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Local Government Hot Topics – Speech and Assembly Rights
Occupy . . .Someplace

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Occupy. . . Someplace

A general discussion on speech and assembly rights in areas of public use space and revisiting the plaza and shopping mall as the "public forum."

As you Occupy with all your might,
And question the left and the right,
Does your lack of removal
Mean that you have approval
To stay in the park overnight?

Notwithstanding a variable tagline, the Occupy Movement, which came to prominence in late summer 2011, continues to generate a good deal of discussion, among themselves and among the media. For the municipal attorney, the more interesting topics include an "in-place" discussion examining the places in which these protesters—and other public gatherings—occur.

The current movement brings into focus some intersecting and interwoven issues of free speech, freedom of assembly and a local government's role and perhaps, obligation, to maintain an orderly and safe protest locale. The issues become a bit more nebulous when the sites of the protests are in quasi-private (and thus, quasi-public) spaces.

Via a quick review of the caselaw, this paper provides a brief examination of the rules governing various places in which protesters occupy. It looks at "predecessor protestors"[1] which inform how the government or private parties apply and enforce limits on the occupations and demonstrations. This discussion takes a broad overview of the spaces which can be occupied: Public Spaces, Private Spaces and Privately Owned Public Spaces. Each may be occupied, but the rules of occupation differ.[2]

It's a great day to protest

So you get up in the morning and decide that protesting is at the top of your agenda today. What do you need to know?

First, it would be helpful to recall the First Amendment. Second, you may want to identify the status of your protesting destination to know just how far your activities will take you. (It would probably also be helpful to know some other crucial information, such as whether your organizers have obtained necessary permits, but this paper concedes that protestors often learn on the fly.)

Free to Speak…But Where?

The First Amendment provides that "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." The Fourteenth Amendment makes these protections applicable to the states. So, where can an occupier take these rights out for a spin?

A Crystalizing Movement

As of the beginning of March 2012, Wikipedia listed some 335 Occupy movement protest locations in the United States. [3] Most were fairly small gatherings with reports of no more than a couple dozen protesters at a time. Most did not maintain a continuous, vigil-like presence. In some of the major cities, however, including New York, Chicago and Washington, DC, the Occupiers' presence was most accurately described as an encampment. In these cities the protesters have primarily inhabited public parks and squares.

In New York the activity was largely confined to Zuccotti Park and to Wall Street. In Chicago protesters were found on Jackson Boulevard and LaSalle Street in the financial district and they met regularly in Grant Park. The Occupy San Francisco crowd set up camp in Justin Herman Plaza, a city park that is somewhat on the periphery of San Francisco's office district.

In Washington, DC the Occupiers camped mostly in Freedom Plaza and McPherson Square.[4] Notwithstanding that the Washington, DC spaces are federal properties under the auspices of the United States Park Police, the large-city urban spaces selected (perhaps, serendipitously) by the protesters were among the most permissive in where persons may "speak."

Case law

First, a brief overview of some of the case law as it evolved to illustrate the extent of protections, as well as the degrees of exclusion, permitted in various spaces.

In *Marsh* v. *Alabama*, 326 US 501 (1946) the stage was set for the idea that a place open to the public cannot exclude, wholesale, the protesting public. *Marsh* entailed a company town in which "the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation."[5]

In the case of *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968) protesters were specifically directing their

demonstrations within the shopping center against a food store's use non-union food labor. The Court extended its *Marsh* pronouncement in holding that a shopping center is the "functional equivalent" of the downtown business district and the owners could not completely "exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put." Nonetheless, the property owners were permitted to "to make reasonable regulations governing the exercise of First Amendment rights on their property."[6]

Logan Valley was, for a time, particularly instructive to the municipal lawyer in recalling the limitations to the exercise of First Amendment rights on public property:

> Even where municipal or state property is open to the public generally, the exercise of First Amendment rights may be regulated so as to prevent interference with the use to which the property is ordinarily put by the State. Thus we have upheld a statute prohibiting picketing '"in such a manner as to obstruct or unreasonably interfere with free ingress or egress to and from any . . . county . . . courthouses.' *Cameron v. Johnson*, 390 U. S. 611, 616. Likewise it has been indicated that persons could be constitutionally prohibited from picketing 'in or near' a court 'with the intent of interfering with, obstructing, or impeding the administration of justice.' *Cox v. Louisiana*, 379 U. S. 559 (1965).
>
> In addition, the exercise of First Amendment rights may be regulated where such exercise will unduly interfere with the normal use of the public property by other members of the public with an equal right of access to it. Thus it has been held that persons desiring to parade along city streets may be required to secure a permit in order that municipal authorities be able to limit the amount of interference with use of the sidewalks by other members of the public by regulating the time, place, and manner of the parade. *Cox v. New Hampshire*, 312 U. S. 569 (1941); *Poulos v. New Hampshire*, 345 U. S. 395 (1953). Compare *Kovacs v. Cooper*, 336 U. S. 77 (1949) (use of sound trucks making 'loud and raucous noises' on public streets may be prohibited).[7]

