The "Occupy Movement" and the Regulation of Public Spaces in the Next Generation of Protest

by Julia "Rita" McNeil Danish



A protest that started in a park in New York City in September of 2011 quickly and unexpectedly spread to urban centers across the country. Less than a month later, it was deemed to be an international movement expressing anger at the global financial system.[1] Earning the name "The Occupy Movement" from the willingness of its protestors to literally move into open spaces and set up residence, the movement immediately raised issues for local jurisdictions.

This article discusses the challenges faced by local jurisdictions by the Occupy Movement. It examines a selection of the approaches taken by municipalities across the country and the reaction of the courts, primarily federal, to these approaches. It is important to note that in most instances, the litigation has not concluded. There may be case law developing on preliminary injunctions, but the decisions invariably arise from trial courts. The attempts at regulating the public spaces occupied by the movement have not received the appellate review that is sure to follow.

The initial reaction to the Occupy Movement ranged from a *laissez faire* attitude to an embrace of the movement's ideals. Early in the movement's spread, the City of Los Angeles passed a resolution in support of the Occupy Movement and allowed 700 protesters to spend the night on the lawn of City Hall, in clear violation of local law.[2] Other jurisdictions simply monitored the situation, perhaps in the belief that the occupation would last only a few days or weeks. Within four months, the Occupy Movement in Austin, Texas progressed from a welcoming party at City Hall to removal of their encampment by police.[3] It took even less time—only two months—for matters to reach the boiling point in New York City; police cleared out a tent city in a predawn November sweep, eventually arresting more than 200 people.[4]

Problems Arise

Local officials soon found themselves faced with a growing list of complaints. Ranging from maintenance issues, to actual damage to public grounds and parks, the Occupy Movement began to be perceived as an inconvenience and detriment to the public welfare. The question was raised as to why the movement was permitted to exercise privileges in public spaces that most citizens could not. The issue of selective enforcement was very real, particularly for local government legal counsel. Finally, the round-the-clock encampments were creating an increasing burden on law enforcement during a time when most jurisdictions were dealing with severe fiscal constraints.

Attempts to de-escalate the occupation of the public space usually achieved little. Any government official that spent any time interacting with the protesters would readily report the greatest obstacle to a negotiated resolution: the protesters themselves could not reach a consensus on the goal of the occupation. A government representative could sit through hours of meetings involving debate and voting, and still not be sure if any progress was achieved through negotiation with the protesters. The protesters at the camps did not always share the same goals or even adhere to the movement's structure, to the extent it could be described as having a structure.[5] The mayor of Oakland, California was quoted as saying, "I was recently on a conference call of 18 cities across the country [that] had the same situation where, what had started as a political movement and a political encampment, ended up being an encampment that was no longer in control of the people who started them."[6]

Nearly two months after the Occupy Wall Street protestors first camped out in Zuccotti Park in New York City, au-

thorities across the nation, and internationally, moved to remove the protesters. A series of lawsuits were filed across the country, usually seeking at least injunctive relief. Attorneys for the Occupy Movement argued that local governments criminalized a fundamental right of protest. Local governments argued, in response, that health and safety concerns forced the clearing of parks and public spaces. They also pointed to the daily drain on crime-fighting resources that these protests created.[7]

A Review of the Law

The courts immediately determined that the actions by various jurisdictions to enforce regulations pertaining to public spaces triggered a First Amendment analysis. The best case scenario was that local municipal attorneys had the opportunity to review local laws, policies, and practices before the enforcement action occurred. Even more desirable would be that the analysis occurred when the policies and ordinances were drafted or amended. The least desirable situation was to review local laws and policies for the first time on the eve of enforcement or after a court challenge was filed. One effect of the Occupy Movement was to test the preparation and readiness of local jurisdictions to regulate expression in public spaces.

Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.[8] laid out the three-part inquiry that must occur whenever a determination is being made about whether First Amendment rights are violated. First, it must be determined whether the conduct or speech is protected by the First Amendment. Next, the courts will identify the nature of the forum in order to determine the extent to which the government's conduct may limit the conduct or speech. Finally, an assessment is made as to whether the justifications for restricting the conduct or speech satisfied the requisite standard.[9]

Regarding the first element, as lawsuits were filed across the country, the courts agreed with the protestors that tent cities and overnight camping were protected speech.[10] As to the nature of the forum, public spaces such as parks and sidewalks, were places which:

> have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.[11]

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The United States Supreme Court, in *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, made it very clear that, in traditional public forums, "the rights of the state to limit expressive activity are sharply circumscribed."[12]

