</td>
<td>4</td>
<td>36%</td>
</tr>
<tr>
<td>Other</td>
<td>6</td>
<td>2</td>
<td>33%</td>
</tr>
<tr>
<td>Beach</td>
<td>1</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td>Lunch counter</td>
<td>1</td>
<td>0</td>
<td>0%</td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td>283</td>
<td>180</td>
<td>64%</td>
</tr>
</tbody>
</table>

Based on this legal geography, which yielded important descriptive information, it appears that several location types are strictly repressive, meaning that freedom of assembly is not allowed or nearly never allowed, or include some form of repression nearly all the time, such as zones of no-protest around abortion clinics, etc. (repressive rates great than 80%). These places are: churches, hospitals, post offices, and abortion

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clinics; nearby areas for businesses, embassies, police stations, schools, and government buildings; and, surprisingly, public grounds, which also show high rates of repression.

Is it the case that the negotiated management thesis (outlined in chapter 1)—or a more critical thesis, based on an understanding of global cities, and political territories and rights (Sassen 1991, 2006), is the better explanation for the patterns detected? The alternative theories are themselves comparative, as one based in a consensus assumption (negotiated management) and the other in conflict or critical theory (global cities and political territories).

After the comparison of theories and hypotheses, a closer look will be taken at the New York and Boston conventions of the 2004 election, both in the post 9/11 era, as well as with the Philadelphia and Los Angeles conventions from the pre-9/11, but post-Seattle 1999 time frame. But first, two historical trends in the political economy of place must be summarized: one trend, a logic of urban planning and the other, a logic of urban policing.

6.4 Certain Logics of Urban Planning

During the postwar years, there were strategic actions taken by real estate developers, city officials, and political actors that resulted in a massive building of the suburbs and the highways linking together bedroom communities and places of work. This building resulted in a differentiation of place between city and suburb and work and home. The U.S. Census in fact has had to alter its designations for metropolitan and other types of areas numerous times, to account for the new organizations of space into larger and larger areas of combined social life. The Census takes into account the shifting economic and cultural ties between metropolitan, micropolitan, and related areas,
including commuting ties, in making its designations of type of place (see \url{www.census.gov}). Increasingly, each place, along many scales of analysis, had its own legitimated social function. Very generally speaking, cities were for work and leisure and suburbs are for consumption and housing, that is bedroom communities, where television was the focal point. Other scales of differentiation see the major cities, including global cities like New York and Los Angeles, as hubs of distribution and consumption, fed by the surrounding areas as well as distant areas from which resources are drawn. There are also differentiations of space within cities, as the early formations of separate functional areas within a particular city, in concentric formations, were recognized by Park and Burgess in their classic work, *The City* (1925), but these trends accelerated over time (Jacobs 1951; Postman 1985; Spigel 2001). Recent work on how these differentiations lead to distinct regions within large cities has been accomplished by Davis (1999), who looked at the regional differentiations and concentric areas in Los Angeles, which he argues are organized by political-economic interests and an ecology of fear.

In the U.S. the massive building of suburbs and movement out of the cities into surrounding areas, was matched urban planning initiatives in the city that dismantled community diversity and organized spaces into different functions, sometimes leading to failures of organization and the creation of crime-ridden areas (Jacobs 1961). As physical places were increasingly differentiated, there was also a \textit{parallel expansion} of electronic or mediated spaces, caused in part by the sudden, widespread distribution of televisions. One scholar has theorized that there is no longer a "sense of place" because of these two shifts (Meyrowitz 1985; Postman 1995; Spigel 2001). Another scholar has called the new
landscape, the "brave new neighborhood," because so many outdoor spaces were also privatized during the building of the suburbs and gated communities, which also brought about reduced legitimacy for the use of public spaces for outdoor rallies and other shared events (Kohn 2004).

The broad changes in the political economy of cities and surrounding spaces the cities control also resulted in new inequalities distributed across place, because suburban sprawl did not mean prosperity for everyone. It also meant economic segregation. As a result of these migrations, buildings, innovations, and exclusions, cities were largely differentiated from suburbs, small towns apparently lost their "town squares," and people started to travel longer distances from home in the small town or suburbs, which became attached, via economic and cultural ties, to nearby, or somewhat distant, metropolitan or micropolitan areas (Drier, Mollenkopf and Swanstrom 2004). Within the city of New York, for example, economic policies regarding urban spaces and development, under the rubric of "quality of life" lead to increased homelessness (Vitale 2008).

The narrative tied to these changes in the cultural geography of the U.S. was that, while at home, suburbanites (stereotypically) were supposed to watch television (and be trained as passive consumers) rather than go out on the town; so that in the morning they would be ready to travel to work, at a some distance from the well-protected bedroom community. This narrative and social groupings lead to a number of anomic conditions and absurdities (Goodman 1962; Spigel 2001). Goodman (1962) portrays the blandness of growing up in the suburbs of the 1950s and being groomed to work in menial jobs on behalf of urban elites, located far away.
According to suburban critic Andres Duany, co-founder of the Congress for New Urbanism—which works to counteract the extreme differentiations of place created by urban planning—it is hard to find a population, or demographic category of persons, not harmed by the creation of suburban sprawl (Duany, Plater-Zyberk, and Speck 2000). Jacobs (1961), as mentioned, tells the urban side of the same story regarding disastrous city planning and the differentiation of places into functional areas rather than organic communities. While the history of city and urban planning is complex—one author gives it seven distinct periodizations (Hayden 2002)—the summary point here is that the functions of the newly produced spaces were clearly not for outdoor protest or demonstrations, but instead to serve the interests of political-economic elites, primarily located in cities, but also in affluent, gated communities of the suburbs.

Connecting these urban planning trends to the freedom of assembly, we see that the logics of urban planning carried into legal texts. According to detailed readings of the 400 assembly lawsuits, the courts also engaged in differentiation of places. There were a series of cases prohibiting residential picketing in the suburbs and leafleting at the local shopping mall. In the city, there were more and more contests and lawsuits over the permits issued for protest and over TPM restrictions on rallies and marches (see lawsuits listed chronologically, with full citations, in Appendix C). As reported in the Appendix, the cases prohibited protests and dissent in many particular types of places, which were considered to have other functions or purposes. In the aggregate, there were fewer and fewer places to protest or gather in person for the purpose of dissent (see Table 7).
Instead, due to the extreme differentiation of work and home, city and suburb, many places were written out of the public sphere as appropriate places for humans to gather and participate in the political life of their communities.

6.5 Certain Policing Logics, the Emergence of Zero Tolerance

Having developed a regional picture or legal geography, and detailed the areas and differential rates of state repression in the U.S., with regard to public assembly, and considered the shifting perceptions of place in postwar U.S. we now look more closely at institutional trends within the field of policing that might influence these identified trends and juridical outcomes. This summary does not cover every aspect of policing, as law enforcement includes many benefits and many risks. The summary of policing logics is focused on the shift from community-based policing to zero tolerance policing, starting in the 1980s.

The policing logics summarized here did not come out the "spirit in the wind," as Weber describes (1922). Instead, law enforcement changes were likely directed by subjective motivations of political and economic advantage that resulted in the urban planning shifts of the postwar years. These logics find their way into collective identities and professional logics. The regulation of urban spaces was part of a larger trend that differentiated the city from the suburb. And, as discussed below, the logic of law enforcement in urban and semi-urban areas turned from a community-based orientation to one based on policing the differentiated areas for any type of disorder that might interfere with the productive capacities of the city.
Zero tolerance policing (ZTP) is a controversial policing style that has taken several forms over time and has been implemented in a variety of institutional settings. There are disagreements regarding the historical origin and the theoretical basis for ZTP. It is related to other similar policies designated by other names, such as "broken windows," "hot spots," "order-maintenance policing" and "quality of life policing." A more descriptive, or neutral, term for these types of strict enforcement in the criminal justice system is intensive enforcement. It is here that police discretion is saturated.

Although early instances of ZTP can be found in the areas of domestic violence and neighborhood improvement, but most observers agree that the policing style and terminology of ZTP has its origin in the federal policies launched during the 1980s in the "war on drugs" lead by the Reagan administration, and—as is more commonly cited—with strategic innovations in the policing of the subways and streets of New York City during the 1990s. Thus ZTP can be understood as one aspect of the global city, looking at the institutional level of analysis (as opposed to the macro-level analyses offered by Sassen and others). Even though proponents of zero tolerance approaches tend to attach ZTP to criminological theories of rational choice and social disorganization, there is debate regarding the rational basis of ZPT. Another critique of zero tolerance is that it is often a political slogan, rather than a concrete policy.

Often discussed in contrast with community policing, ZPT is a policy of strict enforcement of law, without regard to the particularities of a case or the nature of the offense. While community-based policing initiatives emphasize citizen involvement and police accountability, ZTP accentuates the state’s exercise of authority— and its
monopoly over the legitimate control of antisocial behavior. Community-based policing initiatives, which were funded by the COPS program at the federal level in the U.S., started to fall into a quiet decline following the emergence of ZTP; and that decline accelerated after the September 11, 2001 terrorist attacks (Bratton 1997; McArdle and Erzen 2001).

Zero tolerance can be pursued at the points of fieldwork, arrest, prosecution, convictions, and sentencing. ZTP, or strict-enforcement, can start with interrogation and arrest, an area in which police officers have wide discretion. For instance, instead of allowing for the traditional use of discretion by police officers in decisions to arrest, jurisdictions engaging a zero tolerance policy require—or claim to require—the absolute enforcement of all laws, including mandatory arrest. The logic of ZTP can bleed over from the police force to the fields of lawyers and courts, where the policy can be followed in decisions to prosecute by lawyers and in sentencing by judges, such as the meting out of severe punishments, even—or especially when—the offense is considered a petty offense. (Some of the petty offenses that have come under ZTP programs include graffiti or jumping turnstiles in a subway to evade the fare.)

ZTP can also become a juridical logic, for instance in the punishing all offenses, under sentencing guidelines that discount or disregard mitigating factors. Many judges object to sentencing guidelines, because they remove juridical discretion to assess each case on its own terms, but sentencing guidelines have been put in place, on the rationale that the guidelines prevent case-to-case discrimination on improper bases such as race or social-economic status (although those discriminations remain part of the criminal justice
system). Similar policies in the realm of sentencing include "three strikes" laws that requiring life sentences for a third felony conviction, and other forms of mandatory punishment that turn on a mechanized understanding of the offender's criminal history, rather than providing for judicial discretion or a nuanced review of the facts of a case. Although the federal sentencing guidelines are not considered a form of ZTP, they are another form of uniform enforcement. According to some scholars, various forms of ZTP policies, operating across the fields of policing and judging, contribute to the problem of mass incarceration in the U.S. (Kleinman 2009).

In the literature on ZTP, there are several competing stories regarding its origin. According to McNeal and Dunbar (2010), the origin of the policy can be found in the Gun Free Schools Act of 1994, but there the authors were discussing zero tolerance related school violence, not the more general policy orientation. According to other sources, the origin of ZTP can be found in the Safe and Clean Neighborhoods Act of 1973 in New Jersey, a law that was later the subject of a now-famous article by Wilson and Kelling (1982), titled "Broken Windows," which was published in the Atlantic Monthly.

Wilson and Kelling famously argued that police agencies need to protect communities from not only violent strangers, but also from the disorderly people who congregate on the street, including panhandlers, drunks, addicts, rowdy teenagers, prostitutes, loiterers, and the mentally disturbed. The central claim of the "Windows" article takes the form of a slippery slope argument, a type of argument commonly made but subject to an inherent, logical fallacy in that it proves only the assumption being
made: If broken windows are not fixed, then vandals will break more windows, and if more windows are broken, someone is going to move into the building, become a squatter, and light the building on fire. Likewise, litter is not picked up off the street, then more litter will accumulate and eventually someone will leave a bag of trash. These visible signs of disorder and chaos will eventually lead to a generalized or normative view that no one cares about the neighborhood, as well as the belief that committing crime in the area is acceptable—not only crimes of public disorder, but violent crimes and more egregious property crimes. Practices become beliefs.

Thus "broken windows theory" is the theory that zero tolerance of public disorder can lead to a reduction in crime rates including homicide rates. For these reasons, the theory is closely associated with ZTP as a law enforcement policy. The term "hot spots" is also related to ZTP because hot spots refers to areas of high crime linked to social disorganization. According to some research findings, it is not effective to spread the police evenly throughout a city, but instead, it is more effective to concentrate police efforts in the hot spots. According to Eck and Maguire (2000) and other studies, increasing the number of police or using community policing programs are generally speaking, not effective in reducing crime. Other related terms are "quality of life" and "order maintenance," terms that some of the authorities centrally involved in ZTP would prefer to use because more accurate and less politically charged (Vitale 2008).

The best account of the origin of ZTP is that it originated in the "war on drugs," federal, low-tolerance and intensive enforcement policy initiated by the Reagan administration in the 1980s, which featured the 1986 Anti-Drug Abuse Act and created a
cabinet-level "drug czar" (Newburn and Jones 2007). In the "war on drugs," First Lady Nancy Reagan told students to "just say no to drugs." During the implementation of this policy, U.S. Customs Commissioner William Von Raab decided to use the term "zero tolerance," altering slightly the phrase "zero defect" that was previously used by Nixon White House chief of staff Bob Haldeman. But the policy is most closely associated with the policing strategies adopted by the New York Police Department in the 1990s under the direction of now-former police chief William Bratton and New York Mayor Rudolph Giuliani who was elected in 1993. Bratton had served as the chief of transit authority in New York and used intensive enforcement policies to reduce subway crimes and fare evasion. Bratton later attempted to distance himself from the term "zero tolerance," preferring instead the expressions "order-maintenance" and "quality of life." He acknowledges that phrases such as zero tolerance send a "powerful message" and so "catch on quickly," but says also the phrase can be misleading, when it comes to understanding the complexity of metropolitan policing, which will never fully eradicate public disorder and street crime. For these reasons, Bratton states that "zero tolerance is neither a phrase that I use nor one that captures the meaning of what happened in New York City, either in the subways or on the streets" (Bratton 1997: 43).

