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## THE “THREAT OF TERRORISM” AND THE RIGHT TO THE CIT

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Peter MARCUSE

## **Abstract**

Restrictions on the everyday use of public space; restrictions on access to public buildings; restrictions on political expression and assembly for political purposes; restrictions on the freedom of immigrants to use public facilities and services in the city; increased segregation, exclusion, and concentrated decentralization of residences and economic activities are all key examples of the way the false threat of terrorism has been used to restrict rights to the city. The Right to the City has never been fully recognized in modern times. The false response to the threat of terrorism has made its realization even more remote.

**KEYWORDS:** Security, manhattan, responses, terrorism, post 9/11, right to the city, pretext, urban

## THE “THREAT OF TERRORISM” AND THE RIGHT TO THE CITY

*Peter Marcuse*

### INTRODUCTION AND SUMMARY: CONCEPTUAL ISSUES

Security in the face of a declared threat of terrorism dominates much of the discussion about city life in the United States today, with frequent reference to the events of September 11, 2001 (“September 11” or “9/11”). Do cities give appropriate weight to the threat of terrorism after 9/11? Is the terrorist threat in fact a product of 9/11? How have cities and urban planning changed post-9/11, and how is terrorism related to those changes?

The basic argument of this paper is that whatever has changed about the actual threat of terrorism since 9/11, a great deal has changed in that which is done in its name. I argue that there have been both legitimate and false responses to the perceived threat. The impact of the legitimate response is almost trivial, representing more of a continuation of trends already in place before 9/11 rather than something new. In contrast, the impact of the false response has been substantial. The false response has used the threat of terrorism as a pretext to pursue an agenda that has nothing to do with physical safety or protection against terrorism, but is directed instead at winning elections, restricting debate and dissent, and maintaining tight political control over the range of democratic processes.<sup>1</sup> In New York City, many such agendas have related to changes in real estate values in lower Manhattan. In general, however, the implicit agenda has been to increase the political control of dissent, to limit debate about the general direction of certain policies, and to control the use of public space for democratic but dissident purposes. That implicit agenda has been advanced since 9/11 under the pretext of the threat of terrorism, not in legitimate

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1. The sharpest statement of this position that I have found is in a film shown at the 2005 Cannes film festival: “The Power of Nightmares” by filmmaker and senior BBC producer Adam Curtis. According to one reviewer, “[i]n his film, Curtis argues that Bush and Blair have used what he says is the largely illusory fear of terror and hidden webs of organized evil following the September 11, 2001, attacks to reinforce their authority and rally their nations.” Erik Kirschbaum, *UK Film at Cannes Says Terror Fears Exaggerated*, REUTERS, May 14, 2005.

response to it. I do not, however, claim that these limitations on the use of public space, and the neo-conservative program with which these limitations are connected are new or solely related to 9/11; again, the pattern precedes 9/11, although it has since intensified.<sup>2</sup>

Let me begin by specifying what I mean by legitimate and false responses to terrorism:

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2. For an overview of the origins of neo-conservatism, see IRVING KRISTOL, *NEOCONSERVATISM: THE AUTOBIOGRAPHY OF AN IDEA* (1999). For a critical view, see STEPHEN ERIC BRONNER, *Constructing Neo-Conservatism*, LOGOS, Spring 2004, at 7, available at [http://www.logosjournal.com/issue\\_3.2/bronner.htm](http://www.logosjournal.com/issue_3.2/bronner.htm) (last visited Oct. 26, 2005).

	TYPE OF RESPONSE	DEFINITION	EXAMPLES
Legitimate	Targeted responses	Directed at grounded risks, regardless of costs	<b>Efficient:</b> metal detectors at airports <b>Inefficient:</b> shoe removal at airports
	Balanced responses	Attempting to balance risks against economic and civil rights costs	Surveillance cameras at entries to public buildings; inefficient targeted responses
False	Spillover responses	Expanding the meaning of "security"	No Loitering signs at train stations
	Induced responses	Building a climate justifying unrelated responses	Ethnic profiling, immigrant restrictions, election rhetoric, "security" measures unrelated to safety
	Pretext responses	Directly justifying unrelated responses	Constrained assemblies, Iraq

*Targeted responses* are effective responses intended to eliminate grounded threats of terrorism. The goal of targeted responses is to

eliminate essentially all risk from the targeted threat. Targeted responses share two characteristics: they are based substantially on the belief that the risks at which they are directed are real, and the measures aimed at guarding against those risks use the minimum resources and cause the minimum disruption needed to achieve their objectives. Metal detectors at airports would seem to fall into this category; other airport security measures (such as taking off one's shoes or having dogs sniff passengers or luggage), may be ineffective or inefficient. At the margin, some balancing of costs and benefits is also involved; a very complex security measure that reduces risk only to a trivial extent may not be appropriate. But the decision as to what measures are appropriate is, at least in the first instance, a technical one, in which the capabilities of various technologies and the evaluation of intelligence information are key. I claim no expertise on this decision, even though some of the measures in effect today seem to me to defy common sense.

