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Viewpoint: Preoccupied With the First Amendment

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In keeping with its inconsistent and often incoherent agenda, the Occupy Wall Street movement now occupies hundreds of areas other than Wall Street. The occupied zones tend to be public parks and plazas rather than financial centers.

This creates a dilemma for the nation's mayors, nearly all of whom are liberal Democrats and many of whom are openly sympathetic to the movement. How does one square the First Amendment right of the occupiers to protest with the right of everyone else to have access to city parks and spaces?

This dilemma is moving inexorably toward a resolution. Soon, many protesters will leave. Many will leave voluntarily because winter is coming, and it's getting too cold to camp out. Those remaining will be forced to leave because no city government, no matter its politics, can tolerate the violation of local health and safety ordinances indefinitely. The situation will become even more intolerable when cold weather causes illness, exacerbating the health hazard.

When the inevitable happens, removal, no matter how delicately executed, will generate cries of First Amendment violation. We have already seen a preview in Oakland, whose mayor, Jean Quan, is so sympathetic to the movement that she allowed all city employees, other than the police, time off to join their call for a general strike. But when she limply suggested that the protesters exercise their freedom of speech by occupying Frank H. Ogawa Plaza across from City Hall from 6 a.m. to 10 p.m., they angrily responded: What? No freedom of speech from 10 p.m. to 6 a.m.?

Would the forced removal of the occupiers implicate First Amendment rights? The answer to that question requires analyzing the interplay between content and conduct.

There is no question that the Occupy Wall Street movement has a First Amendment right to publicize its message. Since the movement is leaderless, it is difficult to divine that message. Its San Francisco contingent occupies two bocce ball courts a block from my office; I pass by the protesters every day and read their signs. That's how I know that the occupiers oppose greed, the Federal Reserve and police brutality, and that they support the redistribution of wealth, a \$20-per-hour minimum wage and the forgiveness of student debt. Perhaps the protesters are ignorant of economics, but no one can seriously question their right to espouse these positions. In fact, compared to speakers who customarily test the limits of freedom of speech — Nazis, skinheads, terrorists — the occupiers are well within the mainstream.

The First Amendment gives them an undoubted right to "peaceably to assemble" to speak their views. But does it give them a right to speak their views by occupying public property?

In the history of the U.S. Supreme Court, only one justice is remembered as a First Amendment "absolutist." That was Justice Hugo Black. During oral argument, whenever an advocate urged an interpretation requiring a limitation on speech, Justice Black would remove his 100% copy of the Constitution from his pocket, and ask the lawyer to read the words of the First Amendment. When the latter reached the phrase "no law," Justice Black would quietly say "thank you" and pronounce the matter closed. For him, if an issue dealt with expression, no limitation could be imposed.

But this First Amendment absolutist drew a sharp distinction between expression and conduct. In *Brown v. Louisiana*, the court dealt with an incident where a group of black men visited a public library and tried to take out books, to draw attention to the separate facilities made available for blacks and whites. After being told that the books they requested were unavailable, they refused to leave and were arrested for breach of the peace. Justice Black had little difficulty disposing of their First Amendment appeal:

"The First Amendment, I think protects speech, writings, and expression of views in any manner in which they can be legitimately and validly communicated. But I have never believed that it gives any person or group of persons the constitutional right to go wherever they want, whenever they please, without regard to the rights of private or public property or to state law. ... Though the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else's property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas."

Were he alive today, there is little doubt that Justice Black would find no right of the occupiers to occupy city parks and plazas to espouse their views.

But Justice Black was in the minority in *Brown v. Louisiana*. The majority opinion was written by Justice Abe Fortas. First, he noted that the conduct of the public library protesters was "unexceptionable."

"They were neither loud, boisterous, obstreperous, indecorous nor impolite. There is no claim that, apart from the continuation — for ten or fifteen minutes — of their presence itself, their conduct provided a basis for the order to leave, or for a charge of breach of the peace."

"We come, then, to the bare bones of the problem. Petitioners, five adult Negro men, remained in the library room for a total of ten or fifteen minutes. The first few moments were occupied by a ritualistic request for service and a response. We may assume that the response constituted service, and we need not consider whether it was merely a gambit in the ritual. This ceremony being out of the way, the Negroes proceeded to the business in hand. They sat and stood in the room, quietly, as monuments of protest against the segregation of the library."

The majority reversed their conviction because they understood, as Justice Black did not, that in this instance, the only way to express their viewpoint — that racial segregation in public libraries was wrong — was to sit in the public library and wait for equal service. Similarly, in the lunch counter demonstrations of the same era, black demonstrators "occupied" Woolworth's and other department store lunch counters by sitting and waiting to be served at "whites only" counters. Since city ordinances of that era prohibited black and white patrons eating at the same counters, they sat and waited until they were arrested.

Were these acts of occupation justified? To Justice Black, they were not. The demonstrators could have written op-ed columns, or they could have marched outside, expressing their disfavor with racial segregation. But to truly express their viewpoint, to stand as "monuments of protest against segregation," as Justice Fortas put it, it was necessary for them to do more than speak. They had to be at the library. They had to be at the lunch counters. They had to sit in places they were not allowed to legally occupy to demonstrate the injustice of segregation. Their occupation was their speech.

This brings us back to the current crop of occupiers, sitting on bocce ball courts in San Francisco. The civil rights protesters occupied libraries and lunch counters because they were symbols of segregation. Reasonable people can differ over the value of bocce ball, but no one has ever uncovered a link between bocce ball and banking fraud. The protesters say they oppose greed. Is it necessary for them to occupy

public parks and plazas to stand as "monuments of protest" against greed?

Of course not. Their occupation is a giant non sequitur. Their conduct has no relation to the content of their message.

Camping out in a city park is not a monument of protest. It is merely camping out. And as any backpacker knows, human beings create waste that eventually creates health hazards. That's true in the wilderness, and it's even truer in an urban setting.

Sooner or later, some mayor will summon the courage to get these people off public property. It will probably be a mayor of impeccable liberal credentials, whose general sympathy with the protesters' aims is beyond question. Such a mayor may find inspiration in the words of Oliver Cromwell, a rebel who supported Parliament against the king, and signed the king's death warrant. But when that Parliament, aptly known as the Long Parliament, outlived its usefulness, he barged into Westminster with 40 musketeers, seized the speaker's mace, and proclaimed: "You have sat here for too long for any good you are doing. Depart, I say, and let us have done with you. In the name of God, go! "

And they left.

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