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## Occupy The Parks: Restoring the Right to Overnight Protest in Public Parks

Udi Ofer

*New York Civil Liberties Union; New York Law School*

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## OCCUPY THE PARKS: RESTORING THE RIGHT TO OVERNIGHT PROTEST IN PUBLIC PARKS

*Udi Ofer\**

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### INTRODUCTION

The Occupy Wall Street movement has generated passionate reactions of either disdain or support since its inception. On the one hand, opponents deride the movement for lacking a clear objective and vilifying the economic engines of the nation.<sup>1</sup> On the other hand, proponents praise the movement for bringing a much-needed voice to

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\* Advocacy Director of the New York Civil Liberties Union and adjunct professor at New York Law School.

1. James Oliphant, *Herman Cain Steps Up Occupy Wall Street Criticism*, San Francisco Chronicle (Oct. 10, 2011), <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/10/09/MNLD1LFG8D.DTL> (reporting on Republican presidential candidate Herman Cain's belief that the Occupy demonstrators oppose capitalism and are jealous of the successes of affluent Americans, and House Majority Leader Eric Cantor's (R-VA) view of the demonstrators as "mobs" who are pitting "Americans against Americans"); Andrew Rafferty, *Santorum Supporters Tell Occupy Protesters at Rally: 'Get a Job'*, MSNBC (Feb. 14, 2012, 1:21 AM), [http://firstread.msnbc.msn.com/\\_news/2012/02/14/10402152-santorum-supporters-tell-occupy-protesters-at-rally-get-a-job](http://firstread.msnbc.msn.com/_news/2012/02/14/10402152-santorum-supporters-tell-occupy-protesters-at-rally-get-a-job) (reporting on a Rick Santorum rally in Washington where his supporters yelled at Occupy demonstrators to "get a job"); Douglas Schoen, *Polling the Occupy Wall Street Crowd*, WALL ST. J. (Oct. 18, 2011), <http://online.wsj.com/article/SB10001424052970204479504576637082965745362.html> (criticizing the Occupy movement for being on the radical left and out of touch with most Americans). *Contra Bill O'Reilly Attacks Ben and Jerry Owners for Occupy Wall Street Involvement*, HUFFINGTON POST (Feb. 29, 2012, 10:10 AM), [http://www.huffingtonpost.com/2012/02/29/bill-oreilly-ben-and-jerry-occupy-wall-stret\\_n\\_1309907.html](http://www.huffingtonpost.com/2012/02/29/bill-oreilly-ben-and-jerry-occupy-wall-stret_n_1309907.html) (describing Bill O'Reilly's criticism of the Occupy movement).

the victims of a decades-long march towards policies that benefit the rich over everyone else.<sup>2</sup>

What neither side can deny, however, is that the Occupy Wall Street movement has already achieved what many social movements never accomplish: it has elevated the concerns identified by the movement to the forefront of the national discourse. Regardless of whether one agrees that there exists a problem of economic inequality, we are talking about it.

Similarly, though less glamorously, this movement has challenged the law and the legal profession. The spontaneity and decentralized structure of the movement has made it difficult for lawyers to adequately represent the interests of the movement. Moreover, new legal questions have arisen about the use of privately owned public spaces for the purposes of political protests.<sup>3</sup> Finally, age-old problems associated with police reactions to political protests have also continued to challenge the legal profession's ability to respond quickly and adequately to the needs of the movement. This includes problems associated with police crowd control tactics, use of excessive force, false arrests, searches, denial of access to the media, and surveillance of political activity.<sup>4</sup>

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2. See, e.g., Max Berger, *Opposing View: Occupy is Making a Difference*, USA TODAY (Feb. 9, 2012, 8:02 PM), <http://www.usatoday.com/news/opinion/story/2012-02-09/Occupy-Wall-Street-Berger/53032498/1> (praising the Occupy demonstrators for focusing the nation's attention on the undue influence that the wealthy have on the nation's policies); Charles Biderman, *Making the Case for Occupy Wall Street*, FORBES (Feb. 9, 2012, 4:38 PM), <http://www.forbes.com/sites/investor/2012/02/09/making-the-case-for-occupy-wall-street> (agreeing with the Occupy demonstrators' observations that while Wall Street has bounced back from the recession, most Americans are still suffering economically); Jane Lindholm, *Ben & Jerry's Endorses Occupy Wall Street*, VERMONT PUBLIC RADIO (Feb. 10, 2012), available at [http://www.vpr.net/news\\_detail/93360/ben-jerrys-endorses-occupy-wal-street](http://www.vpr.net/news_detail/93360/ben-jerrys-endorses-occupy-wal-street) (reporting on Ben and Jerry's endorsement and support of the Occupy Wall Street movement); Kim Peterson, *Bruce Springsteen Takes on Wall Street: The Musician's 17th Studio Album Explores Many of the Same Themes as the Occupy Wall Street Movement*, MSN MONEY (Feb. 21, 2012, 2:14 PM), <http://money.msn.com/top-stocks/post.aspx?post=7b0d88b3-0ae5-4ace-913b-7cc35afeccb2> (reporting on Bruce Springsteen's belief that the Occupy demonstrators have changed the national conversation to reflect the movement's concerns).

3. This Article does not address the question of when should private spaces be considered public forums for purposes of First Amendment scrutiny.

4. See Letter from Christopher Dunn, Arthur Eisenberg, Donna Lieberman & Udi Ofer, Directors, New York City Civil Liberties Union, to Raymond Kelly, Police Commissioner, New York City Police Department (Oct. 20, 2011), [http://www.nyclu.org/files/releases/NYCLU\\_Ltr\\_to\\_Kelly\\_re\\_OWS\\_10-20-11.pdf](http://www.nyclu.org/files/releases/NYCLU_Ltr_to_Kelly_re_OWS_10-20-11.pdf) (requesting that the NYPD allow the use of tents and portable toilets in Zuccotti Park and expressing

This Article will focus on one of the key challenges that the movement has faced: overnight camping in traditional public forums like parks. One of the hallmarks of the Occupy Wall Street movement has been, as its name suggests, the symbolic occupation of institutions and interests, by taking over public (and sometimes private) space.<sup>5</sup> The movement began in Manhattan's financial district when its early participants, after failing to find adequate space in the heart of Wall Street, settled a few blocks away in Zuccotti Park, a privately owned public park.<sup>6</sup> They quickly made their presence permanent, erecting

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concern over the nearly blanket NYPD videotaping of Occupy Wall Street events, as well as unlawful arrests and use of excessive force against Occupy Wall Street demonstrators); *see also* Letter from Christopher Dunn, Arthur Eisenberg & Donna Lieberman, Directors, New York Civil Liberties Union, to Michael R. Bloomberg, Mayor, New York City, and Raymond Kelly, Police Commissioner, New York City Police Department (Nov. 21, 2011), <http://www.nyclu.org/files/releases/NYCLU%20Ltr%20to%20Mayor%20Bloomberg%20re%20Press-OWS%2011-21-11.pdf> (objecting to the mistreatment of journalists seeking to cover the policing of the Occupy Wall Street protests).

5. *See, e.g.*, Associated Press, *Portland's Occupy Protesters Face Permit Deadline*, PORTLAND PRESS HERALD (Nov. 29, 2011), <http://www.pressherald.com/news/Portlands-Occupy-protesters-face-permit-deadline-.html> (describing the desires of Occupy Portland demonstrators to maintain a presence at a park outside of the State House); *Dome Warms Occupy Buffalo Protesters*, N. COUNTRY PUB. RADIO (Dec. 6, 2011), <http://www.northcountrypublicradio.org/news/story/18895/20111206/dome-warms-occupy-buffalo-protesters> (reporting on Occupy demonstrators' plans to stay at a park throughout the winter); Jeremy C. Fox, *Where Did Dewey Square Get Its Name? A Short History of the Occupy Boston Site*, BOSTON GLOBE (Nov. 1, 2011), [http://articles.boston.com/2011-11-01/yourtown/30346696\\_1\\_transportation-hub-railroads-william-m-fowler](http://articles.boston.com/2011-11-01/yourtown/30346696_1_transportation-hub-railroads-william-m-fowler) (chronicling the history of Dewey Square, where Occupy Boston has set up a tent city); Ian Lovett, *Occupy Los Angeles Camp Is Allowed to Stay, for Now*, N.Y. TIMES (Nov. 22, 2011), <http://www.nytimes.com/2011/11/23/us/occupy-camp-at-los-angeles-city-hall-allowed-to-stay-for-now.html> (describing the Occupy Los Angeles tent city encampment surrounding City Hall in Los Angeles); *"Occupy" Supporters Camp in Centennial Park*, ABC-7 WZVN (Oct. 17, 2011), <http://www.abc-7.com/story/15714726/occupy-protesters-camp-out-in-support> (reporting on Occupy Fort Myers' plans to camp out indefinitely in a park); Bedel Saget & Archie Tse, *How Occupy Wall Street Turned Zuccotti Park into a Protest Camp*, N.Y. TIMES (Oct. 5, 2011), <http://www.nytimes.com/interactive/2011/10/05/nyregion/how-occupy-wall-street-turned-zuccotti-park-into-a-protest-camp.html> (reporting on Occupy Wall Street's transformation of Zuccotti Park into a living and operations center).

