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The Right to Occupy—Occupy Wall Street and the First Amendment

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THE RIGHT TO OCCUPY—OCCUPY WALL STREET AND THE FIRST AMENDMENT

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Eternal vigilance is the price of liberty—power is ever stealing from the many to the few.[1]

Wendell Phillips, January 28, 1852

INTRODUCTION

The Occupy movement, starting with Occupy Wall Street in Zuccotti Park in New York City, captured the public imagination and spread across the country with a force and rapidity that no one could have predicted. The original occupation in New York, the product of the efforts of a number of groups,[2] was fueled by a call put out by *Adbusters* magazine in July of 2011 featuring the image of a ballerina posing atop the iconic bronze bull sculpture of Wall Street—while

[*] The author is grateful to Professors Ellen Yaroshefsky and Holly Maguigan for their mentorship and guidance, to Daniel Pearlstein for his research assistance and to Jesse Ferguson, Lazar Bloch, Tracy Bunting, and Margaret Ratner Kunstler for their invaluable suggestions.

1. Wendell Phillips speech in Boston, Massachusetts, (Jan. 28, 1852), *in* SPEECHES BEFORE THE MASSACHUSETTS ANTI-SLAVERY SOCIETY 13 (Robert F. Wallcut, No. 21 Cornhill 1852), *available at* http://www.archive.org/details/speechesbeforema01phil.

2. The groups and individuals who helped organize the original Occupy Wall Street protest in New York include U.S. Day of Rage, Anonymous, New Yorkers Against, and The NYC General Assembly. *See* Nathan Schneider, *Occupy Wall Street: FAQ*, NATION (Sept. 29, 2011), http://www.thenation.com/article/163719/occupy-wall-street-faq.

protesters gather in the background amid a cloud of tear gas—and the following text:

WHAT IS OUR ONE DEMAND?

#OCCUPYWALLSTREET

SEPTEMBER 17TH. BRING TENT[3]

The image was resonant and electrifying. "Charging Bull," the giant bronze sculpture that stands in Bowling Green Park near Wall Street, the symbol of the financial optimism that characterizes a "Bull Market," was to be challenged. The October 2008 stock market crisis—together with bank bailouts, high unemployment, and the increasing income disparity between the highest earners and everyone else—had fostered discontent and hopelessness among those who bore the brunt of disastrous financial decisions that appeared to have enriched the few at the expense of the many. To occupy Wall Street was an empowering way to give voice to this outrage. It was also an assertion of control over Wall Street as a symbol, and the power of the people to change its meaning.

On September 17, 2011, about a thousand demonstrators answered the call to Occupy Wall Street, converging in Zuccotti Park in lower Manhattan near the New York Stock Exchange.[4] Several hundred spent the night, and from that day forward, the park was "occupied" by demonstrators on a twenty-four-hour basis.[5] The numbers were small by New York City protest standards; hundreds of thousands of New Yorkers had taken to the streets to demonstrate in opposition to the imminent Iraq War in 2003.[6] But the concept of occupying Wall Street was provocative. "We are the 99%," a popular chant at Occupy protests, and the movement's core slogan, pointed not only to the vast wealth inequality between rich and poor, but to the power that Occupy movement protesters—that all of us—have to combat inequality and injustice: the power of numbers. Over the course of the weeks that followed, many others visited Zuccotti Park, widely known in the movement by its original, pre-2006 name of Liberty Square or Liberty

3. Adbusters also put out an online call to action on its website on July 13, 2011. *#OccupyWallStreet*, ADBUSTERS (July 13, 2011), http://www.adbusters.org/blogs/adbusters-blog/occupywallstreet.html.

4. *See* WRITERS FOR THE 99%, OCCUPYING WALL STREET: THE INSIDE STORY OF AN ACTION THAT CHANGED AMERICA 15–19 (2012).

5. *Id.*

6. *See* Robert D. McFadden, *From New York to Melbourne, Cries for Peace*, N.Y. TIMES (Feb. 16, 2003), http://www.nytimes.com/2003/02/16/nyregion/threats-and-responses-overview-from-new-york-to-melbourne-cries-for-peace.html.

Plaza.[7] Once there, it was difficult to remain a bystander or spectator. Everyone was invited to participate directly in the process of determining what Occupy Wall Street was all about, through the democracy of the "General Assembly," daily meetings at which collective decisions were made in an open, participatory manner.[8]

Adbusters had called for a single demand to emerge from the action.[9] As the Occupy movement continued over weeks, the press focused on the lack of a clear demand or demands of the protesters.[10] What was their purpose? What were they asking for? The protesters themselves, through the General Assemblies, struggled with this issue.[11] Various lists of demands were circulated, some held forth by the press. But over time, it became clear that the "demand" was the occupation itself and the direct democracy that was taking place there.[12] The occupation of Zuccotti Park in New York, and of other parks and plazas across the country, became model communities that literally demonstrated the protesters' vision of the form a more just society might take. But it was the round-the-clock nature of the protests that was—and continues to be—the source of their expressive power, as well as the concept that unified Occupy protests across the country. The idea that demonstrators were willing to literally put their lives and bodies on the line, to physically occupy Wall Street and other locations in Washington, D.C., Augusta, Georgia, Fort Myers, Florida, Minneapolis, Minnesota and countless other cities and towns, in order to call attention to disparities in wealth and power, awakened a national discourse about the role of government in meeting the

7. The park was named Liberty Plaza Park from 1968 until 2006, when it received an $8 million renovation by Brookfield Properties, and was renamed Zuccotti Park in honor of John E. Zuccotti, the chairman of Brookfield, former City Planning Commission chairman and first deputy mayor under Abe Beame. *See* Schneider, *supra* note 2.

8. The General Assembly, or GA, is the decision-making body of the Occupy Movement, as well as the forum by which organizers make sure that the needs of those participating are being met. *See id.*

9. *See #OccupyWallStreet*, *supra* note 3.

10. *See, e.g.*, Meredith Hoffman, *Protesters Debate What Demands, if Any, to Make*, N.Y. TIMES (Oct. 16, 2011), http://www.nytimes.com/2011/10/17/nyregion/occupy-wall-street-trying-to-settle-on-demands.html; Miranda Leitsinger, *To Demand or Not to Demand? That is the 'Occupy' Question*, MSNBC.COM (Nov. 17, 2011), http://www.msnbc.msn.com/id/45260610/ns/us_news-life/t/demand-or-not-demand-occupy-question/; Alaina Love, *What Occupy Wall Street Demands of Our Leaders*, WASH. POST, (Oct. 11, 2011), http://www.washingtonpost.com/national/on-leadership/what-occupy-wall-street-demands-of-our-leaders/2011/10/11/gIQAjHtZcL_story.html.

11. *See* Schneider, *supra* note 2.

12. *Id.*

needs of the people, and the power of people to participate in their own governance. To occupy these spaces was to transform them.

As the occupations continued over days and weeks, lawyers[13] and legal workers working with the Occupy movement began to consider whether the First Amendment might include a "Right to Occupy."[14] Over the past eighty years, the protections of the First Amendment have expanded to include conduct that has come to be viewed as expressive, including demonstrating,[15] marching,[16] leafleting,[17] picketing,[18] wearing armbands,[19] and attaching a peace symbol to an American flag.[20] Should these same protections be extended to round-the-clock occupations, which include activities that were not previously viewed as communicative, such as sleeping and camping? According to the Supreme Court, the answer is no. In a 1984 decision in *Clark v. Community for Creative Non-Violence*,[21] the Court, although acknowledging that sleeping in connection with a twenty-four-hour demonstration is somewhat expressive, nonetheless upheld a regulation banning the activity. This nearly thirty-year-old decision, however, is not the end of the argument. The boundaries of First Amendment protection of expressive conduct have moved over time.[22] Once a particular form of conduct is recognized as having sufficient symbolic value, regulations that limit that conduct receive greater scrutiny. It is time for First Amendment protections to expand to include the form that the Occupy protests have taken—

13. The author is a member of the Mass Defense Committee of the National Lawyers Guild New York City Chapter, which has coordinated the criminal representation of over 2000 people arrested at Occupy Wall Street protests in New York City.

14. This Article does not address public forum doctrine, but assumes, for purposes of discussion, that the locations chosen by the Occupy Movement are traditional public forums for First Amendment expression. "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." Hague v. Committee for Indus. Org., 307 U.S. 496, 515 (1939).

15. *See, e.g.*, Edwards v. South Carolina, 372 U.S. 229 (1963).

