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Why Properly Policing a Movement Matters: A Response to Alafair Burke's Policing, Protestors, and Discretion

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**WHY PROPERLY POLICING A MOVEMENT
MATTERS: A RESPONSE TO ALAFAIR
BURKE’S *POLICING, PROTESTORS, AND
DISCRETION***

*Lenese Herbert**

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Decency, security, and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizen. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.¹

INTRODUCTION

On September 17, 2011, a group of protesters set up camp in New York City’s privately-owned Zuccotti Park to protest America’s political and financial systems, the excesses of capitalism, and widening chasm between the very richest Americans, “The 1%,” and

* Professor of Law, Albany Law School; Visiting Professor of Law, Howard University School of Law. The author thanks the organizers, participants, and members of a most wonderful 2012 Fordham Urban Law Journal Cooper-Walsh Colloquium. Thanks also to Professor Alafair Burke for sharing her draft article, “Policing, Protesters, and Discretion,” which I had the pleasure of reading. A special thank you to Sara Tam, Cooper-Walsh Colloquium Editor, whose unfailing and comprehensive assistance was greatly appreciated.

1. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

the rest of the United States, “The 99%.”² The protest not only caught the attention of millions across the country, but it also spread quickly to other American cities³ and across the globe.⁴ Occupy was lauded as an organic, diverse, grassroots, populist,⁵ anarchist,⁶ self-governing, consensus-based,⁷ direct-action mini-utopian⁸ collective of collectives. Not since the Great Depression has a group or individual captured the division in the American economic classes so vividly. Many repeated its pithy rallying cry—“We are The 99%!”—including celebrities, billionaire moguls, renowned musicians, award-

2. See Brian Greene, *How Occupy Wall Street Started and Spread*, USA TODAY (Oct. 17, 2011), <http://www.usnews.com/news/washington-whispers/articles/2011/10/17/how-occupy-wall-street-started-and-spread>; see also Andy Kroll, *How Occupy Wall Street Really Started*, MOTHER JONES (Oct. 17, 2011), <http://www.motherjones.com/politics/2011/10/occupy-wall-street-international-origins>.

3. At its height, Occupy spread to more than one hundred cities across the United States, including, inter alia, Atlanta, Berkeley, D.C., Denver, Houston, L.A., Oakland, Portland, and Seattle. See *About*, OCCUPYWALLSTREET, <http://occupywallst.org/about/> (last visited Apr. 18, 2013).

4. At its height, Occupy is credited with “actions” in over 1,500 cities across the world. See *id.* There is some understanding that the American Occupy Movement was a subsequent and interim stage of an earlier global agitation for change against the status quo. See, e.g., Kroll, *supra* note 2. In particular, Kroll stated that members of the collective credited with initiating Occupy Wall Street identified as New Yorkers, as well as “Egyptians, Spaniards, Japanese, Greeks. Some had played a part in the Arab Spring uprising; others had been involved in the protests catching fire across Europe. . . . The group included . . . people who’d taken part in uprisings all over the world.” *Id.* He further noted

That international spirit would galvanize Occupy Wall Street, connecting it with the protests in Cairo’s Tahrir Square and Madrid’s Puerta del Sol, the heart of Spain’s populist uprising. Just as a comic book about Martin Luther King Jr. and civil disobedience, translated into Arabic, taught Egyptians about the power of peaceful resistance, the lessons of Egypt, Greece, and Spain fused together in downtown Manhattan.

Id.

5. See Adam Weinstein, “*We Are the 99 Percent*” Creators Revealed, MOTHER JONES (Oct. 7, 2011), <http://www.motherjones.com/politics/2011/10/we-are-the-99-percent-creators?page=2>.

6. See David Graeber, Op-Ed, *Occupy Wall Street’s Anarchist Roots*, AL JAZEERA (Nov. 30, 2011), <http://www.aljazeera.com/indepth/opinion/2011/11/2011112872835904508.html>.

7. *About*, OCCUPYWALLSTREET, <http://occupywallst.org/about/> (last visited Apr. 18, 2013).

8. See Alyssa Newcomb & Carlos Boettcher, *Occupy Wall Street Anniversary Protests Dwarfed by Police Presence*, ABC NEWS (Sept. 17, 2012), <http://abcnews.go.com/US/occupy-wall-street-anniversary-protests-dwarfed-police-presence/story?id=17249773#.UNPgPm9ZWS0>.

winning actors, entertainment tastemakers, and other members of The 1%.⁹

One year later, however, Occupy seems nearly irrelevant.¹⁰ Its protests are no longer headlining newspapers or cable news features.¹¹ Instead, on its first “Occuversary,”¹² Occupy “seems to have lost nearly of all its steam,”¹³ disappeared,¹⁴ and stalled. It is as if the movement’s initial intensity was inversely proportionate to its ultimate legacy.

9. See, e.g., Brian Warner, *The 10 Richest Celebrities Supporting Occupy Wall Street*, CELEBRITY NET WORTH (Sept. 16, 2012), <http://www.celebritynetworth.com/articles/entertainment-articles/10-richest-celebrities-supporting-occupy-wall-street/> (naming and identifying the net worth of Occupy supporters such as Russell Simmons, Kanye West, Susan Sarandon, Michael Moore, Deepak Chopra, Yoko Ono, Russell Brand, and Roseanne Barr). Billionaire Warren Buffet, ranked as the world’s third richest person, and his son also indicated support for Occupy. See Andrew Frye & Alan Bjerga, *Buffet’s Son Defends Occupy Wall Street Protests*, BLOOMBERG (Oct. 13, 2011), <http://www.bloomberg.com/news/2011-10-13/howard-buffett-defends-occupy-wall-street-protests-to-make-things-happen-;> see also Brent Bozell, *Occupy’s Celebrity One Percent Backers*, NEWSBUSTERS (Jan. 13, 2012), <http://newsbusters.org/blogs/brent-bozell/2012/01/03/bozell-column-occupys-celebrity-one-percent-backers>.

10. One writer’s sentiments are as follows:

[T]he Occupy movement seems scattered and almost vestigial. . . . Its numbers are small. And while it continues to send up a flare or two from the socioeconomic front lines of the American commons, there is no lasting organization, no powerful network of tendons linking large-scale movements around the country, and no centered political message.

Tom Watson, *Occupy Wall Street’s Year: Three Outcomes for the History Books*, FORBES (Sept. 17, 2012), <http://www.forbes.com/sites/tomwatson/2012/09/17/occupy-wall-streets-year/>.