6. Laura Batchelor, *Occupy Wall Street Lands on Private Property*, CNN MONEY (Oct. 6, 2011, 2:32 PM), [http://money.cnn.com/2011/10/06/news/companies/occupy\\_wall\\_street\\_park/index.htm](http://money.cnn.com/2011/10/06/news/companies/occupy_wall_street_park/index.htm) (describing how Occupy Wall Street settled on Zuccotti Park and the advantages of staying at a privately owned public park); Colin Moynihan, *Wall Street Protest Begins, with Demonstrators Blocked*, N.Y. TIMES (Sept. 17, 2011, 4:26 PM), <http://cityroom.blogs.nytimes.com/2011/09/17/wall-street-protest-begins-with-demonstrators-blocked/> (describing the first day of protests, with no mention of Zuccotti Park); Colin Moynihan, *Wall Street Protests Continue, with at Least 6 Arrested*, N.Y. TIMES (Sept. 19, 2011, 12:28 PM), <http://cityroom.blogs.ny>

a little village with amenities such as a kitchen, medical station, media hub, and library.<sup>7</sup> Zuccotti Park did not have an overnight curfew like city-owned parks in New York City.<sup>8</sup> As demonstrators in New York City occupied Zuccotti Park, similar occupations of parks began to spread throughout the nation.<sup>9</sup>

A tussle for permanence quickly gripped the Zuccotti Park protesters and similar demonstrators as government officials in New York City, like other officials across the nation, disapproved of the demonstrators' overnight presence, and cited the prohibition on camping as the reason for the protesters to leave.<sup>10</sup> In New York City, Brookfield Properties, which owns Zuccotti Park, also objected to the

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times.com/2011/09/19/wall-street-protests-continue-with-at-least-5-arrested/ (describing protesters sleeping overnight at Zuccotti Park).

7. See Saget & Tse, *supra* note 5; see also Jeff Gordinier, *Want to Get Fat on Wall Street? Try Protesting*, N.Y. TIMES (Oct. 11, 2011), <http://www.nytimes.com/2011/10/12/dining/protesters-at-occupy-wall-street-eat-well.html> (reporting on the free meals provided to Occupy demonstrators at Zuccotti Park); James Thilman, *Inside Occupy Wall Street's New 24-Hour Medical Center*, GOTHAMIST (Nov. 8, 2011, 4:41 PM), [http://gothamist.com/2011/11/08/inside\\_occupy\\_wall\\_streets\\_new\\_24-h.php](http://gothamist.com/2011/11/08/inside_occupy_wall_streets_new_24-h.php) (reporting on the round-the-clock medical tent at Zuccotti Park staffed by emergency room physicians, general practitioners and registered nurses); Adam Warner, *At Zuccotti Park, a People's Library*, CITY LIMITS (Oct. 17, 2011), <http://www.citylimits.org/news/articles/4451/at-zuccotti-park-a-people-s-library> (describing the 1,200 book library at Zuccotti Park).

8. New York City parks are generally open from 6 a.m. to 1 a.m. See City of New York Parks & Recreation, Rules & Regulations, §1-03(a). Moreover, individuals may not camp in a public park in New York City without a permit. See City of New York Parks & Recreation, Rules & Regulations §1-04(p) ("Unlawful camping. No person shall engage in camping, or erect or maintain a tent, shelter, or camp in any park without a permit."). It is unclear whether camping in Zuccotti Park was prohibited by Brookfield Properties prior to the arrival of the Occupy demonstrators. At the time of their arrival, there were no posted rules in Zuccotti Park prohibiting camping, however Brookfield Properties has maintained that such a prohibition had been part of its unwritten rules for the park.

9. See *supra* note 4.

10. Esmé E. Deprez & Alison Vekshin, *New York Police in Riot Gear Clear 'Occupy' Protesters From Zuccotti Park*, BLOOMBERG NEWS (Nov. 15, 2011), <http://www.bloomberg.com/news/2011-11-15/u-s-mayors-crack-down-on-occupy-wall-street.html> (reporting on the NYPD's removal from Zuccotti Park of protesters who had been camping in the park); Anemona Hartocollis, *Facing Eviction, Protesters Begin Park Cleanup*, N.Y. TIMES, Oct. 13, 2011, <http://cityroom.blogs.nytimes.com/2011/10/13/told-to-leave-protesters-talk-pre-emptive-strategy/> (reporting on the cleanup of Zuccotti Park conducted by Occupy demonstrators to try to prevent the removal of their tents and other structures from the park); *Protesters in, Tents out at NYC 'Occupy' Park: Judge Upholds Mayor Bloomberg's Zuccotti Park Camp Eviction*, MSNBC (Nov. 16, 2011), [http://www.msnbc.msn.com/id/45299622/ns/us\\_news-life/t/protesters-tents-out-nyc-occupy-park/](http://www.msnbc.msn.com/id/45299622/ns/us_news-life/t/protesters-tents-out-nyc-occupy-park/) (describing the return of protesters to Zuccotti Park after being evicted by the NYPD, and the new enforced prohibition on bringing tents, tarps and other equipment into the park.).

protesters' permanent presence, citing not only a prohibition on camping but also alleging that the park, which is meant for enjoyment by the public and community residents, was being shut down by the protesters to the detriment of the greater public, and that security and health risks had arisen.<sup>11</sup> Brookfield Properties and New York City planned to clear the park of overnight demonstrators on October 14, 2011 but abruptly decided not to, following pressure from the public and elected officials.<sup>12</sup> On November 15, however, they succeeded. Although demonstrators were eventually permitted back inside the park at all times, they were prohibited from sleeping or camping in the park.<sup>13</sup> Similarly, Occupy demonstrators have been pushed out of other parks across the nation.<sup>14</sup>

As government officials began to object to the permanent camping in parks by demonstrators, the Occupy movement's participants were left with four options: (1) leave the parks; (2) engage in civil disobedience and risk arrest by staying overnight in parks; (3) attempt to negotiate a settlement that would allow them to stay overnight in parks; and (4) file First Amendment challenges to the restrictions on engag-

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11. See Meghan Barr, *Patience Tested over Waste, Crime at Protest Sites*, CNSNEWS (Oct. 25, 2011), <http://cnsnews.com/news/article/patience-tested-over-waste-crime-protest-sites>; Perry Chiramonte, *Owners of Zuccotti Park Say Conditions Unsanitary from Wall Street Protests*, FOX NEWS (Oct. 7, 2011), <http://www.foxnews.com/us/2011/10/07/owners-zuccotti-park-says-conditions-unsanitary-from-wall-street-protests>; *Fire Officials Conduct Safety Inspection of Zuccotti Park, Remove Generators and Gasoline Cans*, CBS NEW YORK (Oct. 28, 2011), <http://newyork.cbslocal.com/2011/10/28/police-fire-officials-conducting-surprise-inspection-of-zuccotti-park>.

12. See Michael Barbaro & Kate Taylor, *Calls Flood In, City Backs Off and Protesters Stay*, N.Y. TIMES (Oct. 14, 2011), <http://www.nytimes.com/2011/10/15/nyregion/occupy-wall-street-protesters-remain-in-zuccotti-park-as-cleanup-is-canceled.html>; Joe Coscarelli & Alex Klein, *City Backs Down in Zuccotti Standoff, Occupy Wall Street Protesters Emboldened*, N.Y. MAG. (Oct. 14, 2011), [http://nymag.com/daily/intel/2011/10/zuccotti\\_park\\_cleaning\\_cancell.html](http://nymag.com/daily/intel/2011/10/zuccotti_park_cleaning_cancell.html); Colin Moynihan & Cara Buckley, *Cleanup of Zuccotti Park is Postponed*, N.Y. TIMES (Oct. 14, 2011), <http://cityroom.blogs.nytimes.com/2011/10/14/cleanup-of-zuccotti-park-cancelled/>; Dean Meminger, *Protesters and Police Clash During "Occupy Wall Street" March*, NY1 (Oct. 14, 2011), [http://www.ny1.com/content/top\\_stories/148951/protesters-and-police-clash-during-occupy-wall-street-march](http://www.ny1.com/content/top_stories/148951/protesters-and-police-clash-during-occupy-wall-street-march) (describing the march that took place after protesters learned that they would be allowed to remain in Zuccotti Park).