*Balanced responses* take into account the absolute costs of eliminating grounded threats, and attempt to strike a balance between physical safety and economic or social cost. The harm that could be done at a crowded subway station in New York City, for instance, might be great, but the disruption caused by any serious measure to avoid the risk of that harm would be tremendous. As a result, essentially no action is taken. For example, posting signs that say, "If You See Something, Say Something" in train stations is not likely to eliminate much risk. The importance of large numbers of people getting to work without a huge waste of time outbalances the protection that any further measures might provide against the risks involved.

Beyond these two types of legitimate responses, other measures justified under the banner of responses to terrorism in fact are not reasonably related to such threats. These false responses might be separated into three different, but interrelated, categories. *Spillover responses* are measures that have nothing to do with terrorism; rather, they simply extend anti-terror control functions into areas unrelated to terrorism. These responses include: no loitering signs in public spaces that are actually aimed at drunkenness or petty crime; metal detectors in school buildings; and security measures in office buildings that are not plausible targets of terrorist activity. *Induced responses* contribute to a vicious circle in which insecurity is first heightened by measures adopted in the name of security, and then the insecurity is addressed by measures that simply reduce the insecurity that those very measures created. Proclaiming an orange alert, and then posting armed National Guard personnel conspicuously on random trains, is an example. The alert induces insecurity, that the sight of the guard is intended to assuage.

Finally, *pretext responses* are the most pernicious of the false responses to the threat of terrorism, for they are unconnected with the threat. Instead, they are simply used to impose restrictions on conduct that is otherwise an essential component of democracy. The classic examples are restrictions on public assemblies, demonstrations, parades, and mass meetings. Although persons enacting these restrictions claim they are justified as antiterrorism measures, these restrictions in fact implement the Bush administration's desire to restrict protest and maintain control.

Private and public responses to the threat of terrorism range from legitimate to false. The line between them is not always clear, except in extreme cases. The stereotyping of what a terrorist looks like, with all its racial and religious overtones, is clearly a false response, as is stockpiling duct tape as a defense against biological terrorism.<sup>3</sup> And it appears that individuals in suburban communities are more likely than their urban counterparts to alter their habits in response to the threat of terrorism, to be suspicious of strangers, to post police in public spaces and at public events, and to guard their public buildings even though the threat is presumably greater in dense urban centers.

There are, however, changes in cities that can be traced back to legitimate responses. This paper goes on to consider these changes below, and tries to separate out legitimate from false responses.

For important urban buildings and locations that may seriously be considered targets for attack, some controls on entry may be rational, but controls on entry were a common feature of pre-9/11 life, as evidenced by gated communities, card entry limits on private office buildings, and metal detectors in criminal courts. Increases in surveillance measures might be inherent to the heightened awareness of risks after 9/11. Yet there has been no apparent lessening of the value accruing to height, and skyscrapers are continuing to be built in cities seeking global status around the world. The limitations on height are more a function of the economics of construction and occupancy<sup>4</sup> than of fear of attack.<sup>5</sup> The economics may indeed have shifted slightly, due to concerns about structural strength and emergency exit arrangements, but that impact seems to be marginal. Some additional

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3. I would go further and argue that the election of George W. Bush was in large part a result of a false response to the threat of terrorism, but that brings us outside the scope of this article.

4. CAROL WILLIS, *FORM FOLLOWS FINANCE* 45-46 (1995). According to Willis, the principle of "economic height" refers to "the number of stories that would produce the highest rate on the money invested." *Id.*

5. The vacancy rate for buildings over fifty stories in Manhattan is only slightly higher than that for all office buildings today. See Alan Krueger, *The Commercial Resilience of New York is Clear Three Years After the 9/11 Attacks*, N.Y. TIMES, Sept. 16, 2004, at C2.

security measures might certainly be expected, and they may provide some marginally greater protection; others are wildly exaggerated, for reasons discussed below. Certainly the mass exodus from cities or city centers that some had expected after 9/11 did not take place.<sup>6</sup>

The sea change in the patterns of development that many expected after 9/11 did not occur. I concentrate on four areas in which significant change in cities is in fact taking place: first, the location of public investment within the city (this is unique to New York City but a direct consequence of 9/11); second, sprawl, flight from the city center, and decentralization of central business districts; third, changing patterns of polarization and inequality in cities; and fourth, changes in the nature and use of public space. This essay attempts to disentangle the causes and consequences of each of these four areas, focusing on how these responses relate to the threat of terrorism. This essay concludes with a comment on how all these changes affect what Henri Lefebvre, the noted French Marxist intellectual, called the “Right to the City.”<sup>7</sup>

Lefebvre makes a useful distinction between lived space and empirical space, between space as it is perceived and used by people and the external “objective” space as it is described by maps and planners and laws. The changes that have followed 9/11 are changes in lived space in the Lefebvre sense—that is, changes in the way space is used, by whom, and the way it affects the lives of people who either use or want to use it.

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6. For a discussion written shortly after 9/11 predicting an exodus from New York City, see Peter Marcuse, *Urban Form and Globalization after September 11: The View from New York*, 26 INT'L J. OF URB. & REGIONAL RES. 596 (2002).