11. News coverage of income inequality (an Occupy *raison d’etre*) increased five-fold between September and November 2011. Dylan Byers, *Occupy Wall Street Is Winning*, POLITICO (Nov. 11, 2011, 2:37 PM), http://www.politico.com/blogs/bensmith/1111/Occupy_Wall_Street_is_winning.html. On November 14, 2011, when some of the larger encampments were evicted, Occupy-related stories accounted for approximately thirteen percent of total U.S. news media coverage. Jesse Holcomb, *Biggest Week Yet for Occupy Wall Street Coverage*, JOURNALISM.ORG (Nov. 20, 2011), http://www.journalism.org/index_report/pej_news_coverage_index_november_1420_2011.

12. See Bill Chappell, *Occupy Wall Street Marks One-Year Anniversary; More Than 100 Arrested*, NPR (Sept. 17, 2012), <http://www.npr.org/blogs/thetwo-way/2012/09/17/161303439/occupy-wall-street-marks-one-year-anniversary-more-than-100-arrested> (identifying the “insiders” terminology for the first year).

13. See, e.g., Watson, *supra* note 10; see also Annie Gowen, *A Year Later, Occupy Has Lost Its Oomph*, WASH. POST, Sept. 16, 2012, at A7 (quoting Occupy “observer,” Howard Steven Friedman).

14. See, e.g., Howard Steven Friedman, *Dear OWS: Y R U MIA?*, HUFFINGTON POST (Sept. 3, 2012, 9:30 AM), http://www.huffingtonpost.com/howard-steven-friedman/occupy-wall-street_b_1850301.html.

Reports of Occupy's death may be greatly exaggerated.¹⁵ Few, however, would dispute a grim prognosis.¹⁶ For all of the various causes that many commentators have emphasized,¹⁷ this Article submits that excessive use of force by the police remains one of the most significant, if not primary, causes of Occupy's precipitous

15. See, e.g., Christopher Robbins, *Thirty-One Groan-Inducing 'Is Occupy Dead?' Headlines from the Past Year*, GOTHAMIST (Sept. 16, 2012), http://gothamist.com/2012/09/16/31_groan-inducing_is_occupy_dead_he.php (criticizing mainstream media reports of Occupy's premature death—not even two full months after its inception); see also Kelley Vlahos, *Occupying a Footnote to History*, AM. CONSERVATIVE, (Sept. 19, 2012), www.theamericanconservative.com/articles/occupying-a-footnote-to-history (criticizing corporate media outlets for announcing or questioning the relevancy, vitality, or quality of Occupy upon its one year anniversary). Vlahos indicates that despite valid points regarding Occupy's failing and difficulties, “some of the same corporate media now gurgling easy memes about why Occupy did not make a bigger anniversary splash this week are the ones who played a role in politicizing, and therefore marginalizing, the movement for easily-digestible public consumption.” *Id.*

16. See, e.g., Friedman, *supra* note 14 (“You once had a powerful voice. It was a strong voice, but not always clear. Today you are conspicuously silent. Regain that voice so you don't lose this critical opportunity to move the political landscape . . .”); see also Annie Gowen, *Occupy Protestors Arrested in N.Y. on Anniversary of Movement*, WASH. POST, Sept. 15, 2012, http://articles.washingtonpost.com/2012-09-15/local/35496743_1_protest-marches-financial-district-supporters (quoting an Occupy protester's prediction that the one-year anniversary would provide “a sense of rekindling the old flame”).

17. One commentator laments the substance—or lack, thereof—of Occupy's protests:

There are no tangible results from the Occupy movement, with [sic] has been as much about self-expression and experiments in creating a new networked community as it has about public policy. There are no real Occupy policy briefs, no legislation, no candidates. And therefore, it's fair to observe that nothing has really changed in terms of the middle class, the under-represented, the “99 percent” or however you'd define it.

Watson, *supra* note 10.

Others critiqued Occupy's cliquish nature. “The movement wasn't inclusive. It was more like a social gathering. The results were not exactly what I was looking for.” Gowen, *supra* note 16 (quoting special education teacher Christopher Bueker, who joined Occupy Cincinnati for three days before growing disillusioned with its “anger and resentment”). Even the author of this Article weighed in on Occupy's lack of inclusiveness and, therefore, legitimacy. See Lenese C. Herbert, *O.P.P.: How “Occupy's” Race-Based Privilege May Improve Fourth Amendment Jurisprudence for All*, 35 SEATTLE U. L. REV. 727, 730 (2012) (criticizing the dearth of racial and ethnic diversity in Occupythat, in the short run, hurt its cause among certain Americans).

Others hint that timing, not substance, catapulted Occupy's public profile. See, e.g., Watson, *supra* note 10 (claiming that Occupy happened to capture the spirit of recessionary resentment by accident, crediting Occupy with creating the eponymous “Brand of The 99 Percent”).

decline.¹⁸ Given that the Occupy demonstrations and their protesters were overwhelmingly non-violent, one might expect governmental response to have been muted and measured. It was not. When footage spread of University of California-Davis police Lieutenant John Pike pepper-spraying peacefully seated student protesters as if they were vermin, it shocked and outraged.¹⁹

It got worse. Jurisdictions deployed overwhelming police force to arrest Occupy protesters and close public fora—actions characterized by some as retaliatory—to prevent arrestees and their supporters from returning and recreating encampments.²⁰ Aggressive encounters, violent arrests, midnight raids, and phalanxes of officers in state-of-the-art riot gear triggered shock and alarm.

Much of the worst police abuses that were documented occurred in cities with some of the most professionally trained, sophisticated police forces. For example, members of the New York Police Department (NYPD) were condemned for their use of force and other questionable conduct (such as obstruction of the press,

18. “Normal people like me weren’t able to go to anything and risk getting hit over the head and pepper sprayed.” Annie Gowen, *A Year On, Occupy Movement Hunts for Ways to Stay Relevant*, BEND BULL. (Sept. 16, 2012), <http://www.bendbulletin.com/article/20120916/NEWS0107/209160400/> (quoting an Occupy protester’s fear of police violence, akin to the experiences of other Occupy encampments, as a reason for withdrawing from Kansas City Occupy).