13. *Occupy Wall Street Returns to Zuccotti Park*, CBS NEWS (Jan. 10, 2012), [http://www.cbsnews.com/8301-201\\_162-57356673/occupy-wall-street-returns-to-zuccotti-park](http://www.cbsnews.com/8301-201_162-57356673/occupy-wall-street-returns-to-zuccotti-park); Colin Moynihan, *Occupy Wall Street Drops Suit on Zuccotti Park*, N.Y. TIMES (Jan. 24, 2012), <http://cityroom.blogs.nytimes.com/2012/01/24/occupy-wall-street-drops-suit-on-zuccotti-park>.

14. Scott Neuman, *As Occupy Camps Close, What's Next for Movement?*, NAT'L PUB. RADIO (Nov. 15, 2011), <http://www.npr.org/2011/11/15/142359267/as-occupy-camps-close-whats-next-for-movement>; see also *infra* note 14.

ing in expressive and symbolic protest activities. Demonstrators have attempted all four options. Many have been arrested while engaging in civil disobedience.<sup>15</sup> Numerous encampments have been allowed to remain overnight following negotiations and settlement agreements,<sup>16</sup> and numerous lawsuits have been filed.<sup>17</sup>

The option of litigation has proven largely unproductive, as many years of bad precedent have greatly limited the ability of members of the public to make constitutional arguments for the right to engage in overnight protest activities in public parks.<sup>18</sup> Indeed, many lawyers now take for granted that municipalities can restrict the public's access to engage in overnight First Amendment activity in traditional public forums.<sup>19</sup>

This Article seeks to revisit the question of whether a traditional public forum like a park should be open for overnight camping when such camping is part of First Amendment protected conduct. Part I of this Article examines whether sleeping overnight in a park can be considered First Amendment protected conduct. It concludes that in the context of the Occupy movement, overnight sleeping in the park is expressive conduct deserving of First Amendment protection. Part II reviews the history that led to the current legal standard for government regulation of expressive conduct. It critiques the Supreme

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15. See, e.g., *Occupy Encampment in Asheville Comes to an End*, NEWS CHANNEL 7, <http://www2.wspa.com/news/2012/feb/19/occupy-encampment-asheville-comes-end-ar-3261522/> (last visited June 12, 2012); Grant Rodgers, *12 Occupy Protesters Arrested Outside State Capitol*, DES MOINES REG. STAFF BLOG (Jan. 30, 2012, 12:00 AM), <http://blogs.desmoinesregister.com/dmr/index.php/2012/01/30/12-occupy-protesters-arrested-outside-of-state-capitol/>; *Indio Woman, 66, Pleads Guilty to Breaking Curfew During 'Occupy' Protest*, CBS L.A. (Feb. 7, 2012), <http://losangeles.cbslocal.com/2012/02/07/indio-woman-66-pleads-guilty-to-breaking-curfew-during-occupy-protest/>.

16. See, e.g., New York Civil Liberties Union, *NYCLU Brokers Deal Between Rochester and Demonstrators to Protect Protest* (Nov. 10, 2011), <http://www.nyclu.org/news/nyclu-brokers-deal-between-rochester-and-demonstrators-protect-protest>; New York Civil Liberties Union, *NYCLU Brokers Deal Between Occupy Buffalo and City to Protect Protest* (Dec. 9, 2011), <http://www.nyclu.org/news/nyclu-brokers-deal-between-occupy-buffalo-and-city-protect-protest>.

17. See, e.g., *Occupy Fort Myers v. City of Fort Myers*, No. 2:11-cv-00608, 2011 WL 5554034 (M.D. Fla. Nov. 15, 2011); *Freeman v. Morris*, No. 11-CV-00452, 2011 WL 6139216, at \*5 (D.Me. Dec. 9, 2011); *Occupy Boston v. City of Boston*, No. SUCV201104152G, 2011 WL 7460294, at \*1 (Mass. Sup. Ct. Nov. 17, 2011).

18. See Part II of this Article for a history of the Supreme Court's move to a restrictive view of the public's right to engage in expressive conduct, including overnight camping as part of a demonstration in a public park.

19. This conclusion comes from conversations that I have had with lawyers from across the country who are working to protect the rights of the Occupy demonstrators.

Court's abandonment of the requirement that courts consider whether less restrictive means are available to government officials when regulating conduct that includes First Amendment-protected activity. Part III examines the difficulties that the Occupy movement has had in winning court battles to protect the right to engage in overnight expressive conduct. The Article concludes with recommendations for local legislatures to restore the requirement that the government choose the least restrictive means when regulating expressive conduct in public forums.

### I. SLEEPING OVERNIGHT IN A PARK AS FIRST AMENDMENT PROTECTED CONDUCT

The first question to consider when determining whether the Occupy demonstrators should be permitted to camp overnight in a park is whether overnight sleeping in a park as part of a demonstration should be regarded as expressive conduct deserving of First Amendment protection. When should demonstrators' actions receive the same level of protection as demonstrators' words? Traditional conduct by demonstrators, such as marching on a street, is treated as conduct protected by the First Amendment.<sup>20</sup> But what about sleeping in a traditional public forum, such as a park, for the purpose of protest? Should this conduct be protected to the same degree as marching on a street?

The Supreme Court has recognized that First Amendment protections extend beyond verbal expressions and has protected communicative conduct in many forms. In 1931, the Court overturned the conviction of a nineteen-year-old camp counselor for displaying a red flag as a symbol of opposition to the United States government,<sup>21</sup> and treated the act of displaying the flag as a form of political expres-

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20. See, e.g., *United States v. Grace*, 461 U.S. 171, 177 (1983) ("It is also true that 'public places' historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be 'public forums.' In such places, the government's ability to permissibly restrict expressive conduct is very limited." (citations omitted)); *Gregory v. City of Chicago*, 394 U.S. 111, 112 (1969) ("Petitioners' march, if peaceful and orderly, falls well within the sphere of conduct protected by the First Amendment."); *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939) ("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 space has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens.").

21. See *Stromberg v. California*, 283 U.S. 359, 362 (1931).



sion.<sup>22</sup> In 1966, the Supreme Court overturned the convictions of five black men who engaged in a sit-in in a racially segregated public library,<sup>23</sup> finding that a silent protest against segregation in a public facility fell under the protections of the First Amendment, and that the convictions of the demonstrators violated their rights to freedom of speech, assembly, and to petition the government for redress of grievances.<sup>24</sup> In 1969, the Court rejected a school district's regulation that prohibited the wearing of armbands to school, recognizing that the wearing of an armband for the purpose of expressing certain views should receive First Amendment protection as a symbolic act, and finding that the ban denied students' their First Amendment right to express their opposition to the war in Vietnam.<sup>25</sup>

The Supreme Court has provided additional guidance for when conduct should receive First Amendment protection. In 1974, the Court, in a per curiam opinion, reversed the conviction of a college student for affixing a peace symbol on an upside-down flag to protest the war in Cambodia and the recent killing of protesting college students at Kent State University.<sup>26</sup> Harold Oman Spence displayed the upside-down United States flag outside of his apartment window and taped to the flag a large peace symbol.<sup>27</sup> He wanted to associate the United States flag with peace rather than war.<sup>28</sup> A Washington court convicted Spence of violating a state statute forbidding the display of a United States flag with attached figures or symbols.<sup>29</sup> The Supreme Court reversed the conviction and held that the Washington statute as applied to Spence violated the First Amendment.<sup>30</sup>

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22. *See id.* at 369–70.

23. *See generally Brown v. Louisiana*, 383 U.S. 131 (1966). When the librarian told the men that the book they wanted to rent was unavailable and then asked them to leave, the protesters remained in the library quietly. Ten to fifteen minutes later, the sheriff arrived and arrested the men for violating Louisiana's breach of peace statute.

24. *See id.* at 141–142 The Court found not only that the protesters did not violate the breach of peace statute, but it also found that even if the demonstrators' conduct had fallen within the statute's prohibition, the statute would have been applied unconstitutionally to the demonstrators' actions.

25. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–506 (1969) (“As we shall discuss, the wearing of armbands in the circumstances of this case was... closely akin to ‘pure speech,’ which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment.” (citation omitted)).

26. *See Spence v. State of Washington*, 418 U.S. 405 (1974).

27. *See id.* at 405–06.

28. *See id.* at 408.

29. *See id.* at 405.

30. *See id.* at 406.