7. HENRI LEFEBVRE, WRITINGS ON CITIES Part II (Eleonore Kofman & Elizabeth Lebas, eds. & trans., 1996).



## II. THE ACTUAL PATTERNS OF URBAN CHANGE TODAY

### A. Lower Manhattan vs. Midtown<sup>8</sup>

In New York City, there have been, at least since the nineteenth century, two central business districts: one in midtown, the other in lower Manhattan.<sup>9</sup> From a real estate point of view, these two business districts have been in competition with each other, with lower Manhattan as the loser for the last 50 years. This is the reason the World Trade Center was built in the first place: the Rockefeller investment in the Chase Manhattan Bank building in lower Manhattan needed the public push that the giant project was expected to provide to justify it as a real estate venture.<sup>10</sup> But lower Manhattan consistently lagged behind midtown Manhattan despite the Rockefeller initiatives, and after 9/11 even Chase moved many of its activities from downtown to its midtown locations. While the World Trade Center's presence ultimately gave lower Manhattan a boost, it was not sufficient to overcome the locational, social, and agglomeration advantages of midtown.

September 11, one would think, would change the relative position of lower Manhattan and midtown. Over 12,000,000 square feet of office space were destroyed or rendered unusable on that day. One might expect lower Manhattan to become less attractive to investors and potential tenants as a result of the attack, but one also might expect that the demand for the remaining space, so much being lost, would increase, if not immediately then at least in the middle run. Those that had found lower Manhattan to be an attractive location before 9/11 would presumably still find it attractive afterwards, the damage from 9/11 having been overcome. This increase in demand, however, has not materialized. Because of the

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8. For a general description of the events in New York City discussed below, see M. Christine Boyer, *Mediations on a Wounded Skyline and its Stratigraphies*, in *AFTER THE WORLD TRADE CENTER: RETHINKING NEW YORK CITY* 109-20 (Michael Sorkin & Sharon Zukin eds., 2002). For details on more current events not otherwise footnoted below, there are several websites that provide both historical and current information. For example, the Civic Alliance website, available at <http://www.civic-alliance.org>, is maintained by New York City civic organizations and planning professionals who have volunteered their time to stay abreast of developments affecting lower Manhattan after 9/11. The Municipal Art Society is a non-profit organization that focuses on New York City's urban design and planning, as is the Regional Planning Association, available at [www.rpa.org](http://www.rpa.org). The Gotham Gazette, published by the New York Citizens Union, is another comprehensive source for most of the issues discussed herein, and is available at [www.gothamgazette.com](http://www.gothamgazette.com)

9. *E.g.*, Marcuse, *supra* note 6, at 598.

10. See ROBERT FITCH, *THE ASSASSINATION OF NEW YORK* 51 (1993). The initial plan for the World Trade Center called for it to be located next to Chase Manhattan Bank. *Id.*

political necessity of showing that the attack on the World Trade Center was not a fatal blow to the city and state and country, and that terrorism would not have a lasting effect, billions of dollars were poured into a rebuilding process in lower Manhattan. Substantial subsidies, outright grants, and low-interest-rate and tax-free loans from special Liberty Bond issues were made available to businesses that either remained in or moved to lower Manhattan, and even to those willing to commit to staying there. Still, despite these subsidies, the vacancy rate in lower Manhattan is 16.8 percent, compared to 11.3 percent in midtown.<sup>11</sup>

But the political interests of Mayor Bloomberg and Governor Pataki, coupled with pressure from investors in lower Manhattan real estate, have required continuing public investment in lower Manhattan. The countervailing pressures from investors in midtown real estate and the continuing attractiveness of midtown are substantial; thus, Bank of America, which was built in midtown, obtained Liberty Bond financing despite its location. But one crucial decision went the other way: the terminus of a direct rail link to JFK airport. The transportation infrastructure is in fact denser in midtown and both the available linkages and the number of directly accessible locations of interest to air travelers are greater in midtown. Despite this, public investment will go to a vastly expensive transportation hub in lower Manhattan. Considerations of efficiency would have dictated otherwise, especially after the physical impact of 9/11 shifted occupancy from lower Manhattan to midtown. The political use of 9/11, not the event itself, led to this result.

### **B. Movement away from the city, decentralization.**

In the immediate aftermath of 9/11, a number of major firms moved out of lower Manhattan—and not just businesses that were directly affected by the World Trade Center destruction. Other businesses that had previously preferred lower Manhattan expanded or built up secondary or redundant centers.<sup>12</sup> And many people expected other cities throughout the country, and even throughout the world, to follow this pattern. Because of the supposed vulnerability of centrally-located operations, many functions were expected to be set up away from city centers, either in locations elsewhere in the metropolitan region or far away from older centers. TIAA-CREF, for instance, the biggest pension fund in the United States,

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11. See, e.g., MANHATTAN OFFICE SPACE, at <http://www.manhattanofficespace.com> (last visited Oct. 26, 2005).