19. See Huaou Yan, *Occupy Wall Street and Police Accountability*, HARV. L. & POL’Y REV. BLOG (Sept. 28, 2011, 10:37 PM), <http://hlpronline.com/?p=6471> (citing as an iconic instance of excessive force against Occupy protesters the “pepper spray cop,” who purposely pepper-sprayed peaceful and calmly sitting, nonviolent protesters at the University of California who were blocking a campus walkway).

20. See, e.g., *Henke v. Dep’t of the Interior*, 842 F. Supp. 2d 54, 54 (D.D.C. 2012) (discussing National Park Service closing part of a Washington, D.C. park in response to Occupy D.C.); *Occupy Columbia v. Haley*, No. 3:11-cv-03253-CMC, 2011 WL 6698990, at *1–2 (D.S.C. Dec. 22, 2011) (assessing Emergency Regulation 19.480 which banned all camping and sleeping on State House grounds, promulgated in response to Occupy Columbia); Toni M. Massaro, Christian Legal Society v. Martinez: *Six Frames*, 38 HASTINGS CONST. L.Q. 569, 603–04 (2011) (discussing various forum closures intended to prevent disfavored expression); Sara Burnett, *At Occupy Denver Protest, Crowds and Officers Thin as Morning Turns to Afternoon*, DENVER POST (Oct. 14, 2011), http://www.denverpost.com/breakingnews/ci_19112322 (closing park and arresting Occupy Denver protesters while park opened during normal hours of operation); Errin Haines & Kate Brumback, *Atlanta Closes Park After Protesters Arrested*, ATLANTA TIMES-HERALD (Oct. 26, 2011), <http://www.times-herald.com/Local/Atlanta-closes-city-park-after-protesters-arrested> (closing park indefinitely after police arrested Occupy Atlanta protesters); Press Release, City of Oakland, Cal., “Occupy Oakland” Wednesday Evening Update (Oct. 26, 2011), available at <http://www2.oaklandnet.com/oakca/groups/ceda/documents/pressrelease/oak031926.pdf> (closing park space via chain-link fence, post-removal of Occupy Oakland protesters who had violated curfew rules).

surveillance of peaceful political activity, and “kettling,” or corralling and trapping protesters).²¹ Similarly, the Oakland, California Police Department was swamped with over 1,000 use of force claims²² and subjected to a 120-page commissioned report that criticized its “outdated, dangerous, and ineffective” policing of Occupy Oakland protestors.²³ The report included, inter alia, the compromised investigation of police use of force against Iraq war veteran and U.S. Marine, Scott Olsen, who was hospitalized in critical condition with a brain injury after an officer shot him in the head with a beanbag.²⁴ The report made sixty-eight policy, procedure, and training recommendations for improving the Oakland Police Department’s handling of future protests.²⁵

Initial responses to the use of force against Occupy encouraged protestors and their supporters.²⁶ Use of force discourse was everywhere.²⁷ Commentators condemned police use of force as

21. See Max Read, *Police Corral, Arrest Protesters on Brooklyn Bridge*, GAWKER (Oct. 1, 2011, 5:53 PM), <http://gawker.com/5845775/police-corral-arrest-occupy-wall-street-protesters-on-brooklyn-bridge> (detailing NYPD efforts to tunnel and funnel protesters who attempted to march across the Brooklyn Bridge).

22. See, e.g., Ali Winston, *OPD Screws Up Scott Olsen Investigation?*, EAST BAY EXPRESS (June 13, 2012), <http://www.eastbayexpress.com/ebx/opd-screws-up-scott-olsen-investigation/Content?oid=3233648>.

23. FRAZIER GROUP, LLC, INDEPENDENT INVESTIGATION OCCUPY OAKLAND RESPONSE OCTOBER 25, 2011, at 17 (2012), available at <http://www2.oaklandnet.com/oakcal/groups/cityadministrator/documents/webcontent/oak036236.pdf>.

24. The October 25, 2011, report, entitled INDEPENDENT INVESTIGATION OCCUPY OAKLAND RESPONSE, reviewed and analyzed “the morning and evening events of October 25, 2011.” *Id.* at 86.

25. Gavin Aronsen, *Aggressive Police Response to Occupy Oakland Was ‘Flawed’*, MOTHER JONES (June 15, 2012), <http://www.motherjones.com/mojo/2012/06/occupy-oakland-police-response-report>.

26. See, e.g., Joshua Holland, *Caught on Camera: Ten Shockingly Violent Police Assaults on Occupy Protesters*, ALTERNET, (Nov. 18, 2011), http://www.alternet.org/story/153134/caught_on_camera:_10_shockingly_violent_police_assaults_on_occupy_protesters.

27. For example, international human rights and U.S. civil liberties experts at seven law school clinics across the United States formed the Protest and Assembly Rights Project to investigate the American response to Occupy Wall Street in light of the government’s international legal obligations. See generally SARAH KNUCKEY ET AL., SUPPRESSING PROTEST: HUMAN RIGHTS VIOLATIONS IN THE U.S. RESPONSE TO OCCUPY WALL STREET (2012), available at <http://chrgj.org/wp-content/uploads/2012/10/suppressingprotest.pdf> (highlighting the need for broad police reform for all, accountability for violations, and rid departments of practices that undermine respect for civil liberties and human rights). For a discussion of the report, see Colin Moynihan, *Accusations of Police Misconduct Documented in Lawyers’ Report on Occupy Protests*, N.Y. TIMES CITY ROOM (July 25, 2012, 11:06 AM),

“excessive,”²⁸ “angry,”²⁹ “overly aggressive if not altogether hysterical,”³⁰ “heavy-handed,”³¹ and “grisly.”³² Early judicial decisions of police use of force during Occupy across the nation seemed largely to favor the Occupiers and their exercise of First Amendment rights.³³ With documented, real-time witnessing of police violence and excess, there was a hope in some quarters that, finally, the larger American society would come to see what too often police are capable of doing to non-violent, peaceful individuals who merely are exercising their rights. It was high time that other members of society not only see what happens at the hands of the police, but also experience it. Despite the significant initial attention paid to departments’ policing of Occupy around the country, however, there remains no significant oversight or overhaul. Modern law enforcement remains largely unchanged.

In her essay *Policing, Protestors, and Discretion*,³⁴ Professor Burke asks why—even if the law allows and given officer discretion—would officers police mass gatherings, rallies, and encampments connected with Occupy? Why not leave the Occupy protestors alone?³⁵ Use of force is always a choice.³⁶

<http://cityroom.blogs.nytimes.com/2012/07/25/accusations-of-police-misconduct-documented-in-lawyers-report-on-occupy-protests>.