16. *See, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

17. *See, e.g.*, Schneider v. Town of Irvington, 308 U.S. 147 (1939).

18. *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88 (1940).

19. *See, e.g.*, Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).

20. *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974).

21. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288 (1984).

22. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12.2 (2d ed. 1988).

twenty-four-hour demonstrations that involve the formation of tent cities and model communities, demonstrations that occupy and transform space, demanding new forms of government accountability and civic participation.

I. SYMBOLIC SPEECH

The protections of the First Amendment are not limited to the communication of ideas through spoken or written words. In a long line of cases, the Supreme Court has afforded First Amendment protection to "symbolic speech," expressive conduct that conveys messages or ideas. Thus, the flying of a red flag as a gesture for the support of communism,[23] the staging of a sit-in by black patrons in a "whites only" library to protest segregation,[24] and the wearing of black armbands by public school students as a protest against the United States policy in the Vietnam War,[25] are all expressive acts to which the Court has extended Constitutional protections.

In *United States v. O'Brien*,[26] the Supreme Court established a test for reviewing governmental regulation of symbolic expression. According to the Court, when a regulation prohibits conduct that contains both "speech" and "nonspeech" elements, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[27] A constitutional regulation must 1) be within the constitutional power of the government to enact, 2) further an "important or substantial government interest," 3) that interest must be "unrelated to the suppression of free expression," and 4) the infringement "is no greater than is essential" to further that interest.[28]

On the morning of March 31, 1966, David Paul O'Brien burned his Selective Service registration certificate ("draft card")[29] on the steps of the South Boston Courthouse in protest of the Vietnam War and

23. Stromberg v. California, 283 U.S. 359 (1931).

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

25. Tinker v. Des Moines Sch. Dist., 393 U.S. 503 (1969).

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

27. *Id.* at 376.

28. *Id.* at 377.

29. Selective Service registration certificates were commonly known as "draft cards." These were small white cards bearing the registrant's identifying information, the date and place of registration, and his Selective Service number, which indicated his state of registration, local board, birth year, and his chronological position in the local board's classification record.

the military draft.[30] He was convicted in federal court for violating a 1965 federal law that made it a crime to "knowingly destroy" or "knowingly mutilate" a draft card.[31] O'Brien defended his act as "'symbolic speech' protected by the First Amendment."[32]

Wary of extending First Amendment protections to all forms of expressive conduct, the Court refused to "accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."[33] The Court did not decide whether Mr. O'Brien's conduct implicated the First Amendment, but even assuming that it did, the Court reasoned, "it does not necessarily follow that the destruction of a registration certificate is constitutionally protected activity."[34] In fact, the Court found that it was not. Under its newly-minted four-part test, the Court found that enacting the law was within the power of Congress, that the government's interest in "preventing harm to the smooth and efficient functioning of the Selective Service system" was sufficiently important, that the law was an appropriately narrow means of protecting that interest, limited to the "noncommunicative aspect" of O'Brien's conduct, and therefore unrelated to any incidental suppression of speech.[35] The Court declined to look for a connection between the governments' stated interest and its ban on the destruction of draft cards.[36] Although the legislative history of the law indicated that the decision to punish draft protesters who burned their draft cards may have had more to do with the nature of their message than the facilitation of a smooth draft process, the Court declined to delve into legislative motive, stating, "It is a familiar principle of constitutional law that this Court will not strike down an otherwise constitutional statute on the basis of an alleged illicit legislative motive."[37]

30. *O'Brien*, 391 U.S. at 369.

31. Act of June 5, 1942, ch. 340, § 462, 56 Stat. 314.

32. *O'Brien*, 391 U.S. at 376.

33. *Id.*

34. *Id.*

35. *Id.* at 382.

36. "The Court was content to demonstrate that the government's interest in preventing the destruction of draft cards is real, that is, not imaginary or nonexistent. But an interest may well be real without being important enough to sustain an abridgment of speech." Dean Alfange, Jr., *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 23.

37. *O'Brien*, 391 U.S. at 383.

Beyond refusing to accept all expressive conduct as speech, the *O'Brien* Court did not explain how to distinguish between conduct deserving of First Amendment protection and conduct outside the ambit of that protection. Six years later, however, in *Spence v. Washington*,[38] the Court announced a two-part test for determining when conduct is to be treated as speech.[39] The first factor is whether there is intent on the part of those engaging in the conduct to communicate a message through the conduct, and the second factor is whether it is likely that those observing the conduct will understand the message.[40]

In *Spence*, the Court held that displaying an American flag marked with a peace symbol was protected conduct.[41] The person engaging in the conduct was a college student who was outraged by the invasion of Cambodia by United States forces, announced by President Richard Nixon in a televised address on April 30, 1970, and shooting of unarmed college students by members of the Ohio National Guard on Monday, May 4, 1970.[42] In protest of these events, Harold Spence hung an American flag outside the window of his apartment—upside down and with peace symbols made out of black tape attached to both sides—in order to communicate his belief that the United States should stand for peace instead of violence or war.[43]

Spence was arrested and charged under a law banning "improper use" of the American flag.[44] He was convicted after the judge told the jury that merely displaying the flag with an attached peace symbol was sufficient grounds for conviction, fined $75, and sentenced to ten days in jail (suspended).[45] In an unsigned, *per curiam* decision, the Supreme Court held that the Washington law "impermissibly infringed protected expression."[46] The timing and circumstances of Spence's conduct distinguished it from "an act of mindless nihilism" and transformed it into "a pointed expression of anguish by appellant about the then current domestic and foreign affairs of his government."[47] The Court noted that Spence had taken action "at a time of national turmoil" over the invasion of Cambodia and the killings at

38. Spence v. Washington, 418 U.S. 405 (1974).
39. *Id.*
40. *Id.* at 410–11.
41. *Id.* at 410.
42. *Id.* at 408.
43. *Id.*
44. *Id.* at 406–07.
45. *Id.* at 408.
46. *Id.* at 406.
47. *Id.* at 410.

Kent State University.[48] "It is difficult now, more than four years later," the Court acknowledged, "to recall vividly the depth of emotion that pervaded most colleges and universities at the time, and that was widely shared by young Americans everywhere."[49]

In *Spence*, the Supreme Court decided that it is the context in which an action is taken that determines whether the action is symbolic speech. As the late Professor Robert Cover stated:

> [M]any of our actions [can] be understood only in relation to a norm. . . . There is a difference between sleeping late on Sunday and refusing the sacraments, between having a snack and desecrating the fast of Yom Kippur, between banking a check and refusing to pay your income tax. In each case an act signifies something new and powerful when we understand that the act is in reference to a norm.[50]

The same can be said for symbolic expression. Covering a flag in black tape isn't per se expressive conduct. Why you are doing it, what you mean to convey, and whether your message is understood are all relevant to determining whether a particular medium of expression falls under the protections of the First Amendment.

Spence also illustrates why it is difficult for courts to adjudicate these matters as they happen. Certain acts only become speech against the backdrop of the times in which they occur. At the time the conduct in question takes place, it may be the first instance, or among the first instances, of a particular form of expressive conduct. In *Spence*, an action that may very well have been viewed as an "act of mindless nihilism" on April 29, 1970 was transformed into a protected form of expressive conduct by what happened in the week that followed.[51] But in the heat of the moment in which the conduct transpires, it may be difficult for law enforcement or judicial officers to see such conduct for what it signifies.

The Supreme Court had the benefit of time to analyze the context of Spence's actions. The Court issued its *Spence* opinion in June 1974, four years after Kent State and the Cambodian invasion. In between the time Spence hung his American flag in protest and the decision of the Court, the Pentagon Papers were published, detailing the Defense Department's secret history of the Vietnam War, and the "Watergate" scandal revealed a massive campaign of political spying

48. *Id.* at 414, n.10.
49. *Id.*
50. Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 7–8 (1983).
51. *Spence*, 418 U.S. at 410.

and sabotage. These events lead to resignations, prosecutions, and Senate hearings, and ultimately the resignation of President Nixon on August 8, 1974.

The scope of symbolic speech protection has primarily been defined in the context of cases involving the physical desecration of the American flag.[52] In *Texas v. Johnson*, the Supreme Court found that a law punishing an individual for burning an American flag in protest was a violation of the First Amendment, and therefore unconstitutional.[53] In reaching this conclusion, the Court looked to both *Spence* and *O'Brien* for guidance.