12. Marcuse, *supra* note 6, at 597-98.

moved its offices to Charlotte, Virginia.<sup>13</sup>

That pattern of movement away from city centers did occur. I call this pattern “concentrated decentralization.”<sup>14</sup> This pattern of concentrated decentralization is generally recognized as long-standing.<sup>15</sup> Its residential manifestation is suburban sprawl. Its spatial manifestation is in edge cities and the growth of business clusters outside central cities but still within metropolitan regions—for example, White Plains, Princeton, and Stamford in the New York City region.<sup>16</sup> Its real estate manifestation is a sharp decline in property values in downtown areas in all but the largest and strongest cities. Its political manifestation is in policies of smart growth and in the economic revitalization of downtown areas through tax concessions, public loans and grants, limitations on sprawl, and the flexible application of land use controls. An induced threat of terrorism has caused some wildly unbalanced responses in the process of decentralization. For example, after the South Central Connecticut Regional Water Authority hired an architect to design its new water filtration plant in the outskirts of New Haven, the Authority tried to keep the location a secret out of concern that it would attract terrorists.<sup>17</sup>

But these are mostly patterns of long duration. The redevelopment and urban renewal programs of the 1950s and 1960s represent early examples of patterns of concentrated decentralization. These programs reflected a shift in economic activity from manufacturing to services, which changed the economic basis on which many downtowns had been built. They have to do with an increase in the centralization of control, enabled (but not caused) by technological advances that permitted an efficient increase in the span of control, and a process of globalization that permitted greater and greater accumulations of capital.<sup>18</sup> They have to do with the spatial patterns produced by that centralization of control, both within and among cities, so that a few downtowns grew rapidly while others declined abruptly. They have to do with the decentralization that communications and advanced transportation technologies made both possible and desirable. They have to do with real estate markets and labor markets that reflect these developments. September 11 focused attention on them, and in New

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13. *See id.* at 599.

14. *Id.* at 596.

15. *See id.* at 599.

16. *Id.*

17. Fred A. Bernstein, *In My Backyard, Please: The Infrastructure Beautiful Movement*, N.Y. TIMES, Feb. 27, 2005, at 37.

18. For a fuller discussion of the impact of globalization on city form, see Peter Marcuse & Ronald van Kempen, *Introduction* to GLOBALIZING CITIES: A NEW SPATIAL ORDER? 1, 1 (Peter Marcuse & Ronald van Kempen eds., 1999).

York City physical destruction accentuated their effect. But the vacancy rates in lower Manhattan were high well before 9/11, and vacancy rates are still high in the many buildings in lower Manhattan that were not physically damaged.<sup>19</sup>

For businesses, and increasingly for residences, the pattern of decentralization is not one of shapeless sprawl. Agglomeration economies, the benefits of being near other activities in the same business sector, remain important and lead to the substantial clustering of business activities both inside and outside the central city of metropolitan areas. The availability of support service businesses (such as accounting, law, or financial firms) that are only profitable if there is sufficient market for them reinforces this pattern of concentrated decentralization. On the residential side, public facilities with cultural, entertainment, and environmental amenities that can only be provided where there is sufficient demand reinforces this pattern. Thus, the pattern is appropriately called “concentrated” decentralization.<sup>20</sup> It is a pattern in which metropolitan areas grow as a whole, with growing clusters outside city centers and the decline of the centers themselves.

This pattern of concentrated decentralization has many undesirable consequences, coupled with rather limited advantages, both of which are fairly well known. The pattern increases segregation by changing the pattern of a white noose around a black city perhaps to be more nearly a white center, a black ring in inner suburbs, and a more extended white noose further from the center with more concentrated clusters of activity within this outer ring. The pattern thus increases inequality and polarization within metropolitan areas. Decentralization wastes land and destroys the natural environment; the arguments against sprawl are familiar.<sup>21</sup> Decentralization has economic costs in the form of increased demand for transportation investment and increased claims on people’s time. On the other hand, it may have some economic advantages for individual business firms, which may be able to put land to more cost-efficient uses.

But both the positive and negative effects of the pattern of concentrated decentralization pre-date 9/11, and have only been marginally accentuated

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19. For example, Seven World Trade Center, the first major new construction in the area of impact of 9/11, is still seeking tenants. *See, e.g.*, David W. Dunlap, *Rising Above Ground Zero, Tower Slowly Takes Shape*, N.Y. TIMES, May 5, 2004, at B3. Thus far, the only occupant is the developer himself. *Id.*

20. *See supra* note 14 and accompanying text.

21. *See, e.g.*, Mark Fina & Leonard Shabman, *Some Unconventional Thoughts on Sprawl*, 23 WM. & MARY ENVTL. L. & POL’Y REV. 739, 739-40 (1999).

by it.

### C. Polarization and exclusion

After 9/11, limitations on access to various spaces in the city increased. In less dense areas, there are gated communities; in cities like New York, the equivalents are luxury high-rises, doorman condominiums, and mega-projects, where access is as tightly controlled. Only those that live or have business in these places (and can prove it) can gain access. The result is a sharp reflection of social and economic status in space; the line between those who are entitled to enter and those who are excluded is sharp. Sociologists have spoken of the abdication of the wealthy from the city;<sup>22</sup> many have described the segregated pattern of residence in gated communities;<sup>23</sup> and the ghettos of the poor are well known.<sup>24</sup> The formal justification for the imposition of these restrictions has long been “security.” But 9/11 has given a presumed legitimacy to the term “security” that overrides concerns about racial segregation, ethnic profiling, and economic discrimination—what is called above the spillover response.