28. Watson, *supra* note 10.

29. *Id.*

30. Vlahos, *supra* note 15.

31. Aronsen, *supra* note 25.

32. Nathan Schneider, *Occupy, After Occupy*, NATION (Sept. 24, 2012), <http://www.thenation.com/article/169761/occupy-after-occupy#>.

33. *See, e.g.*, *Watters v. Otter*, 854 F. Supp. 2d 823, 825 (D. Idaho 2012) (granting Occupy Boise’s motion to enjoin governmental dismantling of the protesters’ symbolic tent city as protected First Amendment expression); *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 246 (D. Conn. 2012) (holding that Occupy protesters’ erecting tents, waving signage, chanting, and sleeping in encampments engaged in protected speech “in its purest form”).

34. Alafair Burke, *Policing, Protestors, and Discretion*, 40 FORDHAM URB. L. J. 999 (2013).

35. *Id.* at 1002.

36. That officers may use force in their work is clear. That officers should use force in their work may also be clear. There is no requirement, however, that officers must use force in policing. Peruse, for example, the National Institute of Justice (NIJ) website, located at <http://www.nij.gov/about/welcome.htm>. NIJ describes itself as an agency of the U.S. Department of Justice dedicated to “improving knowledge and understanding of crime and justice issues through science.” *About NIJ*, NAT’L INST. JUST., <http://www.nij.gov/about/welcome.htm> (last updated Feb. 25, 2013). NIJ seeks to “reduce crime and promote justice.” *Id.* NIJ’s policies clearly contemplate police use of force and advise it under varying sets of circumstances. *Police Use of Force*, NAT’L INST. JUST., <http://www.nij.gov/topics/law-enforcement/officer-safety/>

This Article discusses why it may be myopic to look at protestors' expressive conduct during political demonstrations through the lens of the Fourth Amendment, as it may ignore or insufficiently protect protestors' First Amendment speech.³⁷ Expressive conduct that occurs in "high-crime areas" may best be understood "not as behavior indicative of criminality or a basis of criminal suspicion, but as the communication of protest, disaffection, or merely a simple desire to be let alone."³⁸ Nonetheless, officers are able to exercise their discretion to suppress expressive conduct by stripping it of its communication and translating it as criminally suspicious behavior. By allowing officers to "interpret" protest and dissent as criminal conduct, the Court legitimizes officer discretion as constitutionally

use-of-force/welcome.htm (last updated Jan. 20, 2012). Use of force is not mandated, however, even when an officer's life is threatened. See *The Use-of-Force Continuum*, NAT'L INST. JUST. (Aug. 4, 2009), <http://www.nij.gov/nij/topics/law-enforcement/officer-safety/use-of-force/continuum.htm> (describing police officer use of force continuum). This seems true, even when officer use of force is "justified, reasonable, and appropriate." See CMTY. ORIENTED POLICING SERVS., INT'L ASS'N OF CHIEFS OF POLICE, EMERGING USE OF FORCE ISSUES: BALANCING PUBLIC AND OFFICER SAFETY 17-18 (2012), available at <http://www.theiacp.org/portals/0/pdfs/EmergingUseofForceIssues041612.pdf> (explaining why use of force may be legitimate and not excessive, even if it exceeds that being used against the officer).

37. See Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112 (2007).

38. Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime In High-Crime Areas*, 9 GEO. J. ON POVERTY L. & POL'Y 135, 138 (2002) (arguing similar challenges faced by expressive conduct in so-called "high-crime areas"). In that article, I registered a similar concern in the wake of the U.S. Supreme Court's decision in *Illinois v. Wardlow*, which held that that police could seize an individual in a so-called high-crime area who runs in reaction to and upon seeing police officers. In applying the Fourth Amendment, the Court accepted without question or challenge officer characterization of flight as evidence of criminality. See *Illinois v. Wardlow*, 528 U.S. 119, 125 (2000). The Court never considered the possibility that, under the circumstances, running in response to police presence was not an indication of criminality but, instead, protected First Amendment expression of, e.g., dissent or desire to be left alone. I warned:

When faced with a hostile and abusive governmental presence in their neighborhoods, those in so-called high-crime areas may flee as an expressive response to that presence. Such conduct may be best understood not as behavior indicative of criminality or a basis of criminal suspicion, but as the communication of protest, disaffection, or merely a simple desire to be let alone.

. . . [U]nreflective application of the decision in similar cases will foreclose individuals in high-crime areas from protesting nonverbally via reactive flight, notwithstanding their First Amendment right. . . . [U]nreflective application [of the Fourth Amendment] will discourage individuals from exercising what may be the best means of communication available to them, even though their actions may be misunderstood.

Herbert, *supra*, at 138-39.

reasonable while chilling speech that should, instead, be protected.³⁹ This Article suggests that until the Court closes the extant loophole regarding retaliatory officer conduct, modern law enforcement departments will continue to exploit it.

I. POLICE USE OF FORCE AND FOURTH AMENDMENT “REASONABLENESS”

The Fourth Amendment regulates police conduct.⁴⁰ It provides that “[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated.”⁴¹ A seizure occurs when a reasonable person (1) would not feel “free to leave” or (2) would not feel “free to decline the officers’ requests or otherwise terminate the encounter.”⁴² Under the Fourth Amendment, seizure of the person can occur via a full custodial arrest or an investigatory “stop.”⁴³ The standard for arrest is probable cause, defined as “facts and circumstances sufficient to warrant a prudent man in believing that the suspect had committed or was committing an offense.”⁴⁴ This standard represents “a necessary accommodation between the individual’s right to liberty and the [government’s] duty to control crime.”⁴⁵

Governmental interests can also justify temporally “brief” seizures of the person on less than probable cause.⁴⁶ Investigatory stops—brief seizures—are governed by the Fourth Amendment and are lawful when justified by “reasonable suspicion.”⁴⁷ Reasonable suspicion exists when an officer can “point to specific and articulable facts, which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.”⁴⁸ In adopting this formulation, the Supreme Court in *Terry v. Ohio*⁴⁹ emphasized the importance of

39. See *supra* note 38 and accompanying text.

40. See Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 369 (1974) (“[R]egulation of police behavior is what the fourth amendment is all about.”).

41. U.S. CONST. amend. IV. This Article only focuses on Fourth Amendment seizures, not Fourth Amendment searches.

42. *Brendlin v. California*, 551 U.S. 249, 255 (2007).

