

The “Occupy” Movement and What Cities Can Do to Regulate or Avoid the Impacts of Such Events

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The Occupy Movement blew through California cities last year challenging the capacity of city officials to find the right balance between the city’s police powers and the Occupy Movement’s First Amendment rights. The clash was more than just theoretical, as arrests were numerous in every major California city and several smaller jurisdictions as well. By the end of the year, the Occupy Movement had cost taxpayers millions of dollars and left public officials more uncertain than ever about their rights and obligations under the First Amendment.

California city attorneys played a central role during the protests whether it was advising councilmembers on their dual roles as elected officials and private citizens, evaluating the constitutionality of permitting programs and public space ordinances, or authoring memoranda on the nuanced aspects of the Supreme Court’s First Amendment jurisprudence. The “directionless” nature of the Occupy Movement and the demand for immediate legal counsel made it difficult for city attorneys to anticipate what issues they would be asked to address next or how much time they would have to evaluate, articulate and implement constitutional strategies. Due to the nature of their work, in which a new “crisis” is usually brewing right around the corner, many city attorneys never had the time to step back and analyze what, if any, assistance they could have provided in advance of the protests to make everyone’s jobs a little easier.¹

This paper reviews the brief history of the Occupy Movement and summarizes its impacts on California and the different ways in which cities responded to Movement protests. It also contains a summary of the Supreme Court jurisprudence governing expressive conduct and recent federal and state court decisions involving the Occupy Movement. Finally, the paper will suggest ways in which city attorneys can help their cities be ready the next time protestors show up at municipal doorsteps.

I. The Occupy Movement in California

“Mobilized by social media and inspired by the Arab Spring, the movement has confused reporters, frustrated politicians and garnered support from notable groups.”²

In a blog post dated July 13, 2011, a Vancouver-based anti-consumerist magazine entitled *Adbusters* proposed a protest be undertaken against Wall Street similar to the

¹ A list of topical resources for city attorneys is attached as Appendix A.

² *Occupy Wall Street Timeline*, Los Angeles Times (Oct. 2, 2011), only online at <http://timelines.latimes.com/occupy-wall-street-movement/> (“*Occupy Timeline*”).

protests being carried out that year in Egypt and Spain.³ Much like a wildfire, the Occupy Movement sprang to life from a small spark and within two months the first protestors were gathering in Wall Street. Various reasons have been given for the Occupy Movement's quick growth, but the swiftness with which social media could be used to organize and publicize events is one recurring theme.⁴

It did not take long for the seeds of Occupy to find their way to the West Coast, first in San Francisco and soon elsewhere. The same day an encampment was set up in Manhattan's Zuccotti Park a small band of roughly ten people camped outside the Bank of America building on California Street in a show of support and, within two weeks, San Francisco's first Occupy camp was set-up outside the Federal Reserve Bank on Market Street.⁵ In Los Angeles, about 100 protesters marched toward City Hall from Pershing Square on the morning of October 1, 2011 in the first organized effort of Occupy LA. The group was accompanied by Los Angeles police officers who briefly stopped traffic at intersections for the marchers. A group of volunteers helped coordinate the event by getting permits and working with the Los Angeles Police Department and several participants told the press that they intended to camp out at City Hall indefinitely.⁶ In Oakland, the first march of Occupy Oakland consisted of "teachers, nurses, families and the unemployed, among others, ...carrying signs in front of an empty City Hall."⁷

Similar Occupy events began occurring in other cities across the state and, with few exceptions, the marches, rallies and camps were initially well-received by local officials.⁸ A

³ Martin Kaste, "Exploring Occupy Wall Street's 'Adbuster' Origins," *National Public Radio* (October 20, 2011) at <http://www.npr.org/2011/10/20/141526467/exploring-occupy-wall-streets-adbuster-origins>.

⁴ Gloria Goodale, "Social media drive Occupy Wall Street. Do they also divulge its secrets?," *The Christian Science Monitor* (October 12, 2011) at <http://www.csmonitor.com/USA/Politics/2011/1012/Social-media-drive-Occupy-Wall-Street.-Do-they-also-divulge-its-secrets>. The Los Angeles Times reports that most participants in Occupy LA say they heard about the protest via Twitter and on social media sites such as Tumblr and Reddit. *Occupy Timeline* (Oct. 2, 2011).

⁵ Dan Schreiber, "Occupy SF movement takes root on Market Street," *San Francisco Examiner* (Oct. 5, 2011) at <http://www.sfexaminer.com/local/2011/10/occupy-sf-movement-takes-root-market-street> and Vivian Ho, "City dismantles protesters' camp," *San Francisco Chronicle*, Oct. 7, 2011, p. C2.

