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THE CONSTITUTIONALITY OF
THE OCCUPY MOVEMENT

by

YOE LOPEZ

A thesis submitted in partial fulfillment of the requirements
for the Honors in the Major Program in Legal Studies
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ABSTRACT

The Occupy movement has spread over hundreds of cities nationwide and over 1,500 cities around the world. The movement is formed around a common goal, which is to protest the way government actions or inactions have rooted widespread discontent. The Occupy movement has encountered opposition from the cities and counties where it is located. Arrests have been made for a number of violations of city and county codes including resistance to police orders and disorderly conduct charges. In our country, freedom of speech and the right to protest have been regarded as inalienable rights. The question becomes how to balance the rights of the people involved against the rights and obligations of the government. This thesis will provide an in depth look at the issues being discussed in cases and hearings involving the Occupy movement. The key issue plaintiffs argue is that their First Amendment rights are being infringed on. In January 2012, both international human rights and United States civil liberties experts at seven law school clinics across the country met and formed the Protest and Assembly Rights Project. The project investigated the United States response to Occupy Wall Street. This thesis will discuss and recap some of their findings. In addition, it will analyze the Federal Constitutional restrictions to protestor's rights and the cases that arise on the grounds of these restrictions, as well as examine how the courts interpret the First Amendment and clarify these issues along with defining protestor's constitutional rights. Based upon the Constitutional rights and legitimate restrictions, the thesis will make appropriate recommendations on the limits for both the protestors and the local government.

DEDICATION

For my parents, thank you for making me the person I am today.

For my brother, thank you for pushing me to always better myself.

For my family and friends, thank you for your encouragement and love.

For my mentor, Kathy Cook, thank you for your advice and support throughout the process.

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BACKGROUND

The Occupy movement has become an international protest against social and economic inequalities. The first sign of the movement in the United States received wide media coverage and became what is known today as Occupy Wall Street. It began on September 17, 2011 in Liberty Square, Manhattan's Financial District, and classifies itself as a leaderless resistance movement driven by individuals formed around a common goal: to protest the way government actions or inactions have rooted widespread discontent.¹ Occupy Wall Street gave rise to the movement across the nation in over 600 communities.²

The initial mention of Occupy Wall Street was in July 2011 in a post by the Canadian organization called Adbusters. Inspired by several international protests, Adbusters made the first call to the public in mid-July. Their goal was established as follows: "On September 17, we want to see 20,000 people flood into lower Manhattan, set up tents, kitchens, peaceful barricades and occupy Wall Street for a few months. Once there, we shall incessantly repeat one simple demand in a plurality of voices."³ Thousands answered the call, arriving in Zuccotti Park to protest the influence of corporations on politics and an increasing disparity in wealth. Many

¹ Occupy Together, (2012). *About: Occupy*. Retrieved August 2012, from #OccupyTogether: <http://www.occupytogether.org/aboutoccupy/#background>.

² Walters, J. (2011, October 8). *Occupy America: protests against Wall Street and inequality hit 70 cities*. Retrieved 2012, from The Gaurdian, The Observer: <http://www.guardian.co.uk/world/2011/oct/08/occupy-america-protests-financial-crisis>.

³ Adbusters, (2011, July 13). *#Occupy Wallstreet*. Retrieved February 2012, from Adbusters: <http://www.adbusters.org/blogs/adbusters-blog/occupywallstreet.html>.

stayed every night for several months and created an encampment in the park, a tactic adopted by people all over the country, as the movement quickly spread to over 500 cities worldwide.

Occupy Wall Street is a movement with people of different backgrounds and political beliefs. According to the protestors' unofficial website, "The one thing we all have in common is that we are the 99% that will no longer tolerate the greed and corruption of the one percent." The movement aims to fight back against the system that continues to allow the rich to get richer and the poor to get poorer. Many protestors believe that the wealthiest members of society hold all the power, write the rules governing an unbalanced and inequitable global economy, and thus foreclose on their futures.⁴

Using the revolutionary Arab Spring tactics to achieve their ends, the movement encourages the use of nonviolence to maximize the safety of all participants.⁵ The movement is coordinating and publicizing massive gatherings in order to spread the word. The Arab Spring, also known as the Arab Revolution, is said to be a major influence in the start of the Occupy movement in the United States. The revolutionary wave of demonstrations and protests which occurred in the Arab world began in December, 2010 and was observed by the world via the

⁴ Occupy Together, (2012). *About: Occupy*. Retrieved August 2012, from #OccupyTogether: <http://www.occupytogether.org/aboutoccupy/#background>.

⁵ Occupy Wall Street, (2011). *About Occupy Wall Street*. Retrieved March 2012, from Occupy Wall Street: <http://occupywallst.org/about/>.

internet and television.⁶ Numerous factors led to the Arab Revolution, including issues such as dictatorships, human rights violations, government corruption, economic decline, unemployment and poverty.⁷ Many Arab Spring demonstrations have been met by violent responses from the authorities, as well as from pro-government militia. In some cases, this leads protestors to answer back with their own violent attacks.⁸ A major slogan among the protestors in the Arab world has been “the people want to bring down the regime.”⁹ Several techniques have been used in the Arab protests, mostly civil resistance in campaigns involving demonstrations, strikes, rallies, and marches. The effective use of social media to communicate, organize, and raise awareness are tools that helped the Arab Spring succeed and are used in the movement here in the United States. During the Arab protests, social media helped organize protests, transmit locations of demonstrations and helped gain support for the cause around the world.

Occupy Wall Street is a people powered movement and is being organized using what is known as a "people's assembly".¹⁰ The Commission for Group Dynamics in Assemblies of the Puerta del Sol Protest Camp defines a People's Assembly as:

⁶ Channel 4 news, (2011, November 4). *Where now for the occupy protests*. Retrieved 2012, from 4 News: <http://www.channel4.com/news/the-occupy-movement-fighting-the-global-mubarak>.

⁷ Andrey V. Korotayev, R. S. (2011, April 4). *Egyptian Revolution: A Demographic Structural Analysis*. Retrieved 2012, from http://cliodynamics.ru/index.php?option=com_content&task=view&id=276&Itemid=70.

⁸ Huffington Post, (2011, February 24). *Libya Protests: Gaddafi Militia Opens Fire On Demonstrators*. Retrieved 2012, from Huffington Post: http://www.huffingtonpost.com/2011/02/24/libya-protests-gaddafi-fo_n_827568.html

⁹ Abulof, U. (2011, March 10). *What Is the Arab Third Estate?* Retrieved 2012, from Huffington Post: http://www.huffingtonpost.com/uriel-abulof/what-is-the-arab-third-es_b_832628.html.

¹⁰ Occupy Wall Street, (2011). *About Occupy Wall Street*. Retrieved March 2012, from Occupy Wall Street: <http://occupywallst.org/about/>.

[A] participatory decision-making body which works towards consensus. The Assembly looks for the best arguments to take a decision that reflects every opinion – not positions at odds with each other as what happens when votes are taken... An Assembly should not be centered around an ideological discourse... The Assembly is based on free association – if you are not in agreement with what has been decided, you are not obliged to carry it out. Every person is free to do what they wish – the Assembly tries to produce collective intelligence, and shared lines of thought and action. It encourages dialogue and getting to know one another.¹¹

The movement is in opposition to the power of major banks, corporations and the role of Wall Street in creating the collapse of the economy. Protestors allege that said banks, corporations and the actions of Wall Street caused the recession that is affecting our nation today. It aims to adjust the economic structure and power relations in today's society. The movement claims that corporations, which place profit over people, oppression over equality, and self-interest over justice, run our government. Protestors see it as a gathering to protect the rights of themselves

¹¹ Commission for Group Dynamics in Assemblies of the Puerta del Sol Protest Camp, (2011, July 31). *Quick guide on group dynamics in people's assemblies*. Retrieved March 2012, from Take the Square: <http://takethesquare.net/2011/07/31/quick-guide-on-group-dynamics-in-peoples-assemblies/>.

and others. It is up to the individuals to protect these rights, and seek to correct the causes of economic deprivation.¹²

“We are the 99%,” is a slogan adopted by the movement which refers to the concentration of wealth among the top one percent of income earners in the United States. It reflects a belief that the 99% are truly paying the price for the mistakes made by the one percent.¹³ A person needs to earn at least \$506,000 annually to be in this upper economic echelon.¹⁴ The movement is heavily reliant on social media, and is organized through websites such as "Occupy Together". Mark Weisbrot, director of the Center for Economic and Policy Research, states in an article, *The Occupy Wall Street Movement: The Real Moral Majority*: “Between 1979 and 2007, the richest 1 percent received three fifths of all the income gains in the country. Most of this went to the richest tenth of that 1 percent, people with an average income of \$5.6 million including capital gains.”¹⁵

Since the movement has no official leaders, it empowers individuals and has them share the responsibility together, rather than placing the power in the hands of a few. These individuals

¹² New York City General Assembly, (2011, October). *New York City General Assembly Principles of Solidarity*. Retrieved February 2012, from Occupy Wallstreet.org: <http://www.nycga.net/resources/principles-of-solidarity/>.

¹³ Weinstein, A. (2011, October 7). *"We Are the 99 Percent" Creators Revealed*. Retrieved March 2012, from Mother Jones: <http://motherjones.com/politics/2011/10/we-are-the-99-percent-creators?page=2>.

¹⁴ Izzo, P. (2011, October 19). *What Percent Are You?* Retrieved March 2012, from Wallstreet Journal: <http://blogs.wsj.com/economics/2011/10/19/what-percent-are-you/>.

¹⁵ Berkowitz, B. (2011, October 19). *From a single hashtag, a protest circled the world*. Retrieved February 2012, from Brisbane Times: <http://www.brisbanetimes.com.au/technology/technology-news/from-a-single-hashtag-a-protest-circled-the-world-20111019-1m72j.html>.

are asked to lead others into action by gathering in places of need to demonstrate a community willing to seek change. The movement seeks to end relationships built on money and donations that affect elected officials and corporate interests, since they claim these relationships have led to extensive corruption and criminal activities that undermine the economic and political system.¹⁶

Throughout the United States different local groups have different foci, some of which include more balanced distribution of income, bank reform, more jobs, forgiveness of student loans, and foreclosed homes.¹⁷ Some protestors are in favor of a set of national policy proposals, while others oppose this demand saying it would limit the movement. Most occupy groups have general assembly meetings that consists of a collective decision-making group, which determine the functions of protestors. These groups also create local web sites with their community's goals and plans in mind.¹⁸

¹⁶ Occupy Together, (2012). *About: Occupy*. Retrieved August 2012, from #OccupyTogether: <http://www.occupytogether.org/aboutoccupy/#background>.