At the outset of its analysis, the Court, per Justice Brennan, acknowledged that it "must first determine whether Johnson's burning of the flag constituted expressive conduct, permitting him to invoke the First Amendment in challenging his conviction."[54] The Court employed the *Spence* test, and looked to context to determine whether Johnson's act was communicative in nature.[55] Johnson had burned the flag as part of a protest during the 1984 Republican National Convention in Dallas, Texas, in protest of the nomination of Ronald Reagan as the Republican Candidate for a second term as President. Within this context, the Court found that "[t]he expressive, overtly political nature of this conduct was both intentional and overwhelmingly apparent" and, quoting *Spence*, "'sufficiently imbued with elements of communication' to implicate the First Amendment."[56]

After making the determination that Mr. Johnson's burning of the flag was symbolic conduct protected by the First Amendment, the Court went on to consider whether the conduct could be regulated.[57] Because Mr. Johnson's conduct involved both speech and nonspeech elements, under *O'Brien*, the Court needed to consider whether a governmental interest in regulating the nonspeech element of the conduct justified incidental limitations on First Amendment freedoms. Before reaching the *O'Brien* factors, however, the Court asked, as a threshold question, whether *O'Brien* was even applicable.

52. *See, e.g.*, United States v. Eichman, 496 U.S. 310 (1990); Texas v. Johnson, 491 U.S. 397 (1989); Smith v. Goguen, 415 U.S. 566 (1974); Spence v. Washington, 418 U.S. 405 (1974); Street v. New York, 394 U.S. 576 (1969).

53. *Johnson*, 491 U.S. 397. The case was argued before the Supreme Court by the author's father, William M. Kunstler.

54. *Id.* at 403.

55. *Id.*

56. *Id.* at 406 (citations omitted).

57. *Id.* at 406–07.

The Court explained that *O'Brien's* "relatively lenient" standard was only applicable in cases where "the governmental interest is unrelated to the suppression of free expression."[58]

The Court then scrutinized the interests asserted by the Texas government. Texas first claimed that its interest in "preventing breaches of the peace" justified Johnson's conviction for flag desecration.[59] The Court found that this interest was not implicated by the facts on the record as "no disturbance of the peace actually occurred or threatened to occur because of Johnson's burning of the flag."[60] The second interest asserted by the State of Texas was "an interest in preserving the flag as a symbol of nationhood and national unity."[61] As this interest arose out of a concern that a person's treatment of the flag would communicate a different symbolic message, the Court found that it was clearly "related 'to the suppression of free expression' within the meaning of O'Brien."[62]

Having found that the government interests were connected to the suppression of speech, the Court held that the *O'Brien* standard did not apply, suggesting the need for a stricter standard.[63] The Court then decided that the Texas statute was not content neutral, as it only prohibited burning of the flag that was likely to be offensive to others, and not burning the flag for other purposes, such as disposing of a flag that was no longer fit for display. Because application of the Texas law was dependent upon the content of the burner's message, the Court subjected the State's interest to "the most exacting scrutiny."[64]

The Court emphasized in *Texas v. Johnson* that the government may not restrict the expression of a message because of its content.[65] The importance of the decision for future cases of symbolic expression, however, does not lie in its eloquent assertion of content neutrality as the "bedrock principle underlying the First Amendment."[66] In *Johnson*, the Court signaled, as it had in *Spence,* that context is important in determining when symbolic acts receive First Amend-

58. *Id.* at 407 (citations omitted).

59. *Id.*

60. *Id.* at 408. The Court noted that "[t]he only evidence offered by the State at trial to show the reaction to Johnson's actions was the testimony of several persons who had been seriously offended by the flag burning." *Id.*

61. *Id.* at 410.

62. *Id.*

63. *Id.*

64. *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312 (1988)).

65. *Id.* at 414.

66. *Id.*

ment protection.[67] But unlike in *Spence*, the Court looked to the context of the regulation itself—the motivation of the government in regulating the conduct, balancing the competing interests of the expressive activity and the governmental purpose for restricting that activity.[68] Even before it examined the content neutrality of the Texas law, the Court found that the *O'Brien* test was inapplicable because the state's interest was connected to the suppression of speech.[69]

The *Johnson* Court's sensitive analysis of the rights and interests at stake—present in many of the Court's earlier decisions recognizing and protecting symbolic speech—is missing from the Court's holding in *O'Brien*. In *O'Brien*, the Court assumed, without deciding, that O'Brien's burning of his draft card implicated the First Amendment, and accepted, without scrutinizing, the government's stated interest for passing the draft card regulation. Unfortunately, when evaluating the scope of First Amendment protections in the context of twenty-four-hour protests, the trend in symbolic speech law appears to be more in line with *O'Brien* and protecting government interests at the expense of the expressive rights of individuals.

II. SYMBOLIC SLEEPING AND THE COURTS

The concept of the twenty-four-hour protest as protected symbolic and expressive conduct is not unique to the Occupy movement. Over the past forty years, it has been litigated primarily in connection with protests in Washington D.C. on the National Mall and in Lafayette Park, which sits directly across the street from the White House.[70] It is easy to see why; our Nation's capitol is a traditional and longstanding forum for citizens wishing to bring their grievances to the United States government. The majority of protests and rallies that take place there are one-day events, where participants show up, air their grievances, and go home. But over the past century, there have always been protests in which protesters have "occupied" parts of the

67. *See id.* at 405.

68. *See id.* at 406–07.

69. *Id.*

70. *See generally* Cmty. for Creative Non-violence v. Watt (*CCNV I*), 670 F.2d 1213 (D.C. Cir. 1982) (sleeping in Lafayette Park); United States v. Abney, 534 F.2d 984 (D.C. Cir. 1976) (sleeping in Lafayette Park); Vietnam Veterans Against the War v. Morton (*VVAW*), 506 F.2d 53 (D.C. Cir. 1974) (camping on Mall); Quaker Action Grp. v. Morton (*Quaker Action*), No. 71-1276 (D.C. Cir. Apr. 19, 1971), *vacated mem.*, 402 U.S. 926 (1971) (camping on Mall).

Capitol for a longer period of time in order to express the seriousness of their grievance and more effectively communicate their message.[71]

In 1976, in *United States v. Abney*, the Court of Appeals for the District of Columbia invalidated a National Parks Service regulation prohibiting camping after a World War II veteran was convicted for sleeping in Lafayette Park during a round-the-clock vigil to protest his treatment by the Veterans Administration (VA).[72] For thirty years, Stacy Abney, a sixty-four-year-old Texas farmer, had been in a dispute with the VA over disability benefits. During that time, he had traveled to Washington, D.C. on multiple occasions to meet with VA officials, whose headquarters bordered Lafayette Park. After being denied benefits for the ninth time, Mr. Abney "went across the street to the park to take up a round-the-clock vigil protesting his treatment at the hands of the VA."[73] Carrying a sign that said "I will stay here until I get my VA rights," Abney was arrested eleven times for sleeping in Lafayette Park and was sentenced to thirty days in jail.[74]

The D.C. Court did not apply the *Spence* test to determine the expressive nature of Mr. Abney's conduct, nor did it apply the *O'Brien* test to determine the propriety of the government of the regulation. By focusing on Mr. Abney's intent and the circumstances surrounding his conduct, however, the Court applied a *Spence*-like analysis, finding that "[i]n the unusual circumstances here presented, Abney's sleeping must be taken to be sufficiently expressive in nature to implicate First Amendment scrutiny in the first instance."[75] Although the Court failed to explain why Mr. Abney's circumstances were "unusual," it is likely that the sign he carried, which explained his purpose, together with the physical proximity of his protest to the VA headquarters, created a context for the Court that clearly communicated Mr. Abney's intent and message. "Obviously," the Court reasoned, "given appellant's concept of the purpose underlying his con-

71. The first of the "tent city" protests was likely the "Bonus Army" protests of 1932. In May of that year, with unemployment soaring to almost twenty-five percent, tens of thousands of World War I veterans, their families and supporters set up encampments demanding payment of the "bonus" promised to veterans, but deferred until 1945. The protest lasted until the encampments were evacuated by force on July 28, 1932. *See generally* PAUL DICKSON & THOMAS B. ALLEN, THE BONUS ARMY: AN AMERICAN EPIC (2004).

72. United States v. Abney, 534 F.2d 984, 985 (D.C. Cir. 1976).

73. *Id.* at 985.

74. Lance Gay, *Jailed Veteran's VA Protest in Park Ruled Legal*, WASH. STAR (May 1, 1976), http://prop1.org/history/1776plus/76abney.htm.