⁶ Jason P. Song, "Economic Protestors Take to the Streets," *Los Angeles Times* (Oct. 2, 2011), p. A32.

⁷ *San Francisco Chronicle*, (Oct. 11, 2011), p. C3.

⁸ Eric Carpenter, "Protesters March on Bank," *The Orange County Register* (Oct. 11, 2011), p. B1 and Jessica Davis, "Occupy Coachella Valley' Gains Momentum," *Palm Desert, CA Patch* (Oct. 10, 2011) only online at <http://palmdesert.patch.com/articles/occupy-coachella-valley-gains-momentum>.

spokesperson for Oakland Mayor Jean Quan said “there were no plans to dismantle the camp and that officials were ‘keeping it cool.’ We understand the frustration, it’s our frustration, too.”⁹ In Los Angeles, the city council passed a resolution in support of the demonstration, provided portable toilets and chose not to enforce the city’s ban on sleeping overnight in city parks.¹⁰ At the same time, a Reuters poll found more people in support of the Occupy Movement than against.¹¹

During this era of good feeling, numerous Occupy Movement “camps” were taking hold in public parks and plazas, often outside city halls, in contravention of local ordinances and policies governing public spaces. Other cities soon discovered they did not have local laws governing protests in the nature of an “occupation” or a permitting process that contemplated protests lasting weeks or months. Soon cities were drafting emergency ordinances to implement a permitting process and bring the camps into compliance with local laws.¹² Only as health and safety issues began to accumulate did many cities discover that forestalling enforcement of their ordinances carried First Amendment implications as well as political ramifications. Occupy protestors grew emboldened and it became clear that force would likely be necessary in many cities to move or relocate protestors.¹³ Eventually most cities set deadlines for the removal of the camps and by the end of November public

⁹ Michael Cabanatuan, Jill Tucker and Vivian Ho, “Activists leave before raids on local hotels,” *San Francisco Chronicle*, Oct. 12, 2011, p. C2.

¹⁰ *Occupy Timeline* (Week of Oct 3, 2011). Council President Eric Garcetti invited protestors to “stay as long as you need to.”

¹¹ “Most Americans aware of Wall Street protests: Reuters/Ipsos” (Oct. 12, 2011) at <http://www.reuters.com/article/2011/10/12/us-usa-wallstreet-protests-poll-idUSTRE79B6V120111012>. Eighty-two percent of Americans said they had heard of the protest movement, 38 percent felt favorably toward it, 35 percent were undecided, and 24 percent were against.

¹² In Santa Rosa, for example, the city council established 15-day camping permits for the city hall lawn on which protestors had gathered throughout October. The city manager eventually suspended issuance of the permits after health and sanitation problems persisted on the site and Occupy Santa Rosa protestors boycotted the process. Kevin McCallum, “Occupy Santa Rosa camp permits expiring; protestors vow ‘reoccupation,’” *Santa Rosa Press Democrat*, (Nov. 28, 2011), B1.

¹³ On October 6, 2011 in Los Angeles, police in riot gear confronted 500 protestors who had taken over the intersection of 7th and Figueroa and a week later San Francisco police arrested 11 Occupy San Francisco protestors who were blocking the entrance to Wells Fargo’s corporate headquarters. Conflicts increased in intensity and further arrests of Occupy members were made in cities such as San Diego, Long Beach, and Sacramento before the much-publicized pre-dawn raid occurred in Oakland on the morning of October 25, 2011. *Occupy Timeline*.

safety officers in concert with other city employees vacated most camps and cleaned out tents, sleeping bags and other residue from the two-month long protests.¹⁴

The costs associated with the first two months of the Occupy protests were staggering. An Associated Press survey of 18 cities reported costs associated with the Occupy Movement through November 15, 2011 of at least \$13 million in police overtime and other municipal services.¹⁵ Eventually Los Angeles would estimate it spent more than \$4.7 million in police, clean-up and repair costs with Oakland next at \$3.7 million.¹⁶ Even San Diego, with far fewer protestors but several high-profile run-ins reported \$2.4 million in police department expenses alone.¹⁷

II. The Occupy Movement and the Law of Public Protest

The Occupy Movement demanded more from city attorneys than a basic understanding of United States Supreme Court decisions on time, place and manner restrictions. The broader state constitutional protections afforded public speech were also implicated as were a multiplicity of decisions involving the interplay between speech and conduct. Some cities were governed by settlement agreements concerning the use of public property for public protests or camping by the homeless and, of course, each city had its own unique set of ordinances concerning parades, demonstrations, rallies, camping and the use of city parks. Varying interpretations of the California Penal Code and local misdemeanor statutes also made it difficult for police officers to know when and how to make arrests.