For their part, local officials base the regulation of public spaces on the rationale expressed by the Supreme Court in *Heffron v. Int'l Soc. for Krishna Consciousness, Inc.*—that "the First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[13] This is generally understood to be the power of the government to place restrictions on the time, place, and manner of expression. To survive a First Amendment challenge, however, the time, place, and manner restrictions must be content-neutral, narrowly-tailored to serve a significant government interest, and leave open ample alternative channels of communication.[14] This is the standard that applies to the restriction of conduct or speech in a traditional public forum. In contrast, content-based regulations of expression are presumptively unconstitutional and must satisfy a strict scrutiny test.[15] In dealing with the Occupy Movement, the courts tailored the time, place, and manner standard to fit the circumstances. In Sacramento, California, the district court described a five-part First Amendment analysis, requiring that the regulation (1) be content neutral; (2) be narrowly-tailored; (3) support a substantial government purpose; (4) provide the regulator with constitutionally sufficient discretion; and (5) be constitutionally sufficient.[16]

The desire of the protesters to occupy spaces 24 hours-a-day, and sleep in tents, was not unique to the Occupy Movement. This had been previously addressed by the Supreme Court in *Clark v. Community for Creative Non-Violence* in 1984.[17] The Court found that a regulation of the National Park Service, prohibiting sleeping in tents overnight on National Parks property in Washington, D.C., was a legitimate and permitted time, place, and manner regulation. The *Clark* case is referenced repeatedly by district courts across the country. It should be read carefully and understood for the direction it provides for local jurisdictions, and for what it does not address. What is often lost, or at least overlooked, in the analysis of the *Clark* holding is that the National

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Park Service *allowed* the erection of two symbolic tent cities, and the Supreme Court assumed that sleeping in a tent was protected speech.[18] In *Clark*, the erection of tents as expression was not addressed, and the prohibition against sleeping in the park was upheld because it survived the time, place, and manner scrutiny.

Other Considerations

In the case involving Occupy OKC (Oklahoma City), the district court granted a temporary restraining order, but eventually denied the City a preliminary injunction.[19] In Oklahoma City, the protesters were initially granted a permit to stay in the municipal park overnight for a "political rally." In keeping with *Clark*, the permit was not renewed when it became apparent that the protesters were sleeping and camping in the park. Municipal ordinances and park regulations clearly established that sleeping overnight was not allowed without a permit.[20]

In addition, it is important not to review the enforcement policy in a vacuum. In New Haven, Connecticut, the district court denied injunctive relief and in doing so, referred in its analysis not only to the language of the regulation, but to the well-established practice of enforcement.[21] Courts will ask not only how the policy describes enforcement, but how enforcement has actually been undertaken in the past. The U.S. Supreme Court explained that,

> [i]t is true that when a state law has been authoritatively construed so as to render it constitutional, or a well-understood and uniformly applied practice has developed that has virtually the force of a judicial construction, the state law is read in light of those limits. That rule applies even if the face of the statute might not otherwise suggest the limits imposed."[22]

Accordingly, in Augustus, Maine, the court gave weight to the administrative interpretation of the regulation enforced against Occupy Augustus.[23]

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When reviewing the local laws and policies, the courts will determine if sufficient guidance is provided for those charged with enforcement. The Supreme Court has "required that a time, place, and manner regulation contain adequate standards to guide the official's decision and render it subject to effective judicial review."[24] Occupy Columbia obtained a preliminary injunction after the U.S. District Court in South Carolina criticized the policy justifying removal of the protesters for (1) lacking notice to the public; (2) lacking consistent application; (3) failing to provide clear guidance to law enforcement to ensure compliance; and (4) being vague and giving unbridled discretion to suppress speech.[25] Clear policies, supported by clear laws, and enforced in a manner that is even-handed and consistent, give local jurisdictions the best chance to withstand judicial review.

The lawsuits filed across the country also revealed nuances and weaknesses in local laws and regulations. Occupy Fresno in California successfully challenged a definition of "assemblage" as being more than ten people and a ban on the distribution of handbills. The district court there found neither was narrowly tailored and declared them unconstitutional.[26] In Minneapolis, prohibitions against chalking public property and against leaving personal property unattended were upheld. However, Occupy Minneapolis successfully challenged a prohibition against signage. The court found that permitting government-approved signage, but not protester signage, triggered content-based review.[27]

An interesting, if rather basic, lesson can be found in the Boise, Idaho protest. Occupy Boise was successful in obtaining injunctive relief when the district court determined that the enforcement action, removing a symbolic tent city, exceeded the scope of the regulatory policy.[28] Enforcement action should be based upon clear policies, and authorized by local ordinances or state law.