As with suburbanization and sprawl, the pattern of concentrated decentralization long antedates 9/11. It existed before the threat of terrorism was in the national consciousness. September 11, however, substantially hardened the pattern and probably extended its imposition.

In the process, the term “security” has undergone a substantial shift in meaning and focus. In its application to the travails of urban life, it used to refer to protection against criminal conduct like mugging, theft, burglary, and rape. Today, the definition of “security” includes protection against a perceived threat of terrorism. At least in the United States, the term “security” has always been used as a code word for protection against blacks and the poor, the homeless and the different, and has always reinforced the momentum of segregation and exclusion. Currently, “security” is used even more broadly as a means of social control.<sup>25</sup>

A sign hanging in the railroad station in Bridgeport, Connecticut, reads

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22. See, e.g., Robert B. Reich, *Secession of the Successful*, N.Y. TIMES MAG., Jan. 20, 1991, at 16.

23. E.g., SETHA LOW, BEHIND THE GATES: LIFE, SECURITY, AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA 11 (2003) (noting that “[g]ated residential communities . . . intensify social segregation, racism, and exclusionary land use practices”).

24. For a classic study of the phenomenon of the ghetto, see KENNETH B. CLARK, DARK GHETTO: DILEMMAS OF SOCIAL POWER (1965). The most thorough, current account is offered in DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID: SEGREGATION AND THE MAKING OF THE UNDERCLASS 140-44, 160-62 (1993).

25. See Stephen Graham, *Introduction*, in CITIES, WAR, AND TERRORISM: TOWARDS AN URBAN GEOPOLITICS 1, 3-4 (Stephen Graham ed., 2004).

“For Security Reasons, No Loitering.” Five years ago, such a sign would have seemed strange, or at most interpreted as being aimed at the homeless or at drunks, and enforcement would have been narrowly targeted. Today, the police are routinely present at the train station, and the sign is interpreted as a reference to the threat of terrorism rather than to the harmless loitering of the homeless or drunk—again, this shift is an example of the spill-over response to 9/11. Insecurity, in the deeper ontological sense, resulting from living in what is seen as a “risk society,”<sup>26</sup> underlies both the exaggerated fear of crime and the susceptibility to the manipulation of the fear of terrorism.<sup>27</sup>

The false uses of the threat of security are particularly noticeable in immigrant communities in the cities. The impact is particularly strong on those who may have questions about their legal status, perhaps because they have overstayed their visa or violated some other administrative law. But it also affects immigrants where there is no question about their legal status. These immigrants, too, are questioned, stopped, and viewed warily by police and other officials. In effect, the false threat of terrorism turns neighborhoods where immigrants are concentrated into defensive refuges in which their residents have a sense of security and belonging increasingly different from what they feel elsewhere. “If You See Something, Say Something” can have a quite different impact, depending on who you are and where you are. Racial and ethnic profiling may not be official policy, but its reality is everywhere for those of color or who have different religions or beliefs or habits.<sup>28</sup>

#### D. The uses of public space

The impact of the threat of terrorism on public spaces in cities has been substantial. Lefebvre viewed public space as representative of the physical nexus of a humane and urban life, as a form of lived space in which the right to the city could be exercised.<sup>29</sup> At her confirmation hearing,

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26. See, e.g., ULRICH BECK, *RISK SOCIETY: TOWARDS A NEW MODERNITY* 9 (Mark Ritter trans., 1992).

27. Peter Marcuse, *Die Manipulation der Kriminalitätsangst: Anti-Terrorismus als Verlagerung der Unsicherheit nach dem 11. September*, in *KRIMINALITÄT UND SICHERHEITSPOLITIK: ANALYSEN AUS LONDON, PARIS, BERLIN UND NEW YORK* 89, 89-102 (Sylke Nissen ed., 2003).

28. See, e.g. Lee Epstein et al., *The Supreme Court During Crisis: How War Affects Only Non-War Cases*, 80 N.Y.U. L. REV. 1, 16 n.56 (2005); Teresa A. Miller, *Blurring the Boundaries Between Immigration and Crime control After September 11*, 25 B.C. THIRD WORLD L.J. 81, 102-03 (2005).

29. HENRI LEFEBVRE, *THE PRODUCTION OF SPACE* 93-96 (Donald Nicholson-Smith trans., 1991); see also LEFEBVRE, *WRITINGS ON CITIES*, *supra* note 7, at 236-37 (discussing

Secretary of State Condoleeza Rice quoted the “town square test” definition of democracy advanced by Israeli politician Nathan Sharansky: “if a person cannot walk into the middle of the town square and express his or her views without fear of arrest, imprisonment or physical harm, then that person is living in a fear society, not a free society.”<sup>30</sup> In this view, which harkens back to a view that sees public space, the agora, the forum, as central to democracy, the openness of public spaces becomes the essence of democracy. It is collective action, not individual action, communicative action, not self-expression, which is at the core of the democratic use of public space.<sup>31</sup>

I use the phrase “public space” in the lived sense, not in the legal sense. This view implies a broader conception of public space than a formal legal one that looks at ownership as the defining criteria for publicness. I mean public space in its social sense, space that is lived as open and communicative, seen and felt and treated by most as public, without regard to any particular form of ownership or physical arrangement.