43. See *Terry v. Ohio*, 392 U.S. 1, 22–27 (1968).

44. *Gerstein v. Pugh*, 420 U.S. 103, 111 (1975) (citations omitted) (internal quotation marks omitted).

45. *Id.* at 112.

46. See *Terry v. Ohio*, 392 U.S. 1, 21–22 (1968).

47. See *id.* at 20–21.

48. *Id.* at 21.

49. 392 U.S. 1 (1968).

balancing “the need to search (or seize) against the invasion which the search (or seizure) entails” to determine whether a search or seizure is lawful,⁵⁰ as well as judging the officer’s conduct against an objective standard.⁵¹ An officer’s subjective, even malicious, intent is irrelevant to the evaluation of constitutionality of the stop.⁵²

Regardless of the reasonableness of the seizure (e.g., the officer actually did have probable cause that the person has committed or is committing a crime or that criminality is afoot), the Fourth Amendment requires that its manner of execution also be reasonable.⁵³ If it is not, even a seizure lawful at its inception can violate the Fourth Amendment.⁵⁴

Fourth Amendment jurisprudence long has recognized that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.⁵⁵ Determining whether the force used to effect a particular seizure is reasonable under the Fourth Amendment requires a careful balancing of “the nature and quality of the intrusion on the individual’s Fourth Amendment interests” against the countervailing governmental interests at stake.⁵⁶ Under these circumstances, reasonableness requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.⁵⁷ In a use-of-force case, the complainant’s allegation of excessive force will be judged under a Fourth Amendment reasonableness inquiry: whether the officers’ actions are objectively reasonable in light of the facts and

50. *Id.* at 21 (citations omitted).

51. *See id.*

52. *See Whren v. United States*, 517 U.S. 806, 811–13 (1996) (holding a purported pretextual stop constitutionally valid because probable cause objectively existed and subjective motivations of police are irrelevant). In *Whren*, the Court held that an automobile may be stopped “where the police have probable cause to believe that a traffic violation has occurred.” *Id.* at 810. The actual motives of the police are irrelevant.

53. *Tennessee v. Garner*, 471 U.S. 1, 9 (1985) (holding that the use of deadly force to seize a fleeing, non-deadly criminal suspect is constitutionally unreasonable, notwithstanding probable cause to seize).

54. *United States v. Jacobsen*, 466 U.S. 109, 124 (1984).

55. *Terry v. Ohio*, 392 U.S. 1, 22–27 (1968).

56. *United States v. Place*, 462 U.S. 696, 703 (1983).

57. *See Garner*, 471 U.S. at 8–9 (the question is “whether the totality of the circumstances justifie[s] a particular sort of . . . seizure”).

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circumstances confronting them. An officer's evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer's good intentions make an objectively unreasonable use of force constitutional.⁵⁸

Not all encounters between individuals and police, however, are seizures governed by the Fourth Amendment.⁵⁹ The Court has made clear that

“[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers” violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.⁶⁰

Concepts regarding subjective officer intent “like ‘malice’ and ‘sadism’ have no proper place in that inquiry.”⁶¹

II. PROTESTORS' EXPRESSIVE CONDUCT AND THE FIRST AMENDMENT

The First Amendment provides, *inter alia*, that “Congress shall make no law . . . abridging the freedom of speech.”⁶² Expressive conduct is protected “to some extent” by the First Amendment, and is subject to reasonable time, place, or manner restrictions.⁶³ Expressive conduct is behavior intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative. These types of restrictions on expression—whether

58. *See* *Scott v. United States*, 436 U.S. 128, 137–39 (1978).

59. *See* *Muehler v. Mena*, 544 U.S. 93, 101 (2005) (finding no independent seizure when police asked about immigration status during questioning pursuant to search warrant); *see also* *Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cnty.*, 542 U.S. 177, 185 (2004) (holding no seizure when officers only ask for identification); *United States v. Drayton*, 536 U.S. 194, 200 (2002) (noting no Fourth Amendment seizure when officers question willing individuals in street or other public places); *Florida v. Rodriguez*, 469 U.S. 1, 5–6 (1984) (finding no seizure during routine interaction with police in airports because it is consensual and implicates no Fourth Amendment interest); *United States v. Mendenhall*, 446 U.S. 544, 553 (1980) (noting not “every encounter between a police officer and a citizen is an intrusion requiring an objective justification”); *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring) (“There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets.”).

60. *Graham v. Connor*, 490 U.S. 386, 396–97 (1989) (citations omitted).

61. *Id.* at 399.

62. U.S. CONST. amend. I.

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

verbal or symbolized by conduct—are valid, so long as they “are justified without reference to the content of the regulated speech, . . . are narrowly tailored to serve a significant governmental interest, and . . . leave open ample alternative channels for communication of the information.”⁶⁴

The First Amendment not only includes the right to express, but also the right to be free from retaliation by a public official for exercising that right. Though “not expressly referred to in the Constitution, [retaliation] is nonetheless actionable because retaliatory actions may tend to chill individuals’ exercise of constitutional rights.”⁶⁵ As non-verbal expression also involves conduct, however, “expression of this kind may be forbidden or regulated if 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.”⁶⁶ But once a State law, or the State’s enforcement of that law, targets and restricts certain speech because of its content—especially when the target is political speech in a public forum—the law is presumptively unconstitutional.⁶⁷ When the restriction is, in fact, content-based, the government bears an extraordinarily heavy burden of showing that the law or its enforcement is the least restrictive means to further a compelling governmental interest.⁶⁸

Not every governmental action or restriction, however, sufficiently chills the exercise of First Amendment rights; not every restriction—even if retaliatory—is actionable.⁶⁹ A complainant alleging retaliation must demonstrate that the government’s actions adversely impacted his or her exercise of constitutional rights.⁷⁰ Specifically, a complainant must demonstrate:

64. *Id.* (citations omitted).

65. *ACLU of Md., Inc. v. Wicomico Cnty., Md.*, 999 F.2d 780, 785 (4th Cir. 1993).

66. *Clark*, 468 U.S. at 293 (citations omitted).

67. *See United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010); *see also R.A.V. v. St. Paul*, 505 U.S. 377, 382 (1992).

68. *See Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983).