75. *Abney*, 534 F. 2d at 985.

duct, this necessitated sleeping in the park."[76] The Court then examined the Park Service regulation, which prohibited "[s]leeping, loitering or camping, with intent to remain for a period of more than four hours . . . except upon proper authorization of the Superintendent."[77] Because the regulation gave the Superintendent unfettered discretion to deny or permit sleeping in the park, the Court found it unconstitutional.[78]

In a pair of cases that arose out of protests organized by the Community for Creative Non-Violence (CCNV), the Court of Appeals for the District of Columbia reiterated its view that sleep could be speech-related.[79] In the fall of 1981, CCNV applied to the National Park Service for a permit to hold a demonstration calling attention to the plight of the homeless in Lafayette Park.[80] The Park Service granted CCNV a permit to erect nine "symbolic tents" and to have a continuous, twenty-four-hour presence in the park, but prohibited sleeping, which it contended was prohibited under its newly enacted regulation banning camping "primarily for living accommodation" outside of designated campsites.[81] In *Community for Creative Non-Violence v. Watt (CCNV I)*, the Court of Appeals for the District of Columbia found that sleeping in symbolic tents was consistent with "the use of symbolic campsites," which was permitted under the regulation.[82] Holding that "in this case sleeping itself may express the message that these persons are homeless and so have nowhere else to

76. *Id.* at 987.

77. 36 C.F.R. § 50.25(k) (1975).

78. Mr. Abney later moved his protest to the Capitol steps. In 1996, at age 84, he was still out there protesting. "I'm a 24-hour demonstrator," he told a reporter. He lived in a cardboard box beneath the steps for at least twenty years. T. M. Hartmann, *Homeless Demonstrator Lives Under Capital Steps*, CAPITAL NEWS SERVICE (Mar. 12, 1996), http://www.journalism.umd.edu/cns/wire/1996-editions/03-March-editions/960312-Tuesday/HomelesMan_CNS-UMCP.html.

79. *See generally* Cmty. for Creative Non-Violence v. Watt [hereinafter *CCNV I*], 670 F.2d 1213 (D.C. Cir. 1982); Cmty. for Creative Non-Violence v. Watt [hereinafter *CCNV II*], 703 F.2d 586 (D.C. Cir. 1983).

80. *CCNV I*, 670 F.2d at 1214.

81. The relevant text of the National Park Regulation, 36 C.F.R. § 50, enacted on November 13, 1981, is as follows: "Camping is prohibited in all park areas except those specially designated as official campsites (36 CFR 50.27). The National Park Service does permit the use of symbolic campsites reasonably related to First Amendment activities. However, camping primarily for living accommodation must be confined to designated campsites." No such campgrounds have ever been designated in Lafayette Park or the Mall.

82. Having found that sleeping in symbolic campsites was consistent with the National Park Service's own regulation, the D.C. Court did not pass on the constitutionality of the regulation itself. *CCNV I*, 670 F.2d at 1217.

go," the Court based its ruling on the "uncontroverted evidence" that the purpose of the campsites was primarily to express the problems of the homeless and not to serve as living accommodations.[83]

After *CCNV I*, the Park Service modified its regulation to expand the definition of camping.[84] The new regulation stated that sleeping or using tents or other structures for sleeping "constitute camping when it reasonably appears, in light of all the circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation *regardless of the intent of the participants or the nature of any other activities in which they may also be engaging*."[85] In banning sleeping "regardless of the intent of the participants or the nature of any other activities in which they may also be engaging," the Park Service's intention was, in light of the Court's decision in *CCNV I*, to expressly prohibit sleeping in symbolic campsites.[86]

In the fall of 1982, as it had done the year before, the Park Service granted a permit request from CCNV to conduct a wintertime protest, this time in both Lafayette Park and on the Mall, for the purpose of demonstrating the plight of the homeless. The permit authorized the construction of two symbolic tent cities; twenty tents accommodating fifty people in Lafayette Park, and forty tents accommodating up to a hundred people on the Mall. Citing its newly modified regulation, the Park Service denied CCNV's request that demonstrators be permitted to sleep in the symbolic tents. CCNV filed an action seeking to invalidate the ban on sleeping as an unconstitutional restriction of their First Amendment rights. Finding that the government had failed to show that a ban on sleeping—in the context of a round-the-clock protest for which it had already granted permission—furthered any legitimate government interest, the Court of Appeals for District of Columbia granted CCNV's request for an injunction.[87]

The *CCNV II* court began its analysis with an application of the *Spence* test, looking to the intent of the actor and the context of his or her conduct. The court found that the intent of the protesters was "to create an inescapable night-and-day reminder to the nation's political leadership that homeless persons exist."[88] Looking at "the context of

83. *Id.* at 1216–17.
84. 36 C.F.R. § 50.27(a) (1983).
85. *Id.* (emphasis added).
86. *Id.*
87. *CCNV II*, 703 F.2d 586 (D.C. Cir. 1983).
88. *Id.* at 594.

a large demonstration with tents, placards, and verbal explanations" protesting the plight of the homeless, the court found the "pointed use of the simple act of sleeping" permeated with "the indicia of political expression."[89] The court compared the twenty-four-hour "presence" of the CCNV demonstrators in Lafayette Park and the Mall to the "reproachful presence" of civil rights activists protesting segregation in a silent vigil in a public library in *Brown v. Louisiana*,[90] and found that the CCNV demonstration was "identical in both concept and purpose to such conduct."[91] Given the context and intent of the demonstration, the court found that CCNV's presence "at the seat of our national government" was "entitled to the same First Amendment protection as a vigil," regardless of whether the protesters were sitting down, lying down or sleeping.[92]

The court then turned to an examination of the regulation itself. Applying *O'Brien*, the court looked to the governmental interests put forth by the Park Service, noting that "[t]he right to use a public place for expressive activity may be restricted only for weighty reasons."[93] The interests identified by the Park Service were (1) preserving parkland for the use of others, the possibility of (2) damage to park resources or (3) sanitation problems, (4) the overburdening of law enforcement officers, and (5) a concern that permitting sleeping would result in an increase in requests for sleeping by demonstrators and non-demonstrating visitors.[94]

The *CCNV II* court then considered whether these interests were furthered by prohibiting expressive sleeping in a permitted demonstration in which protesters had received permission to maintain a twenty-four-hour presence and erect symbolic tents.[95] The court found that preserving parkland for the use of others was not an issue, because the CCNV protesters had already been granted use of the space.[96] Further, because protesters were already permitted to "sit, stand or even lie down" in the symbolic tents, prohibiting sleeping would not serve to protect park resources, reduce sanitation problems, or conserve law enforcement resources.[97]

89. *Id.* at 593.
90. Brown v. Louisiana, 383 U.S. 131, 142 (1965).
91. *CCNV II*, 703 F.2d at 594.
92. *Id.*
93. *Id.* at 595 (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)).
94. *Id.* at 595–96.
95. *Id.* at 596.
96. *Id.* at 597.
97. *Id.* at 596.

Finally, the court addressed the Park Service's concern that permitting sleeping would result in an increase in requests for sleeping by demonstrators and non-demonstrators. As far as non-demonstrators, the court questioned whether permitting sleeping in this case would really generate an increase in requests by ordinary citizens with a desire to sleep on the Mall, but found that the Park Service was free to apply its anti-camping regulations to such applicants.[98] For demonstrators seeking permission to sleep, the court found that the Park Service could draw a distinction between those seeking to sleep for convenience, and those seeking to express themselves as part of a twenty-four-hour vigil, but that "it may not deny all such requests merely because it expects a large number of people to apply."[99]

Finding that the Park Service had failed to demonstrate that its interests would be furthered by a ban on sleep, the Court of Appeals for the District of Columbia granted an injunction in favor of CCNV.[100] This victory for the First Amendment rights of demonstrators was short-lived; in *Clark v. Community of Creative Non-Violence*, decided one year later in 1984, the Supreme Court overturned the Court of Appeals decision, finding that the Park Service regulation prohibiting camping did not violate the CCNV demonstrators' First Amendment rights.[101]

Although the court of appeals' decision in *CCNV II*, like *Texas v. Johnson*, is an example of a court utilizing *Spence* and *O'Brien* as a framework for careful balancing of government interests and First Amendment rights, the Supreme Court's decision in *Clark* is an example of an *O'Brien*-like decision that accepts government interests but fails to scrutinize whether those interests are actually served by the regulation, and fails to examine the symbolic value of the expressive conduct. As in *O'Brien*, the Court in *Clark* assumed, without deciding, that "overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment."[102] The Court then went directly to an analysis of whether the conduct could be regulated. The Court noted that it could apply either the *O'Brien* test for regulating symbolic conduct, or the standard