¹⁷ Lowenstein, R. (2011, October 27). *Occupy Wall Street: It's Not a Hippie Thing*. Retrieved 2012, from Bloomberg Businessweek : <http://www.businessweek.com/magazine/occupy-wall-street-its-not-a-hippie-thing-10272011.html>.

¹⁸ Occupy Wall Street Tech, (2011). *#OccupyWallStreet New York City General Assembly*. Retrieved 2012, from New York City General Assembly: <http://www.nycga.net/>; See, Occupy Boston Media. (2011). *Occupy Boston*. Retrieved 2012, from Occupy Boston General Assembly: <http://www.occupyboston.org/general-assembly/>; See also, Occupy Oakland. (2011). *Occupy Oakland General Assembly*. Retrieved 2012, from Occupy Oakland: <http://occupyoakland.org/our-general-assembly/>.

Social Media

The Occupy movement relies heavily on social media to connect protestors and coordinate activities. Today's technology has allowed these protestors to become self reporters and journalists to promote and document the movement. The use of the internet has made web sites such as Occupytogether.org possible, which facilitate the coordination of mass protests and help shape the movement. OccupyWallSt.org is the unofficial online source for the movement on Wall Street and around the world. It is an affinity group committed to supplying technical support work for movements nationwide. Occupiers utilize the use of social media networks such as Twitter to keep the public constantly updated about events such as protests and general assembly meetings. It also allows videos to be uploaded instantly on the web for anyone to see. Such tools make it possible for supporters or bystanders to stay up to date and informed. The use of social media has facilitated the growth and popularity of the Occupy movement.¹⁹

The role of social media has become a fundamental infrastructure for the success of the movement. Occupy movement protestors distrust many traditional mainstream media sources because they represent the very corporate structure that the movement is speaking out against.²⁰ Since one goal of the movement is to end corporate control of government, this outlook lends itself to this view of self reporting. Through this approach the movement is able to eliminate any

¹⁹ Shafa, P. N. (2012, March 1). *The Occupy Movement's use of social media as an organizing method*. Retrieved 2012, from Participedia Beta: <http://participedia.net/methods/occupy-movements-use-social-media-organizing-method>.

²⁰ Thomas, M. (2011, November 29). *A snapshot of Occupy Wall Street: The use of social and citizen media*. Retrieved March 2012, from Spotify: <http://storify.com/mRAWRYse/a-snapshot-of-occupy-wall-street-the-use-of-social>.

constraints on communication to the public through what many regard as a narrow minded media, as well as allow more information to be disseminated. Through the use of social media the Occupy movement is able to successfully reach hundreds of cities around the world. Without it, the Arab Spring would not have become the movement it turned into, nor would Adbusters have been able to successfully accomplish Occupy Wall Street. The easy accessibility of social media allows the movement to continue today and provides continuous support for future events.

First Amendment

A major issue concerning the Occupy movement is the rights of protestors to express their views. Plaintiffs argue that their First Amendment rights are being infringed upon through the termination of encampments as well as arrests. Freedom of speech is the right to communicate one's thoughts by means of speech and actions, and is protected by the Constitution. The First Amendment of the United States Constitution confers freedom of speech and the right to assemble as constitutional rights. The Amendment states: "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."²¹

Freedom of speech is not only protected by the First Amendment of the United States Constitution, but by many state and federal laws. The freedom is not absolute; the Supreme

²¹ United States Constitution. *Amendment I*.

Court of the United States has acknowledged several exclusions in what constitutes speech. Supreme Court cases have recognized that governments may enact reasonable restrictions on speech. Despite the exceptions, freedom of speech continues to be one of the broadest recognized rights and remains a controversial issue in our society.

Picketing, patrolling, marching and addressing publicly assembled audiences are all forms of communication known as expressive conduct. Because these forms of expression involve actions instead of mere speech, they are subject to more regulation and restriction than is speech alone.²² Justice Roberts wrote:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.²³

²² *Hague v. Committee for Industrial Organization*, 307 U.S. 496, (1939).

²³ *Id.* at 515-516

Recent decisions have restated Robert's language and made them the position of the Court. Parks and public streets are open to public demonstrations, although certain restrictions have been placed based on the location of these public areas. Therefore, not all public areas can be used for public demonstrations. Even though open to public forums, speech is subject to time, place, and manner regulations. Traffic control in streets and blockages of building entrances are closely scrutinized to protect the rights of others.²⁴

²⁴ Find Law, (n.d.). *Speech Plus--The Constitutional Law of Leafleting, Picketing, and Demonstrating*. Retrieved 2012, from Find Law, Cases & Codes > U.S. Constitution > Amendments > First Amendment: <http://caselaw.lp.findlaw.com/data/constitution/amendment01/20.html#1>.

CASE LAW

As the Occupy movement spread throughout the nation, the First Amendment became a riveting topic. Did the protestors have a right to occupy? To answer this question the thesis must examine the United States Supreme Court cases that have been decided which have either limited or expanded what is included within the First Amendment actions. Actions that have been found to be protected by the First Amendment include demonstrating,²⁵ marching,²⁶ leafleting,²⁷ picketing,²⁸ wearing armbands,²⁹ and attaching a peace symbol to an American flag.³⁰ But do these extended rights give the Occupy movement protection to communicate their message, as well as their ability to camp and sleep on public property? The Supreme Court has given First Amendment protection to symbolic speech, a type of expressive conduct that tries to convey a message. In *Brown v. Louisiana*, the Supreme Court held that individuals had this extended protection when engaging in a peaceful sit-in at a public library to protest segregation.³¹

The difference between speech and nonspeech was discussed in *United States v. O'Brien*.³² The Court limited the scope of protection when a regulation prohibited certain conduct that contained both speech and nonspeech holding that, “a sufficiently important

²⁵ *Edwards v. South Carolina*, 372 U.S. 229 (1963).

²⁶ *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969).

²⁷ *Schneider v. Town of Irvington*, 308 U.S. 147 (1939).

²⁸ *Thornhill v. Alabama*, 310 U.S. 88 (1940).

²⁹ *Tinker v. Des Moines School District*, 393 U.S. 503 (1969).

³⁰ *Spence v. Washington*, 418 U.S. 405 (1974).

³¹ *Brown v. Louisiana*, 383 U.S. 131 (1966).

³² *United States v. O'Brien*, 391 U.S. 367 (1968).

governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”³³

In *Spence v. Washington*, the Supreme Court developed a test to determine when conduct was to be treated as speech. The two-part test includes whether the person involved in the conduct intends to communicate a message and whether observing the conduct will suffice to comprehend that message.³⁴ A problem arises in that acts sometimes become speech only under certain circumstances, making it difficult for law enforcement to determine whether it is protected or not.³⁵ The Court stated that the appellant clearly engaged in a form of communication when adding a peace sign on an American flag with removable tape and displaying it on his window. They went on to hold that Spence’s communication imbued sufficient elements to be protected under the First and Fourteenth Amendments. The Court explained that although the conduct might not have been labeled speech, the nature of the activity along with the context and environment under which it was exposed, led to the protected expression.³⁶

In *Texas v. Johnson*, the Supreme Court found that an individual burning an American flag in protest was protected under the First Amendment. The Court determined that Johnson’s burning of the flag was a nonspeech act of communication. Using the two prong test established

³³ United States v. O'Brien, 391 U.S. 367, 376 (1968).

³⁴ Spence v. Washington, 418 U.S. 405, 411 (1974).

³⁵ Kunstler, S. (2012). The Right to Occupy- Occupy Wall Street and The First Amendment. *Fordham Urban Law Journal*.

³⁶ Spence v. Washington, 418 U.S. 405 (1974).

in *Spence*, the Court held that there was intent to convey a message and the message would be understood by those who viewed it. The Court also considered the Texas statute that prohibited burning the flag if it offended others, and not for any other reasons, as not content neutral. The Court emphasized that governments cannot restrict a manner of communicating a message because of its content. Under the circumstances, the burning of the flag entailed expressive conduct and was protected under the First Amendment.³⁷

A very important case to take note of is *Clark v. Community for Creative Non-Violence*. In *Clark* the Supreme Court considered the issue whether a national park prohibiting camping violated the First Amendment when it prohibited demonstrators from protesting in the park. This restriction is in many ways similar to the Occupy movement's circumstances with encampments. The Court held that camping at the park was a form of picketing which demonstrated conduct, not speech. In addition the conduct interfered with the rights of others to use the park. The Court added, "Lafayette Park and others like it are for all the people, and their rights are not to be trespassed even by those who have some "statement" to make. Tents, fires, and sleepers, real or feigned, interfere with the rights of others to use our parks."³⁸ The Court held that the prohibition was content neutral; it applied to all camping, not particularly camping with a message. Even without camping, the protestors still had ample alternative means to communicate their message,

³⁷ Texas v. Johnson, 491 U.S. 397 (1989).

³⁸ Clark v. Community for Creative Non-Violence, 468 U.S. 288, 300 (1984).

and that it was in the government's substantial interest to maintain the parks in intact condition.³⁹ The *Clark* decision is one which seems to apply and limit the Occupy movement's actions. The holding would appear to limit any argument that the First Amendment would allow sleeping overnight in encampments. However, the dissenting opinion written by Justice Marshall may hold hope for those in the movement. Justice Marshall pointed out the similarities in both *Spence* and *Clark*. Marshall stated that sleeping in a highly public place, outside, for the purpose of protesting - is symbolic speech protected by the First Amendment. This would entitle the conduct to warrant Constitutional protection. In determining what can be properly denoted as speech, Justice Marshall turned to *Spence v. Washington*. Justice Marshall noted that in *Spence*, the Court held that the displaying of a United States flag with a peace sign attached to it was conduct to be protected by the First Amendment. The Court looked at the intent of the speaker and the perception of the audience to make this determination. If intended to convey a particular message and if that message was to be understood by those who viewed it, it constituted protection.