69. *See DiMeglio v. Haines*, 45 F.3d 790, 806 (4th Cir. 1995) (“Not every restriction is sufficient to chill the exercise of First Amendment rights, nor is every restriction actionable, even if retaliatory.”).

70. *See Wicomico Cnty.*, 999 F.2d at 785 (“In order to state a retaliation claim, Appellees are required to show that WDCDC’s actions adversely impacted these First Amendment rights.”).

1. That his or her speech was protected,⁷¹
2. The alleged retaliation adversely affected the complainant's constitutionally protected speech,⁷² and
3. A causal relationship exists between his or her speech and the government's retaliation.⁷³

Restrictions on First Amendment freedoms are analyzed under either strict scrutiny or intermediate scrutiny, depending on the nature of the restriction. Strict scrutiny requires the least restrictive means to achieve a "compelling" government interest; intermediate scrutiny requires a law to be "narrowly tailored" to a "significant government interest"⁷⁴ and "leave open ample alternative channels of communication."⁷⁵ Laws and actions that do not survive the appropriate level of scrutiny are invalid.

III. HOW POLICE "SEE" WHAT OCCUPY IS SAYING

The typical criminal defendant who attempts to protest objectionable policing and use of force is at a disadvantage. These complainants are typically regarded as "high-crime people" who are denizens of "high-crime areas."⁷⁶ As a result, these typical

71. *Cf. Huang v. Bd. of Governors of Univ. of N.C.*, 902 F.2d 1134, 1140 (4th Cir. 1990).

72. See *Wicomico County*, 999 F.2d at 785 ("[A] showing of adversity is essential to any retaliation claim.").

73. See *Huang*, 902 F.2d at 1140.

74. See *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45-46 (1983).

75. *Id.* at 45.

76. Ten years ago, I began to suspect that when officers used the term "high-crime area,"

[T]hey were not describing particular locations. A high-crime area is a misnomer: areas do not commit crimes; people do. Still, despite varying levels of police training, officers seemed to identify areas as "criminal" based on fixed, incontrovertible, and fairly obvious traits.

I suspected that the police were using a code language to suggest that their actions were justified because they were directed at "high-crime people": poor, undereducated, black and brown males who live in . . . frequent depressed (e.g., culturally, educationally, socially, economically) inner-city neighborhoods or who look as if they do. In practice, police have the implicit authorization to create and apply an inferior set of rights to individuals in high-crime areas, presumably because those individuals are regarded as being less worthy than other citizens. The erosion of individual rights leaves people in high-crime areas unprotected and often requires a sub-citizen level of obedience to those who patrol their streets.

complainants are “burdened with the understanding that they are ‘more threatening, more dangerous, less remorseful, and more culpable,’ deserving of harsher treatment and less forgiving judgments in the eyes of their observers.”⁷⁷ Though the Court proclaims, on one hand, that location, standing on its own, is never sufficient probable cause of criminality nor reasonable suspicion to believe that criminality is afoot,⁷⁸ it also has held that location—when coupled with conduct—may be enough.⁷⁹

Additionally, the typical use-of-force complainant challenges the government’s unconstitutional conduct in the face of tangible, and perhaps substantial, evidence of his or her separate criminality that the government intends to introduce in a criminal prosecution (e.g., a gun, illegal narcotics). Challenging police officer use of force grows even more daunting when there is tangible evidence of criminality. Try as many might, it is difficult to ignore evidence of crime when assessing the reasonableness of law enforcement’s conduct. The Court’s jurisprudence manifests this challenge. Initially, governmental unreasonableness in gaining evidence of criminality under the Fourth Amendment was regarded as a scourge, the taint and stain of which the Court was uninterested in approving.⁸⁰ This

Once an area was accepted as high crime, judges sanctioned police tactics that would never be tolerated—much less court-sanctioned—in low- or no-crime areas.

Herbert, *supra* note 38, at 136.

77. Lenese Herbert, *Othello Error: Facial Profiling, Privacy, and the Suppression of Dissent*, 5 OHIO ST. J. CRIM. L. 79, 99 (2007) (citations omitted).

78. *See Brown v. Texas*, 443 U.S. 47, 52 (1979) (“The fact that appellant was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that appellant himself was engaged in criminal conduct.”).

79. *Wardlow v. Illinois*, 528 U.S. 119, 124 (2000) (“An individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.”); *id.* at 125 (“[I]t was not merely respondent’s presence in an area of heavy narcotics trafficking that aroused the officers’ suspicion, but his unprovoked flight upon noticing the police. Our cases have also recognized that nervous, evasive behavior is a pertinent factor in determining reasonable suspicion. . . . Headlong flight—wherever it occurs—is the consummate act of evasion: It is not necessarily indicative of wrongdoing, but it is certainly suggestive of such.” (citations omitted)); *see also United States v. Arvizu*, 534 U.S. 266, 277 (2002) (holding officer has reasonable suspicion to stop driver the officer suspected was engaged in criminality because the driver traveled a road often used by illegal narcotics smugglers from Mexico and his passenger children, upon seeing the officer, waved in a “mechanical-like” fashion “for a full four to five minutes”).

80. *See Olmstead v. United States*, 277 U.S. 438, 469–71 (1928) (discussing the “imperative of judicial integrity” as a reason to exclude illegally obtained evidence;

jurisprudential recoil birthed the exclusionary rule in criminal prosecutions.⁸¹ Increasingly, however, the Court began to elide the link between upholding governmental misconduct and its integrity. Today, the Court's concern, seemingly, has vanished.⁸²

Occupy protestors, to their surprise, found themselves subjected to much of the same policing that the typical criminal defendant use-of-force complainant who is criminally profiled experiences. But Occupy protestors are not the typical criminal defendant use-of-force complainants; they are far from the "usual suspects."⁸³ In fact, compared to the typical victim of policing abuses, Occupy protesters are "blessed with a stunning array of privileges,"⁸⁴ including but not limited to race-based privilege.⁸⁵

If Occupy protesters were so privileged, why did Occupy plaintiffs suffer much of the same policing "enjoyed" by the typical criminal defendant? Perhaps it is because police successfully profiled the Occupiers. As M. Chris Fabricant has noted, "In a law enforcement context, the perception of inherent criminality for disfavored groups serves as justification for collective punishment policies to deter

courts should not ratify law enforcement's unconstitutional actions by admitting wrongfully seized evidence).

81. "[T]he rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principal mode of discouraging lawless police conduct." *Terry v. Ohio*, 392 U.S. 1, 12 (1968) (citing *Weeks v. United States*, 232 U.S. 383, 391–93 (1914)).