Intensive enforcement polices, even when implemented under other terminology that is less politically charged than "zero tolerance," continue to be used by many police agencies and other authorities. This is true even where community policing initiatives, which seem to be contradictory in purpose, are in place (Lum 2009). In her study of international policing trends and the perceptions of police officials, Lum finds that the
widespread use of technology has largely superseded the hands-on approach that was central to community policing styles, as local law enforcement officials are increasingly removed from direct contact with the public.

The logic of ZTP is new, but comes from longer-term, and more engrained aspects of the institution of policing. The commonplace notion about the purpose of the policing field is that the police serve the function of law enforcement and the prevention of crime. But since their inception in England and early development in the U.S., the purpose of police forces is also (or primarily) are to instill law and order, especially public order, not so much to prevent crime (Lardner and Reppetto 2000; Dickey 2009). These books from the vast literature on policing develop two complementary pictures of policing in New York, one taking the long, historical and institutional view of the Department's goal of securing order in its early years and the other taking an in-depth look at the counterterrorism task force run by David Cohen, a former CIA official, who later came to work for the Department.

In fact, aggregate level studies have shown that police force strength is significantly related to economic inequality in an area (Jacob and Helms 1997). Rejecting both pluralist and consensus theories of political stability, Jacobs and Helms found that economic inequality between the very rich and the other classes leads to increased police strength, which supports a conflict perspective. They argue that if economic version of conflict theory is correct, and inequality is a fragile condition that creates fears of dispossession, then elites are likely to see a need and have "the ability to see that the coercive potential of the state increases [via increased police forces] after disparities
between their resources and those of the rest of the population become greater” (1997: 1365).

Indeed, critics of ZPT argue that it serves elite interests, rather than promoting the reduction of crime. There is debate regarding the rational basis of ZPT, as a professional logic, because, under zero tolerance, the punishment often does not fit to the crime. Opponents of ZPT take the position that it removes the discretion and decision making from police officers, judges and others, in ways that can become irrational. Minor crimes are punished with a certainty and severity that exceed the petty nature of the offense. But proponents say that swift and intensive enforcement of the law is necessary, to monitor levels of disorder and reduce overall levels of crime, including serious crime. This is a logic that equates any form of disorder with violent crime. It remains an open question whether ZTP has the goal of reducing crime or of clearing the streets of those considered marginal. But, importantly, as this section shows, the trend toward intensive law enforcement in certain global cities predates many of the historical events that state actors used as legitimations, including not only 9/11, but also the 1999 civil unrest in Seattle. Therefore, both the police agencies and judicial legitimations that rely on these events as the cause for intensive enforcement miss the mark (For an in-depth discussion of legalistic understandings of the Seattle 1999 protests, see section 3.2.2, above.)

6.6 Convergence of Trends, Influence on Juridical Regulation

The differentiation of spaces, in accord with political-economic interests that promote one form of organization over another, may have lead to ZPT as a logic of city spaces, but even if it did not, the two trends converged, the differentiation of space
(physical and mediated) and zero tolerance. Moreover, as the police turned toward zero tolerance in the regulation of urban and suburban spaces, so did the courts in regulating the freedom of assembly. The logics of differentiation of place and ZTP were translated into judicial logics, starting in the 1980s, with emergence of the public figure doctrine and increased use of the time, place, and manner restrictions on assembly (Appendix C).

Despite these long-range trends in urban planning, policing and even judging of civil liberties, there are often arguments made by state actors and other in public disputes over the legitimacy of current protest policing strategies, that the historical turning points of the 9/11 attacks can be used to legitimate protest policing. But the institutional practices of using TPM regulations and the use of protest permits—including protest permit denials—*predate the 9/11 attacks* by many years (Tables 4, 5, and 6 above). In the legal geography, above, it is established that public assemblies are increasingly contested at law, rather than being agreed upon. In court outcomes, more and more places regulated. This logic of the juridical field matches the logic of zero tolerance in the police field, which also tends to reflect the logic of real estate developers, city officials and other political-economy elites, in the creation of separate spaces for work, home, and consumption, and the development of police forces to protect resources. In the lawsuits, which cannot be fully explained in terms of their various discursive breaks and turning points in the space of this report— the courts use categorical logics that divide the public and private, and regulate outdoor spaces, so that there are few places left for dissent.

The public forum doctrine, which started in the mid-1980s, has become more and more categorically, as places are designated public, limited public and non public.
Certainly it is true that the courts sometimes also maintain liberties, but the constructs of juridical field in TPM restrictions, and the public forum doctrine, are regulations that approach zero tolerance, in the aggregate and over time, as policing logics are increasingly translated into judicial outcomes.

Whether and how this translation takes place at the micro-level has not been studied. Perhaps lawyers for the city bring ZTP logics into their legal briefs, and those arguments are adopted by courts. Perhaps judges actually experience the differentiations of place in urban and suburban environments, in their daily lives, and come to see these productions as natural. In any event, at the institutional level, the logics are reconverted.

As what is simply described within the policing field as zero tolerance policing or quality of life regulations, is converted into a judicial discourse. As earlier established (chapter 5), the formation of elegant rules, for instance turning on categories of the public and nonpublic, is the core value of the juridical sphere. Thus, zero tolerance policing becomes the public forum doctrine, which serves a similar purpose. This argument is not based on supposed purposes alone, however; as practices and outcomes are detailed. As shown in the legal geography, over the aggregate of many legitimacy-and-law disputes, many, many types of places are not considered legitimate places for protest and are increasingly regulated, including: churches, hospitals, post offices, abortion clinics and nearby areas for businesses, embassies, police stations, schools and government buildings (see tables 6 and 7, above).

Even the location type of "public grounds," shows high rates of some form of repression. There were judicial opinions that maintained civil liberties, such as the
opinion that a lunch counter, but on the whole the courts found that one type of place after another was no longer the right or legitimate place for free assembly. And, in fact we know that many lunch counters were segregated, which again indicates that the legal geography (with one case about lunch counters) is but the tip of the iceberg with regard to state repression.

In the cases read (over 400 court opinions), there were insurance requirements, noise requirements, bond requirements, even identification of activists requirements that were implemented by police officials, including for instance park commissions, and by city officials, and these regulations were, more often than not, legitimated by court. These rulings flew in the face of much earlier laws that reserve the streets and parks as in the trust of the government on behalf of the people (Hague v. CIO, 1939) instead of deeming the state a property owner with rights of management; and earlier rulings that government requests for list of member violate the right of association (for example, NAACP v. Alabama, 1958). These earlier rulings, and conceptions of differences between state-controlled spaces and public spaces, although cited in passing, were largely ignored in the 400 and more court opinions, as place after place was regulated—and more and more identifications were required of activists. As shown in table 4 of the legal geography, many places were the subject of state repression, at varying levels, even below those areas that were most strictly regulated.

All of these types of areas were subject to permit requirements and/or TPM restrictions in these disputes, based on legitimations of the courts that "time, place, and manner" could not infringe on content: the National Forest, outdoor parks, areas near
residences, areas in government buildings, military bases, theaters, public auditoriums, public campuses, public high schools, streets, fairgrounds, shopping malls, and airports. For example, in the case of *International Society for Krishna Consciousness v. Lee*, (1992), the U.S. Supreme Court found that airports are not public in the way that streets and parks are, and rejected arguments about the massive changes in transportation and social organization that would support the view that airports are the new streets. The sheer number and range of locations regulated in these disputes (and these are only the disputes that reached court opinions) indicates that negotiation management theory does not entirely explain the time period.

The juridical logics expressed in the public forum rules and TPM restrictions are categorical rules at the level of elite, state actors. These logics, however, match the descriptive logic of the police, at a lower level in the enforcement regime that includes multiple fields, political, policing, and juridical. At the top was the lofty public forum doctrine, and in the policing logics, a rhetoric of zero tolerance. But on analysis, the trend in juridical outcomes matched the descriptive term: zero tolerance policing. This structuration of the paths of legitimacy matches the juridical use of a public-private distinction in media cases, while mid-tier journalists used the more descriptive logic of storytelling. Journalists tell stories. Police officers keep order in the street.

Also, because of the requirements of causal order, the 9/11 attacks cannot be a necessary cause for the use of these intensive enforcement tactics that started earlier, in both the police agencies and the courts. The terrorist attacks might be a reason for the increasingly intense, or *accelerated*, enforcement of law and order, but not for the overall
regulation of the political economy of place. This policing dynamic can be mapped in this way:

![Diagram showing the relationship between Government, Policing Field, Juridical Field, and Civil Liberties with descriptive and categorical logics.](image)

Figure 13. Policing (political) influences on the juridical sphere

### 6.7 Consensus Theory versus Global City Hypothesis

Building on her earlier work on the global city, in which Sassen places cities in a global network of production, she has a new work on "Territory-Authority-Rights" or TAR (2006). Under the terminology of TAR, she is able to model a number of different configurations of political power over physical spaces and populations. In her long, historical analysis of shifts in the political economy of place, she shows that the national is not always the correct scale of analysis, and establishes that cities are also prime organizers of political spaces and cultural power. She also rejected the idea that globalization started hundreds of years ago, with the development of long-distance trade.
There are several types or forms of globalization, but she theorizes a tipping point for economic globalization in the 1970s, early 1980s, which changed the political organization of territory. She says the new globalization "explodes" the boundaries of traditional hierarchies of scale, which place the city (inside the county), inside the local state, inside the nation (Sassen 2006: 394). Further, the global city—of which New York City is the preeminent example, has grown into a "strategic site for innovation" in the political economy of place (2006: 70). At the same time that cities have become innovators in the political regulation of place, the presidency was become more and more a site for expanded policing powers, precisely feared by the founding fathers, as described in chapter 2 (see Sassen 2006: Appendix to Chapter 4).

It is argued here that this theory of the global city and the model of TAR, when used to account for modern organizations of political power, goes farther to explain current regulations of assembly, than does the negotiated management thesis. This study is using TAR to illustrate how juridical logics are part of a larger organization of power in the control of places, or the political economy of place, especially with regard to non-hierarchal protest events, such as presidential conventions which draw global protesters. The issue is whether a political economy narrative, or conflict perspective, does a better job of explaining the empirical showing, made in the legal geography.

In that geography, we see a longer-range history of judicial outcomes regulating assembly, which, in part, corresponds with earlier historical shifts, in urban planning and urban policing. Thus, at the top level of the elite field of federal judging, state actors engage in the professional logic of rule making and distinguishing the public from the
private in the "public forum" rules, for instance finding that airports are not public fora
(International Society for Krishna Consciousness v. Lee, 1992). At the lower level of the state, in the enforcement agencies, zero tolerance is the apt descriptor.

To compare these two accounts of protest policing (consensus and conflict), a statement of formal hypotheses is required. Then, looking more closely, an analysis of the presidential conventions, at the meso-level, will illustrate how the modified global city thesis works in particular, critical cases.

6.8 Competing Hypotheses

Negotiated management was intended to be a descriptive of broad, observed trends but it can be stated in two formal hypotheses:

NM1 Reduction in state repression at protests is the result of peaceful negotiations and agreed-to regulation of the time, place, and manner of protest, in advance of anticipated protests, thus leading to less violence.

NM2 This reduction in state repression, especially violent repression, occurred after 1968, when an event changed history (a police riot at the Democratic National Convention).

The global city hypothesis (as here modified) is:

GC1 State actors engage in repression in order to control territory as political space, such that city officials, policing agencies and others are increasingly engaging in strategic action to differentiate and segregate physical spaces in ways that meet the needs of economic (and cultural) production, but leave little or no space for political participation and dissent in outdoor spaces.
6.9 Licensing Repression Before the 2004 RNC

The presidential conventions are selected for closer analysis of contentious politics, and the policing of street protest, and the examination of these competing hypotheses, because the election of the president, as sole executive, is a key democratic site. Indeed, fear of the power of the executive was a motivating factor in the adoption of a Bill of Rights, as outlined in chapter 2 (see also Sassen 2006). To set the stage for understanding protest policing outside of the convention, which the Dynamics of Contention (McAdam et al. 2001) authors would term transgressive contention, it is important also to look at the counterpart—the democratic processes inside of the convention hall, including shifts in convention procedures and policies, as the conventions transformed from working meetings to television showcases, meant to present the presumed nominee to mass audiences.