98. *Id.* at 597–98.
99. *Id.* at 598.
100. *Id.* at 599.
101. 468 U.S. 288 (1984).
102. *Id.* at 293.

applied to time, place and manner restrictions.[103] It opted to apply time, place and manner analysis, which requires that restrictions "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 the information."[104] The Court then found that the regulation prohibiting camping satisfied this test. The regulation, the Court held, was content neutral as it applied to all camping, and was not being applied here because of the message of CCNV's symbolic camping; that without sleeping, the protesters had ample alternative means within the context of their twenty-four-hour vigil to communicate their message; and that it was narrowly tailored to the "Government's substantial interest in maintaining the parks in the heart of our Capital in an attractive and intact condition."[105]

Central to the Court's opinion was its perception that the ban on sleeping did not detract from the demonstrators' message. Without employing the *Spence* test, the Court found it "evident that its major value to this demonstration would be facilitative," in that it enabled homeless protesters to attend the demonstration who would not otherwise be able to attend.[106] But by failing to look at the act of sleeping within the context of CCNV's planned demonstration, the Court was able to effectively ignore its meaning. As Justice Thurgood Marshall noted in his dissenting opinion,

> It is true that we all go to sleep as part of our daily regimen and that, for the most part, sleep represents a physical necessity and not a vehicle for expression. But these characteristics need not prevent an activity that is normally devoid of expressive purpose from being used as a novel mode of communication. Sitting or standing in a library is a common-place activity necessary to facilitate ends usually having nothing to do with making a statement. Moreover, sitting or standing is not conduct that an observer would normally construe as

103. Although not addressed in this Article, it is worth nothing that the *O'Brien* test and the time, place, manner standard are not interchangeable and should not be used interchangeably. The *O'Brien* test has a higher standard, requiring that the restriction be "no greater than is essential" to further the governmental interest, as it recognizes that a regulation that prohibits expressive conduct acts forecloses that particular form of expression. *O'Brien*, 391 U.S. at 377. A time, place, manner restriction assumes that the actor is still free to engage in the same form of expression at another time, in another place, or in another manner, and therefore only requires that the government leave open "ample alternative channels." *Clark*, 468 U.S. at 293.

104. *Clark*, 568 U.S. at 293.

105. *Id.* at 295–96.

106. *Id.* at 296.

> expressive conduct. However, for Negroes to stand or sit in a "whites only" library in Louisiana in 1965 was powerfully expressive; in that particular context, those acts became "monuments of protest" against segregation.[107]

Like Robert Cover, who acknowledged that certain acts of rebellion can only be understood when viewed in relation to a norm,[108] Justice Marshall saw that the demonstrators were creating a "novel mode of communication" out of an activity that is normally facilitative in nature. In the context of CCNV's demonstration, the act of sleeping outdoors, in winter, was powerful symbolic expression, a way to "re-enact the central reality of homelessness."[109] As Judge Edwards wrote in his concurring opinion for the appellate court in *CCNV II*: "[the protesters] can express with their bodies the poignancy of their plight. They can physically demonstrate the neglect from which they suffer with an articulateness even Dickens could not match."[110] Unfortunately, in *Clark*, the Majority saw only the norm, and not the new form of expression that was being created in relation to that norm. From this standpoint, it was easy for the Court to discount its symbolic value and find that the protesters had ample alternative channels to express their message.

Justice Marshall saw symbolic speech as an evolving form of expression, and believed that First Amendment law must evolve with it. By recalling the library sit-in from *Brown v. Louisiana*,[111] he was reminding the Court that the essence of symbolic speech jurisprudence (and the role of the Supreme Court) is the recognition of this evolution. Justice Marshall looked at activities that were not previously understood to be communicative, and acknowledged that something new is happening that is deserving of First Amendment protection. Although Justice Marshall recognized the importance of the Court's role in protecting new forms of communication, the majority clearly did not. Implicit in the Court's decision is a concern that extending First Amendment protection to sleep would undoubtedly lead to a rise in the number of groups who would "demand permission to deliver an asserted message by camping," and that some "would surely

107. *Id.* at 306.

108. Cover, *supra* note 50.

109. *Clark*, 468 U.S. at 303–04.

110. Cmty. for Creative Non-Violence v. Watt (*CCNV II*), 703 F.2d 586, 601 (D.C. Cir. 1983).

111. 383 U. S. 131 (1966).

have as credible a claim in this regard as does CCNV."[112] In short, the Court anticipated future protests, such as the Occupy movement, which would seek to express themselves through sleep, and issued a decision that undervalued the expressive value of the conduct to justify a regulation that prohibited it altogether.

For better or for worse, the 1984 *Clark* decision is the Supreme Court's last word on sleep as symbolic speech, and it is within this landscape that Occupy movement cases asserting a First Amendment right to occupy will be decided.

III. THE LANDSCAPE OF SYMBOLIC SLEEP PROTECTION AFTER *CLARK V. CCNV*

In the wake of the Supreme Court's decision in *Clark*, the federal courts, including those considering recent Occupy movement protests, have either found or assumed that overnight sleeping, tent cities and temporary shanties can be a form of symbolic communication protected by the First Amendment.[113] In at least two cases predating the Occupy movement, federal courts have enjoined the enforcement of regulations or policies prohibiting sleeping or the erection of symbolic structures, finding that the regulator's interests were outweighed by the First Amendment rights of demonstrators.

In 1986, in *University of Utah Students Against Apartheid v. Peterson*,[114] Judge Aldon J. Anderson of the United States District Court for the District of Utah granted a permanent injunction to students seeking to enjoin the university from removing symbolic South African shanties representing "the oppressive conditions suffered by blacks in South Africa"[115] erected on campus in protest of apartheid and the university's investment policies. After allowing the structures

112. *Clark*, 486 U.S. at 297; *see* Brown v. Louisiana, 383 U.S. 131, 165 (1966) (Black, J., dissenting) ("[I]f one group can take over libraries for one cause, other groups will assert the right to do so for causes which, while wholly legal, may not be so appealing to this Court.").

113. *See* U.S. v. Gilbert, 920 F.2d 878 (11th Cir.1991); Acorn v. City of Tulsa, Okl., 835 F.2d 735, 742 (10th Cir. 1987); Occupy Columbia v. Nikki Haley, Governor of South Carolina, No. 3:11-CV-03253, 2011 WL 6318587 (D.S.C. Dec. 16, 2011); Occupy Minneapolis v. County of Hennepin, No. 11–3412, 2011 WL 5878359 (D. Minn. Nov. 23, 2011); Occupy Fort Myers v. City of Fort Myers, No. 2:11–cv–00608, 2011 WL 5554034, at *5 (M.D. Fla. Nov. 15, 2011); Metropolitan Council Inc. v. Safir, 99 F. Supp. 2d 438 (S.D.N.Y. 2000); Students Against Apartheid Coalition v. O'Neil, 660 F. Supp. 333, 337 (W.D. Va. 1987); University of Utah Students Against Apartheid v. Peterson, 649 F.Supp. 1200, 1202 (D. Utah 1986).

114. *Peterson*, 649 F. Supp. at 1200.

115. *Id.* at 1202.

to remain for six months, the University of Utah, citing potential tort liability and the cost of protecting the shanties, told the students to take them down.