The dissent goes on to add that sleep in this context is symbolic speech and therefore subject to reasonable time, place, and manner restrictions. It agrees with the majority in that “[R]estrictions of this kind are valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of

³⁹ Kunstler, S. (2012). The Right to Occupy- Occupy Wall Street and The First Amendment. *Fordham Urban Law Journal*.

the information.”⁴⁰ Justice Marshall concluded by stating that government agencies are driven to overregulate public forums and by doing so, are detrimental to First Amendment rights.⁴¹

Early First Amendment cases held that picketing and parading, categorized as forms of expression, were entitled to some protection. *Edwards v. South Carolina* involved numerous African American students who took part in a peaceful protest in South Carolina in 1961. They did not engage in any violent conduct, nor did they threaten to use violence. The petitioners were there to protest laws which they believed prohibited African American privileges in the state of South Carolina. Petitioners were told to disperse by the police, when they failed to do so they were arrested and convicted of breach of the peace. The Supreme Court held that the arrests and conviction of these individuals infringed on their rights of free speech and freedom of assembly. The Court stated these rights, guaranteed by the First Amendment, must be upheld by every state through the Fourteenth Amendment.⁴² Freedom of speech and assembly should not be denied because of possible hostility. The Court noted that free speech may best serve its purpose when it stirs up disputes or speaks out against something about which the majority feels strongly about. Any statute that is broadly written to help limit these freedoms shall be struck down.⁴³

In other cases, the Supreme Court has rejected the notion that the First and Fourteenth Amendments afford the same freedom to those who attempt to communicate ideas by marching and picketing, as to those who communicate solely by speech. In *Cox v Louisiana*, two major

⁴⁰ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984).

⁴¹ *Id.* at 315-316

⁴² *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963).

⁴³ *Id.* at 237

sections in the opinion addressed issues relevant to the Occupy movement. The breach of peace conviction involved a statute which states were using to restrict individuals from picketing, marching or patrolling the streets with a message. According to this Court, the statute on its face was so broad that it could be considered unconstitutionally vague under the First and Fourteenth Amendments. The statute did not define how people who wanted to express their views in public were allowed to do so in public streets or parks. Instead it gave full discretion to law enforcement officers to determine whether or not restricting individuals from communicating their message would be allowed. The Court added that if a statute's effect might impinge on freedom of speech, press, or religion, it would be unconstitutional; especially if it appeared that the state seemed to be suppressing this conduct. The opinion holds that the First and Fourteenth Amendment take power away from the governments to restrict individuals' freedom of speech, assembly, and where they have the right to be. However, these amendments do not give rights to engage in communicating messages wherever or however one may please. In *Cox*, picketing was found to be a way to communicate a message, but was not considered speech here; therefore, not subject to full protection. However, because the breach of peace statute was so narrow, South Carolina could not punish people for assembling for redress of grievances.

The second issue in *Cox* involved the conviction of the respondents by obstructing-public-passages. The Louisiana law which prohibited obstructing public streets and sidewalks provided an exception for picketing and assembly by labor unions. The law provided disparate treatment for various groups protesting unfair treatment. According to the Court, the First and Fourteenth Amendments require equal treatment of groups and if towns are open to some views,

they must be open to all. The statute was applied to convict Negroes for assembling for the purpose of publicly protesting racial discrimination. They added that marching, patrolling, or standing on streets is conduct, not speech, which can be regulated or prohibited but by specifically disallowing one particular type of message, Louisiana was picking and choosing what was allowed to be discussed on the streets. That appeared to be censorship and in turn unconstitutional under the First and Fourteenth Amendments.⁴⁴

The states and government have legitimate interests in regulating actions of protestors to protect people and property. Some faction movements linked to Occupy have turned violent. The question then is the extent and manner of regulation. In *NAACP v. Claiborne Hardware Co.*, a protest against racial conditions was carried out by speeches and non violent picketing by African Americans in Mississippi. Acts of violence did occur when members did not go through with the boycott of certain companies. The Mississippi Supreme Court held that the existence and use of physical force and violence to achieve the boycott deprived it of any First Amendment protection. However, the United States Supreme Court reversed that ruling stating that the goals of the boycotters were legal as were their means. The Court held that while violence is not protected, its existence does not deprive other activities of First Amendment protection. Therefore, speeches and non violent picketing were protected activities. Violence engaged in by some individuals does not result in a loss of rights for others in that group. Adding, "Speech does

⁴⁴ *Cox v. Louisiana*, 379 U.S. 536 (1965).

not lose its protected character... simply because it may embarrass others or coerce them into action.”⁴⁵

The Occupy movement has been fighting to classify sleep under protected symbolic speech. The United States District Court for the Southern District of New York allowed protestors the right to sleep overnight on a sidewalk, stating that a policy by the New York City Police Department banning the sleep violated the First Amendment rights of the demonstrators. In *Metropolitan Council, Inc. v. Safir*, demonstrators had planned a protest that involved using sleep as a way to communicate a message. The demonstration was to protest a rent increase in New York City buildings that the protestors argued would cause individuals to become homeless. They planned to lie on the ground in a park to symbolize the homelessness; after the park closed they would relocate across the street where they would sleep on the sidewalk overnight. The sleep was classified as an expressive component in an effort to communicate a message. The Court then examined the protestor’s interest in their message with the City’s interest in preventing them from sleeping on the sidewalk. Citing *Clark*, the Court applied time, place, and manner restrictions to these interests. They found that a total ban on sleeping on sidewalks was not focused on these interests. The demonstrators planned to leave ample space for the use of the sidewalk to be used by others and would employ marshals to protect those sleeping, as well as to make sure they did not block the sidewalk.

⁴⁵ NAACP v. Claiborne Hardware Co., 458 U. S. 886, 910 (1982).

The Court added that the city was free to ban participants who were believed to engage in disorderly conduct (“obstruction of vehicular or pedestrian traffic with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof”);⁴⁶ but to ban symbolic sleeping due to the possibility that they might impede foot traffic while protesting, was not allowed. The Court stated that in this case the core First Amendment rights to protest were at stake. The city had already agreed that the protest would not itself cause public disorder, so the equities weighed heavily in favor of permitting the sleeping to go forward without restraint.⁴⁷

Adderley v. Florida shows that the right to assemble only holds on public property. In this case the Supreme Court held that the arrests of protestors in front of a jail were constitutional. In 1966, a group of students who attended Florida A&M University were arrested while protesting racial segregation. The students were on the premises of a nonpublic jail to protest prior arrests which they held to be forms of segregation. The sheriff asked the students to leave the grounds. When they did not obey, he notified them that if they did not leave the premises they would be arrested for trespassing. Those who remained were arrested. The petitioners argued they had a right to protest and that their arrests denied them "rights of free speech, assembly, petition, due process of law, and equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States."⁴⁸

⁴⁶ N.Y. Crim. Law § 240.20[5].

⁴⁷ Metropolitan Council, Inc. v. Safir, 99 F. Supp. 2d 438 (2000).

⁴⁸ Adderley v. Florida, 385 U.S. 39 (1966).

The Court used the *Edwards*⁴⁹ case to assist with the ruling. However, they highlighted the difference of facts between both cases by stating the demonstrators in *Edwards* were on state capitol grounds which are open to the public. Here, protestors were on the jail premises built for security, not open to the public. The Court in this case upheld the trespassing conviction, arguing county jails were not public places. Therefore, protestors' rights to assembly were not infringed upon. They added that states had the right to protect their property from possible damage done by demonstrators.⁵⁰

The dissenting opinion written by Justice Douglas expressed the belief that the protestors' rights had been violated. Douglas asserted that the demonstrators did not engage in violence or block the entrance at any point. Public officials should not be given discretion to decide what places can be used to express an idea via the First Amendment. He goes on to add that the consequences of the trespass law had suppressed a message allowed by the First Amendment. Justice Douglas quoted a *DeJonge v. Oregon* finding that:

These [First Amendment] rights may be abused by using speech or press or assembly in order to incite to violence and crime. The people through their legislatures may protect themselves against that abuse. But the legislative intervention can find constitutional justification only by dealing with the abuse.

The rights themselves must not be curtailed. The greater the importance of safeguarding the community from incitements to the overthrow of our institutions

⁴⁹ *Id.* at 41

⁵⁰ *Id.* at 46-48

by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.⁵¹

Under the *Spence* test, the Occupy movement's actions of sleeping in public parks should be protected under the First Amendment. In recent cases, the courts have found that camping and sleeping twenty four hours a day in public parks is crucial to protestors' ways of communicating their message.⁵² As argued by Occupy Boston, encampments represent a democratic society and exemplify the society the movement seeks to create. Adding, the name Occupy in the movement signifies a role in physically inhabiting a public place to spread a message. The encampments are also a way for the movement to inform the general public about social and economic inequalities.⁵³

⁵¹ De Jonge v. Oregon, 299 U. S. 353, 364-65 (1937).

⁵² Occupy Fort Myers v. City of Fort Myers, No. 2:11-cv-00608 (Florida 2011). *See also*, Occupy Minneapolis v. County of Hennepin, Civ. No. 11-3412 (Minnesota 2011).

⁵³ Ofer, U. (2012). Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks. *Fordham Urban Law Journal*.

ENCAMPMENTS

Occupy movement encampments are being shut down all across the nation. But does this government intervention violate the First Amendment? Gene Policinski, Executive Director of the First Amendment Center at Vanderbilt University said “What we are seeing right now is a classic collision between fundamental rights and a government weighing if they cross the line because of issues such as public safety.”⁵⁴ Encampments in cities such as New York, Portland, and Nashville have been dismantled. Does this violate protestors’ right to peaceably assemble? Policinski states that the First Amendment is not absolute. Governments can make provisions about time, place, and the manner a protest can take place. Restrictions of noise, blockage of traffic and destruction of property are allowed if used in a content neutral way. Some regulations though, such as the overnight stays in some public parks are suspect since they were enacted after the protestors started. Cities like Oakland and Burlington have had a successful elimination of these encampments due to shootings and even deaths at these camps.⁵⁵ Police make the case that the existence of tents are creating a hazardous environment for the public.