Some aspects of the political processes inside of the convention hall or at least inside the permanent political parties (Bourdieu 1981), a realm that the Dynamics of Contention authors call contained politics. The contained politics of these elections could merit their own books—especially the contested election of President George W. Bush, which was the subject of its own legitimacy contest and resulted in a Supreme Court opinion. Therefore the discussion of the contained politics of the presidential conventions will be limited to dynamics influenced by the transgressive politics of the street, meaning in these cases, the changes in primary procedures and in protest policing that are considered the result of transgressive politics.
On the inside track, that is, within the contained politics of election process, and because of the police riots in 1968, the Democratic National Committee formed a blue-ribbon commission to revise the way that presidential candidates are selected. The commission—formally called the Commission on Party Structure and Delegate Selection, but better known as the McGovern-Fraser Commission—lead the Democrats to adopt a primary system operating before the convention, in order to allow for a greater participation by voters in the nomination. The Republicans followed suit and also adopted a primary system in 1972. Thus, the conventions were supposed to become more democratic, but many globalization activists and scholars argue that the opposite as occurred. According to political scientist, the various reforms made the primary system arguably less democratic because they created unintended mechanisms for selection of certain candidates (Busch 1997).

At the same time, or earlier, as outlined in the historical notes to this study, television became more and more of a dominant influence over the presidential conventions after the first televised convention in 1952, the convention in which Dwight Eisenhower was nominated in the city of Chicago (Appendix D, summary of the postwar presidential conventions). Because of the influence of television, working aspects of the conventions were reduced and the event became what scholars call a "pseudo event" or "media event," meaning an occasion designed for television, rather than real-time interactions (Boorstin 1962; Dayan and Katz 1994).

This trend in the reduction of political discourse at the conventions matched the removal of political discourse from open spaces more generally as discussed above, and
lamented by Postman (1985) in his work on political discourse in the "Age of Show Business."

Having reorganized the conventions, both to increase legitimacy but also to turn the conventions into media vehicles rather than working meetings, what do state actors do to control or monitor political participation outside of the conventions? Do state actors take strategic action to license repression at the conventions (Davenport 2007)? Looking at the months before the 2004 Republican National Convention, it becomes clear that police agencies were using a number of strategic actions to gain control of anticipated, large-scale, outdoor protests, not only at the time of the protest, but also during legitimacy contests about protest-policing methods (Davenport 2007). The legitimacy and law contest unfolded over several months, both in the mediated public sphere, and in First Amendment litigation. This is the "licensing of repression," because state actors are working to change public perceptions of threat and give themselves permission, so to speak, to engage in law and order tactics.

For example, during this process, state actors observe the strategies and litigation outcomes achieved by structurally equivalent state actors, in related episodes—such as earlier conventions—in order to discern what types of legitimacy claims might be successful. Moreover, state actors also take into account the protest outcomes, and legal outcomes, from earlier protest events, when they assess the legitimacy of policing methods to be used at future protests. They also send out news releases or talk to the media about the "threats" of anticipated protest. For example, during the break between the 2004 Democratic National Convention in Boston and the 2004 Republican National Convention in New York City, there was an article
published including government actors offering quotations about the anarchists who were expected to arrive for convention protests (Boston Herald, August 24, 2004, p. 6, "Campaign 2004: Race for the White House, Big Apple Keeps Eye on Pair of Hub Anarchists"). Also, earlier in the year, FBI Director Robert Mueller announced that "Islamic extremists may try to tilt the presidential election" by launching attacks during the DNC or RNC (Boston Herald, "FBI Director: Terrorists May Target Conventions," March 26, 2004, p. 6).

On the litigation side, police officials, city officials and other state actors, including national and regional policing agencies, were working together to plan for protests (Deposition of Cohen, Appendix E; see also Dickey 2009 on counterterrorism efforts). There were lawsuits over the February 2003 protests at the start of the Iraq War, which were resolved in a law-and-legitimacy dynamic, partially in favor of the protesters, as the court ordered barricades used in the future to be opened or capable of being opened, instead of entirely closed (Stauber v. New York, 2003). But another lawsuit was decided in favor of the city, as permits were denied to use Central Park for a large rally to protest state policies during the convention (United for Peace and Justice v. Bloomberg, 2004).

The Department formed a committee that it called the Mass Arrest Subcommittee, although it later disavowed this naming (Appendix F: document (1), Monthly Committee Report, dated May 4, 2004). The Committee worked to plan the mass arrests of activists during street sweeps. In early August, then Criminal Justice Bureau Chief John Colgan presented the overall plan to Commissioner Raymond Kelly and obtained his approval of
it (Appendix F: document (2), PowerPoint presentation dated August 5, 2004). The sweeps were based on a logic that any disorder of any kin, or any breaking of the law whatsoever, was the same as a violent crime. These logics are not new, and instead are part of the larger, public logic of ZPT outlined above. The deposition testimony of several of the police officials (not officers, but high-ranking officials) during the Schiller lawsuits repeatedly expressed this public logic in internal claims making and in publicly available documents released during the lawsuits. No disorder and breaking of the law would be tolerated during the 2004 RNC (Appendix E). Practices and claims more than aligned because during the 2004 RNC, mass arrests by the NYPD included a sweep of anyone on the street, including bystanders. In many instance, there was not even a code violation (a criminal violation of lower significance than misdemeanor) committed (Complaint, Schiller lawsuit; and Appendix F: document (3), RNC Arrest Worksheet, dated September 3, 2004, p. 2).

During the months before the convention, the police also licensed the repression by denying the permits to some groups that planned to protest, but accepting permit requests filed by the Republican National Committee (Appendix F: document (4), Major Event Application, dated June 21, 2004). While the permit process unfolded in negotiations that did not assist the activists groups, and certainly not in the form of a negotiated management, the Department was working internally on its mass arrest plan. Based on the Department documentation, the sweep appears to be based on an intent to clear the streets, without regard to whether there was a crime or a violent episode.
The Department prepared an executive summary of plans for the policing of the 2004 that used the quality of life terminology, rather than ZPT (Appendix F: Document (5), 2004 Republican National Convention Executive Summary, June 24, 2004, Table of Contents). There were plans that no summons would be issued, to ensure that all persons at the protests were identified (Appendix E: Depositions of NYPD Officials and public information alleged in the Schiller complaint). This is not a regular practice when code violations occur. The Department also entered an agreement to house the arrested activists in a large warehouse on the Hudson, where the Department fingerprinted all arrestees. The fingerprints were later destroyed after court proceedings in which civil liberty attorneys argued that the fingerprinting was unlawful (Appendix F: Document (6), Memo of Agreement, signed July 26, 2004). The arrestees were detained during the course of the entire presidential convention, in violation of existing arrest-to-arraignment laws and despite emergency court orders that they be released (Appendix F: Document (7), Arrest-to-Arraignment Time and Arrest Volume).

In addition to this timeline of events in the months before the 2004 convention, there were related lawsuits regarding the use of horse charges and blanket searches during the February 2003 protests, which lawsuits resulted in orders against the Department prohibiting those practices and requiring that barricades not be closed into cages, but instead allow activists to go in and to exit (Stauber v. New York, 2003). State actors and activists groups—each group separately brokered by their lawyers, also went to the courthouse for various reasons, in the months before the 2004 RNC, in order to contest legitimacy of planned repressions of assembly. In New York, in fact, the police
agencies tried use the court system to "undo" earlier, long established procedures for preventing police abuses in the surveillance of protest groups. In the year before the 2004 RNC, the police agencies, though counsel, filed requests with the courts asking that the requirements of the "Handschu agreement"—a court order from the 1980s that prohibits the unlawful surveillance of activists and monitors police requests to conduct surveillance of activist—be lifted. Handschu v. Special Services Division (decisions in 1985 and 2008) (see also testimony regarding proposed lift of Handschu degree, available at http://www.nyCLU.org/content/testimony-police-surveillance-of-political-activity-history-and-current-state-of-handschu-de).

In summary, the licensing of repression activities of the New York Police Department engaged the media and the courts to pursue zero tolerance policing logics during the convention. While the New York Civil Liberties Union has publicly acknowledged that many aspects of the convention policing were well handled (NYCLU 2005), the lawsuits over the mass arrests, including arrests of bystanders, and the fingerprinting and long detentions remain in the court system, some six years after the convention ended. These legitimacy-and-law dynamics, in the 2004 RNC, can be read together with the legal geography, showing the longer-range trends, and the other historical shifts here documented.

6.10 Two Key Findings Based on Policing and Juridical Logics

Two key findings are established in these empirical analyses. First, the innovative tactics of protest policing—such as the use of free speech zones and barricades and mass arrests—work in tandem with the judge-made law that legitimates those tactics, over
time, in a legitimacy-and-law dynamic. As the police moved to protect open spaces with 
zero-tolerance logics, a descriptive logic that equates all forms of lawbreaking with 
violent crime, the courts matched that logic with elegant rules about the difference 
between the public forum, limited public forums, and nonpublic places. Over time, there 
were more limits and less public spaces (Appendix C). There are productive interests 
involved in the organization of cities; and public conflicts about the use of cities spaces. 
This is the dominant trend, rather than consensus or agreement between police and 
protesters, as described in the meta-narratives of negotiated management theory—at least 
in these data, the four hundred and more lawsuits about protest policing, and the case 
examples from the 2004 RNC in New York City and 2004 DNC in Boston.

Second, the global city thesis appears to be better account or pattern description of 
current policing tactics than are state-offered legitimations—security needs after 9/11 and 
riot prevention, as the institutional practices predate the conventions. The converging 
trends of policing and judging may be better explained by the modified global city thesis, 
than by the negotiated management theory.

6.11 Rejection, in Part, of Negotiated Management

This study tests the consensus theory of negotiated management against a 
competing theory, grounded in critical legal studies and conflict theory, of the political 
The negotiated management theories of existing studies, stated in two hypotheses, do not 
stand up to the competing theory of conflict and economic production of space. The 
competing theory, is suggested here in the modified, global cities hypothesis above (p.
As it turns out, data analysis and secondary historical analysis requires rejection of both NM hypotheses (stated above on p. 269).

Existing research studies on protest policing often assume that there have been peaceful negotiations reaching agreements as to protest permits, and these studies use newspaper data to see where there is violence or disorder in protest events, and police reactions of escalated force, as an exception or variation away from consensus. In other words, there is an assumption of consensus, reached in the background, for instance in police-protester negotiations that are never reported in the news or made part of the public record. The studies then look for news reports of protest events having disorder or arrests, etc. and seek to explain where disorder erupts. This study takes an opposite tack. Why assume there has been an increasing consensus between state actors and protesters in the negotiation of protest permits? Is there any evidence of it, other than anecdotal evidence? Systematic data collection to test or establish that proposition would be very difficult, as news reports on protest events do not cover agreements, under a newsworthiness preference for covering disorder, violence, number of arrests, etc.

This study does not assume that consensus occurs. Instead, it investigates when and where conflicts over the terms of anticipated protests and actual protests have been carried forward into the public sphere and the courts. This investigation is reported in the legal geography, and supported by historical analysis of institutional logics and practices.

Based on the data analysis, the first hypothesis (NM 1) is rejected because, even if there have been peaceful negotiations, in some places and times, there has also been a trend of increasing conflict over protest permits and over restrictions on the freedom of
assembly under time, place, and manner regulations. The many hundreds of lawsuits in the data frame (Appendix C) may not include all disputes over permits and assembly restrictions, but are nearly all of the disputes that went to court and reached an opinion. Thus the trend of increasing conflict over public assembly is conservatively estimated. The disputes that become lawsuits are just the "tip of the iceberg" showing that increasing numbers of conflicts exist regarding freedom of assembly. (The fact that the number of conflicts is increasing over time, not turning into a consensus or negotiation between state actors and activists, tends to show that there likely is not as much negotiated management as is assumed in existing studies.) There may be less violence in the bureaucratic repressions, but reducing violence is not the same as reducing repression.

The second hypothesis (NM 2) is refuted because there was no shift or renewal in protest permits starting in 1968, as suggested by the original chroniclers of negotiated management. According to the legal geography summarized above, there is not break or shift after 1968, other than a drop in the lawsuits in the region where the civil rights movement was contested. Further, historical research shows that protest permits were not created or accelerated in the 1960s and 1970s, in order to make protest more likely and to allow for more toleration of civil liberties, as negotiated management theorists suggest. To the contrary, historical research establishes that protest permits have a much longer history. Protest permits were first used in the U.S. in the late nineteenth century to repress dissent and gain control over the productive capacities of cities (El-Haj 2009). Moreover, there is no reduction in repression over time, in all places, as disputes over assembly increase, even if there might be peaceful, parade permits issued somewhere (Table 7).
The empirical evidence—gathered in the legal geography and also in institutional histories of the presidential conventions, as particular cases or instantiations—reveals that the professional logics of urban planning and the extreme differentiation of place during the postwar era have found their way into both the policing and juridical fields. Coupled with the television era that changed the inside politics of the convention, and the emergence of zero tolerance policing, which changed the landscape for street protests, the juridical trend is to repress political participation in a variety of types of places, including public grounds and areas outside of government buildings (Table 7).

The shift to negotiated management or police-protester agreements, if and when there was one, did not occur with the 1968 event. The tables show a trend of increasing conflict. There is no clear break after 1968 or even after a lag of years post-1968, other than the overall decline of protests in civil rights era (Table 7; see also Appendix C). It is common to use big-picture events—such as the 1968 police riots, the emergence of the Internet or the Seattle unrest or the 2001 terrorist attacks—to legitimate social changes or even to locate social changes. Yet events may rarely change the course of history. They just appear to—or they are argued to be signals of change, that is, turning points in the course of history, in various types of legitimations. The legitimations support existing or shifting practices that align with the interests of one or another social group. According to Sassen (2006), turning points in history are sometimes shifts in policy or practices that cause existing institutional capabilities to be dislodged and used in novel ways. As shown in this chapter, the narrative offered by the NM hypotheses may not be correct, or entirely correct for all time periods, regions, and scales, even if it appears to be the case.
6.12 Blame it on 9/11? Pattern Consistency at the 2000 Conventions

The pattern of legitimacy contests and legal outcomes in the Boston case—and patterns of licensing repression and pursuing repression, as yet to be adjudicated in the New York case, as the *Schiiler v. New York* litigations are continuing—were consistent with the pre 9/11 conventions. Thus the generalized legitimation that "9/11 changed everything" can be discarded. We will now look at the pre-9/11 conventions to address this commonplace claim.