I am concerned with those spaces that traditionally might be considered available or suitable for public discussion of common concerns, and specifically for the expression of political opinions. One might argue that these are spaces in which the rights to free speech and freedom of assembly under our Constitution are guaranteed.<sup>32</sup> The complexities of formal

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the role that public space plays in preserving the right to the city).

30. See, e.g., Roger Cohen, *A View of Democracy's Responsibilities, Forged in Totalitarianism's Prisons*, N.Y. TIMES, Feb. 12, 2005, at B7.

31. Thomas McCarthy, *Systems Theory: Complexity and Democracy*, in *ESSAYS ON JÜRGEN HABERMAS'S THEORY OF COMMUNICATIVE ACTION* 132-33 (Axel Honneth & Hans Joas eds., Jeremy Gaines & Doris L. Jones trans., 1999).

32. One might thus conceive of six legal forms of ownership of public space. Here I provide a typical example of each of the six legal forms of ownership of public space:

- Public ownership, public function, public use (streets);
- Public ownership, public function, administrative use (city halls);
- Public ownership, private function, private use (space leased to commercial establishments);
- Private ownership, public function, public use (airports, gated communities, zoning bonus private plazas, community benefit facilities);
- Private ownership, private function, public use (cafes, places of public accommodations); and
- Private ownership, private use (homes).

In each category, there is a wide range of situations that affect the use of public space—depending on, among other things, size, the extent of public financing, and the public purpose of the use. Under public function, I would include eight uses of public spaces:

- Organized democratic activity;
- Political communication;
- Symbolism;
- Sociability/diversity;

definition and legal interpretation are substantial, but I want to raise the issues of the use of public space as these issues affect both city planning and the uses of public space in cities in the United States today as matters of policy and political concern, not as legal matters.

The following are classic examples of the kind of public spaces to which I refer: the agora of Athens, as to its (limited range of) citizens; the squares of Rome, as that in which Mark Anthony denounced Brutus, at least in Shakespeare's play<sup>33</sup>; the Plaza de Mayo in Buenos Aires in which the mothers of the disappeared protested the dictatorship;<sup>34</sup> the steps of the Lincoln Memorial in Washington, D.C. where Martin Luther King, Jr., gave his famous "I Have a Dream" speech<sup>35</sup>; the streets of Leipzig where protesters marched and helped precipitate the events that ultimately led to the downfall of the East German regime;<sup>36</sup> the streets of Seattle, where protesters raised discussions of globalization to a new level of awareness,<sup>37</sup> and, most recently, perhaps, the square in front of Parliament in Kiev, where masses of people camped to bring down a falsely elected president.<sup>38</sup>

What is the situation in regard to such spaces today, in a city like New York, after 9/11? One concluding example may suffice: the use of the streets of New York City, Union Square, and Central Park—public spaces by anyone's definition—during the recent Republican Convention.<sup>39</sup>

There were approximately 400,000 protestors who wanted to demonstrate their objections to the Bush agenda in a public place where

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- Recreation;
  - Environmental protection;
  - Promotion of efficient urban uses; and
  - Promotion of efficient economic uses.

33. See WILLIAM SHAKESPEARE, *JULIUS CAESAR* (Washington Square Press 2004) (1623).

34. See, e.g., Daniel W. Schwartz, *Rectifying Twenty-Five Years of Material Breach: Argentina and the Legacy of the "Dirty War" in International Law*, 18 EMORY INT'L L. REV. 317, 364 n.295 (2004).

35. See MARTIN LUTHER KING, JR., *A TESTAMENT OF HOPE: THE ESSENTIAL WRITINGS AND SPEECHES OF MARTIN LUTHER KING, JR.*, 217 (James M. Washington ed., First Hapercollins Paperback 1991) (1986).

36. See, e.g., PETER MARCUSE, *MISSING MARX: A PERSONAL AND POLITICAL JOURNAL OF A YEAR IN EAST GERMANY, 1989-1990* 16-17 (1991). The peaceful ending of the East German Regime was, to some extent, decided when German conductor Kurt Mazur convinced the central authorities to treat the streets as public spaces and permit the marches. *Id.* at 66-67.

37. See Anupshah, *W To Protests in Seattle*, GLOBAL ISSUES THAT AFFECT EVERYONE, at <http://www.globalissues.org/Traderelated/Seattle.asp> (Feb. 18, 2001).

38. See *Kiev Crowds Circle President's HQ*, BBC NEWS, at <http://news.bbc.co.uk/2/hi/europe/4036867.stm> (Nov. 24, 2004).

39. I was a participant in the events described below.



they could be widely heard, and particularly by those attending the Republican convention. After long negotiations, the organizers of the protest and city officials finally agreed on a march-route up Seventh Avenue, and a permit was secured. The organizers hoped to end the march with a rally at the Great Meadow in Central Park, where hundreds of thousands had gathered on previous occasions for everything from rock concerts to anti-war protests. But the City said no, asserting that such a rally would endanger the grass on the Meadow.<sup>40</sup> Court appeals failed.<sup>41</sup> Ultimately, there was no rally.