An examination of the long tortured path the Supreme Court followed to establish the framework for interpreting the First Amendment's speech protections is beyond the scope of this article but the threshold question many city attorneys initially had to face was whether merely occupying public property was a form of speech. The Supreme Court long-ago decided that certain forms of nonverbal activities should be treated as "speech" but not

¹⁴ Zuccotti Park in New York was cleaned out in a surprise midnight raid on November 15, 2011 and after failing to agree with protestors on an alternative location, the City of Los Angeles cleared out the City Hall lawn on the morning of November 30, 2011. *Occupy Timeline*

¹⁵ "Occupy protests cost nation's cities at least \$13M," *Wall Street Journal* (Nov. 23, 2011) at <http://online.wsj.com/article/AP6e57b7540ed6422f8e9255077a0dfef2.html>.

¹⁶ David Zahniser, "Council aims to thwart new Occupy protest at L.A. City Hall," *Los Angeles Times* (Jun. 7, 2012) at <http://articles.latimes.com/2012/jun/07/local/la-me-0607-occupy-tent-ban-20120607> and Jennifer Inez Ward, "City releases latest Occupy Oakland costs: \$3.7 million," *Oakland Local* (Mar. 10, 2012) at <http://oaklandlocal.com/article/city-releases-latest-occupy-oakland-costs>.

¹⁷ "Occupy San Diego has cost Police Department \$2.4 million," *Los Angeles Times* (Nov. 22, 2011) at <http://latimesblogs.latimes.com/lanow/2011/11/occupy-san-diego.html>.

an “apparently limitless variety of conduct.”¹⁸ If the conduct is intended to convey a particularized message, and there is a substantial likelihood that the message will be understood by those receiving it, the Court will consider it a form of protected communication.¹⁹

Making things more difficult was the apparent “leaderless” nature of the Occupy Movement and the claim by many participants that the movement stood for what it stood for.²⁰ Even more confusing was the fact the Supreme Court had been down this road before and refused to determine whether camping overnight in a public space was a form of expressive conduct deserving of First Amendment protection. On November 26-27, 1981, in an effort to bring publicity to the plight of the homeless, 20 people pitched tents and slept overnight across the street from the White House in Washington D.C.’s Lafayette Park in violation of National Park Service regulations prohibiting camping in the Park. At dawn, the United States Park Police advised the protestors to leave and a half-hour later peacefully arrested the six activists who remained. A few days later, the activists applied for and received a permit from the Park Service to erect nine tents in the Park during the winter of 1981-82 on the condition they not sleep in them overnight. Another permit was issued by the Park Service with the same conditions for the winter of 1982-83 while the activists pursued their right to sleep overnight in the tents all the way to the Supreme Court.²¹

In a 7-2 decision authored by Justice Byron White, the Supreme Court refused to decide the question of whether camping was a form of “expressive conduct” and therefore subject to protection as speech under the First Amendment.²² Instead, the Court held that even if camping was a form of expressive conduct, the Park Service’s regulations met the four-factor standard for validating the regulation of such conduct as developed in *United States v. O’Brien*. The Court found the Park Service’s prohibition against overnight camping achieved the substantial government interest of limiting the wear and tear on park properties

¹⁸ *U.S. v. O’Brien*, 391 U.S. 367, 376 (1968).

¹⁹ *Spence v. Washington*, 418 U.S. 405, 409-12 (1974).

²⁰ Heather Gautney, “What is Occupy Wall Street? The history of leaderless movements,” *Washington Post* (Oct. 11, 2010) at http://www.washingtonpost.com/national/on-leadership/what-is-occupy-wall-street-the-history-of-leaderless-movements/2011/10/10/gIQAwkFjaL_story_1.html. (“On these issues, the movement has been clear: This is a leaderless movement without an official set of demands. There are no projected outcomes, no bottom lines and no talking heads. In the Occupy Movement, We are all leaders.”) The failure to define a particularized message also made it more difficult for the Occupy Movement to declare that its occupancy of public property was a form of direct civil obedience that could permit a defense of necessity to attempts to enforce anti-overnight camping ordinances. *See e.g., U.S. v. Schoon*, 971 F.2d 193 (9th Cir. 1992).

²¹ *New York Times*, Nov. 27, 1981, p. B14; Nov. 28, 1981, p. B8; Dec. 1, 1981, p. A25; Dec. 2, 1981, p. B8; and Jun. 30, 1984, p. B7.