As background to the 2000 and 2004 conventions, the 1996 conventions were relatively calm. At the 1996 Republican National Convention held in San Diego, California, in mid-August, Robert J. Dole sought the nomination of the party and *Nightline* host Ted Koppel famously announced he is going home because convention is an infomercial that does not require journalists (see Appendix D). After the 1996 conventions, media coverage of presidential conventions by the major networks has been more limited. Even so, the 1996 RNC did include a separate, designated free speech zone (FSZ) that protesters were required to use, if they wanted to participate in the convention. Instead, FSZs clearly predate the Seattle protests. Yet, 1996 was a year in which the connections between contained and transgressive politics seemed to be on a mend. The 1996 Democratic National Convention marked the first time that the Democrats returned to Chicago, in the 28 years since the 1968 DNC in Chicago, during which there was widespread police-protester violence in the streets.

That being said, in the mid-1990s, President William J. Clinton signed orders creating what is now known as the National Special Security Event (NSSE). The purpose
of designating a national or international event—such as a presidential convention or the Olympics, and so forth—as a NSSE is to allow for greater law enforcement coordination between agencies, including federal jurisdiction and management of event security. The 2000 RNC in Philadelphia was one of the first NSSE designated events.

The 2000 RNC was held in late July, early August in Philadelphia. At the convention, George W. Bush accepted his first nomination, and he later became the forty-third president of the U.S. As theorized, within a paths of legitimacy (POLA) analysis, the planning for protests at the 2000 RNC took place at an institutional level, long before the anticipated protests. More than a year before the 2000 RNC, state actors entered an agreement with the Republican National Party to entirely privatize the protest permitting process. The deal was discovered when, in March 2003, under four months before the convention, the police unveiled a free speech zone for protesters. Under the deal, referred to as a "compact" in media reports, the Republican National Party would have an absolute right of first refusal over permits issued for public events, at and around the convention. Moreover, the party would not have to respond to protest permits requests for some time, creating a serious time delay that would impact the potential for achieving legal outcomes. This privatization of public spaces—a strategy recognized by earlier scholars, especially McCarthy and McPhail—had already been partially legitimized in Philadelphia.

There were two prior lawsuits regarding free speech outside of the First Union Center, where the 2000 RNC would be held. Yet, in those cases, the defense raised to First Amendment claims was that the convention halls were private venues; and the court
accepted that argument, for the non-convention cases, in a decision issued in September 2000, shortly after both of the 2000 convention were concluded (Center for Bio Ethical Reform v. Spectrum Arena Limited Partnership City of Philadelphia).

Regarding the convention use of First Union Center in 2000 for the Bush convention, state actors later had to back down on the compact and delegation of authority to the Party, after the Pennsylvania Civil Liberties Union (CLU-Pa.) began a program of media statements, starting with the comment that "They're treating Republican speech in one fashion, and at the same time saying to [protesters] your speech must be contained in a 50-minute time period in one spot. To the extent the city does not make it possible to use other areas, this [security] plan will be unconstitutional" (Philadelphia Inquirer, March 28, 2000).

In response, the state actors announced said they were not basing its social-control actions on a Seattle 1999 arguments. This strategic action in claimsmaking was likely influenced by Philadelphia organizers being aware of the anticipatory lawsuit, already filed and decided in Los Angeles, related to the future 2000 DNC.

In the LA-based lawsuit, the court rejected as unconstitutional a FSZ set up at a great distance from the convention hall. There, the court also rejected an argument that, because there was disorder on the streets at the Seattle 1999 protests, there was likely going to be disorder in Los Angeles. Applying legal logics and legitimated procedures, the court stated that more evidence was required (SEIU v. City of Los Angeles, 2000).

Later, in Philadelphia, civil liberties advocates similarly filed an anticipatory lawsuit that the state delayed responding to for some time, using a strategy of proposing
settlement to the CLU-Pa. in order to get critical court hearings taken off the calendar. The 2000 RNC lawsuit was finally settled with an agreement to end the compact, however, the state still effectively won because the protesters were nevertheless subject to infiltration, surveillance, under a sealed warrant not available for public review, as well peremptory arrests of key leaders the day before the convention, who were held during the course of the convention (in a way similar to what happened in New York, four years later). Convention activists in Philadelphia also had their protest warehouse physically searched and destroyed right before the convention. The warehouse contained puppets and computers, but no bombs or other actually threatening devices were found there. The police infiltrated by posing as carpenters several months earlier. While the claimsmaking efforts of activists were focused on the compact, the state was going ahead with covert practices and avoided a legitimacy challenge to those practices until after the convention was completed.

A similar pattern, with a different outcome, took place in Los Angeles. At the 2000 DNC held in Los Angeles in mid-August, but shortly after the 2000 RNC in Philadelphia, Albert A. Gore, Jr. accepted the nomination of his party. The social movement organizations and their counsel had won the anticipatory lawsuit in LA, because the California court rejected the Seattle 1999 argument (SEIU v. City of Los Angeles), as described. As a result the FSZ in Los Angeles, was moved to within eyesight of the convention hall, the Staples Center in downtown LA. Even so, the convention protesters were still subject to a shutdown by police of the free-speech area in the middle of the event, even though most observers say that no riot had started. This was a pure
show of force; however, as the convention planners in Los Angeles had realized that merely referring to the Seattle 1999 protests was not a sufficient claim to establish the legitimacy of a FSZ in court. According the next step on the legitimacy-and-law dynamic was to engage in contested practices and start the wheel or cycle over again.

6.13 Paths of Legitimacy, within the State and across Fields of Liberty

In this chapter, the theory of negotiated management was compared to conflict theories of the global city or political control over territory, at national and local scales. It is shown that the era of negotiated management did not start in the 1960s as first thought, but that protest permits were used and contests much earlier. It is also shown that negotiated management, if once true and no longer, has devolved into an era of restrictive protest management, which has also been called strategic incapacitation (Gillham and Noakes 2006). If negotiated management were once true and still true, it only applies in places were legitimacy contests do not arise and turn into lawsuits and legal opinions about freedom of assembly. The data collected here refutes the consensus theory because it shows the large number of disputes that did not reach consensus during the postwar era and dating from before and after 1968, the turning point event that supposedly shifted the tide, according to negotiated management studies. Therefore, the modified GC hypothesis, stated above at p. 269, is a better explanation.

What are the implications of a conflict theory? The restrictive of protest events decreases the quality of American democracy, because it increases the inequality of access to political processes. There is less freedom to assemble for political purposes, even if the regulatory mechanisms are not as violent as they once were.
Soule 2006). The level of violence, relative to the number of protests, threats of protest violence, is still a partially open question (Davenport and Soule 2006). Yet, under new strategies of control, violence to the body has diminished, while freedom of assembly is narrower.

The restrictive regulation of protest is bureaucratic and focused on the control of perceptions: public perceptions, judicial perceptions, and activist perceptions, police perceptions. In a way the shift from a violent, spectacular repression to a repression pursued in bureaucracies, such as detention centers, and in the mind, rather than the body, parallels the shifts in punishment traced by Foucault (1975) in his classic on modern punishment. In current protest policing configurations, when public legitimacy contests turn to the juridical field for resolution, the courts—both enabled and constrained by institutional discourses and practices—issue opinions regarding the use of protest permits and protest-policing methods, including time, place, and manner (TPM) restrictions. Some opinions strongly privilege speech and assembly rights, in accord with the constitutional powers that distinguish the federal courts in the U.S. from other courts and forms of legal power.

But other court opinions only give rhetorical credence to First Amendment rights, and decided against activists. These courts allow for the erosion of those rights, by accepting as legitimate and lawful various types of bureaucratic and criminal-law restrictions on peaceable assembly.

In the opinions conferring greater legitimacy to restrictive protest policing, the courts sometimes find that particular methods of protest policing are either reasonable or
unavoidable. The courts also sometimes find that there has not been the required showing of harm, necessary for a preliminary injunction to prevent the proposed policing method from being used.

Looking beyond the protest pen in Boston in 2004, and into the longer, more involved history of assembly disputes that reached litigation—not only regarding assembly and speech, but religion/conscience as well—this study found that police agencies use a variety of place regulators, including free speech zones, pens, capture nets, mass arrests and detainments, during large-scale protests. This trend is thought to have started in the mid-1980s, with the use of pens outside of the 1988 Atlanta convention at which Dukakis was the presumed nominees (see historical notes in Appendix C); however, there is another, commonsense belief that the trend has accelerated with the 1999 protests at the World Trade Organization protests in Seattle, and/or after the 2001 terrorist attacks, as a series of "turning point" events are used to legitimate policing behaviors and de-legitimate activist behaviors.

Looking way back to early American political life, however, is a better point of initial contrast. In early American political life, there were no permit requirements, or other types of prior legal sanctioning of public assemblies. According to then-current police practices, criminal sanctions were only used when assemblies actually became disorderly (El-Haj 2009; see also Zaret 2000). Protest permits started to be used by U.S. cities and other localities in the 1870s, (not the 1960s or the 1980s) following waves of state repression at the beginning of the Progressive era (El Haj 2009; Goldstein 2001).
Looking forward to the 1960s, U.S. cities and colleges, such as the University of Berkeley, started to use protest permits and free speech areas, to regulate traffic and to repress dissent—for instance during the Free Speech Movement (Mitchell 2003: chap. 3). As the so-called negotiated management era continued into the 1980s, protest pens and other forms of repression started to be used more often by state actors. The issue addressed in this chapter is partially a question of when and how were these policing tactics started. The larger theoretical question is about the subject of legitimacy-and-law dynamics that resulted in legal opinions and legal change in the area of civil liberties.

Because of the references made—during legitimation efforts regarding protest policing at the presidential conventions—to the Seattle protests in 1999 and the terrorist attacks in 2001, new questions and issues are raised, regarding legitimacy of public assemblies outside of national and international events, and legitimacy contests about those assemblies. It was shown in this chapter, based on empirical data, that singular events are not some sort of "switching mechanism" that causes "everything" to change. That appears to be a commonplace legitimation used to support ongoing practices that have long historical tails.

This chapter also found that, in addition to new claimsmaking about old practices, pre-existing practices have become more deeply institutionalized. For example, protest pens were used in the regulation of protests in New York City, at least as early as 1985, but their use has been both institutionalized and more likely to contested in the last five to ten years, as globalization accelerates. In contrast to early American politics, today, state actors take on a "licensing function" in the management of civil liberties. This licensing
function is both literal and metaphorical. The literal licensing of protest takes place via protest permits. If these are regulatory requirements are not met, criminal charges might be brought, or arrests made, without prosecution (see Appendix F, collected documents of the New York Police Department). The figurative licensing function operates through sequences of public claimsmaking, undertaken to metaphorically "license," or authorize, or legitimate, the use of repression (Davenport 2007).

The overarching question of this chapter was: What forces shape collective rights to challenge political authority? Although existing, social movement theory takes a micro-level view, looking at street protest, and protester-police interactions, assessing levels of threat, the escalation of force, and the negotiation of permits, this study takes a meso-level view. This chapter located the policing and juridical logics that have lead to a widespread reduction in civil liberties, which likely has a chilling effect on future protests and dissent. By addressing the professional logics and historical shifts within urban planning, real estate building and urban policing, and the influences of those interrelated logics and shifts on judicial decision making, it is established that, as the police turn toward a policy of zero tolerance, so do the courts in regulating the time, place, and manner of protest. Further, it is established that some regulations of assembly are better explained by a modified version global city thesis, directed to questions of regulating liberties, than they are by the prevailing social movement theory regarding the negotiated management of street protest. Reduced tolerance for street protest is in part a function of urban differentiation and the political economy of place, in addition to offered legitimations—security needs after 9/11 and the prevention of riots.
Data examined in this chapter included: judicial opinions in First Amendment cases, historical trends in urban planning and urban policing, and, looking more closely at particular events, various legitimation claims made by police agencies and courts regarding the use of free speech zones and mass arrests during the presidential national conventions. These data, and the testing of competing theories, support a final mapping of the social spaces of civil liberties. As we have seen, policing logics influence courts, in the categorical constructions of place, as either public, limited public or non-public forums—and in the descriptive logics of each type of physical place, as best used for any other purpose than dissent-oriented political participation. Based on these analyses, the paths of legitimacy within the state and across fields of liberty can be illustrated.

Figure 14. Political economic, policing influences on the civil liberties realm
The apparent purpose of the assembly right in the First Amendment was to allow *the people*, as primary sovereign, to make political claims and participate in a political process in physical spaces where those claims could be developed and have impact. There is limited opportunity for popular sovereignty in this current mapping.