Applying the test articulated by the Supreme Court in *Spence v. Washington*, Judge Anderson concluded that the shanties were symbolic speech, there was an intent to convey a particularized message, and it was likely that the message would be understood.[116] Shanties, the court found,

> have come to symbolize the poverty, oppression and homelessness of South African blacks and have been used by student groups throughout the United States to convey this same message. Much like a flag, a cross, or the black armbands used during the Vietnam war, the shanties are now understood to represent a strong statement condemning apartheid and protesting university investment in South Africa.[117]

Because the shanties had become such widely recognized symbols, Judge Anderson found it "hard to imagine a more effective transmission of a message."[118] Judge Anderson distinguished the shanties on the University of Utah campus from cases like *Clark v. Community for Creative Non-Violence*, which involved more "ambiguous" forms of conduct. In these cases, "these types of conduct frequently occur for noncommunicative reasons and thus blur any message intended to be conveyed."[119] Judge Anderson noted that in *Clark*, sleep was such an activity, and therefore made it difficult to determine the symbolic value of the conduct. Because sleep served other non-communicative purposes, the *Clark* Court was "skeptical of the actual intent of the protesters in including sleep as part of the protest."[120]

Judge Anderson did not spend much time examining the University of Utah's asserted interests, as he was troubled by the fact that the decision to remove the shanties was not based on a formal regulation. Without written regulations, the court found it impossible to determine whether the university's restriction on the First Amendment rights of its students was constitutional under a time, place and manner analysis.[121] In light of the University of Utah's concern regarding

116. *Id.* at 1204–05.
117. *Id.* at 1205.
118. *Id.*
119. *Id.* at 1207.
120. *Id.*
121. *Id.* at 1210–11.

nighttime vandalism, however, the court found it reasonable to order that the shanties be removed at night.[122]

In *Metropolitan Council, Inc. v. Safir*,[123] Judge Kimba M. Wood of the United States District Court for the Southern District of New York found that a New York City Police Department policy banning sleeping on New York City sidewalks violated the First Amendment rights of demonstrators, who had planned a protest which involved "using public sleeping as a means of public expression."[124] In June 2000, Metropolitan Council, Inc., a tenant's rights organization, had planned a demonstration to protest proposed rent increases for rent-regulated apartments in New York City. The demonstration, which began with an evening press conference in Carl Schurz Park next to the Mayor's residence at Gracie Mansion, was to include a five-hour vigil in the park with protesters lying on the ground "in order to symbolically convey the additional homelessness that plaintiff alleges will result from the rent increases."[125] After the park closed at 1 a.m., the plan was for the vigil to move to the sidewalk across the street from Gracie Mansion, where demonstrators would sleep overnight.

Because the parties agreed that "the proposed activity of lying and sleeping on the City sidewalks has an expressive component in the context of this vigil," Judge Wood went directly to an examination of the interests at stake, balancing the protestors' "interest in engaging in expressive activity" with the City's "interest in preventing people from lying and sleeping on City sidewalks."[126] Citing *Clark*, Judge Wood applied the test for time, place, and manner restrictions. Judge Wood gave credence to the City's asserted interests—to protect sleeping individuals from the dangers of the street and to prevent sleepers from obstructing pedestrians—but found that in the context of the planned protest, a total ban on public sleeping was not narrowly tailored to serve these interests, as the demonstrators planned to leave ample sidewalk space for pedestrian passage and to employ marshals who would protect the sleepers and make sure that they did not block the sidewalk.[127]

122. *Id.* at 1211.

123. Metropolitan Council Inc. v. Safir, 99 F. Supp. 2d 438 (S.D.N.Y. 2000).

124. *Id.* at 439.

125. *Id.* at 439–40.

126. *Id.* at 443–44.

127. *Id.* at 445. The court also noted that the City planned to staff the protest, as it did every large well-publicized demonstration, with police officers protecting its interests. *Id.*

After finding that symbolic sleeping was expressive conduct protected by the First Amendment, and that the City's total ban on sleeping was not a valid time, place, and manner restriction, Judge Wood distinguished *Metropolitan Council* from *Clark*.[128] Unlike *Clark*, this was "a case in which a subset of conduct falls within the parameters of the ban and yet fails to implicate the interests allegedly supporting the ban."[129] In *Clark*, the court reasoned, the ban on camping needed to apply to demonstrators and non-demonstrators alike, because permitting sleeping in the park by either group could damage the parks and make them inaccessible to other users.[130] Here, there was a vast difference between the behaviors at which the ban was aimed (homeless persons and intoxicated individuals) and a planned, organized, political protest. "Because the suppression of any such protest to the extent that it involves the symbolic use of sleeping or lying on the ground is utterly unnecessary to further the interests that underlie the sleeping ban, the Court concludes that the ban is not narrowly tailored to the asserted interests."[131] Judge Wood further distinguished *Clark* on the grounds that the "major value" of sleeping to the CCNV protest was "primarily facilitative," in that it enabled homeless protesters to participate.[132] "[H]ere," the court explained, "sleeping plays a more significant expressive role relative to other aspects of the protest."[133]

Crucial to the court's decision was its view that the City's ban on sidewalk sleeping operated as a prior restraint on speech.[134] The City had argued that the legal basis for its total ban on public sleeping was that it furthered the purposes of the local penal law on disorderly conduct, which prohibits the obstruction of "vehicular or pedestrian traffic" when it is done "with the intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof."[135] The City was free to arrest protest participants whom it believed had engaged in disorderly conduct, but to arrest them for symbolic sleeping on the theory that they *might* block pedestrian passage if allowed to continue their protest was repugnant to the court.

128. *Id.* at 446.
129. *Id.*
130. Clark v. Community of Creative Non-Violence, 468 U.S. 288, 298 (1984).
131. *Metropolitan Council*, 99 F. Supp. 2d at 446.
132. *See id.* at 446 n.12.
133. *Id.*
134. *See id.* at 448–49.
135. N.Y. CRIM. LAW § 240.20[5] (McKinney 2010).

> Here, where core First Amendment rights to political protest are at stake, where the City concedes that this vigil itself will not cause any public disorder, and where the City's authority to treat sleeping as per se disorderly conduct is far from clear, the equities weigh heavily in favor of permitting this protest to go forward without restraint.[136]

Despite the distinctions drawn by the district court between the Metropolitan Council protest against rent regulations and CCNV's protests concerning the plight of the homeless, it is difficult to see how symbolic sleep was more expressive at one demonstration than the other. Like the Metropolitan Council protest, the primary purpose of sleep at the CCNV protest was symbolic.[137] The fact that the symbolic sleeping component of the protest may have also facilitated the presence of homeless participants does not lessen its symbolic value.[138] Further, it is not at all clear that the Park Service's ban on camping was aimed at sleeping at demonstrations in which permission for the erection of tents and a twenty-four-hour presence had already been granted, and that prohibition of sleeping at this protest furthered the interests underlying the camping ban.

A superficial reading of *Clark*, *University of Utah*, and *Metropolitan Council*, suggests that the cases may turn on whether there was a written regulation at the time of the demonstration banning the conduct in question. In *University of Utah* and *Metropolitan Council*, the decisions to remove the shanties or ban sleeping were informal policy decisions as opposed to written regulations. But that cannot be the end of the inquiry. Even when a written regulation exists, the government's asserted interest underlying the regulation must be important or substantial. The regulation must be narrowly tailored to that interest. And the interest must be carefully balanced against the First Amendment rights of the people who seek to engage in the prohibited conduct as symbolic speech.[139] The difference in outcomes in these three cases may in truth have more to do with the results of this balancing; the relative weight given by the respective courts to the

136. *Metropolitan Council*, 99 F. Supp. 2d at 450.

137. As one of the homeless CCNV participants explained, "Sleeping in Lafayette Park or on the Mall, for me, is to show people that conditions are so poor for the homeless and poor in this city that we would actually sleep outside in the winter to get the point across." Clark v. Cmty. of Creative Non-Violence, 468 U.S. 288, 304 (1984).

138. As Justice Marshall noted in his dissent in *Clark*, "The facilitative purpose of the sleep-in takes away nothing from its independent status as symbolic speech. Moreover, facilitative conduct that is closely related to expressive activity is itself protected by First Amendment considerations." *Id.* at 310 n.7.

139. *See supra* note 107 and accompanying text.

symbolic value of the conduct and the interests asserted by the government in suppressing that conduct. This is certainly the more important distinction for the Occupy movement and future demonstrators who express themselves through sleep. *Metropolitan Council*, decided sixteen years after *Clark* and fourteen years after *University of Utah*, points the way towards a future in which symbolic sleeping may no longer be viewed as ambiguously expressive, and "occupations," like sit-ins, boycotts, and pickets, may be widely recognized by the courts as an oft-used tool of protest and a clear form of expression.