The Supreme Court recognized that not all conduct in which a person engages to convey an idea could be considered speech for purposes of First Amendment protection.<sup>31</sup> The Court emphasized two factors in determining whether conduct is communicative and deserving of First Amendment protection: “An intent to convey a particularized message was present, and in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it.”<sup>32</sup>

Context is key to the Court’s analysis of whether conduct may be considered speech.<sup>33</sup> In Spence’s situation, within the context of the war in Cambodia and the recent killing of student demonstrators at Kent State University, an upside-down flag bearing a peace symbol changes the meaning to the act of displaying a flag.<sup>34</sup> The Court thus concluded that Spence expressed his ideas and beliefs through activity that deserves First Amendment protections and should be shielded from criminal prosecution.<sup>35</sup>

In *Clark v. Community for Creative Non-Violence*, a case that will be discussed in greater detail below,<sup>36</sup> the Supreme Court had an opportunity to clearly decide whether sleeping in tents in a park as part of a demonstration should be considered expressive activity deserving of First Amendment protection.<sup>37</sup> In upholding the United States Park Service’s denial of a permit to a homeless rights organization seeking to sleep in tents overnight as part of a protest about homelessness, the Court assumed, but did not rule, that overnight sleeping in connection with the demonstration deserves First Amendment protection.<sup>38</sup>

Thus, this leaves unresolved the preliminary question of whether the Occupy movement’s conduct of sleeping in public parks as part of its demonstrations deserves First Amendment protection. Under the

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31. *See id.* at 409.

32. *See id.* at 409–11.

33. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969) (emphasizing that black armbands worn in school in the context of protesting the Vietnam War deserved constitutional protection).

34. *Spence*, 418 U.S. at 410–11 (“[I]t was a pointed expression of anguish by appellant about the then-current domestic and foreign affairs of his government. An intent to convey a particularized message was present, and in the surrounding circumstance the likelihood was great that the message would be understood by those who viewed it.”).

35. *See id.* at 414.

36. *See infra* Part II.

37. *See* 468 U.S. 288, 290 (1984).

38. *Id.* at 293.

*Spence* test (intent to convey a message and the likelihood that in the surrounding circumstances, the message would be understood),<sup>39</sup> the answer is yes.

Setting up tents and sleeping in public parks twenty-four hours a day is a key component of the Occupy movement's message in several ways. First, as argued on behalf of Occupy Boston<sup>40</sup> and Occupy Augusta,<sup>41</sup> the tent cities in many of the occupy camps have become a representation of hope for a more egalitarian and democratic society. Sleeping and eating communally in a park and making decisions collectively through General Assembly meetings exemplify the model society that the Occupy movement seeks to create. Second, the very name of the Occupy movement signifies the important role that physically inhabiting and taking over a public space is to the movement's message. Some of the Occupy protestors have taken over public space just outside of their state capitol buildings as a way to symbolize how the people are taking back control over their governments.<sup>42</sup> Finally, as Occupy Ft. Myers and Occupy Minneapolis successfully argued, sleeping in the park and maintaining a presence in one place has been a key way of raising awareness about the economic inequalities that the movement seeks to address.<sup>43</sup> The encampments have allowed the movement to educate the general public about economic inequalities and other social justice issues<sup>44</sup> and to do so "through symbolic, around-the-clock, peaceful protests referred to as 'occupations.'"<sup>45</sup>

The overnight sleeping in the parks has also been a key component of the Occupy movement's successes in spreading its message to the public and the public's understanding of that message in the context

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39. See *Spence*, 418 U.S. at 410–11, 412.

40. Plaintiffs' Memorandum of Law in Support of Their Motion for a Temporary Restraining Order and, After Hearing a Preliminary Injunction, at 5, *Occupy Boston v. City of Boston*, SUCV2011041526, 2011 WL 7460294 (Mass. Super. Nov. 17, 2011).

41. *Freeman v. Morris*, 11-CV-00452-NT, 2011 WL 6139216, at \*5 (D. Me. Dec. 9, 2011).

42. See, e.g., OCCUPY COLUMBIA, <http://occupycolumbiasc.org> (last visited Apr. 2, 2012); *Occupy Augusta*, FACEBOOK, <http://www.facebook.com/OCCUPYAUGUSTATA> (last visited Apr. 2, 2012).

43. For Occupy Minneapolis, sleeping in the park was a way to raise awareness of the foreclosure and homelessness crisis afflicting the nation. Plaintiffs' Memorandum of Law in Support of Motion for Temporary Restraining Order and/or Preliminary Injunction, at 33, *Occupy Minneapolis v. County of Hennepin*, 11-cv-3412-RHK-TNL, 2011 WL 5878359 (D. Minn. Nov. 23, 2011).

44. See *Occupy Fort Myers v. City of Fort Myers*, No. 2:11-cv-00608, 2011 WL 5554034, at \*1 (M.D. Fla. Nov. 15, 2011).

45. *Id.* at \*1.

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of a major economic crisis. As Judge Nancy Terresen explained in finding that Occupy Augusta's tent city represented expressive conduct:

The October 2008 stock market crisis, subsequent bank bailouts, high unemployment, deflation of the housing market, rise in foreclosures, and increasing disparity between the incomes of the highest wage-earners and the low and middle-income earners are all well-known and have set the stage for the Occupy movement. Groups associated with Occupy Wall Street have coalesced in cities around the nation and their protests have received wide coverage in the press. Those who view the tent cities erected by the Occupy movement in general and by Occupy Augusta in particular are likely to understand that these tent cities in parks and squares near centers of government and finance symbolize a message about the unequal distribution of wealth and power in this country.<sup>46</sup>

Similarly, Judge Frances A. McIntyre in Boston found that overnight sleeping and the setting up of tents deserve First Amendment protection because their message is understood by the public: "There is considerable media attention devoted to Occupy sites, and most articles, per journalistic custom, restate the Occupy position. The media has clearly understood the plaintiffs' contribution to the national conversation."<sup>47</sup>

Indeed, federal courts in Minneapolis,<sup>48</sup> Boston,<sup>49</sup> Fort Myers,<sup>50</sup> Columbia,<sup>51</sup> and Augusta<sup>52</sup> have all found that the Occupy movement's

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46. *Freeman*, 2011 WL 6139216, at \*5. Judge Terresen also found the overnight sleeping and the need to "occupy" the park twenty-four hours a day is expressive conduct deserving of First Amendment protection. *Id.* at \*6.

47. *Occupy Boston v. City of Boston*, No. 11-4152-G, Reporter 16 (Super. Ct. Mass. Dec. 7, 2011).

48. *See Occupy Minneapolis*, 2011 WL 5878359, at \*4 ("Plaintiffs correctly note that 'tent cities and temporary shanties built on public property can be a form of expressive symbolic communication.'").

49. *See Occupy Boston*, No. 11-4152-G, at 16 ("The setting up of tents, sleeping overnight, eating, and meeting in their General Assembly are all demonstrative and expressive of the democracy they claim to be creating. Within the presentation of the case that has been made to me, this court can only conclude that those activities are communicative of the exemplar democracy they wish to convey.").

50. *See Occupy Fort Myers*, 2011 WL 5554034, at \*5 ("The Court finds that in the context of this case the tenting and sleeping in the park is described by plaintiffs' counsel as symbolic conduct which is protected by the First Amendment. The 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. The expressive conduct relates to matters of public concern because it can be fairly considered as relating to matter of political, social, or other

act of sleeping overnight in public grounds is expressive conduct that warrants the protections of the First Amendment.

## II. GOVERNMENT REGULATION OF FIRST AMENDMENT PROTECTED COMMUNICATIVE CONDUCT

Determining that conduct should receive First Amendment protection only begins the inquiry of whether and how the government may regulate the conduct.<sup>53</sup> The Supreme Court's view on this next phase of inquiry has evolved over time. The Court first adopted a standard that took into consideration whether less restrictive means were available to the government to achieve its interest through regulation.<sup>54</sup> Yet over time the Court departed from that standard and eventually rejected it,<sup>55</sup> which has led to the current predicament faced by the Occupy encampments.

In 1968, the Court considered whether the public act of burning a Selective Service registration certificate as part of a demonstration against the war in Vietnam should receive First Amendment protection.<sup>56</sup> David Paul O'Brien burned his card in 1966 knowing full well that it violated federal law.<sup>57</sup> O'Brien challenged his conviction and the federal law as applied to him.<sup>58</sup>

In upholding both the conviction and federal law,<sup>59</sup> Chief Justice Warren, writing for the Court, articulated a four-part test to determine whether government action unconstitutionally infringes on First

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concern to the community and is a subject of general interest and of value and concern to the public.").

51. See *Occupy Columbia v. Haley*, No. 3:11-cv-03253-CMC, 2011 WL 6318587, at \*7 (D. S.C. Dec. 16, 2011) (finding that Occupy Columbia's camping on state grounds is likely expressive conduct under the *Spence* test). Eight days later the court upheld a prohibition on sleeping overnight after the state board formally adopted an emergency regulation establishing such a prohibition.