Conclusion

The body of law developing at the trial court level reaffirms the power of local jurisdictions to enforce reasonable regulations of public forums. Six months after first using protests and encampments, the Occupy Movement is seen as having lost momentum and has moved to the periphery of public discourse.[29] The Movement's detractors argue that it is leaderless and lacking in a real purpose, while its defenders posit that its "blended organizing model" is effecting a permanent change in the political landscape.[30] Supporters view it as a spur to the national dialogue on economic equality and a factor in the political debate involving tax policy and financial regulations.[31] Having been pushed out of parks and public spaces, the protestors are exploring new avenues of expression, including the occupation of sidewalks in New York.[32] Just as the appeal process still has much to say about the lasting effect of the Occupy Movement on First Amendment law, it will be some time before we know the legacy of the Movement.

As for best practices, a few common elements have run through the cases involving First Amendment review, and the success or failure in seeking injunctive relief:

- There should be well considered, narrowly-tailored regulations in place before any enforcement action.
- Provide clear, documented notice of these regulations to the public. The regulations should give clear guidance to law enforcement and limit the discretion of the regulator.
- The history of regulatory enforce-

ment should be able to withstand constitutional review and should comport with the intended enforcement in the present situation.

- It is recommended that the regulations and the enforcement actions leave room for alternative means of expressive conduct. Examples are sidewalks, leaflets, signs and the internet. Remember, in *Clark*, the National Park Service permitted a symbolic tent city.
- Finally, it is always helpful to have clear and realistic reasons when asked why the enforcement action is necessary. Gene Policinski of the First Amendment Center acknowledges that "real public mandates like safety and sanitation will resonate with judges."[33] The U.S. Supreme Court acknowledges that "it is clear that a State's interest in protecting the 'safety and convenience' of persons using a public forum is a valid governmental objective."[34]

The regulation of public spaces has not changed with the advent of the Occupy Movement. The movement drew the finer points of the First Amendment into sharper focus for many local jurisdictions. It is likely that the lessons learned will be useful as protest movements promise to continue to test not only the boundaries of the law, but the preparedness of local jurisdictions.