When the encampment in Zuccotti Park was being cleared by police, over 100 protestors were arrested. New York City Mayor Michael Bloomberg called the encampment “a health and

⁵⁴ Peralta, E. (2011, November 15). *The Occupy Movement And The First Amendment: 'A Classic Collision'*. Retrieved 2012, from NPR: <http://www.npr.org/blogs/thetwo-way/2011/11/15/142348726/the-occupy-movement-and-the-first-amendment-a-classic-collision>.

⁵⁵ Joyne, J. (2011, November 11). *Shooting Deaths at Occupy Oakland and Occupy Burlington*. Retrieved from Outside the Beltway: <http://www.outsidethebeltway.com/shooting-deaths-at-occupy-oakland-and-occupy-burlington/>.

fire safety hazard to the protestors and to the surrounding community.”⁵⁶ He added that the protestors could return to the park; they just couldn’t sleep there.

Many of the arrests related to Occupy Wall Street have been for disorderly conduct charges, which under New York Penal Code includes: unreasonable noise, obstructing traffic, congregating with persons in a public place and refusing to comply with orders of police officers to disperse. Geoffrey Stone, a professor specializing in constitutional law at the University of Chicago states "You have to tolerate a certain amount of inconvenience in order to make room for First Amendment activity, but not so much that it disrupts things."⁵⁷

Time, place and manner restrictions have to apply similarly in all protests equally, regardless of their message. However, when dealing with private property, the owner can lawfully evict protestors without violating the First Amendment. Law enforcement officers are the ones responding to these peaceful protestors. *Graham v Connor* set the reasonable force standard to ensure excessive force is not used. The three prong test involves the severity of the crime, the threat or safety of the officers and the public, and the resisting nature of the suspect.⁵⁸

The consensus among some legal experts is that protestors have a First Amendment right to protest in public parks, but not the right to camp overnight.⁵⁹ Officers may remove tents, and

⁵⁶ Goyette, B. (2011, November 15). *Just How Much Can the State Restrict a Peaceful Protest?* Retrieved 2012, from Pro Publica: <http://www.propublica.org/article/explainer-just-how-much-can-the-state-restrict-a-peaceful-protest>.

⁵⁷ *Id.*

⁵⁸ *Graham v. Connor*, 490 U.S. 386, 396 (1989).

⁵⁹ Freivogel, W. (2011, November 27). *What place do protests Occupy in the Constitution?* Retrieved from St. Louis Beacon : https://www.stlbeacon.org/#!/content/14622/legal_opinions_about_occupy_rights.

if legally able to remove protestors, must do so with reasonable, not excessive force.⁶⁰ Some civil libertarians believe that courts should protect peaceful overnight assemblies. Public parks have traditionally been places for groups to protest, but the court's reasonable time, place and manner restrictions are altering that. Courts have not found that protestors have a right to occupy public property, until then protestors must leave when asked and return at appropriate times. The Association for Education in Journalism and Mass Communication said they "encourage public officials and law enforcement officers to work with Occupy participants and journalists covering their protests to ensure that basic constitutional freedoms are maintained and not encroached. The rights to protest and to criticize government are core values enjoying Constitutional protection."⁶¹

Those in favor of the dissolution of encampments see the increasing reports of violence, sexual assaults, and illegal drug use as a strong reason why. Some claim that these encampments do interfere with others' everyday lives and encroach on other people's freedoms, adding that vandalism, public desecration of property, and interfering with local businesses can all cause a negative effect on the community. These individuals claim the protestors are asking for their First Amendment rights while trampling the rights of others. They believe protestors are creating public safety hazards and destroying property, and these abuses should be stopped.⁶²

⁶⁰ Freivogel, W. H. (2011, November 30). *First Amendment, the law and the Occupy movement* . Retrieved 2012, from Gateway Journal: <http://gatewayjr.org/2011/11/30/first-amendment-the-law-and-the-occupy-movement/>.

⁶¹ *Id.*

⁶² Botwinick, N. (2012, May 2). *Occupy Wall Street Blotter*. Retrieved 2012, from National Review: <http://www.nationalreview.com/corner/282993/occupy-wall-street-blotter-nathaniel-botwinick>.

According to Michael Ratner, president of the Center for Constitutional Rights, many ordinances are being used illegally. Vague statutes are being used, while giving all the discretion to uphold those statutes to law enforcement officers. The majority of arrests in New York were charges of disorderly conduct that won't hold up in court. Ratner believes activists subject to arrest may have their cases dismissed, but the main goal of getting these protestors off the streets will have been accomplished. Did the New York Police Department arrest the protestors with no intention to convict them? Questions about ordinances being content-neutral arise when they are being put into effect after the fact, says Ratner. "In New York, there were a bunch of regulations issued around Zuccotti Park once the occupations got underway. No camping, no tarps – that already tells me that there's a question here about whether these rules are truly neutral. It looks like they're specially tailored toward the people doing the occupation."⁶³

During the development of the Zuccotti Park encampment in New York, the protestors added a kitchen, medical station, media center, library and amenities which included sleeping supplies and information desks.⁶⁴ Protestors used blankets and sleeping bags until tents began being used as a result of rainy and cold days.⁶⁵ The encampment in Zuccotti Park was an example copied across the country for participants of the Occupy movement. Protestors

⁶³ Holland, J. (2011, October 18). *We Have a First Amendment Right to Protest -- So Why All These Arrests Around Occupy Wall Street?* Retrieved 2012, from AlterNet.org:

http://www.alternet.org/story/152781/we_have_a_first_amendment_right_to_protest_-_so_why_all_these_arrests_around_occupy_wall_street?page=0%2C1.

⁶⁴ Packer, G. (2011, December 5). *All the Angry People*. Retrieved 2012, from The New Yorker: <http://www.scribd.com/doc/101144787/Suppressing-Protest-Human-Rights-Violations-in-the-U-S-Response-to-Occupy-Wall-Street#>.

⁶⁵ Firger, A. G. (2011, November 16). *Against Rules, Tents Arise at Protest*. Retrieved 2012, from The Wall Street Journal: <http://online.wsj.com/article/SB10001424052970204190504577039253668863814.html>.

maintained a twenty four hour presence in the park, holding General Assembly meetings until Brookfield Properties shut down the encampment. Yet protestors continued to hold demonstrations and marches all over New York City. Not all participants of the movement stay in the camps overnight. Most people came when they had the chance, after work or on weekends. The number of participants increased heavily for specific marches or direct actions.⁶⁶

The termination of encampments in New York City did not start with the city prohibiting camping and sleeping in the park; rather, by protestors breaking unofficial rules held by the property. Although lawyers were able to obtain a temporary order prohibiting the city from evicting the protestors for awhile, the order was eventually reversed by a judge who claimed the protestors did not have a First Amendment right to camp in the park.⁶⁷ With the dispersion of most encampments protestors are asserting their First Amendment rights in court as well as, challenging the mass arrests and the use of force employed to break up the encampments. Lawsuits have been filed in state and federal courts all over the nation, challenging eviction orders as well as the tactics used by police when dealing with protestors.⁶⁸ Carol Sobel, a co-chairwoman of the National Lawyers Guild's Mass Defense Committee states: "When I think about the tents as an expression of the First Amendment here, I compare it to Tahrir Square in Egypt... Our government is outraged when military forces and those governments come down

⁶⁶ Widdicombe, L. (2011, October 24). *Preoccupied*. Retrieved 2012, from The New Yorker: http://www.newyorker.com/talk/2011/10/24/111024ta_talk_widdicombe.

⁶⁷ Kunstler, S. (2012). The Right to Occupy- Occupy Wall Street and The First Amendment. *Fordham Urban Law Journal*.

⁶⁸ Niedowski, E. (2011, December 23). *Occupy protesters sue over free speech, force*. Retrieved 2012, from USA Today: http://usatoday30.usatoday.com/USCP/PNI/NEWS/2011-12-23-APUSOccupyLawsuits_ST_U.htm.

on the demonstrators. But they won't extend the same rights in this country.”⁶⁹ Gene Policinski, executive director of the First Amendment Center in Nashville, Tennessee, adds that in his opinion police overreacted to the movement in some cities, which might have helped protestors gain some supporters.⁷⁰

After the encampment in Zuccotti Park was shut down and protestors kicked out, New York’s Department of Sanitation’s big trucks hauled off what was left of demonstrators’ belongings. Thousands of dollars worth of property, including books and computers were destroyed. This led to lawsuits filed against the city. However, the city claims that that they had nothing to do with the destroyed property, putting the blame on the park’s owners, Brookfield Properties.⁷¹ The city named Brookfield Properties as third party defendants in the suits. One of the suits involves members of Occupy Wall Street's People's Library, who claim more than \$47,000 worth of property including over 2,700 books were destroyed. The city stated that they played no role in the disposal of protestor’s property, claiming that Brookfield Properties had hired a company the night of the eviction to take property from the park straight to the landfill.⁷² The addition of Brookfield Properties as a third party defendant may suggest a collaboration between City Hall and the owners of the park in the planning of the termination of the Zucotti Park encampment. Brookfield admitted to hiring a cleaning service, but stated that the protestors could have avoided the property loss by complying with police orders. Norman Siegel, a lawyer

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Pinto, N. (2012, August 27). *City and Brookfield Turn On Each Other In Lawsuits Over Zuccotti Eviction*. Retrieved 2012, from The Village Voice: http://blogs.villagevoice.com/runninscared/2012/08/city_and_brookf.php.