52. See generally *Freeman*, 2011 WL 6139216.

53. This Article does not address what would typically be the second question in a court's review of government regulation of expressive conduct: whether the conduct took place in a public forum or not, and if it did, whether the place is a traditional or limited public forum.

54. See *United States v. O'Brien*, 391 U.S. 367, 377, 382 (1968).

55. See *Ward v. Rock Against Racism*, 491 U.S. 781, 798 (1989).

56. See *O'Brien*, 391 U.S. at 370 (O'Brien burned his card to "influence others to adopt his antiwar beliefs . . . so that other people would reevaluate their positions with Selective Service, with the armed forces, and reevaluate their place in the culture of today, to hopefully consider my position.")

57. See *id.* at 369.

58. See *id.* at 376.

59. See *id.* at 372.

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Amendment protected conduct: first, the government action must be “within the constitutional power of the government”; second, it must “further[] an important or substantial government interest”; third, the government’s interest must be unrelated to the suppression of the First Amendment protected expression; and fourth, the restriction on First Amendment expression must be no greater than is essential to the furtherance of the government interest.<sup>60</sup> The Court held that the federal law banning the destruction of Selective Service cards met all four requirements and upheld O’Brien’s conviction.<sup>61</sup>

In reaching its findings, the Court determined that the government had no other way to achieve its substantial interest in maintaining a meaningful military draft system:

We perceive no alternative means that would more precisely and narrowly assure the continuing availability of issued Selective Service certificates than a law which prohibits their willful mutilation or destruction . . . . The 1965 Amendment prohibits such conduct and does nothing more.<sup>62</sup>

The finding of no alternative means was key to the Court’s determination.

O’Brien’s “no greater than essential” test, which has also been described as a “less restrictive” or “least intrusive means” test,<sup>63</sup> represented an important safeguard from the government relying on important interests—such as being able to enlist individuals for the military or to keep a park safe and clean—to curtail needlessly First Amendment rights. The test required that government regulations genuinely be narrowly tailored and that the judiciary, when evaluating such government regulations of expressive conduct, consider

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60. *Id.* at 377.

61. *See id.*

62. *Id.* at 381.

63. Courts have described O’Brien’s test in both ways. *See, e.g.,* *Rock Against Racism v. Ward*, 848 F.2d 367, 370 (2d Cir. 1988) (recognizing that New York City had the right to regulate expressive conduct that harmed others, but cited O’Brien to find that “the method and extent of such regulation must be reasonable, that is, it must be the least intrusive upon the freedom of expression as is reasonably necessary to achieve a legitimate purpose of the regulation”); *Int’l Soc. for Krishna Consciousness, Inc. v. Heffron*, 299 N.W.2d 79, 84 (Minn. 1980) (describing O’Brien’s no greater than essential test and then questioning whether the “state’s interest can be adequately served by means less restrictive of First Amendment rights”); *Comm. for Creative Non-Violence v. Watt*, 703 F.2d 586, 596-97 (D.C. Cir. 1983) (finding that the Park Department’s interest in preventing sleeping in the park to be “wanting under O’Brien’s ‘no greater [restriction] than is essential’ test; any interest in preventing other ‘camping’ activity can be furthered by less restrictive means”).

whether the government could have fulfilled its interests in a manner that had less of an impact on First Amendment rights.

Fast forward to *Heffron v. International Society for Krishna Consciousness*, when the Court upheld a Minnesota state fair regulation that restricted the distribution of literature and solicitation of funds to booths located in the fair.<sup>64</sup> A Krishna organization challenged the regulation both on its face and as applied,<sup>65</sup> contending that the regulation would prohibit its members from engaging in their religious ritual of going into public space to distribute religious literature and solicit donations.<sup>66</sup>

The Supreme Court explained that the First Amendment does not permit individuals to communicate their views in any manner that they desire or at any time,<sup>67</sup> but also recognized that the activities of the International Society for Krishna Consciousness (ISKCON) should receive First Amendment protection, subject to reasonable time, place and manner restrictions.<sup>68</sup> The Court set a test for when such restrictions are reasonable: “they are justified without reference to the content of the regulated speech . . . they serve a significant governmental interest, and . . . in doing so they leave open ample alternative channels for communication of the information.”<sup>69</sup>

Glaringly missing from the Court’s test was an explicit requirement, similar to the one in *O’Brien*,<sup>70</sup> that the government action must be no greater than essential to meet the government’s interest. The Minnesota Supreme Court, which had held that the state fair rule would violate ISKCON’s First Amendment rights, applied this requirement in holding that the state could have achieved its goals through less intrusive means.<sup>71</sup> For example, the state fair could have

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64. 452 U.S. 640, 643–44 (1981).

65. *See id.* at 644.

66. *See id.* at 645.

67. *See id.* at 647.

68. *See id.*

69. *Id.* at 648.

70. *See* *United States v. O’Brien*, 391 U.S. 367, 377 (1968).

71. *Heffron*, 299 N.W.2d at 83 (“What is at issue here is the reasonableness of the rule as a place and manner regulation. The application to an individual of a governmental regulation which incidentally restricts him in the exercise of a First Amendment right is permissible only if the regulation ‘furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.’” (quoting *O’Brien*, 391 U.S. at 377). The party urging that application of the regulation be upheld has the burden of proving that these criteria are met. *Elrod v. Burns*, 427 U.S. 347, 362 (1976). The defendants have not sustained that burden in this case.”)

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penalized disorder rather than ban all potential disorder or limited the number of individuals who could solicit for donations.<sup>72</sup> The Supreme Court rejected these considerations, and instead considered the burden that would be placed on the government when future organizations and individuals would attempt to apply for an exemption to the state fair rules.<sup>73</sup> The court thus engaged in speculative fears in order to justify government action that was more restrictive of First Amendment protected conduct than necessary.<sup>74</sup> The Supreme Court's decision in *Heffron*, however, did not explicitly rule out the "no greater than essential" test. The Court gave some consideration to other means.<sup>75</sup> Thus, questions remained about the decision's broader applicability.

One year later a new controversy arose in Washington, D.C., which allowed the Court once again to step into the debate over regulation of expressive conduct. The facts of the controversy are similar to the issues faced by the Occupy movement, and the Court's handling of the case changed significantly the trajectory of the judiciary's oversight of government regulation of expressive conduct, including in parks.

In 1982, the United States Park Service granted the Community for Creative Non-Violence (CCNV) a renewable seven-day permit to conduct a round-the-clock protest in the Mall and Lafayette Park in Washington, D.C.<sup>76</sup> The organizers wanted to educate the Reagan Administration, lawmakers, and the public about the challenges faced by the homeless community.<sup>77</sup> The Park Service permitted CCNV to establish symbolic campsites in the parks but denied demonstrators permission to sleep in the campsites, finding that it would violate the

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72. *Heffron*, 452 U.S. at 654.

73. *Id.* ("[W]e cannot agree with the Minnesota Supreme Court that Rule 6.05 is an unnecessary regulation because the State could avoid the threat to its interest posed by ISKCON by less restrictive means, such as penalizing disorder or disruption, limiting the number of solicitors, or putting more narrowly drawn restrictions on the location and movement of ISKCON's representatives. As we have indicated, the inquiry must involve not only ISKCON, but also all other organizations that would be entitled to distribute, sell, or solicit if the booth rule may not be enforced with respect to ISKCON. Looked at in this way, it is quite improbable that the alternative means suggested by the Minnesota Supreme Court would deal adequately with the problems posed by the much larger number of distributors and solicitors that would be present on the fairgrounds if the judgment below were affirmed.").

74. *Id.* at 660–62 (Brennan, J., concurring).

75. *Id.* at 654.

76. *Comm. for Creative Non-Violence v. Watt*, 703 F.2d 586, 587 (D.C. Cir. 1983).

77. *Id.*



parks' anti-camping regulations.<sup>78</sup> CCNV objected, claiming that the prohibition prevented the organization and its members and supporters from being able to convey their core message about the unavailability of shelter for homeless people.<sup>79</sup> They filed suit, seeking to invalidate the denial of a permit for sleeping as an unconstitutional restriction on freedom of expression.<sup>80</sup>

The United States District Court for the District of Columbia granted the government's motion for summary judgment,<sup>81</sup> and the D.C. Court of Appeals, in a per curiam decision, reversed and enjoined the government from prohibiting demonstrators from sleeping in tents.<sup>82</sup> Circuit Judge Abner J. Mikva filed an opinion rejecting the Park Service's denial of permission for the homeless rights organization to sleep in temporary structures.<sup>83</sup> Judge Mikva first applied the *Spence* test to conclude that in the context of a large demonstration with tents, signs, and other expressions of views, sleeping could be understood as expressive conduct deserving of First Amendment protection, particularly since the protestors chose to sleep across from the White House and the Capitol.<sup>84</sup> Judge Mikva then applied the *O'Brien* test to the government's regulation of First Amendment pro-

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78. *Id.* The Park Service regulation defined camping as

“the use of park land for living accommodation purposes such as sleeping activities, or making preparations to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or . . . other structure . . . for sleeping or doing any digging or earth breaking or carrying on cooking activities . . . . [The activities] 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.”