Notes

1. Karla Adam, *Occupy Wall Street protests go global*, The Washington Post, Oct. 15, 2011, at http://www.washingtonpost.com/world/europe/occupy-wall-street-protests-go-global/2011/10/15/gIQAp7kimL_story.html (last accessed May 11, 2012).
2. Jens Erik Gould, *How Occupy L.A. May Get the City to Go After the Banks*, Time, Oct. 24, 2011, at http://www.time.com/time/printout/0,8816,2097543,00.html (last accessed May 11, 2012).
3. Rick Hampson, *Occupy movement at crossroads*, USA Today, Feb. 05, 2012, at http://www.usatoday.com/news/nation/story/2012-02-05/occupy-wall-street-movement-camps-pack-up/52978308/1 (last accessed May 8, 2012).
4. Andrew Grossman, Alison Fox & Sean Gardner, *Wall Street Protesters Evicted From Camp*, The Wall Street Journal, Nov. 16, 2011, at http://online.wsj.com/article/SB10001424052970204190504577040563377026378.html (last accessed May 13, 2012).
5. *See, e.g.*, the findings of fact referred to in *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 U.S. Dist. LEXIS 142506 (W.D. Okla. Dec. 12, 2011): "Occupy OKC is a leaderless organization but has a leadership structure. The persons in leadership roles have changed over time. ... Membership in Occupy OKC is also fluid and primarily depends on self-identification or, perhaps, recognition by a person in a leadership role based on past participation..." *Id.* at *10,11,12.
6. Shannon Bond & Tom Burgis, *Authorities move against Occupy protests*, The Financial Times, Nov. 16, 2011, at http://www.ft.com/cms/s/0/fdd2f1e0-0f5b-11e1-88cc-00144feabdc0.html#axzz1ua6oPV9R (last accessed May 11, 2012).
7. Erika Niedowski, *Occupy protesters sue over free speech, force*, USA Today, Dec. 23, 2011, at http://www.usatoday.com/USCP/PNI/NEWS/2011-12-23-APU-SOccupyLawsuits_ST_U.htm (last accessed May 11, 2012).
8. 473 U.S. 788 (1985).
9. *Id.* at 797.
10. *See, e.g.*, Occupy Columbia v. Haley, No. 3:11-cv-03253-CMC, 2011 U.S. Dist. LEXIS 145115, 2011 WL 6318587 (D.S.C. Dec. 16, 2011); Freeman v. Morris, No. 11-cv-00452-NT, 2011 U.S. Dist. LEXIS 141930, 2011 WL 6139216 (D. Me. Dec. 7, 2011); Occupy Minneapolis v. County of Hennepin, No. 11-3412 (RHK/TNL), 2011 U.S. Dist. LEXIS 135646, 2011 WL 5878359 (D. Minn. Nov. 23, 2011); Occupy Ft. Myers v. City of Ft. Myers, No. 2:11-cv-00608-FtM-29DNF, 2011 U.S. Dist. LEXIS 131778, 2011 WL 5554034 (M.D. Fla. Nov. 15, 2011).
11. Hague v. Committee for Indus. Org., 307 U.S. 496, 515-16 (U.S. 1939).
12. 460 U.S. 37, 45 (1983).
13. 452 U.S. 640, 647 (1981).
14. Clark v. Community for Creative Non-Violence, 468 U.S. 288 (1984).
15. Carey v. Brown, 447 U.S. 455, 462-63, and 463 n. 7 (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 98-99 (1972).
16. Occupy Sacramento v. City of Sacramento, No. 2:11-cv-02873-MCE-GGH, 2011 U.S. Dist. LEXIS 128218, 2011 WL 5374748 (E.D. Cal. Nov. 4, 2011).
17. 468 U.S. 288 (1984) (the regulation prohibited "the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or . . . other structure . . . for sleeping or doing any digging or earth breaking or carrying on cooking activities").
18. *Id.* at 292-93.
19. Isbell v. City of Oklahoma City, No. CIV-11-1423-D, 2011 U.S. Dist. LEXIS 142506 (W.D. Okla. Dec. 12, 2011).
20. *Id.* ("In addition to minor incidents, such as public intoxication and noise complaints, a death occurred in a tent... *id.* at *17).
21. Mitchell v. City of New Haven, No. 3:12cv370 (MRK), 2012 U.S. Dist. LEXIS 49797 (D. Conn. Apr. 09, 2012).
22. Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 770 (1988).
23. Freeman v. Morris, No. 11-cv-00452-NT, 2011 U.S. Dist. LEXIS 141930, 2011 WL 6139216 (D. Me. Dec. 7, 2011).
24. Thomas v. Chicago Park Dist., 534 U.S. 316, 323 (2002) (citation omitted).
25. Occupy Columbia v. Haley, No. 3:11-cv-03253-CMC, 2011 U.S. Dist. LEXIS 145115, 2011 WL 6318587 (S.D. S.C. Dec. 16, 2011).
26. Fresno v. County of Fresno, 835 F. Supp. 2d (E.D. Cal. 2011).
27. Occupy Minneapolis v. County of Hennepin, No. 11-3412 (RHK/TNL), 2011 U.S. Dist. LEXIS 135646, 2011 WL 5878359 (D. Minn. Nov. 23, 2011).
28. Watters v. Otter, No. 1:12-CV-76-BLW, 2012 U.S. Dist. LEXIS 26589, 2012 WL 640941 (D. Idaho Feb. 26, 2012).
29. Michael S. Schmidt, *Less Visible Occupy Movement Looks for Staying Power*, The New York Times, Mar. 31, 2012, at http://www.nytimes.com/2012/04/01/us/for-occupy-movement-a-challenge-to-recapture-momentum.html (last accessed May 8, 2012).
30. Gina Glantz, *The 'Occupy' movement lives*, The Washington Post, Dec. 30, 2011, at http://www.washingtonpost.com/opinions/the-occupy-movement-

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Occupy Movement *Cont'd from page 9*

lives/2011/12/27/gIQAwCtNRP_story.html (last accessed May 8, 2012).
31. Meghan Barr, *Occupy Wall Street: 6 Months Later, What Has Occupy Protest Movement Achieved?*, The Huffington Post, Mar. 16, 2012, at http://www.huffingtonpost.com/2012/03/16/occupy-wall-street-6-months-later_n_1352752.html (last accessed May 8, 2012).
32. Colin Moynihan, *Evicted From Park, Occupy Protestors Take to the Sidewalks*, The New York Times, Apr. 12, 2012, at http://www.nytimes.com/2012/04/13/nyregion/evicted-from-park-occupy-protesters-take-to-the-sidewalks.html (last accessed May 8, 2012).
33. Gene Policinski, *Government must be careful with tactics against Occupy camps*, First Amendment Center, Mar. 02, 2012, at http://www.firstamendmentcenter.org/government-must-be-careful-with-tactics-against-occupy-camps (last accessed May 13, 2012).
34. Heffron v. Int'l Soc. for Krishna Consciousness, Inc., 452 U.S. 640, 650, (1981) (quoting *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972)). ML