IV. THE OCCUPY MOVEMENT IN THE COURTS

At the time of this writing, the Occupy movement is in the process of litigating the right to occupy in courts across the country. In many places, the battle to maintain a twenty-four-hour occupation has already been lost. Courts, while finding that the Occupy protests, including tent cities and overnight camping and sleeping, are sufficiently expressive to trigger the First Amendment, have in the same breath allowed these protected activities to be regulated out of existence by the municipalities in which they take place.[140]

In *Occupy Fort Myers v. City of Fort Myers*, for example, the district court held that sleeping and camping within the context of the Occupy protest at Centennial Park in downtown Fort Meyers was symbolic conduct protected by the First Amendment, reasoning that "[t]he conduct of tenting and sleeping in the park 24 hours a day to simulate an 'occupation' is intended to be communicative and in context is reasonably understood by the viewer to be communicative."[141] While finding that ordinances on parade permitting,[142] loitering,[143] and after-hours park use[144] restricted the First Amendment rights of the protesters, the district court upheld an ordinance prohibiting setting up "tents, shacks, or any other temporary shelters for the purpose of overnight camping" or living beyond closing hours in any such

140. *See* Occupy Fort Myers v. City of Fort Myers, No. 2:11–cv–00608, 2011 WL 5554034 (M.D. Fla. Nov. 15, 2011); Occupy Minneapolis v. Cnty. of Hennepin, No. 11–3412, 2011 WL 5878359 (D. Minn. Nov. 23, 2011); and Occupy Columbia v. Nikki Haley, Governor of South Carolina, No. 3:11-CV-03283, 2011 WL 6318587 (D.S.C. Dec. 16, 2011).

141. *Occupy Fort Myers*, 2011 WL 5554034, at *5.

142. *Id.* at *11.

143. *Id.* at *15.

144. *Id.*

structure in city parks.[145] The district court's decision left open the possibility that protesters could remain in Centennial Park, and even sleep there overnight, providing no tents or other structures were used, but two days later, Fort Myers police kicked Occupy Fort Myers out of the park after rejecting the group's permit renewal application.[146] No further legal action was taken by the protesters.

Agreeing with the "well-reasoned" conclusion in *Occupy Fort Myers*, the Minnesota district court, in *Occupy Minneapolis v. County of Hennepin*,[147] found that Occupy Minneapolis protesters could "challenge the ban on sleeping and erecting structures under the First Amendment."[148] Citing *Clark*, the court nonetheless found that a Resolution banning sleeping and erecting tents and other structures on a plaza next to the Minneapolis government center was a valid time, place and manner restriction.[149] Similarly, in *Occupy Columbia v. Haley*,[150] the district court found that "the Plaintiffs are likely to establish that Occupy Columbia's camping on the State House grounds is expressive conduct, as defined by *Spence*,"[151] but upheld a newly enacted "emergency regulation" banning camping and sleeping.[152]

Although these courts have gone beyond *Clark*, in that they explicitly held, as opposed to just assumed, that sleeping and camping as part of an Occupy protest is protected by the First Amendment, the end result is still the same. In keeping with the Supreme Court's holding in *Clark*, all three district courts found that camping and sleeping were ultimately divisible from the First Amendment activity in which Occupy protesters are engaging, and that a balancing of the equities permits municipalities to promulgate and enforce total bans on these aspects of Occupy demonstrations. Implicit in these decisions is the belief that the "major value" of sleep is "facilitative"[153];

145. Fort Myers, Fl., Code of Ordinances § 58–153(3).

146. Chris Umpierre, *Occupy Fort Myers Protesters Leave South Fort Myers Camp,* FORT MYERS NEWS-PRESS (Dec. 1, 2011), http://beta.news-press.com/article/20111201/NEWS0110/111201020/1075/Lee-County-existing-home-sales--prices-fall-in-July.

147. Occupy Minneapolis v. Cnty. of Hennepin, No. 11–3412, 2011 WL 5878359 (D. Minn. Nov. 23, 2011).

148. *Id.* at *4.

149. *Id.* at *5.

150. Occupy Columbia v. Haley, No. 3:11-CV-03283, 2011 WL 6318587 (D.S.C. Dec. 16, 2011).

151. *Id.* at *8.

152. Occupy Columbia v. Haley, No. 3:11-CV-03253, 2011 WL 6698990, at *6–7 (D.S.C. Dec. 22, 2011).

153. Clark v. Cmty. of Creative Non-Violence, 468 U.S. 288, 296 (1984).

that the courts thus far have not attributed significant symbolic value to occupation-style protests and that they do not view sleeping and camping as integral components of the expressive conduct taking place.

If the district courts in *Occupy Fort Myers*, *Occupy Minneapolis* and *Occupy Columbia* had found, like Judge Wood in *Metropolitan Council*, that sleeping at Occupy demonstrations "plays a more significant expressive role relative to other aspects of the protest,"[154] then a total ban would be constitutionally problematic under a time, place, manner analysis, which assumes that the actor is still free to engage in the same form of expression at another time, in another place, or in another manner, and therefore only requires that the government leave open ample alternative channels. By banning sleeping and camping, municipalities are unconstitutionally changing the protesters' message, transforming occupations into other, more acceptable, forms of protest. If Occupy protesters are ever to win the right to occupy, they must show the courts that in the context of Occupy demonstrations, the medium is truly the message. Sleeping and camping are at the heart of what it means to literally occupy a space, and that occupations, which involve the creation of a community that has a continuous, twenty-four-hour presence, are expressive acts. This is the logic of the majority in *CCNV II*, which ultimately held that the demonstrators' "proposed sleeping is expressive in nature and that the Park Service has not justified a total ban on that activity."[155]

Beyond arguing that sleep in the context of Occupy demonstrations is an integral part of the message being expressed, Occupy plaintiffs must also push for real scrutiny of the government interests that are asserted to justify the evisceration of this message. Judge Wood's analysis in *Metropolitan Council* is instructive here, as it shows that a government's interests in prospectively preventing criminal conduct is insufficient to justify a prior restraint on speech. Other governmental interests that are frequently asserted in cases that involve sleeping and camping at twenty-four-hour protests—preserving the aesthetic condition of public spaces, preserving the use of those spaces for the public, sanitation issues, the overburdening of law enforcement, and an increase in requests for sleeping and camping—must also be carefully weighed against the First Amendment rights of Occupy protest-

154. Metropolitan Council Inc. v. Safir, 99 F. Supp. 2d 438, 446 n.12 (S.D.N.Y. 2000).

155. Cmty. for Creative Non-Violence v. Watt (*CCNV II*), 703 F.2d 586, 604 (D.C. Cir. 1983).

ers. The issue is not whether the interests asserted by the government are legitimate in the abstract, but whether the government's interests are furthered by banning sleeping and camping at Occupy demonstrations.

One of the fundamental distinctions between the analysis of the United States Court of Appeals for the District of Columbia in *CCNV II* and the Supreme Court's decision in *Clark v. CCNV*, is that in *CCNV II*, the D.C. Court looked to see if the government's interests were actually furthered by banning sleeping at the CCNV protest (in which a twenty-four-hour presence in symbolic tents was already permitted), while the Supreme Court held that it was free to look beyond CCNV's protest to the possibility that other groups would demand permission to deliver their message by camping in National Parks. Because these possible future protests might expose the parks to harm, the Supreme Court found that a regulation banning camping and sleeping was a reasonable time, place and manner restriction. But despite the *Clark* court's willingness to look beyond the CCNV action to a speculated parade of future horribles in order to justify a government regulation, Occupy plaintiffs must fight to keep the focus on Occupy demonstrations, and the actual impact of their expressive conduct on the interests asserted by the government.

If a government restriction is viewed as content neutral, then according to the Supreme Court it need not be the "least restrictive or least intrusive means" of advancing the government's interest.[156] "So long as the means chosen are not substantially broader than necessary to achieve the government's interest, however, the regulation will not be invalid simply because a court concludes that the government's interest could be adequately served by some less-speech-restrictive alternative."[157] But if the government's intent in passing the regulation was to restrict a particular form of expression, then the regulation cannot stand. In keeping with the Supreme Court's reasoning in *Texas v. Johnson*, Occupy plaintiffs should push for judicial review of legislative intent in enacting bans on sleeping and camping, and for a higher level of scrutiny in cases where there is a clear intent to suppress a particular message or form of expression.[158] This emphasis is particularly important in the context of Occupy cases, in which regu-

156. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

157. *Id.* at 798–99.

158. As discussed in greater detail above, the Supreme Court in *Texas v. Johnson* declined to apply the *O'Brien* test, finding that the government's interest in preserving the flag revealed its intent to suppress free expression.

lations prohibiting sleeping and camping may not have existed prior to the start of the Occupy movement, and in some cases were hastily promulgated for the express purpose of regulating a particular Occupy demonstration.