And what of the march? It did indeed go up Seventh Avenue, from Fourteenth Street to Thirty-Fourth Street, then turned towards Union Square where it ended. Police barricades lined the entire march route. Entry and exit onto Seventh Avenue were blocked except below Fourteenth Street. One could neither join nor leave the march except at locations where police permitted it. Surveillance was intense and hi-tech, and the police were everywhere. Signs or banners on wooden sticks were prohibited, but cardboard tubes attached to signs were permitted. The police asked marchers not to bring backpacks and told them that all bags would be subject to inspection at the discretion of the police. At the formal end of the march, the police told marchers to keep moving; no demonstration was permitted. These limitations, justified in the name of avoiding the threat of terrorism and violence (which, in my opinion, was more a pretext than a spillover response), were visible everywhere. The marchers were peaceful; there were only a handful of arrests, and those were only on minor charges. Many participants later found their way to the Great Meadow and peacefully picnicked or broke into song. The police watched but did not interfere. For the Mayor, this was a successfully handled protest, often cited in the City's bid for the 2012 Olympics as evidence that it could provide effective security against any threat of terrorism.

How did it feel to participate? The answer only came into focus after a few days had passed. As the march proceeded up Seventh Avenue, protesters claimed their right to the city, chanting "Whose Streets? Our Streets! Whose Streets? Our Streets!" This was democracy in action. It felt good, at the time.

But was it really democracy in action? Reflecting on the march, I realized that restrictions on the march demonstrated precisely that the

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40. See, e.g., Jim Dwyer, *A Protest in the Park? Showdown is Tomorrow*, N.Y. TIMES, Aug. 28, 2004, at B4.

41. See, e.g., *Sunday in the Park*, N.Y. TIMES, Aug. 27, 2004, at A20. Perhaps the appeals came too late – the city strung out the negotiations before a lawsuit was filed. *Id.*

streets were not “our” streets; that no “right to the city” had been exercised. The Mayor and the police dictated where assembly could take place; how and when and where and by whom the streets could be used; and whether the public parks could be used for the collective expression of political opinion. Whose streets? City officials’ complete domination over the use of public space in New York City clarified that these were their streets, not “our” streets, and that nothing could be done about it. Polls showed a substantial majority of New Yorkers favored allowing a rally on the Great Meadow but that did not matter. The officials’ actions conveyed that parks are for harmless picnics, not protests.

Yet a democratic use of public spaces requires the ability to organize in advance, to procure loudspeakers, to erect a platform, and to permit collective communication among large numbers of people. There needs to be a balance between the use of a city’s parks for recreation and streets for traffic, and their use for democratic collective purposes. That balance, however, was tipped far in the private direction, for the benefit of the attendees at the well-organized indoor Republican Convention; it did not favor those protesting that convention outside.

The issues around the use of public space for public purposes, and the appropriate response to the threat of terrorism in regulating their use, are not confined to New York City or the United States. Around the Reichstag in Berlin is a “Bannmeile,” an officially sign-posted mile of space in which demonstrations are prohibited.<sup>42</sup> The grounds are clearly public, and the restriction is enforced supposedly only when parliament is in session. But in reality, the police determine whether or not the restriction is enforced. Similarly, in Washington, D.C., arrangements for demonstrations and marches and assemblies are subject to ever increasing restrictions of time, place, and manner. Of course legitimate concerns demand a balance between rights of use and protection against terrorism. But, as New York City’s response to the Republican National Convention demonstrated, the line between legitimate balancing on the one side and, on the other side, false use of the threat of terrorism to limit the impact of actions unfavorable to the administration is increasingly suspect. A panel of the American Planning Association recently conceded that “[t]he fear of terrorism and the rush to protect against it has made the democracy of public space a victim.”<sup>43</sup> Good planners are doing what they can to make the restrictions on public space as inconspicuous and innocuous as possible. Planners,

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42. See, e.g., Abgeordnetenhaus Berlin, Bannmeile, at [http://www.parlament-berlin.de/archiv.nsf/aAlles/D73BD5A14D18137EC1256A550033ABBD/\\$File/Bannmeile.pdf](http://www.parlament-berlin.de/archiv.nsf/aAlles/D73BD5A14D18137EC1256A550033ABBD/$File/Bannmeile.pdf) (last visited Oct. 26, 2005) (noting that the Bannmeile is a demonstration-free zone).

43. See Karen Finucan, *Security That Works – Beautifully*, PLANNING, Mar. 2005, at 4.

however, are told they must adhere to the guidelines provided by city officials. Those guidelines, if they come from the authorities in charge of security, are never open for discussion. Thus, the security authorities have unilateral authority to determine the balance of uses and rights.

### III. THE RIGHT TO THE CITY AFTER 9/11

Lefebvre popularized the phrase “Right to the City” in the heady days of the late Sixties, when social movements were springing up all over the place, very visibly in Paris, claiming rights to use the city, live in the city, work in the city, agitate in the city, in peace. It was a radical, indeed revolutionary, phrase: people had the right to determine their own environment and living conditions, and neither government nor any other powers had the right to tell them what they could or could not do in the exercise of democracy. I interpret the Right to the City as a right to an urbane, a full, a rich, and a diverse life, and, while the right to the use of public space is perhaps a small part of that right to the city, it is a key component.