Because this mapping is partial, further contributions and critiques of the mapping are welcome and encouraged. A serious attempt has been made in this study to build a map of the mediated public sphere and the dynamics of legal change, looking at one type of civil liberty at a time and tracing legal change over time and space. The courts have sometimes proceeded in ways that promote bureaucratic repressions and the commodification of human beings, as well as privatizing matters of conscience, rather steadfastly protecting the realm of civil liberties. In other cases, judges have been courageous and maintained the boundary on political action. Although not discussed in detail in this study, the profession logic of the judicial field also includes a dominant logic of guarding against excessive political action. This logic has constitutional grounding, as courts are defined in the constitution as actors that are beyond the political sphere.

But the evidence of political economic and policing influences on the juridical sphere remains. For this reason, the people, that is groups of challengers need new strategies to regain leverage across the political system of managing civil liberties. One suggestion, based on using the text of the First Amendment to return to well-recognized assembly rights, is offered in the conclusion chapter, which follows.
CHAPTER 7:
CONCLUSION

7.1 The First Amendment in Social Context

Having completed the empirical analysis of particular types of disputes and lawsuits in the regulation of civil liberties, it is important now to draw out the implications of political-economic logics on First Amendment values. What have we learned and what can we do about it? This study provides a sociology of the First Amendment that maps—in part—the dynamics of the mediated public sphere, which set the shifting boundary between state and civil society. This boundary is set in a meso-level process or dynamic called the *legitimacy-and-law dynamic*. The maps offered that show the legitimacy-and-law and the paths of legitimacy are partial mappings of the mediated public sphere and the state-society divide. The maps are partial because the focus of this study is on the influences on the courts and influences of the courts related to defining the scope of civil liberties. The research is directed to understanding the influences on court opinions and of court opinions.

The research questions were:

1. What political influences shape the outcomes of First Amendment lawsuits?
2. What are the juridical effects of civil liberties litigation? and
3. What institutional forces shape individual rights of expression and dignity—and collective rights to challenge political authority?
These questions are *what* questions, not *how* and *why* questions. This means that the research output is a pattern description, in the form of the legitimacy-and-law dynamic and the paths of legitimacy. The *how* and *why* are in the details about the values, logics, practices and norms carried on those paths, within and between fields. The presentation of this pattern description, or the answer to *what* changes civil liberties, is a large step toward *how* and *why* civil liberties change, as we have seen. The influence of nationalist and city-based logics of production, which shape cultural values in other fields, such as religion and journalism, is an important insight into the First Amendment.

The pattern descriptions—regarding what influences changes in civil liberties law and what those changes do to the exercise of civil liberties—provide the basis for a later discussion of *how or why*. The field of social movements was backgrounded from the start in this analysis, but likely fits into the public sphere in the location of the other civil spheres. As shown in chapter 6, the juridical field manages the social movement field with a version of policing logics that organizes social spaces, especially physical spaces, in terms of productive and functional logics that do not leave much room for dissent and political participation, unless there is *resistance* of the people in countering the logic of zero tolerance, with the absolute values of liberty stated in the text of the First Amendment.

The first research question was answered, in part, in the chapter on religious tolerance. There are other political influences on the outcomes of First Amendment lawsuits, but one of the political influences is nationalism, civil religion in particular, a code of politicians that places the state as the authority, over other cultural beliefs.
Those other cultural beliefs that might be capable of becoming the consensus-build- ing area of practice, in Durkheimian terms, or the cultural canopy, in Bergerian terms, that explains, or makes coherent, the goals and purposes of a large social group. Rather than being bound together by religion, we are bound together as nation, in many regards (Durkheim 1912; Gellner 1983). This point is not made as a claim of legitimacy or value, but of social fact.

The national form—despite views on, and arguments for—its end or eclipse, is a dominant form of macro-level organization, for reasons explained by Tilly and interrogated by Sassen (Guéhenno 1995; Evans 1997; Tilly 1990, 2004; Sassen 2007). States are not the same as nations, but the two forms are aligned in the construct of the nation-state. There is nothing inevitable about the state-as-actor, and the state and nation-state have been problematized as natural cases or a priori assumptions as analysis (Finnemore 1996: chapter 1; Sassen 2007). Further, the role of cities in international and global relations is one of the fundamental questions posed about state dominance (Sassen 2007). All of this being said, a code of national unity exerts an influence on juridical decisions regarding the display of religious symbols in the park. Who is to say that a nationalist code does not also lie beneath the regulation of dissent in public spaces? The zero tolerance policing logic works to prevent any critique of the national.

Based on chapter 5, regarding speech rights, it was established that individual rights to challenge injuries to human dignity are sometimes made subordinate to the functioning of media economics, expressed variously in terms of the public-private divide or simply the need to tell or sell the next sensational story about a private person. This
commodification of the person may also translate into the commodification of movements and of political participation. The public assemblies known as the national presidential conventions certainly have shifted from having a political purpose to expressing an entertainment purpose.

In chapter 6, regarding bureaucratic repression at the city, national, and global levels, it was shown that policing logics are influencing the courts, in the categorical constructions of place, as either public, limited public or non-public forums, or and in the descriptive logics of each type of physical place, being a place best used for any other purpose than dissent-oriented political participation. Because of the influence of zero tolerance policing on the rights of challengers to gather in any one place or any of many different types of places, there is one clear implication or consequence of bureaucratic repression. The repression may be less violent, but not less repressive. Other implications are when policing logics influence juridical logics, in interpreting the First Amendment values, challengers are repressed. The "chilling effect" on social movements is that there are fewer and fewer legitimate places to hold a political gathering and petition the state for change.

In this study, to reach these conclusions about First Amendment dynamics, a range of case-based methods were used. The conclusions drawn, and read together, offer a well-informed analysis of sociolegal change in the area of civil liberties in the U.S. case. A series of steps, or patterned behaviors and beliefs, have been traced, mapping out the paths of legitimacy that lead to social change in the area of civil liberties laws and practices. The goal of providing a sociology of the First Amendment was met.
In the introductory chapter, the parameters of the study were outlined. Next, an historical analysis of the text of the amendment itself was provided, followed by a chapter on how nationalism, specifically the code of civil religion, influences the outcomes of First Amendment lawsuits, when U.S. Supreme Court judges are asked to resolve disputes over the sacred and profane, and the limits of tolerance.

Next, the chapter on free speech, personal dignity, and the involuntary public figure cases, a sociological analysis was presented regarding the actors, dynamics and settings in which civil liberties of expression are contested. The paths of legitimacy were traced within the juridical field, and from the juridical field to the field of journalism. There, it was established that the journalism field mixes economic and cultural logics to justify the invasion of privacy in sensational stories, but that, in the final analysis, the result is the commodification of the person, barely restrained by media ethics. This commodification of the person is accomplished by institutional forces expressed differently as categorical or descriptive logics.

Third, in the chapter on assembly, there was analysis of the social forces that have combined to increase the scope of state action, increase the regulation of public assemblies that challenge political authority, and reduce the realm of civil liberties. Again a commodification dynamic was traced, as schools, shopping malls, and public spaces in cities are areas in which dissent is increasingly excluded, at rates of over 50 percent according to the legal geography data. These exclusions are accomplished by *both categorical and descriptive logics* that start in the circles of urban planning and policing, but are translated into positive law in the dynamics of legal change.
7.2 Absolutism, Resistance, and Bureaucratic Change

Rather than simply describe or even explain the dynamics of legitimation contests under the First Amendment, it is worthwhile to propose ways to change what has been observed and theorized. It is not enough to theorize the world, a critical theory requires at least an attempt at praxis or practical action to produce beneficial social change.

The proposal of this study is that the right of petition be brought more expressly into the gatherings organized by social movements. If the assembly right could be torn away from the expressive right, and paired with the petition right again, historically minded jurists would be hard pressed to reject claims for freedom of assembly and legitimate those claims as fully met with Internet discourse or other alternative avenues of expression. Movement activists would be well served to walk in the street with petitions, linking assembly claims to the petitioning of the state, or other government actor, so it cannot be said that the movement may be heard in any way other than delivery of the petition, such as via the Internet. This form of intelligent resistance to the bureaucratic and economic repressions could conceivably bring about a renewed sense of absolute rights under the amendment, in practical terms, not simply as "rights talk."

7.3 Future Avenues

Future avenues of research, that extend the analyses and data collection in this report, include:

(1) A project that traces, in greater detail, the licensing of repression (Davenport 2007) that occurred in anticipation of protests and protest policing tactics used at the presidential conventions, in 2000 and 2004, and also in the 1988-2008 time period,
starting with the Democratic National Convention in 1988, Atlanta, where protest pens were first used in the post-1960s era. This analysis would show how the permit system is used, by law enforcement and other agencies, in tandem with media releases, public announcements, and other statements in the mediated public sphere, to generate negative views of protest—such as perceptions of threat or fear related to street protest, a reduced rate of public approval for civil disobedience, and related perceptions.

(2) A project that completes an extensive discursive explanation of over 400 court opinions for legitimation claims. This project would build on the legal geography and variable analysis of the assembly opinions, presented in chapter 6, but use the methods of discursive analysis and neoinstitutional analysis used in chapters 4 and 5.

(3) A time series analysis of the many variables, both legal and demographic, regarding the counties in which there were—and were not—lawsuits over the regulation of assembly. In the time series, the legal geography of the assembly challenges in U.S. history could be further developed to locate structural influences on the emergence of this type of challenge, looking for instance at crime rates, housing developments, size of police force, the surging information services sector and other types of data found in the U.S. Census that bear on shifts in the political economy of space. The data collection for this project has already started. The unit of analysis would be county-decades, looking at change over time within a county. Another unit of analysis could be the city-suburb differentiation, and change in U.S. Census designations for type of place (metropolitan, micropolitan, etc.) over the postwar wars. This research would engage the changes made by the Census in designating areas as metros or economically tied to metros as
surrounding areas that have been drawn into the global city or globalizing city. In the work of Sassen (2006) on the TAR model, she calls for more work on globalizing cities, as well as global cities.

(4) Additional applications of a "paths of legitimacy" analysis (POLA) in other areas of law. This application could include the area of civil rights and discrimination.
APPENDIX A:

THE RELIGIOUS DISPLAY OPINIONS

The following table is a summary of the religious display opinions in chapter 3. For each opinion, there is a description of the display of religious symbols in dispute, a statement of the outcome and the rationale offered, and a statement of the judicial legitimations. These data were collected by starting with Lynch v. Donnelly, 465 U.S. 668 (1985) and using Lexis to locate later opinions citing Lynch. Lexis is a publication of LexisNexis Matthew Bender, a division of Reed Elsevier, Inc., based in Albany, NY.