⁷² *Id.*

representing the Occupy Wall Street librarians, states he was surprised when Brookfield was entered as a defendant, adding that the upcoming discovery should help sort out the details of what occurred on the night of the eviction.⁷³

⁷³ *Id.*

OCCUPY HEARINGS

At the time this thesis was written, there were no appellate cases published concerning the Occupy movement in the United States. There have, however, been a number of cases in the trial courts. One of the first court hearings regarding the movement involved *Occupy Minneapolis v. County of Hennepin*. The plaintiffs, Occupy Minneapolis, and several of its members, were affiliated with the recent Occupy Wall Street Movement. They had been occupying two plazas next to the Hennepin County Government Center to call attention to the economic injustices ravaging the country. The plaintiffs slept overnight in tents and sleeping bags, cooked and shared meals, displayed signs, chalked walkways, and assembled for meetings, demonstrations, and teach-ins. They were broadcasting their activities over the internet to others who could relate with their cause, and believed that a 24/7 presence at the plazas was essential to effectively communicate their message.⁷⁴

The plaintiffs alleged the county had violated their First, Fifth, and Fourteenth Amendment rights under the United States Constitution by restricting activities they performed while they “occupied” the plazas. Before the protestors occupied the plazas, the County did not have any written statutes relating to assemblies in this public square. On November 8, 2011, the defendants cut off the electricity to the plazas, and passed a resolution prohibiting various activities in them, including signs or posters being placed on plaza property, leaving items unattended in the property, and persons sleeping in the plazas.

⁷⁴ *Occupy Minneapolis v. County of Hennepin*, Civ. No. 11-3412 (Minnesota 2011).

Plaintiffs argued that the County's bans and unwritten rules violate their right to freedom of speech, assembly, and petition governmental grievances as stated in the First Amendment of the United States Constitution. Relying on *Minnesota Bearing Co. v. White Motor Corp.* the Court decided on four factors that had to be met to grant a preliminary injunctive relief. The Court applied it to this case and considered:

(1) Whether there is a substantial probability movant will succeed at trial; (2) whether the moving party will suffer irreparable injury absent the injunction; (3) the harm to other interested parties if the relief is granted; and (4) the effect on the public interest⁷⁵

The Court stated that in a First Amendment case such as this, they would focus on the first factor of the before mentioned test. The Court believed that a loss of First Amendment freedoms, even for a minimal amount of time unquestionably constitutes irreparable injury. To show whether there is a substantial probability of success, the plaintiffs do not need to prove that there is a fifty percent chance or greater they will win, but rather show that the claim can provide a "fair ground for litigation."⁷⁶

The First Amendment prohibits laws that abridge the freedom of speech. The County argued that the specific restrictions that the plaintiffs challenged were irrelevant since they do not involve "speech", and therefore did not implicate First Amendment rights. Yet, speech is not construed literally, or even limited to the use of words. Constitutional protection is afforded not

⁷⁵ *Minnesota Bearing Co. v. White Motor Corp.*, 470 F.2d 1323, 1326 (1973).

⁷⁶ *Watkins Inc. v Lewis*, 346 F.3d 841 (2003).

only to speaking and writing, but also to some nonverbal acts of communication, and "expressive conduct."⁷⁷

Plaintiffs claimed that the County's decision to cut off electricity violated their free speech right because "the use of equipment to amplify a protester's message is an aspect of free speech." The respondents argued that plaintiffs' access to electricity was not necessary to spread their message and they had not stated anything that said they could not effectively express themselves without the use of the internet. Furthermore, the government was not mandated to make its utilities available to the public for anyone who seeks to spread a message. In addition, the First Amendment does not guarantee access to government owned property for public speech activities.⁷⁸ The Court does not require a County to help strengthen a speaker's message and concluded that the plaintiffs may not challenge on the basis of the First Amendment the decision of the County to cut off the plazas' electricity.

In this case, the defendant county argued that plaintiffs sleeping in the plazas or erecting tents or other structures did not implicate First-Amendment concerns. A common theme for the defense was that there was substantial governmental interest in these restrictions. A regulation is content-based rather than content-neutral when "the message conveyed determines whether the speech is subject to restriction."⁷⁹ The Court also agreed with the County that there was a significant interest in controlling the aesthetic appearance of the plazas including the chalking

⁷⁷ *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F. 3d 144 (2002).

⁷⁸ *Cornelius v. NAACP*, 473 U.S. 788 (1985).

⁷⁹ *Neighborhood Enterprises v. City of St. Louis*, 644 F.3d 728 (2011).

restrictions, and that the plaintiffs had ample alternative methods of communication available to them. While there was not a final order in this case, the hearing did include the positions of both the plaintiffs and defendants.

The court concluded, adding that regardless of the order, the plaintiffs had no plans of leaving the plazas. The County had recognized the ability of the plaintiffs to congregate at the plazas any hour of the day, and the plaintiffs had pointed out their intent to remain there for the foreseeable future. Hence, before they undertook expensive and acrimonious discovery, they were ordered to participate in an expedited settlement conference.⁸⁰

Cases involving the Occupy movement are being heard in the cities where the demonstrations occur. The courts seem to be allowing the municipalities in which the protests take place to determine regulations on overnight camping and sleeping. In *Occupy Fort Myers v. City of Fort Myers*, however, the Florida Middle District Court again ruled that camping and sleeping within the context of the Occupy movement was protected by the First Amendment. They referenced the fact that a twenty four hour presence in the park was a way to communicate a message and others could reasonably understand the message by viewing it. Yet they upheld an ordinance prohibiting the setting up of temporary shelters for the purpose of overnight camping.

⁸⁰ *Occupy Minneapolis v. County of Hennepin*, Civ. No. 11-3412 (Minnesota 2011).

Hence the court allowed the protestors the right to sleep overnight as long as no tents or similar structures were used.⁸¹

Both these cases seem to point out that the ban on camping and sleeping overnight in public property may be challenged under the First Amendment. The key in these decisions has been the fact that the courts see the act of camping and sleeping overnight as a clear way to communicate a message. Further, a ban on this conduct would be against protestors First Amendment rights. If the movement is to ever challenge and win the right to occupy a space, they must show that the camping and sleeping are vital channels of communication. Protestors must also show that the twenty four hour presence is essential to the communication of their message.⁸² In some Occupy cases, bans on a specific task, such as camping or sleeping, were established after the incident. If the government's intent was to restrict that particular expression, that regulation would be considered unconstitutional. According to *Texas v. Johnson*, a government cannot intend to suppress any part of a particular message or form of expression. The content must be neutral.⁸³

In a similar hearing to that in *Minneapolis*, the district court of South Carolina ruled on a motion for a preliminary injunction on behalf of Occupy Columbia. The injunction was to prevent the defendants from interfering with plaintiffs' twenty four hour occupation of State

⁸¹ *Occupy Fort Myers v. City of Fort Myers*, No. 2:11-cv-00608 (Florida 2011).

⁸² Kunstler, S. (2012). The Right to Occupy- Occupy Wall Street and The First Amendment. *Fordham Urban Law Journal*.

⁸³ *Texas v. Johnson*, 491 U.S. 397 (1989).

House grounds. The plaintiffs are part of the Occupy movement, and began Occupy Columbia on October 15, 2011. According to the plaintiffs:

Occupy Columbia is now an established occupation located on the State House grounds. Like the other Occupy protests in other locations across the country, literal occupation of the State House grounds 24 hours a day is a core component of the Occupy Columbia movement and a key message that the Occupy Columbia protestors seek to communicate to the government and to the world. “Around the clock” is not merely a symbol, but functions as an exemplar to the community demonstrating the protestors’ vision of a more just and equal society. Physically occupying the State House grounds, including sleeping overnight on the grounds, is the only effective manner in which Occupy Columbia members can express their message of taking back our state to create a more just, economically egalitarian society.⁸⁴

The group alleged it had not caused any damage to the property, had kept from interfering with the sidewalk and did not cook on the grounds. The conditions of the South Carolina State House and Grounds state that special provisions in writing are needed to schedule activities past 6:00 pm. The group had not received the special provision in writing to extend the limitation but alleged they received permission from the Budget and Control Board’s State House and Grounds Committee. After a month of the occupation, the governor announced to the protestors that they must leave the grounds after 6:00 pm, but could return at 6:00 am every morning. A group of

⁸⁴ Occupy Columbia v. Haley, 3:11-cv-03253-CMC. (South Carolina 2011).

protestors stood their ground after the announcement, stayed past 6:00 pm and were later arrested and charged with a trespassing violation.⁸⁵

The motion was ruled on by district judge Cameron McGowan Currie. The civil rights action under 42 U.S.C. § 1983 was used to inquire the injunctive relief for alleged violations of First Amendment rights of free speech, peaceable assembly, and petition. Judge Currie considered the motion for preliminary injunction to demand defendants from interfering with the twenty four hour occupation of the State House grounds, which included and was not limited to sleeping on the State House grounds and using sleeping bags and tents.⁸⁶ According to the Supreme Court of the United States and the Fourth Circuit Court of Appeals, to qualify for injunctive relief, a plaintiff must show (1) likelihood he will succeed on the merits; (2) likelihood he will suffer irreparable harm in the absence of a preliminary injunction; (3) that the balance of equities tips in his favor; and (4) that the injunction is in the public interest.⁸⁷

In their motion, the plaintiffs argued that there was no law or regulation prohibiting them from occupying the State House grounds twenty four hours a day. Plaintiffs used *Spence v. Washington* to qualify that their speech was to be protected speech as a symbolic expression. According to the protestors, the message can only be expressed by a constant twenty four hour occupation of the grounds. Judge Currie added that the Supreme Court had found that camping in a public park may constitute expressive conduct, and if so, may be protected by the First

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Weinberger v. Romero-Barcelo*, 456 U.S. 305 (1982). *See also*, *Winter v. NRDC Inc.*, 555 U.S. 7, 20-33 (2008).

Amendment.⁸⁸ She also noted that in *State v. Sturch*, it was stated that there is “No authority supporting a specific constitutional right to sleep in a public place” unless it is expressive conduct within the ambit of the First Amendment or is protected by other fundamental rights.”⁸⁹ On one hand, the defendants argued that camping and sleeping on State House grounds were not protected expression under the First Amendment. But if the court found that plaintiffs’ camping and sleeping on State House grounds was expressive conduct, they were prepared to argue that the court could approve regulations that impose permissible time, place, and manner restrictions on these rights.⁹⁰

Like similar cases, *Occupy Fort Myers* and *Occupy Minneapolis*, *Occupy Columbia’s* court also found that protestors camping on State House grounds was expressive conduct. These plaintiffs showed their intent to communicate a message that would be likely understood by those who observed the twenty four hour occupation. Therefore, this court found that the expressive conduct was protected by the First Amendment.⁹¹ After determining the protection of speech, the court considered whether the restrictions on the conduct were constitutional. Government may restrict expression in public forums as long as the restrictions “are reasonable time, place, and manner restrictions; are content-neutral; and are ‘narrowly tailored’ to serve a significant governmental interest.”⁹² The court added that the First Amendment does not

⁸⁸ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

⁸⁹ *State v. Sturch*, 921 P.2d 1170, 275 (1996).