City planning is concerned with the physical space of cities. City planners believe that public spaces should be adequate, open, usable, and accessible to all. We see public spaces in a sense as the symbols of a democratic and open city. New York City has some great public spaces, including Central Park, Union Square, and much of the waterfront. The debate over the protests surrounding the Republican National Convention demonstrates that the presence of physically adequate public space is not enough to achieve that openness—that democracy—that urban planners want to see in cities. The management and control of space in the city, as well as its physical aspects, are at stake. New York has become a city of control; the powers that be, in the first instance the political authorities, rather than the people, determine how the city and its public spaces are used. In the controlled city, rights can best be exercised at home, in private, not in public.

And these limitations on public use are all legitimated in the name of “security.” The term “security” has become a catch-all to be defined at the discretion of the police and the professionals in homeland security. Was anyone really at risk from terrorism in New York City while the Republican convention was there? Certainly the protestors were not at risk; security measures were aimed at preventing them from endangering others. Were the conventioners at risk? Hardly, given that the event was held within the fortress created around Madison Square Garden, where access was tightly controlled and police, dogs, metal detectors, and helicopters were on hand. Was the danger from a few anarchists? No—none of the

marchers there were violent. But the word “security” has been cut off from its moorings in reality, and instead has become a mantra that mere citizens don’t even think about questioning. In the controlled city, use is by permit, not by right. So much for public space.

But the Right to the City has been under siege since before 9/11, and the false use of the threat of terrorism is only an accentuation of previously existing trends. The use of public authority to control the use of space in the city at the expense of its residents, the use of power to override the desires and needs of those with less power, has a long history. Robert Moses ran rough-shod over citizen opposition with his highway projects.<sup>44</sup> Urban renewal displaced thousands against their will.<sup>45</sup> Private urban renewal, gentrification, is supported by the city’s leadership despite its adverse impact on residents. Mega-projects, giant developments internalizing many aspects of city life (security, shopping, recreation facilities), are supported by the city as sources of tax revenue, regardless of the impact such projects have on the surrounding communities and the people they displace. The city uses taxes to subsidize global financial firms that will make the city “competitive,” although such actions may help only a minority of the city’s residents.

In broader terms, the situation is even worse. City officials want more than just control of particular streets or parks on particular days, they also want to control major changes in the city’s form and structure, with only the most limited participation by the voters. The two most recent examples are the rebuilding of lower Manhattan and the preparations for the 2012 Olympics. The City is using billions of dollars allocated to it by the federal government to deal with the consequences of 9/11 to subsidize real estate in lower Manhattan and to build a “one-seat ride” direct rail link to lower Manhattan from JFK airport. But these funds would be better directed towards affordable housing, new schools, subway improvements, and job expansion. The majority of the city lives outside of Manhattan in the outer boroughs; these areas have significant development needs. If the matter were put to a vote, the money might be differently spent. But the issue is not put to a vote. Most recently, the state has moved jobs from state offices

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44. E.g., Rachel D. Godsil, *Viewing the Cathedral From Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1847 (2004); Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J.L. & PUB. POL’Y 475, 479 (1997).

45. A classic description of the displacement caused by Moses’s projects in New York City is ROBERT A. CARO, *THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK* 777 (describing the condemnation of whole sections of the cities and the eviction of the residents of those areas) and *passim* (1974).

in Jamaica, Queens, where the residents had fought hard for investment, to lower Manhattan. These decisions are not made by the people of the city.

Indeed, the right to the city has long been in retreat. The medieval legal concept of “Stadt Luft macht freie”—city air produces freedom—is long gone.<sup>46</sup> Even in Germany, with all its sensitivity to restrictions on democracy, there are formal boundaries to the areas where demonstrations are permitted near the Reichstag,<sup>47</sup> and “dangerous places” are established by laws where normal restrictions on police stops are suspended.<sup>48</sup> The manipulation of the false threat of terrorism, the most recent manifestation of which has been the events surrounding the Republican Convention protests, are perhaps only the most striking and the most directly political signs of the retreat from the right to the city. The cordoning off of large sections of central Washington, D.C. for the inauguration is another sign of this retreat. Even without massive arrests, the precautions taken in the name of security devalue the right to use public space in the city.

In summary, key examples of the way the false threat of terrorism has been used to restrict rights to the city would include the following: restrictions on the everyday use of public space; restrictions on access to public buildings; restrictions on political expression and assembly for political purposes; restrictions on the freedom of immigrants to use public facilities and services in the city; increased segregation, exclusion, and concentrated decentralization of residences and economic activities and; restrictions on privacy and freedom from surveillance.

The Right to the City has never been fully recognized in modern times. The false response to the threat of terrorism has made its realization even more remote.

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46. Marcuse, *supra* note 6, at 602.

47. See Robert Leicht, *Die Feinde der Freiheit*, DIE ZEIT, Feb. 3, 2005, at 5, available at <http://www.zeit.de> (last visited July 15, 2005).

48. See Volker Eick, *Städtische Politik zwischen Bürgergesellschaft und Polizeistaat*, 453 AK - ANALYSE & KRITIK: ZEITUNG FÜR LINKE DEBATTE UND PRAXIS 20 (Aug. 30, 2001) (citing paragraph twenty-one of the General Security and Order Law) (on file with author).