TABLE 8

THE RELIGIOUS DISPLAY OPINIONS

<table>
<thead>
<tr>
<th>CASE AND DISPLAY</th>
<th>OUTCOME AND RATIONALE</th>
<th>JUDICIAL LEGITIMATION</th>
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<tr>
<td><em>Lynch v. Donnelly (1985)</em>: Crèche, with Santa Claus house and reindeer, in annual holiday display sponsored by city, Pawtucket, RI, in private park in heart of shopping district.</td>
<td>Display allowed. Crèche does not violate Establishment Clause because there is a secular purpose in celebrating Christmas, recognized by national tradition and by Congress as a National Holiday, and in depicting the holiday's origins. See also: two dissenting opinions.</td>
<td>&quot;Whatever benefit there is to one faith or religion or to all religions, is indirect, remote, and incidental; display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as 'Christ's Mass,' or the exhibition of literally hundreds of religious paintings in governmentally supported museums.&quot; 465 U.S. at 683.</td>
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<td>CASE AND DISPLAY</td>
<td>OUTCOME AND RATIONALE</td>
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<td><strong>County of Allegheny v. ACLU (1989):</strong> Crèche and menorah in government building</td>
<td><strong>Display not allowed.</strong> Crèche placed by religious society within a courthouse does violate the Establishment Clause because it sends an unmistakable message that state promotes Christian praise to God; the county in its display did not simply celebrate Christmas as a cultural phenomenon. In contrast, the menorah in its setting, with both a Christmas tree and sign with civic slogan stating that the city salutes liberty, was a visual symbol of a holiday with a secular dimension, so menorah does not violate Establishment Clause. See also four additional opinions of the court.</td>
<td>&quot;As observed in this Nation, Christmas has a secular, as well as religious dimension.&quot; 492 U.S. 579.</td>
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<td><strong>Capitol Square Review and Advisory Bd. v. Pinette (1995):</strong> Klu Klux Klan cross to be erected in state-owned park (managed by an advisory board) around the statehouse in Columbus, OH, where other religious displays, Christian and Jewish were permitted (Christmas tree and menorah).</td>
<td><strong>Display allowed.</strong> Board was not justified on Establishment grounds to deny the KKK's permit to erect the cross on state-owned property which was a public forum and which included other purely private religious expressions.</td>
<td>&quot;Private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.&quot; 515 U.S. at 759.</td>
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<td><strong>City of Elkhart v. Books (2001):</strong> Monument, listing the Ten Commandments, located outside of the municipal building for city of Elkhart, IN.</td>
<td><strong>Court declines to hear case.</strong> Ten Commandments with statement &quot;I am the Lord Thy God&quot; is difficult to square with argument that monument expresses no religious preference. See also dissenting opinion.</td>
<td>&quot;I would grant certiorari [rule that case be heard] to decide whether a monument which has stood for more than 40 years, and has at least as much civic significance as it does religious, must be physically removed from its place in front of the city's Municipal Building.&quot; Dissenting opinion by Rehnquist, J. 532 U.S. at 1063.</td>
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<td>CASE AND DISPLAY</td>
<td>OUTCOME AND RATIONALE</td>
<td>JUDICIAL LEGITIMATION</td>
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<td>McCreary County v. ACLU (2005): Ten Commandments in Kentucky courthouse that were modified after the lawsuit began to include new displays of eight other historical documents as legal precedent and the title &quot;Foundations of American Law and Government&quot; meant to indicate that the displays were educational</td>
<td><strong>Display not allowed.</strong> Ten Commandments display, when considered in light of the evidence regarding the various statements of purpose made by the counties, does violate the Establishment Clause, because the government's purpose was predominately religious and an endorsement of religion, not a secular purpose, despite changing statements and alternations in the display meant to reach legal standards. (See also dissenting opinion that publicly honoring the Ten Commandments is indistinguishable from publicly honoring God, as both practices are recognized across such a diverse range of the population, from Christians to Muslims, that those practices could not be reasonably understood as government endorsement of a particular religious viewpoint.)</td>
<td>We do not hold that &quot;a sacred text can never be integrated constitutionally into a governmental display on the subject of law, or American history. We do not forget, and in this litigation have frequently been reminded, that our own courtroom frieze was deliberately designed in the exercise of governmental authority so as to include the figure of Moses holding tablets exhibiting a portion of the Hebrew text of the later, secularly phrased Commandments; in the company of 17 other lawgivers, most of them secular figures; there is no risk that Moses would strike an observer as evidence that the National Government was violating neutrality in religion (545 U.S. at 874).</td>
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<td>Van Orden v. Perry (2005): Large granite monument on grounds of Texas state capitol. Monument featured a non-sectarian text of the Ten Commandments. Other features were the American flag, and the Greek letters Chi and Rho that represent Christ.</td>
<td><strong>Display allowed.</strong> Although the Ten Commandments are of religious significance, they have an undeniable historical meaning and the placement on state grounds is more passive than in a classroom. Various court opinions stated different points, including that the monument recognized the role of religion in history and that placement of the monument indicated that the state intended the nonreligious aspects of the Ten Commandments to dominate.</td>
<td>&quot;We [must] neither abdicate our responsibility to maintain a division between church and state nor evince a hostility to religion by disabling the government from in some ways recognizing our religious heritage.&quot; 545 U.S. 683-84.</td>
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<td>CASE AND DISPLAY</td>
<td>OUTCOME AND RATIONALE</td>
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<td><em>Salazar v. Buono (2010)</em>: Latin cross mounted on Sunrise Rock, without government permission, in the Mojave National Preserve, intended to honor American Soldiers who died in foreign wars. Following court injunction, the state made a land transfer to the Veterans of Foreign Wars (VFW), pursuant to a Congressional statute.</td>
<td>Court refers case back to lower court to consider property transfer. The lower court did not properly consider the reasons for the Congressional statute resulting in transfer of ownership of the land where cross located; instead the lower court assumed that the transfer was invalid as an attempt to avoid the injunction and keep the cross were it was. In concurring opinion, Judge Alito states that the land transfer was valid, that no further evidence was needed to decide that question, that the solution was a pragmatic balance of interests in avoiding any perception of religious sponsorship and the disturbing symbolism associated with destruction of the monument.</td>
<td>&quot;The solution that Congress devised is true to the spirit of practical accommodation that has made the United States a Nation of unparalleled pluralism and religious tolerance&quot; (concurring opinion of Justice Alito). 103 S.Ct. at 1821.</td>
</tr>
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APPENDIX B:
SELECTED NEWS REPORTS IN THE PUBLIC FIGURE CASES

ABC News. 2003. Steve Bartman: Cubs Fan who Blocked Catch of Foul Ball, Segment on Good Morning America, 7:00 AM, October 16.


APPENDIX C:
THE FREEDOM OF ASSEMBLY OPINIONS

This table summarizes court opinions regarding regulation of assembly. The time covered is 1945 to 2000, but the first opinion was in 1946. There are two primary types of regulations addressed: "time, place, and manner" of demonstrations; and permits used to control parades and rallies in public; other prosecutions, injunctions, and related actions, in civil and criminal cases, that increase the cost of dissent, are included.

Methods for collecting the data are described below. "R" is coded for whether there repression allowed by the court, with repression defined as increasing the cost of dissent. These outcomes are coded 1 for repression, and 0 otherwise.

TABLE 9
FREEDOM OF ASSEMBLY OPINIONS

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<td>MOORE DUNCAN V METROPOLITAN REGIONAL COUNCIL</td>
<td>1999 U.S. Dist. LEXIS 16372</td>
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The following discussion outlines the methods and procedures for collecting the data listed in Table C. Topics covered include the representative nature of the search; limitations of the search for relevant court opinions; the scope of conditions considered, namely legal change regarding assembly; the lack of systematic error; validity and reliability concerns; research steps, electronic and library-based; an outline of search requests entered into the database, and background information on electronic searches in law; a summary of electronic searches conducted; the method for culling the electronic search results for duplicates and relevance; and outline of library-based research methods; a further discussion of determining if a court opinion was relevant to assembly; summary statement regarding total of 435 court opinions and coding for repressive outcome; coding for the location of dispute, by county; use of the year of decision as time marker instead of year of disputed assembly; and use of ANSI codes at county level as uniform geographic codes.

Representative search or near-universe of cases on assembly and limitations of search. These data are near-universe (or a very large, representative sample) of the freedom of assembly opinions in the U.S. from 1945 to 2000. While in the initial Lexis
searches, only 200 court opinions were uncovered, subsequent library research uncovered more than 200 additional court opinions on the regulation of assembly. As described below in greater detail, a serious attempt was made to systematically locate all of the court opinions on the regulation of public assemblies; however, several caveats apply.

First, many disputes or cases do not get brought to court at all, but there still were grievances, unrest and disputes between individual and groups (state and non-state actors) regarding the freedom of assembly. These cases are "below the tip of the iceberg" when it comes to analyzing legal change, because they are examples of disputed claims and challenges, but there is no court action and no court opinion. Also, many cases get brought to court, but nevertheless do not result in a court opinion. Estimates of the cases that are filed in court as indictments or civil complaints, etc. that do not result in court opinions are about 90 to 95 percent, meaning that only 5 percent of cases are memorialized in court opinions. There may be no court opinion, in a case, but instead only a ruling or order that was not memorialized, even though the court did resolve the case. Also, there are many instances in which a court case is dropped, settled, or otherwise disposed of before resolution by the court, via trial, summary judgment, or other court ruling.

For instance, in the searches outlined below, there were no court opinions found regarding the arrests and prosecutions of Mario Savio and other student-activists in Alameda County, during the Free Speech Movement in Berkeley, California in 1964. (See description of electronic and library-based research conducted below). Yet, it is known that Savio was sentenced and served time for his actions in asserting the freedom
of assembly, under the criminal charge of trespass. Also, the data frame of court opinions on the regulation of assembly may not include all court opinions available on the regulation of freedom of assembly, as the text of the opinions themselves may not include the key words used in electronic searching, as described below—or the opinions may not have been indexed by legal publishers under freedom of assembly or parading without a permit, as described below, and so not located in the library-based research. Thus, there may be court opinions regarding assembly that are not listed here, but these are cases filed in court and indexed by legal publishers under other claim-related terminology, as inciting a riot, failure to disperse, and disorderly conduct. The cases related to protest permits and restrictions known as "time, place, and manner" regulations (see below) were located.

If there were criminal terms and claims used to regulate assembly, such as inciting a riot, those court opinions may not have been located and listed in the data frame here. These other terms and concepts regarding the regulation of assembly provide additional avenues for future research into the criminalization of dissent in the policing of protest, which research would take an even more critical perspective, expanding legal definitions and using a broader net to look for additional, less directly relevant opinions that might shed light on legitimacy of protest policing tactics.

**Scope of legal change regarding assembly, lack of systematic error.** Based on the foregoing and subject to the search parameters described below, the court opinions listed in this data frame are all of the cases that could be found under the terms and indices consulted. Thus, there is no systematic error in locating all of these cases under
the net of concepts used. If there are other cases on freedom of assembly, that were not
brought to court, not the subject of a court opinion, or only listed under criminal terms
and claims, rather than freedom of assembly terminology, parading without a permit, or
other conservative terminology used in these search requests—which cases are not listed
here—the failure to list those cases in this data frame makes the analysis of the search
results more conservative, not less and does not result in a systematic error in data
collection. These court opinions are the "tip of the iceberg" when it comes to analysis of
grievances over regulation of the freedom of assembly, but there is no systematic error in
the way that this set of cases were collected.

**Validity of measure and reliability.** Because the study object of this project is
legal change, the court opinions are relevant because they memorialize changes in law. If
grievances or social movements were the object of study, other measures would be
appropriate. Regarding reliability, if these same procedures were followed again, the
same or nearly the same data frame of court opinions would be produced.

**Research steps, electronic and library-based.** These data were collected over the
course of 2009-2011, using the following multi-step process. First, online searches were
conduct ed using the commercial electronic database *Lexis*, which contains, among other
things, court opinions from the state and federal courts. In accord with standard legal
research practices, follow-up *Lexis* searches were conducted to locate copies of relevant
court opinions cited as case precedent within the court opinions (located by the initial
*Lexis* search). While not all of the cases cited within a court opinion on regulating
assembly are relevant to the substantive topic (for instance, many cases are cited on
procedural grounds), many cases cited within cases are relevant to the substantive topic, but are not found in initial Lexis searches.

There were also many additional, follow-up Lexis searches to locate court opinions in the prior and subsequent appellate histories, using the "Shepard's" function in Lexis. The terms case and court opinion are not synonymous in this context, as there may be more than one court opinion in a single case or dispute, as the litigation moves through the legal system. Shepardizing means using a proprietary service within Lexis to locate the prior and subsequent history of a particular case (that is, multiple opinions in a single lawsuit).

**Overview of library-based research.** Second, library-based research was conducted to read relevant books and encyclopedia entries regarding the freedom of assembly, and related topics such as riots, disorderly conduct, and parade permits—with the purpose of locating court opinions not found in the Lexis database searches. The library-based research included first a detailed review of books on constitutional law and freedom of assembly and, second, analysis of cases cited in legal encyclopedias and indices, as described more fully below.

**Outline and background information on electronic searches.** Regarding electronic research in law, there are two competing databases that produce essentially the same results if modern law is being examined. There may be differences if much older law, such as 19th century law, or very current law, such as in the last month or so, is being examined. In the project the Lexis database was used, not its competitor, Westlaw.
Lexis is a publication of LexisNexis Matthew Bender, a division of Reed Elsevier, Inc., based in Albany, NY. Court opinions in the Lexis database are annotated and indexed by rules of law stated by the court, by the level of court (trial or appellate), by the location of court, and by other points of fact. The database also includes the full text of the judge's official, written opinion, stating the facts of the case, the parties to the case, the arguments made, the controlling and distinguished points of law with citations to precedent, the holding of the case (holding means the statement of the court regarding which party prevails and which party loses, in whole or in part), and the ruling on points of law, including rationales for the application of law to fact or development of new law. The editorial annotations are not considered part of the official record of the court, but are useful in analyzing case law and locating additional case law.

There were two initial Lexis searches. The first search request, submitted to the "Federal and State Cases, Combined" database in Lexis, on November 30, 2009 was designed to uncover all or most of the opinions in the database that discuss the use of permits to regulate public assemblies and protests. The search request and results were:

Search Request, November 30, 2009:

(((first amendment OR 1st amendment) and OVERVIEW((permit
w/20 (assembly or assemblies or parade OR rally OR protest OR
demonstration))))))

Results: 173 court opinions
Sometimes there is a regulation of assembly without use of a parade permit or protest permit. To find these additional types of regulation, in a broader category of cases known as "time, place, and manner" cases, a second online search request was submitted to the "Federal and State Cases, Combined" database in Lexis, on May 18, 2010. This second, search was designed to uncover all opinions in the database that discuss "time, place, and manner" restrictions on public assemblies. The search request and results were:

Search Request, May 18, 2010:

(first amendment or 1st amendment) and (time w/2 place w/2 manner) and OVERVIEW(assembly or assemblies or parade or rally or rallies or protest or demonstration)

Results: 371 court opinions

The Lexis database is not sensitive to capitalization and will search for parts of words (for instance, the term protest will yield protests), but it is sensitive to differences in the spelling, including between singular and plural; words spelled differently in plural were searched both ways (for instance, rally OR rallies). There is no need to search for variations in capitalization or the addition of a letter "s" to the end of a word.

The search expression "OVERVIEW" directs the computer system to look in the editorial annotations, in particular a section of the Lexis database that summarizes the court opinion in a brief paragraph, including the key facts of the case, arguments made, and the court's holding and rationale for decision.
The overview is not part of the official opinion, as it is prepared by legal editors. As mentioned, the full text of the official opinion follows the overview and related editorial notes, in the database file.

The search expression "time w/2 place w/2 manner" looks for the words time, place, and manner because "w/2" means within two words. Time, place and manner is a term of art in First Amendment jurisprudence. As discussed in the study (chapter 6), the First Amendment provides that there shall be "no law" regulating the freedom of assembly, but "time, place, and manner" restrictions are an exception to the rule; the exception has, in some ways, overgrown the rule, such as time, place, and manner restrictions infringe on rights of assembly and speech.