Clark v. Comm. for Creative Non-Violence, 468 U.S. 288, 290-91 (1984) (quoting 36 C.F.R. § 50.27(a)(1983)).

79. *Comm. for Creative Non-Violence*, 703 F.2d at 587.

80. *Id.*

81. *Id.*

82. The court sat en banc and eleven judges produced six opinions; six judges held that the Park Service violated the demonstrators' First Amendment rights and five judges disagreed. *Id.* at 586.

83. *Id.*

84. *Id.* at 592-93. Judge Mikva found that the twenty-four hour protest deserved the same protection under the First Amendment as a vigil. *Id.* at 594. He also emphasized that he did not reach his conclusion because sleeping by a homeless rights organization is uniquely worthy of First Amendment protection; he found such distinctions to be content-based. *Id.* at 594. He also rejected the government's contention that providing CCNV the right to sleep in the park would open up the floodgates to allow non-demonstrators the right to sleep overnight in the park. *Id.* at 598-99.

tected conduct<sup>85</sup> and determined that the regulation failed *O'Brien's* “no greater than is essential” test.<sup>86</sup> He determined that the government’s interest in preserving the park could be accomplished through less restrictive means.<sup>87</sup> For example, the renewable nature of the permit (it was granted for an initial seven day period subject to renewal) allowed the government to restrict activities if illegal conduct occurred.<sup>88</sup> The government could also limit the number of tents or the size of the campsite.<sup>89</sup> Judge Mikva concluded that the Park Service had failed to prove that preventing the protesters from engaging in expressive conduct through overnight sleeping in a park as part of a protest would further the government’s interests.<sup>90</sup>

The United States Supreme Court, in an opinion filed by Justice Byron White, reversed the Court of Appeals decision.<sup>91</sup> As stated earlier, the Court assumed, but did not decide, for purposes of its ruling that overnight sleeping in a park in connection with CCNV’s protest was First Amendment-protected expressive conduct.<sup>92</sup> The Supreme Court then held that the Park Service’s regulation satisfied both the reasonable time, place, or manner test and the test for regulation of symbolic conduct.<sup>93</sup> The Court found the regulation to be

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85. *Id.* at 595 (“In short, *O'Brien* requires us to engage in a balancing of first amendment freedoms and their societal costs that is structured to place a thumb on the first amendment side of the scales.”). Judge Mikva took the position that the Supreme Court in *Hefron* did not abandon *O'Brien's* less restrictive means test, finding that the majority did in fact apply the test in his opinion. *Id.* at 597 n.28.

86. *Id.* at 596–97. The Court also rejected the government’s contention that illegitimate requests for camping by demonstrators will increase significantly, and that the Park Service would have to approve them. *Id.* at 598. Again, the court said that this could be easily addressed by denying permits for overnight sleeping when it is simply a “convenience” for a daytime rally, but granting permits for sleeping when it is expressive and part of a round-the-clock demonstration or vigil. *Id.*

87. *Id.* at 597.

88. *Id.*

89. *Id.* at 598.

90. *Id.* at 599.

91. *Clark v. Comm. for Creative Non-Violence*, 468 U.S. 288, 289 (1984).

92. *Id.* at 293.

93. *Id.* at 294. Under the reasonable time, place or manner test, restrictions 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 the information.” *Id.* at 293. Similarly, according to Justice White, expressive conduct or symbolic expression may be regulated or even forbidden when “the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech.” *Id.* at 294 (referencing *O'Brien*, but not including a direct citation and omitting the other component of the test).

neutral, that it was not being applied because of a disagreement with CCNV over the message it sought to deliver, and that CCNV still had many other ways to deliver its message even with the prohibition on overnight sleeping.<sup>94</sup> The Court concluded that the regulation was narrowly focused on the government's substantial interest to preserve the parks in an attractive condition that is readily available to the many people who visit the parks in the nation's capital.<sup>95</sup> The Court took into consideration, as the Court did in *Heffron*, the impact that its ruling would have on future demonstrators and non-demonstrators' use of the parks.<sup>96</sup>

The Supreme Court rejected the determination by the Court of Appeals that the Park Service's denial of a permit for overnight sleeping violated the *O'Brien* test for regulation of expressive conduct,<sup>97</sup> and in doing so, the Court applied a narrowly tailored test that did not consider whether less restrictive means existed to achieve the government's interest in preserving the parks.<sup>98</sup> Instead, the Court treated the analysis as one of deferring to administrative decisions over how best to preserve the parks, rather than an analysis that serves to ensure that both interests—preserving the park and engaging in expressive conduct—could be fulfilled.<sup>99</sup> Justice White explained this deference to the executive:

We do not believe, however, that either *United States v. O'Brien* or the time, place, or manner decisions assign to the judiciary the authority to replace the Park Service as the manager of the Nation's parks or endow the judiciary with the competence to judge how much protection of park lands is wise and how that level of conservation is to be attained.<sup>100</sup>

Justice White had many options short of inserting the judiciary into a decision-making role over parkland,<sup>101</sup> yet he chose not to question the Park Service's rationale and its factual basis.

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94. *Id.* at 295.

95. *Id.* at 296. CCNV argued that the incremental benefits to the parks could not justify the broad ban on sleeping, particularly when it involved First Amendment protected conduct. The Supreme Court rejected this argument, and in doing so, remarked, but did not rule, that the sleeping appeared to be more facilitative than expressive. *Id.*

96. *Id.* at 296–97.

97. *Id.* at 298.

98. *See id.* at 299.

99. *See id.*

100. *See id.*

101. Justice White could have remanded the case back to the Court of Appeals to determine whether CCNV could provide alternative means to engage in overnight

Justice Marshall filed the dissent, to which Justice Brennan joined, criticizing the majority for failing to fully scrutinize the government's interest in justifying its restrictions as well as the impact of the restrictions on First Amendment protected activity.<sup>102</sup> Justice Marshall found that CCNV's planned activity was expressive conduct that qualified as symbolic speech<sup>103</sup> and held that the application of the Park Service regulations failed to satisfy the reasonable time, place, and manner restrictions test.<sup>104</sup>

Justice Marshall criticized Justice White and the government for failing to explain how denying CCNV a permit to sleep overnight in tents would substantially further the government's interest in maintaining the parks.<sup>105</sup> Justice Marshall took particular umbrage at the lack of a factual showing that a real problem was posed to the government's interest by CCNV's request, rather than a speculative problem.<sup>106</sup> Justice Marshall criticized the majority for never offering a justification for an absolute ban or how such a ban was in fact narrowly tailored.<sup>107</sup> He feared that the majority confused equality of treatment with protections of First Amendment activities,<sup>108</sup> and warned that the majority ignored the incentives that sometimes exist for government officials to over-regulate and to choose to protect the

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sleeping without damaging the park, particularly since the Park Service already permitted the erecting of tents.

102. *Clark*, 468 U.S. at 301 (Marshall, J., dissenting).

103. *Id.* at 306 (“By using sleep as an integral part of their mode of protest, respondents ‘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.’” (quoting *Comm. for Creative Non-Violence v. Watt*, 227 U.S. App. D.C. 19 (1983))). Justice Marshall held that whether the act of sleeping in the park was facilitative or not was irrelevant to determining whether the government's ban on overnight sleeping furthered a substantial interest, *id.* at 310, and that the facilitative nature of the conduct does not take away from its status as symbolic speech as well. *Id.* at n.7.

104. *Id.* at 308. In a footnote, Justice Marshall agreed with the majority that there was no “substantial difference” between the *O'Brien* test and the reasonable time, place or manner restriction test. *Id.* n.6.

105. *Id.* at 308.

106. *Id.* at 311. No evidence had been offered that the absence of a total ban on overnight sleeping would present extraordinary problems, and similar to the Court's rejection in *Tinker* of speculative problems as insufficient to curtail First Amendment protected conduct, Justice Marshall explained that mere apprehension of problems should not form the basis to restrict expressive conduct. *Id.*

107. *Id.* at 312.