²² *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984).

and that such an interest was unrelated to the suppression of any specific type of expression.²³ Only Chief Justice Warren Burger, in a separate opinion, found that camping was purely conduct and not speech. In dissent, Justices Thurgood Marshall and William Brennan found that not only was the camping a form of speech, but that the Park Service's regulations were unreasonable because there was no proof that they would accomplish the asserted goal of keeping the parks in a condition enjoyable for all.²⁴

Not surprisingly, California federal district courts faced with interpreting challenges to city ordinances regulating the Occupy Movement also chose to avoid the question of whether occupancy was or was not speech.²⁵ The first such case to deal with this issue in California was a challenge to a City of Sacramento ordinance prohibiting remaining or loitering in parks overnight.²⁶ In denying a motion for a temporary restraining order, U.S. District Court Judge Morrison England for the Eastern District held that the plaintiffs were unlikely to succeed on the merits because the ordinance satisfied the *O'Brien* test. According to Judge England, the ordinance prohibited everyone from using the parks, regardless of their message, and Occupy protestors were still able to conduct "their expressive activities twenty-four hours a day on adjoining sidewalks or in other public spaces if they so choose."²⁷ Judge England also determined that the City's interests in closing the parks were substantial and narrowly-tailored and similar to the interests the Supreme Court found constitutionally sufficient in *Clark*.²⁸ Finally, the fact that the Parks Director had discretion to grant exceptions to the ordinance did not prove fatal since the standards that governed such discretion were sufficiently precise and offered an opportunity for review by the City Manager.²⁹

²³ *Id.* at 299.

²⁴ *Id.* at 308-310.

²⁵ As did the Supreme Court of the State of New York for New York County in declaring that the owners of the public/private Zuccotti Park had a right to adopt regulations prohibiting camping and lying down in the Park whether or not the actions of the Occupy Wall Street demonstrators were protected by the First Amendment. *Matter of Waller v. City of New York*, Index No. 112957/11 (Nov. 15, 2011).

²⁶ *Occupy Sacramento v. City of Sacramento*, 2011 U.S. Dist. LEXIS 128218 (E.D. Cal. 2011).

²⁷ *Id.* at 20.

²⁸ The City's Parks Director asserted the following government interests for the ordinance: (1) the general public's enjoyment of park facilities; (2) the viability and maintenance of those facilities; (3) the public's health, safety and welfare; and (4) the protection of the City's parks and public property from overuse and unsanitary conditions." *Id.* at 21.

²⁹ The ordinance granted the Director discretionary authority, with the concurrence of the Chief of Police, to extend park hours, subject to three conditions: (1) such extension of hours is consistent with sound use of park resources, (2) the extension will enhance recreational activities in the city, and (3) the extension will not be detrimental to the public safety or welfare. *Id.* at 3.

Eight months later, Judge England essentially made similar findings in denying Occupy Sacramento's request for a permanent injunction.³⁰ In both cases, it is important to note the Court made a point of emphasizing Sacramento's ordinance had been in place since 1981 thereby defeating any argument the ordinance was intended to specifically target the Occupy Movement or its message.³¹ The Court also noted the Director's assertions of the government's interest, although made after the protests began, were sufficiently similar to the justifications provided in the staff report that accompanied the 1981 ordinance.

The second series of cases relating to a local agency's park ordinances arose in Fresno where Occupy Fresno secured a preliminary injunction against the County of Fresno on the grounds the group was likely to succeed on two constitutional arguments.³² The first argument was a challenge to a County ordinance that defined a "public meeting" as "the assemblage of ten or more persons by prearrangement, common design or as a result of advertising, solicitation or other promotion." Under the ordinance, no person was allowed to participate in a public meeting without first securing a permit. The plaintiffs challenged the County's assertion that a permit was necessary to resolve issues associated with competing uses in its parks. After reviewing numerical standards in other jurisdictions, Judge Charles Breyer of the Eastern District concluded the County had not demonstrated why a group of ten people posed the type of problem necessitating a permit, at least with respect to a park the size of Courthouse Park in Fresno where the protestors were encamped.³³

The second argument posed by Occupy Fresno challenged the authority granted to the County's administrative officer to prohibit the distribution of handbills or circulars upon County-owned property. After the court first noted that ordinances forbidding all distribution of literature are highly suspect, it determined that the County's failure to offer any justification for the ban made it clear that it did not promote a "substantial government interest."³⁴ The court did, however, uphold the County's prohibition against the overnight use of Courthouse Park for the same reasons a similar ban in Sacramento was upheld, namely, that the sidewalks and streets remained open to protestors who wanted to convey a message during the period of time the Park was closed.³⁵ It is also noteworthy that the court

³⁰ *Occupy Sacramento v. City of Sacramento*, 2012 U.S. Dist. LEXIS 95517 (E.D. Cal. 2012).