Summary of electronic searches, and method for culling the electronic search results for duplicates and relevance. The two initial searches yielded a total of 544 court opinions (173 opinions in the first search and 371 opinions in the second search). There were duplicates in the set of 544 cases and these cases were not listed in the data frame. Using a cut-off date of December 31, 2000, all of the other opinions issued between 1945 and 2000, as located in the database searches, were listed in the frame, but only after the opinions were read to determine if they, indeed, were First Amendment cases about public assemblies and state regulation of assemblies. The time frame of 1945 to 2000 was used to examine the regulation of assembly during the postwar era.

If within the time frame and relevant to the regulation of assembly, the court opinion was listed in the data frame, by year of decision, case name (e.g. State v. Jones), court level, etc. (see above table). Of the 544 opinions uncovered in the broad, Lexis
searches, less than 200 were non-duplicative and relevant. After follow-up *Lexis* searches to find additional opinions in the same lawsuit, and also case precedents cited within opinions, were conducted the count increased by more than 50%, with more than 300 opinions in the frame. Library-based research increased the count to over 400 opinions.

**Detailed outline of library-based research.** Second, library-based research was conducted. The following books, among many others, were reviewed for case citations on the regulation of assembly in the U.S. from 1945 to 2000: Antieau (1995) on the history and development of constitution law; Leahy (1991) on implied rights and amendments to the constitution; Lewis (2007) on freedom for hate speech; Mead (2010) on the new law of peaceful protest of the human rights era; Richards (1986) on toleration and the constitution; Sajó (2009) on the freedom to protest; Stone (2004) on speech in perilous times; Sunstein (2009) on the many voices or "minds" of the constitution; Sunstein (1995) on the problem of free speech; and Tribe (2008) on standard, and invisible or implicit meanings of the constitution. Surprisingly, many of these core texts do not even list "assembly," one of the primary clauses of the U.S. Constitution, in their indices.

Also, standard textbooks and an edited volume on the freedom of assembly were consulted to locate court opinions, but many of these focused on speech claims, rather than assembly claims, despite the titles of the books. These included: King (1997), *Land of the Free, Freedom of Assembly*; Rohde (2005), *American Rights: Freedom of Assembly*; Russell (2010), *The First Amendment: Freedom of Assembly and Petition*; Winters (2006): *The Bill of Rights: Freedom of Assembly and Petition*. These books were located in the author's personal library, in Notre Dame Law Library (using the electronic
card catalog searching for "freedom of assembly") and on Amazon.com; all of the books consulted are related to freedom of assembly, protest law, and/or U.S. Constitutional law.

In addition to the listed books, encyclopedia articles were also consulted. Two of the primary ways to locate relevant case law is to use encyclopedia entries that index and discuss the law by topic, issue, and court. These include the United States Code Annotated and American Law Reports. The annotated code, published by West Publishing, is a collection of cases organized by U.S. code provisions, including the U.S. Constitution as code. American Law Reports, published by LexisNexis Matthew Bender, is an encyclopedia, written by lawyer-editors, that addresses particular topics and issues of law, organizing the cases by the elements of claims and defenses, noting those arguments that have and have not been successful. It also lists court opinions and outcomes by jurisdiction, such as courts by state and trial and appellate levels.

When completing the search for opinions on the freedom of assembly, these encyclopedia entries were examined and court opinions listed there were reviewed for relevance and added to the data frame if related to regulating the freedom of assembly: United States Code Annotated, U.S. Constitution, Amendment I, "Notes of Decisions," sections 1-50, "Assembly generally" (West 2011); American Law Reports, "Validity of Statutes Regulating Parades," 80 A.L.R.5th 255 (2000, with supplements through August 7, 2010); and the Cornell Legal Information Institute website.

Further explanation regarding determinations if a court opinion was relevant to the regulation of assembly. When reviewing the database results, the library books and the encyclopedias, only cases relevant to the freedom of assembly and state
regulation of assembly were included in the data frame. For instance, court opinions regarding rights of association (such as protection of membership lists) were not included. Also cases speech alone, without assembly, were not included, such as cases about the publication of news, or the placement of signs, or the right to solicit donations, or the right to wear symbolic representations such as armbands to a public high school. (In contrast, cases about the right to picket, or to canvas, distribute literature or solicit door-to-door, in residential neighborhoods, or in public places such as malls, stores, airports, jails and other locations, were included, even if the case was considered as a free speech case, a criminal case, a picketing case, a National Labor Relations Board case, etc.)

It has been a trend in the law to consider assembly cases under the umbrellas of speech, because even though the two social activities are distinguishable, they are related. Also, many early picketing and civil rights cases were not analyzed in terms of the assembly rights at stake; however, rather than look at the cases through the prism of law, it is important to look directly at the fact patterns and social relations described in the empirical statements of the case.

Cases about "symbolic conduct" or "speech-plus-conduct," which are considered a form of speech or expression, were not included in the data frame (see chapter 2 on definitions of speech). Examples of cases about symbolic speech include *U.S. v. O'Brien*, 391 U.S. 367 (1968) on burning draft cards; and *Texas v. Johnson*, 491 U.S. 397 (1989) on burning the U.S. flag. Further, cases about solo "protesters," such as disgruntled employees, were not included, nor were a series of many cases, known as the *Gilbert*
cases, about a homeless man who insisted on living on property surrounding a federal building and who used First Amendment arguments to support his right to live there. Although constitutional arguments were made in the disgruntled employee cases and in the Gilbert cases, in those cases, new legal rules were not made relating to the freedom of assembly. See, for instance, U.S. v. Gilbert, 920 F.2d 878 (1991).

Cases about the right of the press to attend (gather or assemble) in court to witness and report on trials were not included. Also, some of the cases in which the accused were found to be criminally violent were not included in the data frame regarding peaceable assembly. For instance, in the case of Ferguson v. Estelle, 718 F.2d 730 (5th Cir. 1983), the defendants were found to have participated in a mob attack on a place of work, armed with pipes, bottles, and rocks, destroyed company property, and attacked workers. Their claim that the anti-riot statute was unconstitutionally vague was rejected by the court. In addition, cases regarding the search and seizure of materials in private homes under charges of sedition were not included, because those cases did not relate to assembly, but instead to association and speech.

Finally, cases regarding voting rights, forming political parties and petitioning the government (but not assembling) were not included in the data frame. For instance, in Anderson v. Albany, 321 F.2d 649 (5th Cir. 1963), the aggrieved party filed requests and petitions asking that public areas be opened and segregation laws not enforced, but there was no assembly undertaken in pursuit of the petitions. In other words, there was petition to redress grievance, not coupled with peaceable assembly.
That being said, cases about the freedom of assembly that relate to collective action and political challenges were included in the data frame, even if the case itself was not analyzed in terms of assembly. During library-based research, it was discovered that many, earlier cases about the freedom of assembly were not uncovered in the initial, broad *Lexis* searches that looked for cases on time, place, and manner issues and the protest permits. These earlier cases, for instance from the labor movement or the civil rights movement, were cast as criminal cases about disturbing the peace and disorderly conduct, resulting in criminal convictions at the trial-court level, but in many (not all) instances resulting in constitutional analyses in the higher courts on grounds of due process or equal protection of the law, or free speech. These cases are about the freedom of peaceable assembly linked to challenges to political authority (i.e. petitions for the redress of grievances), and so were added to the data frame during the library research phase.

Other cases about segregation were not included when it was unclear whether there was an assembly that asked for political change or challenged political authority. For example, in the case of *Garner v. Louisiana*, 368 U.S. 157 (1961), defendants were convicted of disturbing the peace by sitting at lunch counters that were reserved for people of another race and refusing to leave. Defendants alleged that their convictions were based upon no evidence of guilt and, therefore, denied them of liberty without due process of law. Defendants lost in the Louisiana Supreme Court, but the ruling was overturned by the U.S. Supreme Court on due process grounds. This case was included as a freedom of assembly case in the data frame.
Total of 435 court opinions and coding for repressive outcome. In total, 435 cases related to freedom of assembly in the U.S. from 1945 to 2000 were identified. During the process of listing cases in the data frame, each relevant case was coded for year of decision, geographic location (ANSI code), level of court, etc. (See discussion, below, regarding coding for year and place.) The opinions were then read to determine whether or not there was a repressive outcome. This coding work is listed in column "R" for repression. A repressive outcome was defined as the party in the position of challenger did not prevail in the ruling (which means that costs of dissent were increased). Repressive outcome was coded as 1, otherwise, 0.

Location of dispute, by county. A lot of additional research was required to obtain the locations of each case. All of these opinions were also read to determine the county and state where the disputed assembly occurred, as opposed to the county where the court is located. Sometimes the disputed assembly is in one place, such as a small town, while the court is located in a distant county, such as a nearby city. Obviously, the demographics, or structural variables, of the location of assembly, rather than of the location of court, are relevant to the emergence of legal change regarding assembly rights. Many court opinions named the city of the disputed assembly, but not the county. The counties for all of these hundreds of cities had to be identified with online research. Counties were selected as the unit of analysis, because of theoretical interest in the use of land or territory to mark political authority. As the entire contiguous U.S. is divided into counties or county-equivalents, the counties were these types of disputes arose and resulted in legal change could be compared to counties were there was no legal change.
**Year of decision.** The year of decision of the court was coded as the relevant year in the data frame (rather than year of disputed assembly) because, in some instances, the assembly never occurred and also because this study is about legal change. Thus, the date of legal change, that is, the year of court opinion, is the relevant date, occurring after a period of lag from the date of disputed assembly, not the date of the proposed assembly. The dispute over the assembly arises and develops over time in the location of dispute, but the legal change occurs when the court issues its opinion, based on the court's current view of the situation and relevant facts, which can occur several months or years after the disputed assembly.

The uniform codes for the geographic location of the underlying disputes were retrieved and recorded, as shown in the data frame (see above table). There are uniform, geographical codes for each county and state, and statistically equivalent entities, in the U.S. These uniform codes are used in U.S. Census data. The place codes can be used to link the opinion data on legal change, and data on local demographics from the Census, such as income inequality data, population density, and related measures.

Retrieval was accomplished using websites published by the U.S. Census and other publishers. These sites include: [http://www.itl.nist.gov/fipspubs/](http://www.itl.nist.gov/fipspubs/) and [http://geonames.usgs.gov/domestic/index.html](http://geonames.usgs.gov/domestic/index.html), and [http://mcdd.missouri.edu/webrepts/commoncodes/](http://mcdd.missouri.edu/webrepts/commoncodes/) (Missouri Census Data Center), and [Wikipedia.com](http://Wikipedia.com), which sometimes lists the uniform codes in the right-hand column in place-specific entries.

**Use of ANSI codes for geographic location.** After the county of the dispute was located for every court opinion in the data frame, then the ANSI code for the county was
coded. ANSI codes are uniform geographic location codes. The uniform geographical
codes used by the Census were formerly called Federal Information Processing Standards
(FIPS codes). FIPS codes were administrated by the National Institute of Standards and
Technology (NIST), a division of the U.S. Department of Commerce. Currently, the
uniform codes are called ANSI (for American National Standards Institute). ANSI codes
are the same numbers as FIPS codes in most instances, but ANSI coding system replace
FIPS coding systems, according to the U.S. Census. See, http://www.census.gov/geo/
www/ansi/ansi.html (last retrieved March 2011). The following types of places have
ANSI codes: states, statistically equivalent entities, counties and statistically equivalent
entities, named populated and related location entities (such as Census-designated places
and county subdivisions), and American Indian and Alaska Native areas. States and state-
equivalents have two-digit codes and counties and county-equivalents have five-digit
codes (some with a leading zero).
APPENDIX D:
THE POSTWAR PRESIDENTIAL CONVENTIONS

The following table summarizes the location and nominees for the postwar presidential conventions, 1948 to 2008. It also lists historical information relevant to the political context and media coverage of the conventions, as well as information about the street protests held during and around the conventions.