108. *Id.* at 313 (“The Court, however, has transformed the ban against content distinction from a floor that offers all persons at least equal liberty under the First Amendment into a ceiling that restricts persons to the protection of First Amendment equality—but nothing more.”).

general public over individuals who wish to engage in First Amendment-protected conduct.<sup>109</sup>

Seven years later, a majority of the Supreme Court put to rest any notion that the least restrictive means requirements still applied to regulations of expressive conduct.<sup>110</sup> In 1986, New York City adopted a regulation that required that performances in the Acoustic Bandshell in Central Park use sound-amplification equipment and a sound technician provided by the city.<sup>111</sup> The city did so to regulate the volume of sound at the bandshell so that it did not disturb individuals using the Sheep Meadow or who live on Central Park West.<sup>112</sup> Rock Against Racism, an anti-racism organization that had held annual concerts at the bandshell from 1979 to 1986,<sup>113</sup> challenged the new guidelines as a First Amendment violation.<sup>114</sup> The District Court upheld the sound-amplification guidelines.<sup>115</sup> The Court of Appeals reversed, finding that content-neutral time, place and manner regulations must be the least intrusive upon freedom of expression, and that there were alternative means for the city to achieve its interest in controlling excessive sound without intruding on Rock Against Racism's First Amendment rights.<sup>116</sup>

Justice Kennedy, writing for the majority, reversed the Court of Appeals decision and found that the court wrongfully required New York City to prove that it had used the least intrusive means to further its legitimate governmental interests.<sup>117</sup> The Court recognized that music qualifies as expressive communication deserving of First Amendment protection.<sup>118</sup> The Court then repeated the test used in *Clark* for regulation of protected speech in a public forum: the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are "justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and

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109. *Id.* at 314–15.

110. *See Ward v. Rock Against Racism*, 491 U.S. 781 (1989).

111. *See id.* at 784.

112. *See id.*

113. *See id.* at 784–85.

114. *See id.* at 787.

115. *See id.* at 788.

116. *Id.* at 789 ("For example, the city could have directed respondent's sound technician to keep the volume below specified levels. Alternatively, a volume-limiting device could have been installed; and as a 'last resort,' the court suggested, 'the plug can be pulled on the sound to enforce the volume limit.'")

117. *Id.* at 789–90.

118. *Id.* at 790.

that they leave open ample alternative channels for communication of the information.”<sup>119</sup>

The Supreme Court found that New York City’s regulation had been narrowly tailored to the satisfaction of the *O’Brien* and *Clark* tests, and rejected the analysis performed by the Court of Appeals of whether alternative means of regulation existed that would have been less intrusive to achieve the same government interest (protecting its residents from excessive noise).<sup>120</sup> Justice Kennedy found that a least restrictive alternative analysis had never been part of the Court’s time, place and manner test and repeated the conclusion in *Clark* that the *O’Brien* test and the time, place, or manner restriction test were one and the same.<sup>121</sup> According to Kennedy, narrow tailoring only required that the “regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.”<sup>122</sup>

Justice Kennedy did emphasize that a time, place, or manner regulation may not burden substantially more speech than necessary to advance a legitimate government interest, but he also emphasized that courts should not second guess government regulations.<sup>123</sup> He stated, “so long as the means chosen are not substantially broader than necessary to achieve the government’s interest . . . the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-

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119. *Id.* at 791.

120. *Id.* at 796–97 (“The Court of Appeals recognized the city’s substantial interest in limiting the sound emanating from the bandshell. The court concluded, however, that the city’s sound-amplification guideline was not narrowly tailored to further this interest, because ‘it has not [been] shown . . . that the requirement of the use of the city’s sound system and technician was the *least intrusive means* of regulating the volume.’ In the court’s judgment, there were several alternative methods of achieving the desired end that would have been less restrictive of respondent’s First Amendment rights. The Court of Appeals erred in sifting through all the available or imagined alternative means of regulating sound volume in order to determine whether the city’s solution was ‘the least intrusive means’ of achieving the desired end. This ‘less-restrictive-alternative analysis . . . has never been a part of the inquiry into the validity of a time, place, and manner regulation.’ Instead, our cases quite clearly hold that restrictions on the time, place, or manner of protected speech are not invalid ‘simply because there is some imaginable alternative that might be less burdensome on speech.’” (citations omitted)).

121. *Id.* at 797–99.

122. *Id.* at 799 (quoting *United States v. Albertini*, 472 U.S. 675 (1985)).

123. *Id.* at 800 (“The validity of [time, place, or manner] regulations does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests’ or the degree to which those interests should be promoted.” (quoting *Albertini*, 472 U.S. at 689)).

restrictive alternative.”<sup>124</sup> Justice Kennedy did not explain how future courts should reconcile between what appeared to be two contradictory requests: that the government regulation not restrict substantially more speech than is necessary, and that courts refrain from reviewing whether less intrusive means exist. Justice Kennedy concluded that the Court of Appeals should have deferred to New York City’s determination of how best to control volume, thus echoing Justice White’s deferral in *Clark* to the executive.<sup>125</sup>

Justice Marshall, joined by Justices Brennan and Stevens, filed the dissent, criticizing the majority for eliminating what had been a key safeguard of freedom of expression: the requirement that government regulations adopt the least intrusive restriction necessary to achieve their interests.<sup>126</sup> Marshall stated, “[b]y abandoning the requirement that time, place, and manner regulations must be narrowly tailored, the majority replaces constitutional scrutiny with mandatory deference.”<sup>127</sup>

Justice Marshall disagreed with the majority’s contention that the Court, in past cases, had rejected the less-restrictive-alternative test as part of a narrow tailoring requirement.<sup>128</sup> Quite the opposite, Marshall explained, since in previous cases the Court had interpreted the narrow tailoring requirement to mandate a review of alternative ways of achieving the government’s interest and determining whether a regulation’s increased effectiveness outweighs any increased burden it places on First Amendment protected speech.<sup>129</sup> Justice Marshall concluded with a strong warning:

Today’s decision has significance far beyond the world of rock music. Government no longer need balance the effectiveness of regulation with the burdens on free speech. After today, government need only assert that it is most effective to control speech in advance of its expression. Because such a result eviscerates the First Amendment, I dissent.<sup>130</sup>

Today, the Occupy movement is facing the consequences that Justice Marshall warned about in his dissent.

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124. *Id.*

125. *Id.*

126. *Id.* at 803 (Marshall, J., dissenting).

127. *Id.*

128. *Id.* at 804.

129. *Id.* at 804–05.

130. *Id.* at 812.

### III. THE OCCUPY MOVEMENT IN A POST-*ROCK* WORLD

Not surprisingly, courts dealing with the Occupy movement have relied on *Clark* and *Ward* to uphold government restrictions on the Occupy movement's attempts to sleep overnight in public parks, even while recognizing that sleeping overnight in the park is expressive conduct that merits First Amendment protection.

In Minneapolis, for example, the court found that the ban on sleeping in a public plaza and the prohibition on erecting tents constituted a valid time, place, and manner restriction under *Clark*.<sup>131</sup> Even though the court found that the demonstrators' desires to sleep overnight in the public plaza amounted to expressive conduct, the court never considered whether Hennepin County could have restricted access to the plazas in a less intrusive manner while still protecting the government's interest in maintaining the plazas.<sup>132</sup> For example, the county could have provided overnight access on a conditional basis, designated a smaller part of the plaza as the protest zone, or even limited the number of individuals who may camp out overnight to a reasonable number.

Similarly, the court in Occupy Boston's challenge to the government's restrictions recognized that sleeping overnight by the protesters represented expressive conduct, but also found the government's prohibitions to be reasonable.<sup>133</sup> The court held that the government's interest in keeping the public square open to the public justified a prohibition on overnight sleeping in the park by just one group,<sup>134</sup> and that such a prohibition was narrowly tailored.<sup>135</sup> Again, the court never considered alternative or less intrusive means to achieve the government's interest of preserving the park and keeping it open to the public without infringing on Occupy Boston's First Amendment rights (for example, the court could have instructed the government to limit the availability of space in the park for overnight

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131. See *Occupy Minneapolis v. County of Hennepin*, Civ. No. 11-3412, 2011 WL 5878359, at \*6 (D. Minn. Nov. 23, 2011).

132. *Id.*

133. See *Occupy Boston v. City of Boston*, No. SUCV201104152G, 2011 WL 7460294, at \*1 (Sup. Ct. Mass. Nov. 17, 2011).

134. Judge Terresen ruled similarly in the Occupy Augusta matter, holding that permitting Occupy Augusta to camp overnight at a public park near the State Capitol would deprive other groups of the ability to exercise their First Amendment rights. *Freeman v. Morris*, No. 11-CV-00452, 2011 WL 6139216, at \*12 (D. Me. Dec. 9, 2011).