³¹ The Court cited temporary restraining orders granted to Occupy groups in Nashville, TN and Trenton, NJ where cities attempted to enforce prohibitions or limitations after the protests had begun. *Id.* at 22. Also see, *Santa Monica Food Not Bombs v. City of Santa Monica*, 450 F.3d 1022 (9th Cir. 2006) and *Long Beach Area Peace Network v. City of Long Beach*, 574 F.3d 1011 (9th Cir. 2009).

³² *Occupy Fresno v. County of Fresno*, 835 F.Supp.2d 849 (E.D. Cal. 2011).

³³ *Id.* at 861. Courthouse Park is a 13-acre park with buildings and "large expanses of grass. The Court noted that most school classes consist of more than 10 persons and it was "absurd" that a teacher would need to obtain a permit to use a park. *Id.*

³⁴ *Id.* at 868.

³⁵ *Id.* at 862-67.

made mention of the fact that the Fresno ordinances had been in place long before the Occupy protests began.³⁶ The result of the court's ruling eventually led to a settlement agreement between the County and Occupy Fresno in which the County agreed to remove restrictive ordinances limiting the circulation of flyers, carrying of signs, and holding small gatherings in Courthouse Park.

Efforts in Los Angeles to address the constitutional issues associated with the growing presence of Occupy protestors in public places faced additional challenges due to the settlement agreement the City is under to address housing deficiencies for its homeless population. In 2006, a Ninth Circuit decision found the City's enforcement of its ban against sitting, lying or sleeping on public streets and sidewalks violated the Eighth Amendment rights of homeless individuals against cruel and unusual punishment.³⁷ The ban runs daily from 9:00 p.m. to 6:00 a.m. and it meant that any effort to move the Occupy Movement protestors off of City Hall Park would be compromised by the right for protestors to merely relocate themselves to surrounding sidewalks and streets. However, given the decisions in Sacramento and Fresno, in which the anti-camping ordinances were constitutional precisely because protestors had access to streets and sidewalks as alternative means for expression, the conditions of the settlement agreement may be moot when determining whether sleeping on a sidewalk is a constitutionally-protected form of expressive conduct in Los Angeles.

Los Angeles also discovered its local ordinances governing the overnight use of City parks were inadequate for addressing a protest designed to occupy parks on a full-time basis. More than 400 City parks were not subject to the City's ban on camping when the Occupy Movement protests began and the City recently had to shore up its ordinance in June 2012.³⁸ The amendment also added definitions of "camp," "camp facility," "tent," and "umbrella or sun shade" to further clarify prohibited activities.³⁹ Los Angeles was merely one of many California cities that sought to strengthen anti-camping ordinances in the wake of the Occupy Movement.⁴⁰

³⁶ While the California Constitution's *Liberty of Speech* clause is broader and more protective than the free speech clause of the First Amendment, neither case addressed whether it afforded greater protection to the plaintiffs.

³⁷ *Jones v. City of Los Angeles*, 444 F.3d 1118 (9th Cir. 2006) vacated, remanded and dismissed by *Jones v. City of Los Angeles*, 505 F.3d 1006 (9th Cir. 2007). The court noted that there were almost 50,000 more homeless people than available beds in the city.

³⁸ See City of Los Angeles Ordinance No. 182153, passed by the City Council on June 6, 2012 and approved by the Mayor on June 7, 2012. See Appendix B for a copy of the Ordinance.

³⁹ *Id.*

⁴⁰ See e.g., Ordinances adopted by the City Councils of Claremont on January 24, 2012; Modesto on June 12, 2012; and Colton on December 6, 2011.