82. See Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 COLUM. L. REV. 1433, 1507–08 (1984) (citing the judicially-created exceptions to exclusion that, essentially, admit unconstitutionally acquired evidence of criminality).

83. "The typical complainant in an excessive force case is a criminal suspect from a poor, minority neighborhood, often with a criminal record—not a very credible witness in the eyes of the jury." Barbara E. Armacost, *Organizational Culture and Police Misconduct*, 72 GEO. WASH. L. REV. 453, 467–68 (2004).

84. See e.g., Peter Moskos, *Which Side Are They On?*, SLATE (Nov. 14, 2011), http://www.slate.com/articles/news_and_politics/politics/2011/11/occupy_wall_street_and_the_cops_do_the_police_support_the_protests.html ("Occupy protests complicate matters by bringing a segment of society—a white middle-class segment—into, what is for many, first contact with police authority. If you think of police as coming whenever you call for help, you may be surprised to learn that police do not work for you. Officers work first for the police department and then for the city that pays them. A force designed to maintain order and the status quo will never sing Kumbaya with protesters who combine a desire for change with a privileged sense of agency and entitlement.").

85. "Because of this police perception, people of color have been targeted and disproportionately subjected to intrusive investigative scrutiny so much that the term 'racial profiling' has become part of our national parlance." Herbert, *supra* note 77, at 84.

criminal behavior viewed as endemic within the community.”⁸⁶ This form of profiling relies on guilt by association and is very much like its counterpart, racial profiling. So, for example, when it comes to racially profiled members of society:

[d]iscrimination based on the perception of the shared characteristics of a minority group, such as young blacks and Latinos living in and around public housing, is a form of collective punishment. Negative judgments are formed about the populations as a whole, based on characteristics that are perceived to be common among all group members. Such stereotypes result in discriminatory policies directed at an individual “irrespective of whether she personally possesses those characteristics.”⁸⁷

Similarly, with politically profiled protestors, discriminatory treatment based on the perception of shared characteristics is a form of collective punishment. Negative judgments are formed about the protestors as a whole, based on characteristics that are perceived to be common among all of the protestors. Such stereotypes result in discriminatory policies directed at an individual irrespective of whether the protester personally possesses those characteristics.

Like racial profiling, political profiling occupies a unique place among such harmful practices because it presents several unique issues that make it difficult to address through standard police accountability measures. Society entrusts law-enforcement officers with a wide-breadth of discretion in order to perform their everyday duties. While the fast-paced nature of law enforcement necessitates discretion, if left unchecked, broad grants of discretion can lead police officers to abuse their position and engage in misconduct ranging from falsifying evidence, participating in violent excessive uses of force⁸⁸

One writer put it this way:

[a]t its heart, Occupy was as much about free expression as it was about any tangible political goals. And just as importantly, the reaction against Occupy—especially by the City of New York and the administration of Michael Bloomberg, was about containing that

86. M. Chris Fabricant, *War Crimes and Misdemeanors: Understanding ‘Zero-Tolerance’ Policing as a Form of Collective Punishment and Human Rights Violation*, 3 DREXEL L. REV. 373, 387 (2011).

87. *Id.*

88. Kami Chavis Simmons, *Beginning to End Racial Profiling: Definitive Solutions to an Elusive Problem*, 18 WASH. & LEE J. CIVIL RTS. & SOC. JUST. 25, 28 (2011).

free expression—and quite frankly, limiting the constitutional guarantees to speech and free assembly.⁸⁹

One of the greatest difficulties with profiling is that its elusiveness evades detection. Police departments have not only become increasingly militarized, but also zero-tolerance trained, which spawns harsh and indiscriminate tactics to “combat” perceived wrongdoers. Professional policing—as opposed to community policing—involves “rapid response,” “mastering sophisticated weaponry, and pledging loyalty to the organization,” which involves distancing oneself from—versus collaborating with—those who are policed.⁹⁰ Law enforcement culture of this type seeks not to understand, but to punish noncompliance and demand submission.⁹¹ This is so irrespective of whether the “non-compliance” constitutes an exercise of one’s constitutionally protected rights.

Here, police practices of seizing the protestor—purportedly to ferret out criminality—and using force to do so demonstrate that the potential for governmental reprisal and retaliation via law enforcement’s (mis)use of the Fourth Amendment is great.⁹² Such a seizure may, itself, communicate to the protestor that the government “sees” what the protestor is saying and does not approve. This type of policing political protest not only constitutes “a potent means of inhibiting speech”⁹³ for all so seized, but also threatens to inhibit exercise of the freedom of speech by onlookers.⁹⁴

The Supreme Court has never recognized a First Amendment right to be free from a retaliatory arrest that is supported by probable cause.⁹⁵ Law enforcement personnel and other governmental officials “who [were] perhaps overly fearful and intolerant of civil unrest and

89. Watson, *supra* note 10 (characterizing Occupy’s force as one that “came in like a lion and eased out like a lamb”).

90. Christopher Stone, *Police Need a New Professionalism (Fortunately, It’s Already Hiding Inside Many Agencies)*, OPEN SOC’Y FOUND. (July 24, 2012), <http://www.opensocietyfoundations.org/voices/police-need-new-professionalism-fortunately-it-s-already-hiding-inside-many-agencies> (assessing why police departments around the world are facing all-time lows regarding reputation).

91. See Frank Rudy Cooper, *Who’s the Man?: Masculinities Studies, Terry Stops, and Police Training*, 18 COLUM. J. GENDER & L. 671, 697 (2009) (discussing how police may force those policed to acknowledge their respective statuses, “while ostensibly merely performing their duties”).

92. Herbert, *supra* note 38, at 139.

93. *Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205, Will Cnty., Ill.*, 391 U.S. 563, 574 (1968).