135. *Occupy Boston*, 2011 WL 7460294, at \*4.



sleeping, thus not necessarily infringing on the ability of other members of the public to enjoy the park).

The Occupy movement has advocated successfully<sup>136</sup> before the courts to allow sleeping overnight in a traditional public forum where they have been able to prove that the government's regulations were content-based, triggering a strict scrutiny analysis. In Columbia, South Carolina the state house grounds did not expressly prohibit camping until the Occupy demonstrators attempted to do so.<sup>137</sup> The court granted a preliminary injunction enjoining the prohibitions on camping or sleeping as invalid time, place, and manner restrictions.<sup>138</sup> Eight days later, however, the court upheld as a reasonable content-neutral regulation the prohibition on sleeping overnight after the state board formally adopted an emergency regulation prohibiting the use of the State House grounds for camping and sleeping.<sup>139</sup>

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136. There have been instances outside of the Occupy movement where organizations have made successful arguments in court to carve out exceptions from prohibitions on sleeping in public spaces for purposes of expressive conduct. In *Metropolitan Council, Inc. v. Safir*, for example, a tenants' advocacy group planned a protest near the residence of the New York City mayor, in which the demonstrators would sleep on city sidewalks to convey the homelessness problem. 99 F. Supp. 2d 438 (S.D.N.Y. 2000). New York City had a policy of preventing persons from sleeping on public sidewalks, and the plaintiff, represented by the New York Civil Liberties Union, won a preliminary injunction to enjoin the NYPD from preventing the protesters from sleeping on the sidewalks. *Id.* at 441, 450. The court found the city's prohibition to be overboard and in violation of the narrow tailoring requirement under *Ward. Id.* at 445. The court did recognize that narrow tailoring did not require the city to use the least restrictive means. *Id.* Nevertheless, it found the city's complete ban on sleeping on public sidewalks to be overbroad. *Id.*

137. *Occupy Columbia v. Haley*, No. 3:11cv 03253 CMC., 2011 WL 6318587, at \*1 (D.S.C. Dec. 16, 2011).

138. *Id.* at \*10 ("Certainly the no-camping policy, as defined in Governor Haley's Stipulation and the Board Defendants' brief, is not content-neutral because it applies only to Occupy Columbia and provides no notice to other persons or groups who may wish to engage in expressive conduct involving camping or sleeping on the State House grounds . . . there is no evidence that this policy has been applied to any person or group in the past. In fact, participants in Occupy Columbia slept on the grounds with sleeping bags and tarps for over 30 days before the State attempted to enforce this policy.").

139. *Occupy Columbia*, 2011 WL 6318587, at \*1. Interestingly, the court criticized Occupy Columbia for not demonstrating that the government's interest in preserving and maintaining safety in the park could have been served by a more narrow restriction on camping and sleeping. *Id.* at \*6. The court thus appeared to have been open to an *O'Brien*-like narrow tailoring test, and even cited the *O'Brien* test in its decision (although it also referenced *Clark*'s assertion that the *O'Brien* test was hardly different from the standard time, place, or manner restriction test). *Id.* at \*7.

#### IV. RESTORING THE RIGHT TO OVERNIGHT PROTEST IN PUBLIC PARKS

The courts are of little use (with few exceptions) to demonstrators who wish to maintain a constant presence in a public space such as a park.<sup>140</sup> This fact has significant implications on the ability of individuals to engage in sustained protests in the United States. Park curfews and similar restrictions that may appear to be content neutral have a significant and unique impact on individuals attempting to convey a political and social message using a tactic that numerous courts have recognized as deserving of First Amendment protection (camping and sleeping), yet in practice cannot be deployed in a meaningful manner. This impact can be seen in the Occupy movement's experiences in Zuccotti Park: when protesters were able to maintain a constant presence in the park, a community developed that received daily attention from the public and was able to portray its vision of communal living and participatory democracy. Following the removal of the tents and the aggressive enforcement of restrictions on sleeping and camping, the movement has continued in a very different manner that no longer captures the public's attention in the same way.

Therefore, I propose that local legislatures change the law to protect the rights of demonstrators. The experiences of the Occupy demonstrators provide a rare opportunity to re-evaluate and repair deficiencies in current First Amendment jurisprudence. Lawmakers in cities, towns, and villages can fill in the gap left by the judiciary and pass laws that restore the requirement that the government must use the least restrictive means when regulating expressive conduct. This restoration could focus on all government regulations of expressive conduct in public forums, or it could focus on requiring such exhaustion of alternatives in parks only.

The legislation, which could be named the "Protecting the Right to Protest Bill," should address the concerns raised by Justice Marshall in his dissents in *Clark*<sup>141</sup> and *Ward*<sup>142</sup> about government overregulation of expressive conduct. First, the legislation will have to require that before the government makes a final determination to restrict the public's right to engage in expressive conduct in a park or other public forum, it must explore meaningfully lesser restrictive al-

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140. *See supra* Part III.

141. *See supra* notes 108–15 and accompanying text.

142. *See supra* notes 132–38 and accompanying text.

ternatives. Under the legislation, for example, before banning all overnight camping and sleeping by demonstrators, the government would be required to explore other avenues that both protect the park and also ensure that protesters may engage in First Amendment protected conduct. Such alternatives could include limiting the area within a park where demonstrators may camp or sleep, or limiting the number of tents that may be erected for sleeping purposes on any given night. The government would be required to choose the least restrictive option that still allows it to achieve its interest.

Second, under the legislation, the government will be prohibited from basing its restrictions on speculative assertions of future misconduct. Government restrictions on expressive conduct will have to be based on factual scenarios where the government's interest actually has been threatened, or there is a very high likelihood that it will be threatened. In the Occupy context, the government would have to make a factual showing that the demonstrators' requests pose a real danger to the government's interest in maintaining the parks. Similar requirements exist in the prohibition on schools from restricting students' First Amendment rights based on general fears of disturbances.<sup>143</sup> The Supreme Court has stated that such government restrictions on expressive conduct cannot take place based on an "undifferentiated fear or apprehension of disturbance" and without a finding and showing that the forbidden conduct would "materially and substantially" disrupt the interest that the school seeks to protect.<sup>144</sup>

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143. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508–09 (1969) ("The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.").

144. *Id.* ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." (citations omitted)).

Advocates will be faced with opposition and potential risks when engaging lawmakers in expanding First Amendment protections through the legislative process, particularly in the context of the Occupy movement. First, in the places where lawmakers have been engaged, it has been in the opposite direction, restricting protest rights rather than expanding them.<sup>145</sup> Second, exaggerated concerns over tying the hands of government decision-makers will be raised, and examples will surely be given of the small percentage of instances where illegal or violent activities occurred in the surrounding areas of Occupy encampments.

The first concern should be addressed by focusing initially on passing legislation in localities that would be more sympathetic to protecting the rights of the Occupy demonstrators. These localities will serve as testing grounds for the legislation, and will assist to assuage the naysayers who fear expanding First Amendment protections over expressive activities. In these localities, alliances should be made with conservative and libertarian movements, such as the Tea Party, who are also concerned about ensuring that demonstrators are able to engage in expressive conduct. Once such bills pass in a few jurisdictions, their precedent will increase the likelihood that less supportive localities will pass such legislation.

The second concern should be addressed by explaining to policymakers that this legislative proposal will allow the government to continue to consider all of its options, but will ensure that the final option that is chosen will achieve both the goals of protecting the government's interests and the right of the people to engage in First Amendment protected conduct. The requirement of considering the least restrictive means will ensure careful deliberation by the government, which will then result in better judgments. While it is true that government officials will lose some of their freedom of choice and be required to choose the least restrictive option, they will also be required to continue to protect their own interests. Ultimately, both the government's interests and the protesters' interests will be upheld.

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145. See, e.g., David Davis, *State House OKs Bill On Equal Access*, CLEVELAND DAILY BANNER (Feb. 17, 2012), [http://www.clevelandbanner.com/view/full\\_story/17568396/article-State-House-OKs-bill-on-equal-access](http://www.clevelandbanner.com/view/full_story/17568396/article-State-House-OKs-bill-on-equal-access); Arun Gupta & Michelle Fawcett, *Occupy Fights the Law: Will the Law Win? From Boise to Nashville, the Movement Faces an Unconstitutional Legal Siege*, SALON.COM (Feb 14, 2012 1:00 PM), [http://www.salon.com/2012/02/14/occupy\\_fights\\_the\\_law\\_will\\_the\\_law\\_win/](http://www.salon.com/2012/02/14/occupy_fights_the_law_will_the_law_win/); Adam Tarchoun, *Binghamton Tells "Occupy" to Stay out*, PIPE DREAM (Feb. 10, 2012), <http://www.bupipedream.com/news/7896/binghamton-tells-occupy-stay/>.