Yet another impact of the Occupy Movement was the challenge it presented city attorneys and public safety officers to define the offenses under which arrests would be made. In the City of Oakland, for example, the Police Department consulted with the City Attorney's office prior to enforcing the removal of camps on October 25, 2011 and the decision was made to charge most arrestees with disorderly conduct under Penal Code § 647(e). Section 647(e) makes it a misdemeanor to "lodge" in any "building, structure, vehicle, or place, whether public or private, without the permission of the owner or person entitled to the possession or in control of it."⁴¹ However, an independent investigation conducted by the Frazier Group, LLC ("Frazier Study") of the City's response to the Occupy protests questioned whether Section 647(e) was appropriate for conducting group arrests.⁴² The Frazier Study found that at the time protestors were arrested for failing to vacate Frank Ogawa Plaza, many were not inside structures indicative of "lodging." In addition, the report questioned the definitional "interplay" between sleeping, camping and lodging suggesting Section 647(e) may not adequately address time, place and manner considerations.⁴³ The Study did not suggest what Penal Code provisions may be more appropriate but Sections 407 and 409, for example, which make it a misdemeanor to participate in an unlawful assembly may be applicable in similar circumstances.⁴⁴

The California Commission on Peace Officer Standards and Training recently published the "POST Guidelines" on crowd management, intervention and control which included procedures for declaring unlawful assemblies and issuing dispersal orders.⁴⁵ The POST Guidelines recommend law enforcement agencies understand the law as it pertains to unlawful assemblies with specific reference to the provisions of Penal Code Sections 407 and 409. Generally, an unlawful assembly exists whenever two or people assemble for the

⁴¹ Cal. Penal Code § 647(e).

⁴² *Independent Investigation Occupy Oakland Response*, October 25, 2011, Frazier Group, LLC.

⁴³ *Id.* at p. 51.

⁴⁴ Cal. Penal Code § 407:

Whenever two or more persons assemble together to do an unlawful act, or do a lawful act in a violent, boisterous, or tumultuous manner, such assembly is an unlawful assembly.

Cal. Penal Code § 409:

Every person remaining present at the place of any riot, rout, or unlawful assembly, after the same has been lawfully warned to disperse, except public officers and persons assisting them in attempting to disperse the same, is guilty of a misdemeanor.

⁴⁵ *Crowd Management, Intervention and Control*, California Commission on Peace Officer Standards and Training (March 2012), 33-34.

purpose of committing an (i) unlawful act or (ii) a lawful act in a “violent, boisterous, or tumultuous manner.”⁴⁶ With regard to the latter provision, the California Supreme Court has held that the First Amendment right to peaceably assemble limits the definition of “violent, boisterous, or tumultuous” to only conduct posing “a clear and present danger of imminent violence.”⁴⁷

The Occupy Movement also generated city council proposals aimed at addressing some of the Occupy Movement’s concerns. For example, in San Francisco the Board of Supervisors is considering a “Foreclosure Fairness Ordinance” for the November ballot that would eliminate a provision in the city’s tax code that exempts lenders foreclosing on a home from paying the real estate transfer tax normally required when a property changes hands.⁴⁸ Likewise, the Los Angeles City Council adopted a “Responsible Banking” ordinance in May of 2012 that requires require banks doing business with the city to disclose detailed data on loans and foreclosure activity by community.⁴⁹

III. Improvements for the Future (and What City Attorneys Can Do to Help)

Protests are an inevitable, and at times enviable, part of the American democratic process and it is important to remember that cities have an obligation to protect a protestor’s First Amendment rights as well as the health and safety of its citizens and the condition and use of its public spaces. Likewise, every elected official owes a duty to his or her city to ensure that the city’s laws are carried out in a fair and equitable manner. At the same time, this does not mean an elected official forsakes his or her own First Amendment rights to participate in the political process as a private citizen. Many elected officials that supported the Occupy Movement also represented cities that had ordinances prohibiting overnight camping or requiring a permit for the use of public property.⁵⁰ At times this created a

⁴⁶ Cal. Penal Code § 407

⁴⁷ *In re Robert F. Brown et al.*, 9 Cal. 3d 612, 623 (1973) (Otherwise lawful protest did not constitute an unlawful assembly merely because “thunderous” chanting and shouting forced suspension of university classes). *See also, In re David Nathaniel Bacon*, 240 Cal. App. 2d 34 (1st Dist., 1966) (Remaining at site of unlawful assembly after being told to disperse constituted a violation of Section 409 even though appellants may not have participated in the assembly).

⁴⁸ Aaron Sankin, “Foreclosure Fairness Ordinance: San Francisco Lawmakers Take Aim At Tax Break,” *Huffington Post*, (Jun. 5, 2012) online only at http://www.huffingtonpost.com/2012/06/05/foreclosure-fairness-ordinance-san-francisco_n_1572238.html.