⁹⁰ *Occupy Columbia v. Haley*, 3:11-cv-03253-CMC. at 13-16 (South Carolina 2011).

⁹¹ *Id.*

⁹² *Steinburg v. Chesterfield County Planning Commission*, 527 F.3d 377 (2008). *See also*, *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

guarantee rights for everyone to communicate one's views at all time and all places in whichever manner they choose. They found the conditions to establish restrictions to the park after 6:00 pm to be a valid restriction however it does not expressly prohibit camping or sleeping. A time, place, and manner restrictions must be content-neutral to survive a First Amendment challenge. With respect to the parks unwritten "no-camping or sleeping" policy, the court was not convinced that this policy was content-neutral and was not applied equally to all persons and groups on State House grounds.⁹³

The court concluded by stating that there was no evidence that policy had been applied in the past. In fact, Occupy Columbia protestors had been camping and sleeping over 30 days before the State attempted to enforce this policy. For those reasons the court ordered the injunction, allowing the protestors to remain in the park.⁹⁴

⁹³ Occupy Columbia v. Haley, 3:11-cv-03253-CMC. (South Carolina 2011).

⁹⁴ *Id.* at 23

SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET

In January 2012, both international human rights and United States civil liberties experts at seven law school clinics across the country met and formed the Protest and Assembly Rights Project. The project investigated the United States response to Occupy Wall Street. The projects directors and coordinators included The Global Justice Clinic at NYU School of Law, The Walter Leitner International Human Rights Clinic at Fordham Law School, The International Human Rights Clinic at Harvard Law School, and The International Human Rights and Conflict Resolution Clinic at Stanford Law School. The other participating clinics included The Civil Rights Clinic at the Charlotte School of Law, The community Justice section of Loyola Law Clinic-New Orleans and The Constitutional Litigation Clinic at Rutgers School of Law-Newark.

Civil Rights Movement

Many of the concerns and the tactics used by participants of the Occupy movement have been raised and used by earlier protest movements. Similar tactics including marches and encampments have also led to similarities in how the police and the public respond. Police forcibly broke up similar protests in which protestors were either praised or criticized by the public and government. U.S. District Judge Jed Rakoff issued a decision in June 2012, allowing a civil lawsuit against the New York Police Department in regard to the way protestors were handled on the Brooklyn Bridge. He began his decision by stating:

What a huge debt this nation owes to its “troublemakers.” From Thomas Paine to Martin Luther King, Jr., they have forced us to focus on problems we would

prefer to downplay or ignore. Yet it is often only with hindsight that we can distinguish those troublemakers who brought us to our senses from those who were simply...troublemakers. Prudence, and respect for the constitutional rights to free speech and free association, therefore dictate that the legal system cut all non-violent protesters a fair amount of slack.⁹⁵

During the 1950's-60's civil rights organizations used tactics similar to the ones used by the Occupy movement to communicate their message. In a similar protest movement, individuals came together to demand their basic civil rights. They demanded the repeal of the discriminatory Jim Crow laws and the passage of federal civil rights legislation. The response by local governments incorporated similar tactics as well, such as mass arrests of hundreds of demonstrators in favor of the movement. Police forces even used fire hoses, clubs, and attack dogs on protestors in order to capture these individuals.⁹⁶

Today, the Civil Rights Era is seen as an important and necessary part in history. But at the time, many opposed this struggle of human rights, from politicians to governments. Dr. Martin Luther King Jr. was a key figure in the civil rights movement. He faced much criticism and opposition during the movement, much like the Occupy movement today. Dr. King was taking part in organizing the Poor People's Campaign, addressing issues of economic justice, such as unemployment and the need for a better education and a living wage in April 1968, at the time of his assassination. Weeks after his death, protestors arranged an encampment on the

⁹⁵ Garcia v. Bloomberg, No. 11 Civ. 6957 at 2 (New York 2012).

⁹⁶ Levy, P. B. (1998). *The Civil Rights Movement*. Westport, CT.: Greenwood Press.

National Mall demanding a “fair share of America’s wealth and opportunity.”⁹⁷ The Poor People’s Campaign was unpopular, and many wanted the movement halted on health and safety grounds. Yet, President Johnson at that time did not evict the protestors, basing his decision on the constitutional protections of speech and assembly. The camp remained for several weeks, until Washington, D.C. police were used in its peaceful eviction.⁹⁸

During the Civil Rights movement protestors were often treated with violent police responses. The officer’s use of escalated force included mass arrests and force to try and control the protestors. These responses led to little concern for demonstrators’ speech and assembly rights. According to the escalated force model, protests are sometimes viewed as a threat to public order. The similarities can be made to the Occupy movement as protestors, when part of this model, are met with harsh responses, such as tear gas and other forms of harassment.⁹⁹ This approach led to mass unprovoked arrests, as well as police use of overwhelming force against protestors. The force used led to numerous deaths and injuries and a great deal of property damage during demonstrations. As a result, police agencies across the nation shifted to an approach referred to as “negotiated management.”¹⁰⁰ This model used during protests, features

⁹⁷ Lohr, K. (2008, June 19). *Poor People's Campaign: A Dream Unfulfilled*. Retrieved 2012, from National Public Radio (NPR): <http://www.npr.org/templates/story/story.php?storyId=91626373>.

⁹⁸ Leuchtenburg, W. (2005). *The Johnson Administration's Response to Anti-Vietnam War Activities*. http://www.lexisnexis.com/documents/academic/upa_cis/101121_JohnsonAdminAnti-VietWarActPt2.pdf: Microfilmed from the Holdings of The Lyndon Baines Johnson Library, Austin, Texas.

⁹⁹ McCarthy, C. M. (2005). *Protest Mobilization, Protest Repression, and Their Interaction*. Minneapolis, MN: University of Minnesota Press. *See also*, Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

¹⁰⁰ *Id.*

cooperation between law enforcement officers and protesters. This helps eliminate conflicts that would possibly lead to the use of force. Today, this communication is viewed to protect protesters' First Amendment rights, and to minimize potential conflict.¹⁰¹

During the World Trade Organization protests in 1999 in Seattle, Washington, the majority of the protesters were peaceful, however, some engaged in violence.¹⁰² Officers again responded with mass arrests, using forceful crowd dispersal techniques even towards peaceful protesters. Some of the images that remain of these protests involve tear gas and smashed windows. Seattle “marked the beginning of the newest chapter of increasingly harsh police responses to protesters.”¹⁰³ After these protests, police forces across the nation began investing in riot gear and sent officers to protest-control seminars sponsored by the National Association of the Chiefs of Police and the U.S. Department of Justice.¹⁰⁴ The Protest and Assembly Rights Project noted:

However, Seattle’s police officials view their response to the 1999 WTO protests as a cautionary tale, not a model to be reproduced. Then-Chief of Police Norm Stamper called the response the “worst decision of my 34-year career,” and has advocated for a protest policing approach that closely resembles the negotiated

¹⁰¹ Ear, J. (2010). *A Lawyer’s Guide to the Repression Literature*. National Lawyers Guild Review.

¹⁰² Gillham, J. N. (2007). *Police and Protester Innovation Since Seattle*. Mobilization, 335.

¹⁰³ D'addario, A. A. (2006). *Policing Protest: Protecting Dissent and Preventing Violence Through First and Fourth Amendment Law*. N.Y.U. REVIEW OF LAW & SOCIAL CHANGE [Vol. 31:1].

¹⁰⁴ Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

management strategy, recommending “a more open and more direct approach, negotiating with demonstration leaders to the extent that such leaders are identifiable and generally working to collaborate on both the tactics and the policing of those tactics, to the extent that that’s possible.”¹⁰⁵

The Vancouver Police Department has developed what they call a “meet and greet” strategy to handle protestors. Vancouver witnesses approximately 300 protests each year and adds that they have extensive crowd control experience. The strategy required a lot of planning and communication before, during, and after the implementation of large crowd control. During a report being issued on policing, Vancouver BC Deputy Chief, Doug LePard stated:

[W]e started developing what we call our “meet and greet” strategy. Instead of using riot officers in Darth Vader outfits, we aim to be totally engaged with the crowd. We were out there high-fiving, shaking hands, asking people how they’re doing, and telling the crowd that “We are here to keep you safe.” We have found that this creates a psychological bonding with the crowd that pays real

¹⁰⁵ Conan, N. (2011, November 29). *Shifts In Police Tactics To Handle Crowds*. Retrieved 2012, from National Public Radio (NPR): <http://www.npr.org/2011/11/29/142903638/shifts-in-police-tactics-to-handle-crowds>. See also, Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

dividends. It is very difficult to fight the police if you've just been friendly with some individual officers.¹⁰⁶

The police department used this strategy during the 2010 Winter Olympics. They considered it a huge success, noting that after 17 days of crowd-control, it received only one formal complaint and that no lawsuits were filed against the department. Chapter two of the report on policing, A “Softer” Approach to Crowd Management: The Vancouver Model holds these recommendations and lessons learned:

Recommendations/Lessons Learned

- Planning takes time, especially if you need additional personnel and resources. Policies and procedures need to be established in advance, and agencies must account for training time.
- If possible, shut down vehicle access to streets with high pedestrian traffic.
- Have officers on foot or on bicycles, motorcycles, Segways, and/or horseback to meet crowd control needs.
- Avoid using riot gear unless necessary, but keep it available.