The question left open in *Logan Valley*, i.e., whether a property owner may exclude demonstrators whose message is not directly linked to the plaza or center's purpose "in order to prevent interference with either access to the market building or vehicular use of the parcel"[8] was answered in the affirmative in *Lloyd Corp. v. Tanner*, 407 US 551, 554-5 (1972). The *Lloyd* Court held that "there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights."[9] Perhaps the most interesting aspect of *Lloyd Corp* is the

court's inclusion in the opinion of signs posted in the Lloyd Center which read as follows:

> NOTICE—Areas In Lloyd Center Used By The Public Are Not Public Ways But Are For The Use Of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd.[10]

Four years later, the Court considered *Hudgins v. National Labor Relations Board*, 424 U.S. 507 (1976) and unequivocally pronounced both that the *Lloyd* decision overruled the rationale of *Logan Valley* and that the right of employees to picket in a shopping center was to be considered exclusively under the National Labor Relations Act, not the First Amendment.

Another four years passed and the Court heard *PruneYard Shopping Center v. Robins*, 447 US 74 (1980) with the majority approving the California state court's decision which prohibited the shopping center from completely excluding protesters, in this case high school students opposing United Nations resolution against Zionism. The Court signaled that the shopping center owner could adopt reasonable regulations of time, place, and manner to minimize interference with the shopping center's commercial functions and also could take conspicuous measures to disavow the message of the protestors.[11]

In sum, "the majority of states have found that there is nothing in state law, constitution or statute, that gives an individual the right to conduct activities in a privately owned shopping center against the wishes of the center's owner."[12]

These cited cases illustrate scenarios of wholly privately owned property and they reflect that, in striking a balance, "courts have been influenced by such factors as the nature of the property in question, the relationship between the expressive activity and the use to which the competing property is being put, the existence of alternative public forums available for the exercise of First Amendment guarantees, and the existence of a legitimate need for regulation of expressive activity."[13]

Comparing these results to the limitations permitted in wholly public spaces makes fairly clear such that any limitations on time, place and manner are few. The limited scope was articulated well in *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 US 37 (1983):

> In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed. At one end of the spectrum are streets and parks 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.' *Hague* v. *CIO,* 307 U. S. 496, 515 (1939). In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey* v. *Brown,* 447 U. S. 455, 461 (1980). The State may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication. *United States Postal Service* v. *Council of Greenburgh Civic Assns.,* 453 U. S. 114, 132 (1981); *Consolidated Edison Co.* v. *Public Service Comm'n,* 447 U. S. 530, 535-536 (1980); *Grayned* v. *City of Rockford, supra,* at 115; *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Schneider* v. *State,* 308 U. S. 147 (1939).[14]

Still, in such recognized public fora, the local government practitioner's interest is probably not so much in the message being conveyed, but rather it extends more primarily to enforcing safety and, as evidenced largely by the Occupy Movement participants, ensuring sanitation.[15]

Chicago recently took an interesting tact in addressing assembly regulations by adopting Municipal Ordinance10-8-334, regarding Public Assembly. Entitled as an "Amendment of various sections of Municipal Code regarding parades, athletic events and public assemblies" the legislation was ostensibly intended to enable crowd control surrounding the G-8 Summit scheduled to take place in Chicago in May 2012. It will also affect current protests. Many have noted the Ordinance's lack of a sunset date and have decried even its softened elements which include: "more surveillance cameras, parks and beaches closed until 6 a.m., sweeping parade restrictions and higher fees for those events and empowering Police Superintendent [] to 'deputize out-of-state law enforcement personnel in the event that demonstrators overwhelm Chicago Police."[16] It will be interesting to see if Chicago's measures have any notable impact on the crowds in respect to the upcoming G-8 summit.

Privately Owned Public Open Spaces

The discussion grows more interesting when contemplating how restrictions or lack of restrictions on speech and protest might play in the quasi-public/quasi-private spaces, or **"**POPOS" (for *privately-owned public open spaces* as they are dubbed in San Francisco). In the case of San Francisco, and many urban areas, these are "plazas, atriums, terraces and small parks that support the city's more well-known public park system."[17] New York similarly has an extensive network of POPOS, which historically have come about either as a

developer “contribution” (whether voluntary or mandatory) in exchange for obtaining great development density in a project.