⁴⁹ Catherine Saillant, “Los Angeles adopts 'responsible banking' ordinance,” *Los Angeles Times*, (May 16, 2012) online at <http://articles.latimes.com/2012/may/16/local/la-me-0516-banking-ordinance-20120516>

⁵⁰ As police officers were clearing an Occupy camp on October 6, 2011 for being in violation of city laws banning open flames on a street or sidewalk, creating a public nuisance, disorderly conduct in lodging, and serving food without a permit, Supervisor John Avalos said “With our (footnote continued)

potential conflict for an official speaking out in favor of the Movement, or participating in Movement events, since he or she was also a member of a body elected to represent the city. The distinction was made more difficult by press coverage that often did not discern between the official's two roles.

City attorneys have a duty to keep their clients informed about the implications of the First Amendment which can often be challenging given the complexity of the Supreme Court's jurisprudence and the delicate balancing of interests involved. The suddenness with which public protests can arise makes it important for cities to be as prepared as possible ahead of time and city attorneys can and should play a role in that preparation. Conflict and misunderstanding over the Occupy Movement were not limited to the largest California cities in 2011 and the upcoming national election cycle only raises the likelihood that more protests are on the horizon.

1. Public Safety Departments.

In a time of declining budgets, city attorneys should not assume that public safety officers have access to all of the latest First Amendment jurisprudence or time to regularly update their crowd control policies. One of the findings of the Frazier Study was that Oakland's crowd control tactics were outdated, dangerous and ineffective and it was recommended that formalized First Amendment training be provided.⁵¹ To its credit, the City had already begun that process prior to issuance of the Study by offering training sessions in "Introduction to 21st Century Crowd Management, Intervention and Control Strategies and Shadow Team operations," "Critical Incident Command for OPD leadership and command personnel," and "crowd control tactics, use of force, chemical agents and specialty impact munitions."⁵²

While a city attorney is not in a position to make decisions regarding what is appropriate training for members of a city's police department, it is not out of place for the city attorney to offer the police chief assistance with any training on First Amendment matters. City attorneys might also want to review the police department's crowd control policies to ensure that they meet constitutional requirements. To gain more familiarity with how law enforcement agencies respond to crowd management, city attorneys should familiarize themselves with the POST Guidelines which not only describe crowd management strategies but also techniques for planning and preparation, information management, and the handling the media. The Guidelines also include helpful citations to

unemployment rate nearing 10 percent, we have a responsibility to be a sanctuary for the 99 percent. Instead, last night we witnessed that 99 percent being detained, arrested and intimidated with force." Vivian Ho, "City dismantles protesters' camp," *San Francisco Chronicle*, Oct. 7, 2011, p. C2.

⁵¹ See *supra*, note 41, 77-78.

⁵² *Id.* at 78.

applicable Penal Code provisions and relevant case law regarding such issues as use of force, unlawful assembly, First Amendment, and obstruction of public places.⁵³

A city attorney should also be familiar with the city's protocols for emergency response so that he or she knows who to work through in the event of an unannounced or unplanned protest. Most cities have at least an informal coordinated response team consisting of one or more of the mayor, city manager, and fire and police chiefs. City attorneys should make themselves available to be a part of this team, if they are not already, to ensure that the city is kept apprised of constitutional issues associated with its response to a protest. Some city officials may not recognize that they owe an obligation to protect the First Amendment rights of protestors and their own employees. Advising the city on the degree to which it may infringe on those rights is a role only the city attorney should play in order to ensure legal advice is consistent and applicable attorney-client privileges are preserved.

2. Local Permits and Use of Public Property.

The permitting process allows cities to pre-plan for events and determine what demands will be placed on public resources. Most protests requiring permits are applied for and processed without any issue whatsoever, but the city attorney will often be called upon to resolve questions about the contents of a permit application and whether it complies with city ordinances governing the use of public ways. This is always an uncomfortable time to find out that a city's ordinances are potentially unconstitutional for whatever reason and it is therefore good practice for any city attorney to review and suggest changes to the city's permitting processes and laws governing the use of public spaces.

Of course, the fundamental First Amendment question a city attorney should always ask is whether a permit requirement discriminates against speakers on the basis of the content of their message. Rarely will this be expressly laid out in the ordinance, but there are ways in which seemingly innocuous conditions can rise to the level of content-based discrimination.⁵⁴ Ordinances that are unreasonably burdensome or overbroad are also suspect. Permit fees that can be set at the discretion of the city should raise a red flag and elicit a closer look at how subjective the standards are for setting the fee. If the fee, for example, is higher if an event will be controversial (perhaps for the legitimate reason that more city resources will need to be

⁵³ See *supra*, note 44. For a national perspective, see the *Recommendations for First Amendment-Protected Events for State and Local Law Enforcement Agencies*, Global Justice Information Sharing Initiative (December 2011). Another source of information for case law and guidance on public protest issues from the point of view of the American Civil Liberties Union is *Know Your Rights: Free Speech, Protests & Demonstrations in California*, ACLU (January 2010).