<table>
<thead>
<tr>
<th>YEAR</th>
<th>DAYS</th>
<th>NOMINEE</th>
<th>LOCATION</th>
<th>NOTES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1948 RNC</td>
<td>June 21 - 25</td>
<td>Thomas S. Dewey</td>
<td>Municipal Hall (Philadelphia Convention Center) Philadelphia, PA</td>
<td>POSTWAR ERA: First convention after end of WWII in 1945; Dewey suffers a surprising loss to Truman in the general election</td>
</tr>
<tr>
<td>1948 DNC</td>
<td>July 12 - 14</td>
<td>Harry S. Truman 33rd President</td>
<td>Convention Hall Philadelphia, PA</td>
<td>Incumbent president, due to Roosevelt's 1945 death; peaceful protests held, by men dressed in suits; Dixiecrats walkout over civil rights plank; Truman did not attend convention until end</td>
</tr>
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<td>YEAR</td>
<td>DAYS</td>
<td>NOMINEE</td>
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<tr>
<td>1952 RNC</td>
<td>July 7 - 11</td>
<td>Dwight D. Eisenhower</td>
<td>International Amphitheater</td>
<td><strong>TELEVISION ERA</strong>: First convention to be extensively televised (actual first TV appearance was telecast from 1940 RNC); 1952 platform pledges to bring an end to Communist subversion</td>
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<td></td>
<td></td>
<td>34th President</td>
<td>Chicago, IL</td>
<td></td>
</tr>
<tr>
<td>1952 DNC</td>
<td>July 21 - 26</td>
<td>Adlai E. Stevenson</td>
<td>International Amphitheater</td>
<td><strong>END OF &quot;CONTEST&quot; ERA</strong>: ABC News works to increase TV viewers attention by running feature stories; last nomination &quot;contest&quot; at a convention with more than one round of voting ballots</td>
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<td></td>
<td></td>
<td></td>
<td>Chicago, IL</td>
<td></td>
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<tr>
<td>1956 DNC</td>
<td>Aug. 13 - 17</td>
<td>Adlai E. Stevenson</td>
<td>International Amphitheater</td>
<td><strong>START OF &quot;CORNATION&quot; ERA, WITH PRESUMED NOMINEE</strong>: First convention to include film about candidate aimed at TV audiences, not delegates (The Pursuit of Happiness, narrated by JFK); delegates storm CBS camera platform in protest of network's cutting away from the film</td>
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<td></td>
<td></td>
<td></td>
<td>Chicago, IL</td>
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<tr>
<td>1960 DNC</td>
<td>July 11 - 15</td>
<td>John F. Kennedy</td>
<td>Los Angeles Memorial</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td>35th President</td>
<td>Sports Arena</td>
<td></td>
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<tr>
<td></td>
<td></td>
<td></td>
<td>Los Angeles, CA</td>
<td></td>
</tr>
<tr>
<td>1960 RNC</td>
<td>July 25 - 28</td>
<td>Richard M. Nixon</td>
<td>International Amphitheatre</td>
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<td></td>
<td></td>
<td></td>
<td>Chicago, IL</td>
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### TABLE 10 (CONTINUED)

<table>
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<th>YEAR</th>
<th>DAYS</th>
<th>NOMINEE</th>
<th>LOCATION</th>
<th>NOTES</th>
</tr>
</thead>
<tbody>
<tr>
<td>1964 RNC</td>
<td>Aug. 13 - 16</td>
<td>Barry M Goldwater</td>
<td>Cow Palace San Francisco, CA</td>
<td><em>TV INTENSIFIES:</em> Both parties and TV networks form a committee to plan the conventions for TV; during RNC, television reporters clash with politicians; NBC News juxtaposes images of inside the hall with civil rights protests outside the hall, during Sen. Goldwater's acceptance speech</td>
</tr>
<tr>
<td>1964 DNC</td>
<td>Aug. 24 - 27</td>
<td>Lyndon B. Johnson</td>
<td>Convention Center Atlantic City, NJ</td>
<td>Incumbent president due to Kennedy assassination, Nov. 1963</td>
</tr>
<tr>
<td>1968 RNC</td>
<td>Aug. 5 - 8</td>
<td>Richard M. Nixon</td>
<td>Convention Center Miami, FL</td>
<td><em>ERA OF ESCALATED FORCE:</em> Urban riots in Miami in weeks before convention become TV footage during convention; In convention planning, the Republican National Committee recommends curtailing the work on party platforms, to make the convention more entertaining to TV viewers</td>
</tr>
<tr>
<td>1968 DNC</td>
<td>Aug. 26 - 29</td>
<td>Hubert Humphrey</td>
<td>International Amphitheater Chicago, IL</td>
<td>Widespread violence between police and protesters in battle for control of the streets; Almost 90 million viewers watch police-protester fighting on TV on Wednesday, Aug. 28; Television reporters clash with politicians; CBS News juxtaposes images of Mayor Daley praising the Chicago police with images of police brutality outside the hall; Cleveland Mayor Carl Stokes speech is also intercut with scenes of street fighting, although the violence had by then ended; Democratic candidate Robert F. Kennedy assassinated in LA, in June 1968, before convention</td>
</tr>
</tbody>
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### TABLE 10 (CONTINUED)

<table>
<thead>
<tr>
<th>YEAR</th>
<th>DAYS</th>
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<th>LOCATION</th>
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</tr>
</thead>
<tbody>
<tr>
<td>1972 DNC</td>
<td>July 10 - 13</td>
<td>George S. McGovern</td>
<td>Convention Center Miami, FL</td>
<td><strong>SECOND POSTWAR ERA, USE OF PRIMARY SYSTEM:</strong> Vietnam war starts to draw to close, with soldiers taken out of combat positions under the Nixon Doctrine in 1969 and soldier return home in 1973 (war not over until Fall of Saigon in 1975); Democrats now operating under a primary system, adopted after the 1968 DNC, under the McGovern-Fraser Commission</td>
</tr>
<tr>
<td>1972 RNC</td>
<td>Aug. 21 - 23</td>
<td>Richard M. Nixon</td>
<td>Convention Center Miami, FL</td>
<td>Republican speakers given script about pausing and nodding for cheers because pleasing to TV audience; Following the Democrats, the Republican Party adopts the primary system in 1972</td>
</tr>
<tr>
<td>1976 RNC</td>
<td>Aug. 16 - 19</td>
<td>Gerald R. Ford</td>
<td>Kemper Arena Kansas City, MO</td>
<td>Incumbent president, due to Nixon resignation, Aug. 1974; last convention to almost be a brokered convention as either Nixon or Ford had enough primary votes to lock the nomination</td>
</tr>
<tr>
<td>1980 RNC</td>
<td>July 14 - 17</td>
<td>Ronald W. Reagan</td>
<td>Joe Louis Arena Detroit, MI</td>
<td>Walter Cronkite, David Brinkley, and other network newscasters erroneously report that Gerald R. Ford will be the V.P. candidate</td>
</tr>
<tr>
<td>1980 DNC</td>
<td>Aug. 11 - 14</td>
<td>Jimmy Carter</td>
<td>Madison Square Garden New York, NY</td>
<td>Video minicams on convention floor replace use of film cameras for floor coverage; Sen. Ted Kennedy tries to release delegates held by Carter</td>
</tr>
<tr>
<td>YEAR</td>
<td>DAYS</td>
<td>NOMINEE</td>
<td>LOCATION</td>
<td>NOTES</td>
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<tr>
<td>1984 DNC</td>
<td>July 16 - 19</td>
<td>Walter Mondale</td>
<td>Moscone Center</td>
<td>San Francisco, CA</td>
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<tr>
<td>1984 RNC</td>
<td>Aug. 20 - 23</td>
<td>Ronald W. Reagan</td>
<td>Reunion Arena</td>
<td>Dallas, TX</td>
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<tr>
<td>1988 DNC</td>
<td>July 18 - 21</td>
<td>Michael S. Dukakis</td>
<td>The Omni</td>
<td>Atlanta, GA</td>
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<tr>
<td>1988 RNC</td>
<td>Aug. 15 - 18</td>
<td>George H.W. Bush 41st President</td>
<td>Louisiana Superdome</td>
<td>New Orleans, LA</td>
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<tr>
<td>1992 DNC</td>
<td>July 13 - 16</td>
<td>William J. Clinton 42nd President</td>
<td>Madison Square Garden</td>
<td>New York, NY</td>
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<tr>
<td>1992 RNC</td>
<td>Aug. 17 - 20</td>
<td>George H.W. Bush</td>
<td>Astrodome</td>
<td>Houston, TX</td>
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<tr>
<td>1996 RNC</td>
<td>Aug. 12 - 15</td>
<td>Robert J. Dole</td>
<td>San Diego Convention Center</td>
<td>San Diego, CA</td>
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<td>END OF TELEVISION ERA: Nightline host Ted Koppel announces he is going home because convention is an infomercial that does not require journalists; since then coverage by networks has been more limited; last use of a non-sporting venue to host a convention;</td>
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<tr>
<td>1996 DNC</td>
<td>Aug. 26 - 29</td>
<td>William J. Clinton</td>
<td>United Center</td>
<td>Chicago, IL</td>
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<td>Democrats return to Chicago for the first time in 28 years, following the 1968 DNC violence.</td>
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<td>YEAR</td>
<td>DAYS</td>
<td>NOMINEE</td>
<td>LOCATION</td>
<td>NOTES</td>
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<tr>
<td>2000 RNC</td>
<td>July 31 - Aug. 3</td>
<td>George W. Bush 43rd President</td>
<td>First Union Center Philadelphia, PA</td>
<td><strong>NATIONAL SPECIAL SECURITY EVENTS ERA:</strong> First convention designed as a NSSE under 1998 counter-terrorism law; widespread police-protester violence; last convention before 9/11</td>
</tr>
<tr>
<td>2000 DNC</td>
<td>Aug. 14 - 17</td>
<td>Albert A. Gore, Jr.</td>
<td>Staples Center Los Angeles, CA</td>
<td><strong>Litigation:</strong> SEIU v. City of Los Angeles, 114 F. Supp.2d 966 (2000): protesters win; use of free speech zone prohibited and access to convention re-mapped before event</td>
</tr>
<tr>
<td>2004 DNC</td>
<td>July 24 - 29</td>
<td>John F. Kerry</td>
<td>FleetCenter Boston, MA</td>
<td><strong>POST-TERROR ERA:</strong> First convention held after Sept. 11 attacks. <strong>Litigation:</strong> Black Tea Society v. City of Boston, 378 F.3d 8 (2004): protesters lose, use of free speech zone is enforced</td>
</tr>
<tr>
<td>2008 DNC</td>
<td>Aug. 25 - 28</td>
<td>Barack H. Obama 44th President</td>
<td>Pepsi Center and Invesco Field Denver, CO</td>
<td><strong>Litigation:</strong> ACLU v. City and County of Denver</td>
</tr>
<tr>
<td>2008 RNC</td>
<td>Sept. 1 - 4</td>
<td>John S. McCain</td>
<td>Xcel Energy Center St. Paul, MN</td>
<td><strong>Litigation:</strong> ACLU v. City of St. Paul</td>
</tr>
</tbody>
</table>
APPENDIX E:
DEPOSITION TESTIMONY OF POLICE OFFICIALS, 2004 RNC

There were at least four depositions of New York City Police Department officials regarding the preparation for, and policing of, demonstrations at the 2004 Republican National Convention in the lawsuit, *Schiller v City of New York*. The following table lists the witness's name, title, and dates of deposition, for testimony reviewed as background material for this study. Testimony of other witnesses was not available: Chief Monahan, Inspector Essig, and Chief Graham.

**TABLE 11**
DEPOSITION TESTIMONY OF POLICE, 2004 RNC

<table>
<thead>
<tr>
<th>DEPONENT</th>
<th>TITLE</th>
<th>DATE</th>
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<tbody>
<tr>
<td>David Cohen</td>
<td>Intelligence Division, NYPD</td>
<td>March 28, 2007</td>
</tr>
<tr>
<td>John Colgan</td>
<td>Assistant Chief of Police, NYPD, and Commanding Officer of the Criminal Justice Bureau, NYPD</td>
<td>April 25, 2006</td>
</tr>
<tr>
<td>Patrick Devlin</td>
<td>Commanding Officer of the Criminal Justice Bureau, NYPD</td>
<td>June 13, 20, 23 and 28, 2006</td>
</tr>
<tr>
<td>Joseph Esposito</td>
<td>Chief of Police, NYPD</td>
<td>July 6, 14 and 21, 2006</td>
</tr>
</tbody>
</table>
APPENDIX F:

LIST OF SELECTED DOCUMENTS RELEASED BY THE NYPD

1. Monthly Committee Report for the NYPD Mass Arrest/Prisoner Processing Subcommittee, dated May 4, 2004


3. RNC Arrest Worksheet, dated September 3, 2004

4. Major Event Application, dated June 21, 2004 (regarding permit applications to gather in outdoor spaces during the 2004 Republican National Convention)

5. 2004 Republican National Convention Executive Summary, June 24, 2004, Table of Contents

6. Memo of Agreement between Hudson River Park Trust and New York Police Department, signed July 26, 2004

7. Arrest-to-Arraignment Time and Arrest Volume, All Manhattan Arrests
REFERENCES


———. 2002 How Democratic is the American Constitution? New Haven, CT: Yale University Press.


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Constitutions

U.S. Const., amend. I (1791).

Cases


Aptheker v. Secretary of State, 378 U.S. 500 (1964)

Black Tea Society v. Boston, 378 F.3d 8 (1st Cir. 2004)

Blue v. Revels, 441 F. Supp. 301 (M.D. Fla. 1977)


Chavez v. Arizona, 123 Ariz. 538 (1979)


Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571 (9th Cir. 2010) (en banc)


Gilbert v. Medical Economics, 665 F.2d 305 (10th Cir. 1981)

Gitlow v. New York, 268 U.S. 652 (1925)

Gutman v. New York City, Stauber v. New York City, and Conrad v. New York City, consolidated cases, S.D.N.Y. Index Nos. 03 Civ. 9162, 9163 and 9164

Hague v. CIO, 307 U.S. 496 (1939)

Handschi v. Special Services Division (U.S.D.C., Southern District of New York, Index No. 71 Civ. 2203 (CSH) (decisions in 1985 and 2008)


Kent v. Dulles, 357 U.S. 116 (1958)


Menotti v. Seattle, 409 F.3d 1113 (9th Cir. 2005)

McCreary County v. ACLU, 545 U.S. 544 (2005)

NAACP v. Alabama, 357 U.S. 449 (1958)


Planned Parenthood of Columbia/Willamette v. Am. Coalition of Life Activists, 290 F.3d 1058 (9th Cir. 2002)


Rosenbloom v. Metromedia, 403 U.S. 29 (1971)


Schiller v. New York and Dinler v. New York, consolidated cases, S.D.N.Y. Index Nos. 04 Civ. 07921 and 07922

Shulman v. Group W Productions, 944 P.2d 469 (Calif. 1998)


United for Peace and Justice v. Bloomberg (State Supreme Court, New York County, Index No. 111893/04)


U.S. v. Cassel, 408 F.3d 622 (2005)

Van Orden v. Perry, 545 U.S. 677 (2005)