Many of the POPOS have found a way to limit their usage for public gatherings through specific rules, usually posted at the site. It is unknown how effective the posted regulations would be under the crush of a large assemblage. Some of the signs and regulations found in New York City’s Public Use Spaces are illustrative:

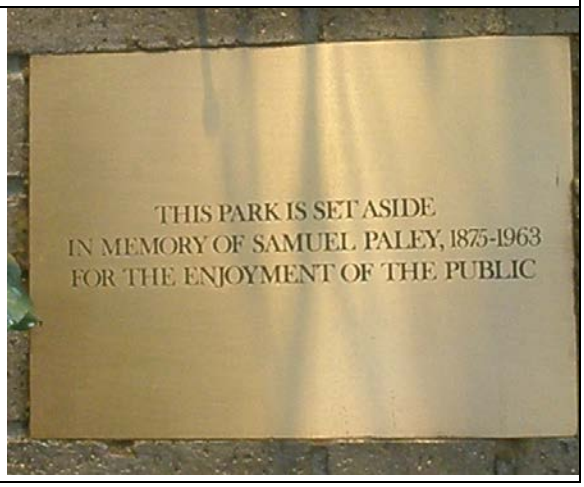
Bel Canto – 1991 Broadway





Privately Owned, Public Use Parks





Signs with firm messages	
	

<u>The Discussion Continues</u>

In launching discussion please consider the following questions which seek, especially, the contribution of well-seasoned local government practitioners:

- If your municipality is among those graced by the Occupy (or other) protests, how has your municipality addressed the balance between protecting First Amendment Rights and health and safety duties?

- Do matters of climate, sanitation, or transportation pose unique considerations for your municipality in accommodating protesters?

- Are posted signs adequate and effective to limit the parameters when a space may be occupied?

- Have permit or registration requirements proven effective for controlling energetic crowds and predicting the duration of protests?

- How has your municipality's public safety personnel interacted with protesters?

[1] This paper uses the term "protestors" fairly loosely. For purposes of this discussion, the term encompasses an individual or group of individuals who gather to communicate a position in a public or quasi-public space.
[2] *See, generally*, Henely, *Bernard D., Property Rights and First Amendment Rights: Balance and Conflict*; 62 A.B.A. J. 77 (1976).

[3] List of Occupy movement protest locations in the United States, *available at* http://en.wikipedia.org/wiki/List_of_Occupy_movement_protest_locations_in_the_United_States, accessed Mar. 1, 2012.
[4] Annie Gowan, '*Occupy DC' protesters rally in Freedom Plaza*, Wash. Post, October 6, 2011, at A1.
[5] 326 U. S. at 502-503.
[6] *Logan Valley*, 391 at 320-21.
[7] *Id*.
[8] *Id.* at 321.
[9] *Lloyd Corp. v. Tanner*, 407 US at 570.
[10] *Id.* at 555.
[11] *PruneYard Shopping Center v. Robins*, 447 US at 87-88.
[12] Edward J. Sack, *Public Access to Shopping Centers: Everyone Wants to Get into the Act*, 2004 International Council of Shopping Centers, Inc.
[13] Henely at 77.
[14] *Perry Ed. Assn. v. Perry Local Educators' Assn.*, 460 US 37, 45 (1983).
[15] Eli Saslow and Colum Lynch, *The Occupy movement: More trouble than change?*, Wash Post, Nov. 15, 2011, at A1.
[16] Fran Spielman, *City Council approves Rahm's watered-down NATO/G-8 rules*, Chicago Sun-Times, Jan. 18, 2012, updated Feb. 21, 2012, at A1.
[17] *See* Williams, et al. *Secrets of San Francisco*, SPUR Policy Paper, 2009 accessed at http://www.spur.org/publications/library/report/secretsofsanfrancisco_010109

Anne Marie Vassallo McKinnon practices land use, administrative, alcoholic beverage and some local government law. She represents large and small clients, often in the Washington, DC metro area, as they seek needed government approvals. Anne Marie combines her planning degree, her legal knowledge as well as her background as an All-American gymnast to assist her clients in jumping through the hoops of the of the regulatory environment. Anne Marie has written about State takeover of a municipality and green building laws. When not stuck in prose, she also likes to compose a well-targeted limerick or two. She is a certified gymnastics official and judges NCAA and children's competitions throughout the East Coast.