¹⁰⁶ Police Executive Research Forum, (2011). *Critical Issues in Policing Series-Managing Major Events: Best Practices from the Field*. http://policeforum.org/library/critical-issues-in-policing-series/MajorEvents_full.pdf: Motorola Solutions Foundation, Washington D.C. *See also*, Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

- Allow officers to exercise discretion in regard to arrests. Decide ahead of time which behaviors will or will not be tolerated.
- Explain your role to the crowd and outline your expectations for their behavior.
 - Most protesters are peaceful; don't allow a small group of instigators to provoke an aggressive response from officers.
 - Be proactive by reaching out to the public or influential community groups beforehand to inform them of your planned activities during an event.
- Use the “meet and greet” strategy.
 - Engage the crowd in a friendly, non-confrontational manner.
 - Make sure the police are highly visible in “soft” gear and uniforms.
 - Befriending the crowd can act as a force multiplier for police.
- EMS personnel can partner with officers during an event to provide medical services quickly and efficiently.¹⁰⁷

Force

Patrick Gillham, a scholar of policing strategies argues that New York City has seen a recent policing shift from a reactive to a proactive style under the “Safe Streets, Safe City”

¹⁰⁷ Police Executive Research Forum, (2011). *Critical Issues in Policing Series-Managing Major Events: Best Practices from the Field*. http://policeforum.org/library/critical-issues-in-policing-series/MajorEvents_full.pdf: Motorola Solutions Foundation, Washington D.C.

initiative.¹⁰⁸ The proactive approach stems from planning in advance to minimize potential difficulties during protests. The preparations might include preparing police forces to attend specific protest locations, or regulating where protests are allowed to occur. The approach also seeks to regulate and restrict the access of demonstrators to protest areas. The creation of no-protest zones, barricades, and strategic use of arrests facilitate the success of this approach. While looking to manage the protest as a whole, the approach looks for police to be prepared so as to not to lose control of the situation.¹⁰⁹

The use of force is an issue coming up all across the country when dealing with the termination of Occupy movement encampments. It is also a controversial topic explained in the Protest and Assembly Rights Project. The International Association of Chiefs of Police defines force as “that amount of effort required by police to compel compliance from an unwilling subject” and excessive force as “the application of an amount and/or frequency of force greater than that required to compel compliance from a willing or unwilling subject.”¹¹⁰

Police departments have certain policies to assist officers in determining when force is appropriate, as well as how to employ it properly. The Supreme Court has set the standards on the use of force policies used by police departments. A key factor in evaluating excessive force is

¹⁰⁸ Gillham, P. F. (2011). *Securitizing America: Strategic Incapacitation and the Policing of Protest Since the 11 September 2001 Terrorist Attacks*. *Sociology Compass* 5(7):636-652.

¹⁰⁹ *Id.*

¹¹⁰ International Association of Chiefs of Police. (2001). *Police Use of Force in America*. <http://www.theiacp.org/Portals/0/pdfs/Publications/2001useofforce.pdf>. See also, Knuckey, S., Glenn, K., & MacLean, E. (2012). *Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

determining whether the individual was seized at the time force was used. The Court in *Terry* defines seizure when a person has been physically touched by a police officer, or when a person has submitted to an officer's nonphysical show of authority.¹¹¹ As stated earlier the three prong test to determine excessive force involves the severity of the crime, the threat or safety of the officers and the public, and the resisting nature of the suspect.¹¹² But if a person is not seized at the time the officer uses force, the court determines if it is appropriate or excess on whether the force "shocks the conscience."¹¹³

According to the Protest and Assembly Rights Project "The use of force during an arrest (of an individual or an entire group of demonstrators) is evaluated under the "objective reasonableness" test; the use of force to disperse a crowd (where no seizure is involved) is evaluated under the "shocks the conscience" test."¹¹⁴ Police department policies give instructions on how to use a particular force, but it is the officer's discretion to determine how much force is appropriate. There are many types of force in which an officer may use; some include verbal commands, physical contact, use of weapons, and deadly force.¹¹⁵

Law enforcement officers are required by the department's policies to use the lowest level of force they believe is necessary. Generally, departments require officers to file a report

¹¹¹ *Terry v. Ohio*, 392 U.S. 1, 18-20 (1968).

¹¹² *Graham v. Connor*, 490 U.S. 386 (1989).

¹¹³ *County of Sacramento v. Lewis*, 523 U.S. 833 (1998).

¹¹⁴ Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

¹¹⁵ Hatch, R. (2006). Coming Together to Resolve Police Misconduct: The Emergence of Mediation as a New Solution. *Ohio State Journal on Dispute Resolution*, 478-479.

after any use of force.¹¹⁶ For example, the Project holds that the Washington, D.C. Metropolitan Police have a special team in charge with handling all investigations dealing with incidents involving both First Amendment assembly and the use of force used in those situations.¹¹⁷

When dealing with protecting First Amendment rights, policing policies seek to maintain public safety while stressing the importance of the protestor's rights. Some policies highlight the need for minimal use of force to be used against demonstrators.¹¹⁸ Policies involving large demonstrations seek for police to communicate with those in charge of the demonstrations ahead of time, to help facilitate the process.¹¹⁹

The New York Police Department's Police Student's Guide

The background of policing is being discussed to provide a context to the strategies used during the Occupy Wall Street demonstrations. The Protest and Assembly Rights Project found that the New York Police Department's (NYPD) Police Student's Guide offered general guidance on the use of force during demonstrations and pointed out some key points. The guide does identify the need for a positive relationship between protesters and police. It states that "A lack of professionalism or the use of unnecessary force against civilians damages the relationship

¹¹⁶ Denver Police Department, *Use of Force Policy*. Retrieved 2012, from Denver.Gov:

<http://www.denvergov.org/DenverPoliceDepartmentOperationsManual/tabid/392273/Default.aspx>.

¹¹⁷ Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at the Leitner Center for International Law and Justice (Fordham Law School).

¹¹⁸ The Police Commission of the City and County of San Francisco, (2005). *Officer Hearing*. <http://sf-police.org/Modules/ShowDocument.aspx?documentid=22780>).

¹¹⁹ Oakland Police Department, (2005). *OPD Crowd Control and Crowd Management Policy*. Oakland Police Department.

between the Department and the community, as well as the Department's image."¹²⁰ The guide also states, "The most desirable method of handling demonstrations is with reasonableness rather than confrontation."¹²¹

The Oakland Police Department's policies make a specific reference to the impact of policing when involved in First Amendment freedom of speech. One policy declares "a large and visible police presence may have a chilling effect on the exercise of free speech rights," and for this reason, officers are instructed to "be positioned at a reasonable distance from the crowd to avoid a perception of intimidation," and to deploy resources for mass arrests "so they are not readily visible to the crowd."¹²²

United States laws and policies of potential use of force during public demonstrations hold force may be used "to arrest individuals who are liable for arrestable offenses, and to disperse individuals gathered in violation of the law."¹²³ Most department policies have the exact or similar rules for the use of general force. Some policies may include references to specific concerns, such as the Oakland Police Department's task to minimize the use of physical force against protesters. In general, a law enforcement officer has the discretion to use force against protestors. Force becomes obligated in cases where it is necessary to defend a fellow officer or

¹²⁰ New York Police Department, (2004). *Maintaining Public Order*. Confidential and Subject to Protective Order.

¹²¹ *Id.*

¹²² Oakland Police Department, (2005). *OPD Crowd Control and Crowd Management Policy*. Oakland Police Department.

¹²³ Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

individual from imminent danger.¹²⁴ Similarly, The NYPD Police Student’s Guide briefly discusses the use of force when dealing with demonstrations, stating it should only be used to prevent crime and protection against officers and others. The guide adds that the minimum amount of force is to be used to handle any task.¹²⁵

Like force, many police departments have regulations for the use of “less-lethal” weapons. These weapons are not intended to cause as much harm as weapons like firearms. However, they can still cause permanent injury, or even death, if handled or used incorrectly.¹²⁶ The weapons include, but are not limited to pepper spray, “bean bag” guns, batons, and stun guns. Police departments have individual policies that determine which weapons are available to the officers, and which require special training to use.¹²⁷ For example, the NYPD Police Student’s Guide allows the use of pepper spray to be used during public demonstration by officers who have forgone special training.¹²⁸ Pepper spray, much like tear gas, can be dispersed against individuals or a large crowd. The NYPD has specific instructions when it comes to the use of pepper spray during a demonstration. They instruct officers to avoid using the spray over a crowd to control demonstrators.¹²⁹

¹²⁴ Oakland Police Department, (2005). *OPD Crowd Control and Crowd Management Policy*. Oakland Police Department.

¹²⁵ New York Police Department, (2004). *Maintaining Public Order*. Confidential and Subject to Protective Order.

¹²⁶ Seattle Police Department, (2011). *Use of Force by Seattle Police Department Officers*. <http://www.seattle.gov/police/publications/UseForce/UseofForce.PDF>: SPD Special Report.

¹²⁷ American Civil Liberties Union of Massachusetts, (2005). *Proposed Standards for Massachusetts Law Enforcement Agencies*. Less Lethal Force.

¹²⁸ New York Police Department, (2004). *Maintaining Public Order*. Confidential and Subject to Protective Order.

¹²⁹ *Id.*

During many demonstrations, such as the Occupy movement, sometimes protestors refuse to obey the law. During this civil disobedience police officers are allowed to arrest those engaging in criminal or law disobeying conduct, not those who are attempting to communicate their message lawfully. NYPD officers are instructed to react to this civil disobedience by issuing warnings and giving protestors time to end the unlawful conduct or disperse.¹³⁰ This policy, held by the NYPD, is in line with the recommendations given by the American Civil Liberties Union (ACLU) on how to handle demonstrations involving civil disobedience.