Public Employer *Cont'd from page 13*

against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Age Discrimination in Employment Act of 1967 (prohibits age discrimination against workers 40 or older and also makes it illegal to retaliate against a person because the person complained about age discrimination), Title VII of the Civil Rights Act of 1964 (discrimination on the basis of race, color, religion, national origin, or sex prohbited; the law also makes it illegal to retaliate against a person because the person complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit), Genetic Information Nondiscrimination Act of 2008 (this makes it illegal to discriminate against employees or applicants because of genetic information).
8. Macy v. Holder, Appeal No. 0120120821, April 20, 2012 at http://www.eeoc.gov/decisions/0120120821%20Macy%20v%20DOJ%20ATF.txt (transgender complainant's complaint of discrimination based on gender identity, change of sex, and/or transgender status held cognizable under Title VII).
9. As an example, the Civil Service Reform Act of 1978, prohibits federal employees who have authority to take, direct others to take, recommend or approve any personnel action from discriminating against applicants and employees on the bases of race, color, sex, religion, national origin, age, disability, marital status or political affiliation and from discriminating against an applicant or employee on the basis of conduct which does not adversely affect the performance of the applicant or employee. The Office of Personnel Management has interpreted the prohibition of discrimination based on "conduct" to include discrimination based on sexual orientation. *See* U.S. Office of Personnel Management, Addressing Sexual Orientation Discrimination In Federal Civilian Employment, A Guide to Employee's Rights, at http://www.opm.gov/er/address2/Guide01.asp (last visited July 22, 2012) and U.S. Equal Employment Opportunity Commission, Discrimination Based on Sexual Orientation, Status as a Parent, Marital Status and Political Affiliation, at http://www.eeoc.gov/federal/otherprotections.cfm (last visited July 22, 2012). ML

Supreme Court *Cont'd from page 23*

rantless "sniff test" violated his right against unreasonable searches under the Fourth Amendment.

The Florida court granted the motion to suppress. "Contrary to popular belief, a 'sniff test' conducted at a private residence is not necessarily a casual affair in which a canine officer and dog approach the front door and the dog then performs a subtle 'sniff test' and signals an 'alert' if drugs are detected." Instead, it was a "public spectacle," "a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement departments." Accordingly, given the special status accorded a citizen's home under the Fourth Amendment, the "sniff test" was a "substantial government intrusion into the sanctity of the home" and constituted a search within the meaning of the Fourth Amendment. As such, the search had to be preceded by an evidentiary showing of probable cause. ML

Code Enforcement *Cont'd from page 31*

I do believe in making the penalties as stiff as possible. The penalty provision should also include attacking municipally-issued licenses, such as a tobacco dealer's license. This provision would allow pursuing businesses, such as gas stations and convenience stores selling these substances, which would be the likely places for teens and young adults to purchase the drugs.

Folks, the war on drugs just got bigger and more problematic. If the thinking on the previous version of the war on drugs is that it is unwinnable, what position are we in now as we deal with synthetic drugs, a moving target? We all need to work in concert to wage this war, as best we can. ML

Ordinances *Cont'd from page 29*

"Legislature's intent to allow not only local regulation of the geographic placement of collectives and the manner in which they conduct operations, but also local regulation of the creation of collectives. The local power to regulate creation, by definition, carries with it the power to regulate the number of collectives in existence." The trial court's order granting the preliminary injunction was therefore reversed. *420 Caregivers, LLC v. City of Los Angeles*, No. B230436, 2012 Cal. App. LEXIS 780 (Cal. Ct. App. July 03, 2012). The League of California Cities and California State Association of Counties participated as Amici Curiae on behalf of the City in this case. ML

Cases *Cont'd from page 35*

intended that the projectiles explode over the students' heads or against a wall, the officers' conduct resulted in Nelson being hit by a projectile that they intentionally fired towards a group of which he was a member. Their conduct was intentional, it was aimed towards Nelson and his group, and it resulted in the application of physical force to Nelson's person as well as the termination of his movement."

Regarding the reasonableness of the use of force, Nelson and his friends did not