For example, in *Occupy Columbia*, District Judge Cameron McGowan Currie initially granted a temporary restraining order on the grounds that the City of Columbia's unwritten policy prohibiting sleeping and camping violated the First Amendment rights of the protesters,[159] but later held that an emergency regulation prohibiting camping and sleeping, enacted just four days after the temporary injunction was granted, was an acceptable time, place and manner restriction.[160] While the plaintiffs argued that the new regulation was motivated by the defendant's frustration with Occupy Columbia, Judge McGowan Currie cited *O'Brien*[161] as support for her refusal to delve into legislative intent. Judge McGowan Currie's reliance on *O'Brien,* however, is misplaced. As Professor Lawrence H. Tribe observed: "[T]he broad statement of the Court in O'Brien concerning the limited relevance of legislative motive in constitutional adjudication must be strongly qualified."[162] The Supreme Court can and does engage in close scrutiny of the purpose behind statutes that abridge speech.[163] In this context, the City of Columbia's emergency regulation banning sleeping and camping should have been vigorously scrutinized, as the timing of its passage demonstrates that the intent of the ban was to end the Occupy protest on State House grounds.

In general, courts should be skeptical of facially neutral time, place and manner regulations. Even if the intent of legislators was not to

159. Occupy Columbia v. Haley, No. 3:11-CV-03283, 2011 WL 6318587 (D.S.C. Dec. 16, 2011).

160. Occupy Columbia v. Haley, No. 3:11-CV-03253, 2011 WL 6698990 (D.S.C. Dec. 22, 2011).

161. 391 U.S. 367 (1968).

162. LARRY H. TRIBE, AMERICAN CONSTITUTIONAL LAW 825 (2d ed. 1988). Tribe uses *Cornelius v. N.A.A.C.P.*, 473 U.S. 788 (1985) to illustrate this point. *Cornelius* held that the test to determine whether a forum that is created by the government must be open to all speakers on an equal basis is dependent upon "whether [the government] intended to designate a place not traditionally open to assembly and debate as a public forum." *Cornelius*, 473 U.S. at 802.

163. *Id.* For example, in *Washington v. Davis*, Justice White wrote for the majority: "To the extent that [some of our cases suggest] a generally applicable proposition that legislative purpose is irrelevant in constitutional adjudication, our prior cases . . . are to the contrary." 426 U.S. 229, 244 n.11 (1976); *see also Lemon v. Kurtzman*, 403 U.S. 602 (1971) (dealing with the issue of public financing for private schools and announcing that the validity of public aid to church-related schools requires close inquiry into the purpose of the challenged statute).

suppress free expression, these regulations frequently have a disparate impact on communicators without the means to otherwise communicate their message. As the late Professor Harry Kalven observed, "We would do well to avoid the occasion for any new epigrams about the majestic equality of the law prohibiting the rich man, too, from distributing leaflets or picketing."[164] Leafleting, picketing, street demonstrations, sit-ins and occupations are vastly more important tools to communicators among "the 99%" than they are to the wealthy, who have ample alternative means to amplify their message.

In New York City, the birthplace of the Occupy movement, the twenty-four-hour occupation of Zuccotti Park continued uninterrupted for almost two months, from September 17, 2011 until it was cleared by the New York City Police Department in the early hours of November 15, 2011.[165] There is no city regulation barring camping and sleeping in the park. Instead, protesters were evicted on the basis of unofficial rules posted by Brookfield properties, the park's private landlord, several days *after* Occupy Wall Street began its occupation.[166] Although lawyers for the protesters initially obtained an emergency temporary restraining order from Justice Lucy Billings barring the city and Brookfield properties from evicting protesters or removing their belongings,[167] the order was ignored by Mayor Bloomberg and the New York City Police Department, and promptly reversed by Justice Michael D. Stallman, who found that the protesters had not demonstrated a First Amendment right to sleep and camp

164. HARRY KALVEN, JR., THE NEGRO AND THE 1ST AMENDMENT 210 (1966).

> On rare occasions, the Court has been sensitive to the discriminatory effects of facially neutral regulations. For example, in *Martin v. City of Struthers*, the Court held unconstitutional a ban on door-to-door distribution of leaflets, stating that this method of communication "is essential to the poorly financed causes of little people."

William E. Lee, *Lonely Pamphleteers, Little People and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 765 (citing Martin v. City of Struthers, 319 U.S. 141, 146 (1943)).

165. *See* WRITERS FOR THE 99%, *supra* note 4, at 206–10.

166. Zuccotti Park, a "Privately Owned Public Space," must remain open on a twenty-four-hour basis for public use. See *Current Public Plaza Standards*, NEW YORK CITY DEP'T OF CITY PLANNING, http://www.nyc.gov/html/dcp/html/pops/plaza_standards.shtml (last visited Mar. 16, 2012).

167. James Barron & Colin Moynihan, *City Reopens Park after Protesters are Evicted*, N.Y. TIMES (Nov. 15, 2011), http://www.nytimes.com/2011/11/16/nyregion/police-begin-clearing-zuccotti-park-of-protesters.html.

in the park.[168] In the wake of Stallman's decision, Zuccotti Park was ringed by metal barricades and guarded by police officers and Brookfield security personnel. Access was limited to two "check-points," where members of the public were indiscriminately searched before entry. After a successful campaign of complaints to the Department of Buildings led to the removal of the barricades, [169] the state lawsuit was withdrawn.[170] While Brookfield's restrictions against sleeping and camping in the park remain in force, thus far, no federal lawsuit has been filed to challenge them. This must not be the end of the story. Occupy protesters in New York and elsewhere across the country should not give up the fight for the right to occupy, as to do so is to guarantee a decisive victory for the prior restraint of speech.

CONCLUSION

When the Supreme Court decided in *Brown v. Louisiana*,[171] that protesters have a First Amendment right to engage in a sit-in in a public library, Justice Black, in his dissent, cautioned that the decision could lead to a total shut-down of public institutions:

> It means that the Constitution (the First and the Fourteenth Amendments) requires the custodians and supervisors of the public libraries in this country to stand helplessly by while protesting groups advocating one cause or another, stage 'sit-ins' or 'stand-ups' to dramatize their particular views on particular issues. And it should be remembered that if one group can take over libraries for one cause, other groups will assert the right to do so for causes which, while wholly legal, may not be so appealing to this Court. The States are thus paralyzed with reference to control of their li-

168. *Id.* In his decision denying the temporary restraining order to Occupy Wall Street protesters, Justice Stallman nonetheless recognized that the protest's effectiveness was inextricably linked to its method, acknowledging that Occupy Wall Street has "brought attention to the increasing disparity of wealth and power in the United States largely because of the unorthodox tactic of occupying the subject public space on a 24-hour basis, and constructing an encampment there." Waller v. City of New York, 34 Misc. 3d 371, 372 (N.Y. Sup. Ct. 2011)

169. Nick Pinto, *Don't Fence Me out*, VILLAGE VOICE (Jan. 25, 2012), http://www.villagevoice.com/2012-01-25/news/Paula-Segal-barricades-Zuccotti-Park/.

170. Joseph Ax, *Occupy Protesters Drop Lawsuit over Camping out*, REUTERS (Jan. 23, 2012), http://www.reuters.com/article/2012/01/24/us-occupy-lawsuit-idUSTRE80N02620120124.

171. 383 U.S. 131, 165 (1965).

> braries for library purposes, and I suppose that inevitably the next step will be to paralyze the schools.[172]

Justice Black was right, in the sense that sit-ins have continued as a form of protest, in other locations, for other reasons. But his premonition that the decision would lead to the paralysis of state governments never came to pass. We should be similarly skeptical of other doomsday scenarios posited by courts and state governments to justify regulating sleeping and camping out of Occupy protests. There will never be a First Amendment right to a permanent occupation of public space. But the government cannot be permitted to over-regulate our ability to engage in First Amendment speech or to use traditional public forums to express or communicate ideas.

Given the string of recent defeats faced by the Occupy movement in the courts, it may be time to consider legislative efforts to limit the power of municipalities to regulate the use of public space. But regardless of whether the battle is to be won in the courtroom or on the floors of the legislature, it must continue to be fought in the streets. If there is any chance of success, the Occupy movement must engage in the expressive activity for which it was named, and which captured the attention of the media, the country, and the world; it must continue to occupy space. The occupation of physical space is important and resonant, and the symbolic value far exceeds any facilitative value. In truth, what these occupations facilitate is not the presence of those who remain day after day and night after night, but the full access and participation of the rest of us. Because of the sustained, twenty-four-hour presence of the Occupy movement in public spaces across the country, those of us who visit—in person and online—are able to participate in the exchange of ideas and the creation of meaning taking place on the ground. The Occupy movement has reinvigorated the meaning of the public forum and civic participation, and created a powerful new form of expression that is worth fighting for.

172. *Id.* at 165.