Police department policies of several offices emphasize that the orders of dispersing a crowd may only be issued when protestors have engaged in illegal conduct or when the conduct poses “a clear and present danger of imminent violence.”¹³¹ Different departments have different rules on the use of dispersal orders. One of Oakland Police Department’s policies “instructs officers to make arrests where necessary to disperse a “non-violent demonstration that fails to disperse and voluntarily submits to arrest as a form of political protest,” rather than using force to induce dispersal of the crowd.”¹³² Other departments permit officers to employ several different options when handling protestors engaging in civil disobedience, from dispersal orders to tactics to maneuver crowds, and even the use of less-lethal weapons.¹³³

¹³⁰ *Id.*

¹³¹ Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

¹³² *Id.*

¹³³ *Id.*

Mass arrests were used by the NYPD when dealing with demonstrations held by Occupy Wall Street, as well as by other officers all over the nation in response to the movement as a whole. Some department policies allow officers to conduct mass arrests during large demonstrations in which everyone in a given area is arrested, regardless whether the individual is partaking in the demonstration or not. The Seattle Police Department partook in this policy during the 1999 World Trade Organization protests, but now reportedly “believes that it is usually more effective tactically to focus law enforcement efforts on particular individuals who may lead others into criminal misbehavior.”¹³⁴

In a similar approach, other departments discourage the use of mass arrests as a policing tactic during large demonstrations and require officers to attempt to employ non-arrest as a primary means of restoring order. If those methods fail, officers are given discretion to make arrests based on probable cause and to use the minimum force necessary.¹³⁵ The department has also developed a detailed policy relating to mass arrests of demonstrators, including a step-by-step procedure for determining whether a mass arrest is necessary, a detailed explanation of how to make the mass arrest, and transportation and processing of those arrested. During demonstrations in which protestors obstruct traffic Oakland’s policy on such procedure states:

¹³⁴ Seattle Police Department, (2011). *Use of Force by Seattle Police Department Officers*. <http://www.seattle.gov/police/publications/UseForce/UseofForce.PDF>: SPD Special Report. *See also*, Knuckey, S., Glenn, K., & MacLean, E. (2012). *Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

¹³⁵ Seattle Police Department, (2011). *Use of Force by Seattle Police Department Officers*. <http://www.seattle.gov/police/publications/UseForce/UseofForce.PDF>: SPD Special Report.

Regardless of whether a parade permit has been obtained, OPD officers will try to facilitate demonstrations that may temporarily block traffic and/or otherwise use public streets subject to time, place and manner of circumstances, by regulating and/or rerouting traffic as much as possible. For a demonstration without a pre-planned route, the Incident Commander shall evaluate the size of the crowd with regard to whether demonstrators should be required to stay on the sidewalk or whether demonstrators should be allowed to be in one or more lanes of traffic.¹³⁶

The commanding officer is instructed to use discretion in making arrests based on the disruption of traffic and the policy facilitating First Amendment activity.

International Protest Rights

In *Whitney v. California*, a case involving a violation of free speech rights, United States Supreme Court Justice Brandeis discussed his views on these rights.

Those who won our independence believed that ... freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; ... that the greatest menace to freedom is an inert people; that public discussion is a political duty, and that this should be a fundamental principle of the American government.... that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds

¹³⁶ Oakland Police Department, (2005). *OPD Crowd Control and Crowd Management Policy*. Oakland Police Department.

hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies ... Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law --the argument of force in its worst form. ... they amended the Constitution so that free speech and assembly should be guaranteed.¹³⁷

During a General Assembly on a report focusing on the right to protest in the context of individual's rights to assemble, the members of the United Nations (U.N.) stated:

Historically, protests and demonstrations have been the engines of change and major contributing factors to advances in human rights. Unknown defenders as well as activists of high caliber have led and inspired protest movements in all regions and historical epochs, paving to achievements in human rights... the protests of human rights defenders all over the world have been high-water marks of history.¹³⁸

Protest and Assembly Rights Project holds that freedom of expression and assembly protect activities which include: public assemblies and gatherings, protest camps, private meetings,

¹³⁷ Whitney v. California, 274 U.S. 357, 375 (1927).

¹³⁸ United Nations General Assembly . (2007). *Report of the Special Representative of the Secretary-General on human rights defenders* . <http://www.unhcr.org/refworld/pdfid/4732dbaf2.pdf>. See also, Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

processions, static meetings, marches, vigils, mass demonstrations, pickets, sit-ins, flash mobs, mass bicycle processions, chants and other verbal expression, the holding of posters and banners and other visual forms of communication, distribution of leaflets or other publications, and the collection of signatures.¹³⁹

The International Covenant on Civil and Political Rights (ICCPR) allows restrictions on protestor's rights during demonstrations only on limited grounds. In the United Nations, Economic and Social Council, U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, the Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights hold these grounds:

- National security restrictions may only be invoked to protect the existence of the nation against force or the threat of force and cannot be invoked in response to “merely local or relatively isolated threats to law and order.”
- Public safety means the protection “against danger to the safety of persons, to their life or physical integrity, or serious damage to their property.” Public safety cannot be used to impose “vague or arbitrary limitations.”
- Public order often overlaps with public safety, and is the “sum of rules which ensure the functioning of society”. Neither the “hypothetical risk of public disorder nor the presence

¹³⁹ Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

of a hostile audience” is a legitimate basis for restricting assembly rights. Restrictions may be imposed where protesters “themselves use or incite imminent, lawless and disorderly action [and where] such action is likely to occur”.

- Public health may be “invoked as a ground for limiting certain rights in order to allow a state to take measures dealing with a serious threat” to health, and the measures must be “specifically aimed at preventing disease or injury or providing care for the sick and injured.”
- If the rights of others are clearly harmed or threatened, necessary and proportionate restrictions may be justified. Any restrictions imposed must be the least restrictive to secure other rights.¹⁴⁰

The U.N. holds that encampments and other forms of assemblies and protests are protected by international law and that the purpose of policing is to ensure the protestor’s rights and safety. They add that according to one’s human rights, officers have to consider their duty to facilitate individuals’ rights to speech and peaceful assembly.

¹⁴⁰U.N. General Assembly, (1976). *International Covenant on Civil and Political Rights*. <http://www2.ohchr.org/english/law/ccpr.htm>.

CONCLUSION

The balance between the Constitutional right to protest versus the reasonable restrictions is a difficult one for governments. The First Amendment right to speech and assembly are two issues that have been closely discussed throughout this thesis. The movement must continue to challenge protestor's arrests and the infringement of their First Amendment rights in the courtroom. For some, the courts should limit the power of municipalities to regulate how people may use public space. For those, protestors must continue fighting on the streets for the opportunity to be heard in court. The movement must continue its fight, which has captured the attention of many across the world. To these people, the movement is symbolic, and they feel that the presence of individuals who occupy day and night is essential to their message. Those who maintain a twenty four hour presence during protests can best keep the public informed. The Occupy movement has brought upon a new form of expression, one worth fighting for.¹⁴¹

The government's interest to prevent possible criminal conduct is not sufficient to prohibit individuals from exercising their First Amendment rights. Similarly, excluding protestors from camping and sleeping in public spaces because of the government's interest in preserving the aesthetics and overall condition of these spaces can be considered a violation of protestors' rights. These First Amendment rights of Occupy protestors should be protected.

¹⁴¹ Kunstler, S. (2012). The Right to Occupy- Occupy Wall Street and The First Amendment. *Fordham Urban Law Journal*.

If the courts won't recognize the negative impact of park bans on camping and sleeping as it relates to the Occupy movement's significance in relaying their message, state legislatures must. At the start of the research for this thesis, the Occupy movement was in full swing, whereas currently with the restrictions in place, there are few protests on the news. The impact of this message is clear, based on the amount of publicity and public attention the movement received while in its full force. Once encampments were eliminated, the attention was significantly decreased. State legislatures can propose laws to protect the rights of these demonstrators. They can pass laws where the government must use the least restrictive means when attempting to regulate expressive conduct.¹⁴²

According to Udi Ofer, the legislature can have the local governments explore a lesser restrictive alternative before restricting the protestors' rights in parks or public forums. The government could explore ways to protect protestors' rights, as well as the parks and public forums. An alternative may include designating an area within the park where protestors may camp or sleep. In this situation, the government will still be able to achieve its interest without restricting protestors' rights. The legislation may also prohibit government from restricting activity based on possible future misconduct. Instead, the courts will base the bans on instances where the threats of misconduct have occurred, or seem probable.¹⁴³

¹⁴² Ofer, U. (2012). Occupy the Parks: Restoring the Right to Overnight Protest in Public Parks. *Fordham Urban Law Journal*.

¹⁴³ *Id.*

Occupy protestors across the country should not give up the fight to occupy. They must continue to fight for their First Amendment rights. The courts cannot allow the government to over regulate the ability of protestors to engage in the communication of a message using traditional public forums. The lack of uniform laws keeps hope alive for protestors. In *Occupy Fort Myers*, the court held that sleeping and camping while occupying were protected by the First Amendment. While these victories in motion hearings might seem irrelevant, these decisions could serve as precedent for the movement nationwide. The impact of allowing camping and sleeping to be constitutionally protected can be seen in the strength of the movement while the encampments were present. While protestors were occupying a space with twenty four hour presence they received daily media attention. After the termination of said encampments, the movement no longer captures the public's attention as strong as it did before.

While the use of force remains an issue during the arrests of protestors, it is important to realize that any force can quickly escalate. Law enforcement officers have engaged in violations of unnecessary and excessive use of force against demonstrators, even bystanders.¹⁴⁴ Nationwide these reports have occurred during the termination of encampments as well as marches and protests. In order to prevent these violations from occurring in the future, police departments should implement policies that promote communication among officers and demonstrators, especially when dealing with massive crowds. The meet and greet strategy would be successful

¹⁴⁴ Knuckey, S., Glenn, K., & MacLean, E. (2012). Suppressin Protest: Human Rights Violations in the U.S. Response to Occupy Wall Street. *Protest and Assembly Rights Proect* (p. 195). The Global Justice Clinic (NYU School of Law) and the Walter Leitner International Human Rights Clinic at theLeitner Center for International Law and Justice (Fordham Law School).

in helping to keep control of large crowds while decreasing the possibility of violence. These policies would help facilitate protests and assemblies as well as protect those taking part in it. It should emphasize communication and negotiation while leaving harsher actions such as force and arrests as a last resort. By setting out clear protocols for the use of force during protests police officers will seem less of a threat to demonstrators.

Affirming the right of individuals to assemble in public places during peaceful protests and acknowledging that even minor restrictions and unnecessary use of force hampers protestor's rights is crucial to the movement. The constitutional right to speech and assembly provides a means to communicate important messages. Protesting, when done peacefully, should be protected under the First Amendment. People all over the world still fight for the opportunity to be heard. The Occupy movement is looking to make a difference and they have a right to be heard.

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