⁵⁴ A good examination of how the Supreme Court evaluates ordinances regulating the content of speech can be found in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (bias-motivated crime ordinance declared unconstitutional on its face because it prohibited otherwise permitted speech solely on the basis of the subjects the speech addressed).

dedicated to crowd control) the permit scheme is likely unconstitutional because it requires an official to examine the content of the message to determine how likely it is to cause disruption.⁵⁵ The standards in the ordinance for denying a permit should also be precise and specific and should be communicated to the applicant.⁵⁶

The Occupy protests also revealed inconsistencies between the terms of city ordinances governing the use of public property and how such ordinances were being enforced. On the one hand many cities had local laws expressly prohibiting the overnight use of city parks only to find, upon closer examination, that the city did not regularly enforce such ordinances. Many cities had good reasons for not doing so (compassion for the homeless population, lack of city resources, etc.) but such policies also made it difficult for cities to defeat arguments that they were singling-out the Occupy Movement by forbidding its members to use the parks overnight. The lesson to take away from this is that city attorneys need to both review local ordinances for facial constitutionality and investigate how such ordinances are being enforced in practice by the city. Only with both pieces of information can a city attorney provide comprehensive advice on an ordinance's constitutionality.

3. Planning.

In addition to reviewing the city's crowd control policies and permitting ordinances ahead of time, a city attorney should be included in any pre-planning undertaken by city officials prior to a specific proposed demonstration or in preparation for future protests. As discussed above, some cities have already amended inadequate ordinances and otherwise addressed how public safety officers will respond to protests in the future but others may still have work to do. City attorneys can assist this effort by calling attention to constitutionally-infirm ordinances, policies and procedures and suggesting amendments before an emergency makes it appear that changes are being undertaken purely because a city disagrees with the current protest. Most cities will have a "crisis" team of specific officials already designated in the event of emergencies but the scope of the team should be expanded to involve potential responses to public demonstrations. City attorneys should make every effort to insert themselves into these crisis teams in order to provide guidance and, more importantly, protect the interests of their clients.

IV. Conclusion.

⁵⁵ The Supreme Court jurisprudence on the subject of permitting is broad but *Forsyth County v. The Nationalist Movement*, 505 U.S. 123 (1992) is a good examination of permits in the context of public protest. See also *Alfredo Kuba v. 1-A Agricultural Association*, 387 F.3d 850 (9th Cir. 2003) for a discussion of the California Constitution's Liberty of Speech clause and designated free speech zones, and *NAACP v. City of Richmond*, 743 F.2d 1346 (9th Cir. 1984) for a discussion of the constitutionality of permit processing times.

⁵⁶ *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988).

The Tea Party and Occupy Movements arose quickly and spread across the country in a matter of weeks thanks to the advent of social media, national news coverage, and the force of the messages being advocated. The upcoming election cycle may spur new protests later this year and it appears that mass demonstrations will continue to be a part of the American fabric for years to come. In a state with an established history of protest movements of all kinds, it will be difficult in the future for city officials to claim they were unprepared for a given protest or that they had no inclination there was a need to pre-plan. City attorneys alone have the knowledge and training to understand the constitutional issues involved when a city permits, and responds to, public demonstrations and should therefore consider what opportunities they have to improve the process before the next protest takes place.

Appendix A

List of Resources

Crowd Management, Intervention and Control, California Commission on Peace Officer Standards and Training (March 2012) at <http://lib.post.ca.gov/Publications/CrowdMgtGuidelines.pdf>.

Handbook of Free Speech Issues, Office of General Counsel, The California State University (May 2009) at http://www.calstate.edu/gc/ogc_manuals_on_legal_issues.shtml.

Independent Investigation: Occupy Oakland Response October 25, 2011, Frazier Group, LLC (Jun. 14, 2012) at <http://www.scribd.com/doc/97147612/Frazier-report-on-OPD-response-to-Occupy-Oakland-Oct-25-2011>.

Know Your Rights: Free Speech, Protests & Demonstrations in California, American Civil Liberties Union (January 2010) at <https://www.aclunc.org/issues/index.shtml>.

Recommendations for First Amendment-Protected Events for State and Local Law Enforcement Agencies, Global Justice Information Sharing Initiative (December 2011) at <http://www.it.ojp.gov/default.aspx?area=home&page=1224>.

Appendix B

Los Angeles City Ordinance 182,153, Eff. 7/18/12

[Attach Copy of Ordinance]

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