94. See *Crawford-El v. Britton*, 523 U.S. 574, 588 n.10 (1998).

95. See *Reichle v. Howards*, 132 S. Ct. 2088, 2093 (2012).

disobedience,”⁹⁶ and who did not care for Occupy’s message could have silenced it under the auspices of Fourth Amendment policing by focusing on the conduct. Such a “translation” of the expressive conduct allows the government to “produce a result which [it] could not command directly.”⁹⁷ Thus, if the officer presents evidence that supports either an investigatory stop or arrest, “such evidence could be thought similarly fatal to a plaintiff’s claim that animus caused his arrest.”⁹⁸ Accordingly, under the Court’s current jurisprudence, an officer might harbor content-based animus but “decide”—via stripping the conduct of its communication (or interpreting it as “criminal”)—to arrest the protestor because his or her conduct provides evidence that a crime or criminality is afoot.⁹⁹

This point should not be missed. The Occupy Movement was and remains a political protest of income inequality, making clear that true power “resides within the ranks of our capitalistic society’s wealthy corporate oligarchy.”¹⁰⁰ An example of this point is in order. The NYPD has received a considerable amount of money from the very banks that the protesters are targeting.¹⁰¹ JP Morgan Chase alone donated \$4.6 million to the NYPD—an “unprecedented” gift—rumored to have occurred on the eve of the department’s violent October 2011 surprise eviction of Occupy protesters from Zuccotti Park.¹⁰² Goldman Sachs, Barclays Capital, Jefferies & Company, and Bank of America have also donated large sums of money to the NYPD, the very police department violently policing Occupy Wall Street protesters.¹⁰³

96. Trina Jones, *Occupying America: Dr. Martin Luther King, Jr., The American Dream and the Challenge of Socio-Economic Equality*, 57 VILL. L. REV. 339, 344 (2012).

97. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (citation omitted) (internal quotation marks omitted).

98. *Reichle*, 132 S. Ct. at 2095.

99. *See, e.g.,* *Wayte v. United States*, 470 U.S. 598, 612–13 (1985).

100. Herbert, *supra* note 17, at 741 n.71 (citing *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) for the proposition that when corporations exercise their First Amendment rights, they can “lavish money on police departments,” thereby purchasing political power and “personhood” that trumps even massive numbers of political protesters).

101. Justin Elliott, *The NYPD, Now Sponsored by Wall Street*, SALON (Oct. 7, 2011), http://www.salon.com/2011/10/07/the_nypd_now_sponsored_by_wall_street.

102. *See, e.g.,* *J.P. Morgan Buys NYPD for 4.6 Million*, DAILY KOS (Oct. 2, 2011), <http://www.dailykos.com/story/2011/10/02/1022031/-JP-Morgan-buys-NYPD-for-4-6-million>.

103. Though officers are typically regarded as blue-collar or working class and would, at first blush, be regarded as natural Occupy allies and supporters, it seems

As it turns out, that specific version of the rumor is not quite correct; the timing has been reported as coincidental and not in response to Occupy.¹⁰⁴ But Wall Street finance firms reportedly have donated millions of dollars into the NYPD in an arrangement that critics say compromises the Department's law enforcement legitimacy.¹⁰⁵ Simultaneously, like other criminally profiled populations and locations, the Occupiers and their encampments were maligned in popular media, transforming the generally "high-speech areas" occupied into "high-crime areas." Law enforcement co-signed the transformations, citing a barrage of alleged violations to support their reasonableness in policing these "high-crime people" in their "high-crime areas" so aggressively.

CONCLUSION

Some had hoped that the Occupiers' experiences with the police would bring to the public the understanding that "[s]quelching civil unrest with official violence is a textbook tactic of American law enforcement agencies."¹⁰⁶ Some had also hoped that in virtually every Occupy city, but especially in cities like New York City, the Occupiers would be more sophisticated in their understanding that police use of force against their members mirrors the longstanding, well-documented history of that same force being used against disfavored,

that they were not and, instead, were avid supporters of The 1%. It is possible that individuals who see conflict between the classes think that anger toward the rich is misdirected. In a January 2012 report, the Pew Research Center found that a significant percentage of Americans believe that most rich people "are wealthy mainly because they know the right people or were born into wealthy families." Rich Morin, *Rising Share of Americans See Conflict Between Rich and Poor*, PEW RES. CENTER 3 (Jan. 11, 2012), http://www.pewsocialtrends.org/files/2013/01/Rich_vs_poor-final_1-10-13.pdf. Similarly, "overwhelming majorities of self-described middle- and lower-class Americans say they admire people who get rich by working hard (92% and 84%, respectively)." Kim Parker, *Yes, The Rich Are Different*, PEW RES. CENTER 1 (Aug. 27, 2012), <http://www.pewsocialtrends.org/files/2012/08/sdt-rich-poor-082712.pdf>. About 43% say that rich people are more likely than average Americans to be intelligent and 42% say rich people are more likely than average Americans to be hardworking. *Id.* at 3.

104. Elliott, *supra* note 101.

105. "This gift is especially disturbing to us because it creates the appearance that there is an entrenched dynamic of the police protecting corporate interests rather than protecting the First Amendment rights of the people. . . . They've essentially turned the financial district into a militarized zone." *Id.* (quoting Heidi Boghosian, National Lawyers Guild).

106. Herbert, *supra* note 17, at 748 nn.106–11.

criminally profiled communities of color, specifically Black and Latino, that are often (but not always) poor.¹⁰⁷

Perhaps I, like others, unfairly expected far too much for such a young movement.¹⁰⁸ Occupy Wall Street may or may not have changed the world, but it is nevertheless remarkable that Occupy was able to change the economic conversation in such a short time, as well as begin the conversation of social equality. There remains support for Occupy, which rightly recognized that the causes of the economic meltdown of 2008 were systemic inequality and the failures of our representative democracy. If there is any chance that there might come a new day in law enforcement, thanks to the inroads Occupy has made, may the movement be instrumental in the ushering in of that new day and way. In fact, those of us who support Occupy hope that they ultimately return renewed, prepared to retake the movement's *raison d'être*, as they remain as relevant today as they were on September 17, 2011.¹⁰⁹

107. According to statistics cited by the NYPD and the Center for Constitutional Rights, “[l]ast year, city police officers stopped nearly 686,000 people, 84 percent of them [B]lack or Latino. The vast majority—88 percent of the stops—led to neither an arrest nor a summons.” Wendy Ruderman, *Rude or Polite, City’s Officers Leave Raw Feelings in Stops*, N.Y. TIMES (June 27, 2012), <http://www.nytimes.com/2012/06/27/nyregion/new-york-police-leave-raw-feelings-in-stops.html>.

108. See Jones, *supra* note 96, at 352.

109. See Nick Pinto, *Occupy Wall Street’s Anniversary*, VILLAGE VOICE (Sept. 18, 2012, 4:26 PM), http://blogs.villagevoice.com/runninscared/2012/09/occupy_wall_str_58.php.