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## Putting Accessible Expression to Bed

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## COMMENT

### PUTTING ACCESSIBLE EXPRESSION TO BED

Jamila A. Odeh\*

*In 2011, the Occupy movement began. Occupiers seized space in dozens of public parks and in the American imagination, providing a compelling illustration of an inclusive format of political expression. In the courtroom, protesters sought injunctive relief on First Amendment grounds to protect the tent encampments where Occupiers slept. In 2017, the last of the Occupy litigation ended; but the ramifications the Occupy cases hold for the First Amendment and expressive conduct remain unexamined.*

*This Comment takes an in-depth look at the adjudication of Occupiers' First Amendment interest in sleeping in public parks. It analyzes the adjudication of the Occupy cases and contends that the pattern of judicial enforcement results from a desire to remove the appearance of disorder associated with houselessness. This Comment argues that the test used to set the scrutiny level for First Amendment expressive activity systematically disadvantages speech by and about houseless persons.*

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## INTRODUCTION

It is illegal to be houseless<sup>1</sup> and unsheltered in most American cities.<sup>2</sup> In late 2010, two parents and their three children in Wenatchee, Washington, believed that their period of houselessness was nearly over.<sup>3</sup> After a year without housing, they were finally closing a lease. Late at night—long after public restrooms closed—the father was arrested for public urination.<sup>4</sup> Because of that arrest, the family missed its appointment with an apartment manager the next morning, and the opportunity vanished.<sup>5</sup>

The law against public urination that stymied the family’s hopes for housing is part of a larger body of laws called “broken windows” policies.<sup>6</sup> These policies began three decades earlier in New York City, and a cascade of similar ordinances quickly swept across America.<sup>7</sup> In 2011, the family of

1. This Comment uses the term “houseless” and not “homeless,” because it more accurately describes a broader population of people experiencing housing insecurity, and it does not imply the experience is an immutable characteristic.

2. Don Mitchell, *Anti-Homeless Laws and Public Space: I. Begging and the First Amendment*, 19 URB. GEOGRAPHY 6 (1998); Don Mitchell, *Anti-Homeless Laws and Public Space: II. Further Constitutional Issues*, 19 URB. GEOGRAPHY 98 (1998); NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, HOUSING NOT HANDCUFFS: ENDING THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 10, 52–71 (2016), <https://www.nlchp.org/documents/Housing-Not-Handcuffs> (on file with the *Michigan Law Review*).

3. NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, CRIMINALIZING CRISIS: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 33–34 (2011) [hereinafter CRIMINALIZING CRISIS], [https://www.nlchp.org/documents/Criminalizing\\_Crisis](https://www.nlchp.org/documents/Criminalizing_Crisis) [<https://perma.cc/3U73-KEYH>].

4. *Id.* at 34.

5. *Id.*

6. Broken windows policies prioritize the strict application of petty crime laws in an effort to prevent serious criminal activity. They often include the expansion of criminal law for petty crimes like vandalism, loitering, and panhandling and take a zero-tolerance approach to enforcement. See Eric Klinenberg, *The Other Side of “Broken Windows,”* NEW YORKER (Aug. 23, 2018), <https://www.newyorker.com/books/page-turner/the-other-side-of-broken-windows> [<https://perma.cc/T2XD-AVYD>].

7. Ngozi C. Kamalu & Emmanuel C. Onyeozili, *A Critical Analysis of the ‘Broken Windows’ Policing in New York City and Its Impact: Implications for the Criminal Justice System and the African American Community*, 11 AFR. J. CRIMINOLOGY & JUST. STUD. 71, 72 (2018); Klinenberg, *supra* note 6; see *infra* Section I.A. The “broken windows” label came from an influential article by George Kelling and James Wilson that “used the analogy that a broken window, left unattended, would signal that no one cared and ultimately lead to more disorder and even crime.” Sarah Childress, *The Problem with “Broken Windows” Policing*, FRONTLINE (June 28, 2016), <https://www.pbs.org/wgbh/frontline/article/the-problem-with-broken-windows-policing/> [<https://perma.cc/Q53B-9WE9>].

five from Wenatchee remained houseless.<sup>8</sup> The criminalization of living unsheltered made housing unattainable. That same year, Occupy Wall Street began<sup>9</sup> and quickly spread across America.<sup>10</sup>

Occupy's key feature, twenty-four-hour protests in tent encampments, had its roots in tent communities set up by houseless people.<sup>11</sup> But as police worked to disperse the protesters, Occupiers learned what houseless people knew all along, that "biologically necessary activities are illegal when performed in American streets—not just peeing, but sitting, lying down and sleeping."<sup>12</sup> One houseless-outreach worker explained: "The city will not tolerate a tent city. . . . The camps have to be out of sight."<sup>13</sup> Yet visibility for the encampments was the protesters' explicit goal.<sup>14</sup>

Occupy put a national spotlight on the criminalization of public sleeping when several Occupy groups challenged anti-sleeping ordinances on First Amendment grounds.<sup>15</sup> Because sleeping in the encampments was an activity potent with political meaning, it was ostensibly protected by the First Amendment. But the anti-sleeping laws made this core aspect of Occupy's expression illegal.<sup>16</sup> Occupiers sought injunctions to cease enforcement of anti-sleeping ordinances. The courts, however, applied tests for content-neutral regulations and held that the sleeping restrictions were valid.<sup>17</sup>

8. CRIMINALIZING CRISIS, *supra* note 3, at 34.

9. Oleg Komlik, *The Original Email that Started Occupy Wall Street*, ECON. SOC. & POL. ECON. (Dec. 27, 2014), <https://economicsociology.org/2014/12/27/the-original-email-that-started-occupy-wall-street/> [<https://perma.cc/7NGR-GYWB>]; see Martin Kaste, *Exploring Occupy Wall Street's 'Adbuster' Origins*, NPR (Oct. 20, 2011, 12:01 AM), <http://www.npr.org/2011/10/20/141526467/exploring-occupy-wall-streets-adbuster-origins> [<https://perma.cc/A9F9-E5SF>].

10. *'Occupy Wall Street' Protests Spread Across the Country*, ABC NEWS (Oct. 3, 2011), <https://abcnews.go.com/blogs/headlines/2011/10/occupy-wall-street-protests-spread-across-the-country-bloomberg-calls-them-misguided> [<http://perma.cc/7LKY-T343>]; Michael Levitin, *The Triumph of Occupy Wall Street*, ATLANTIC (Jun. 10, 2015), <https://www.theatlantic.com/politics/archive/2015/06/the-triumph-of-occupy-wall-street/395408/> [<https://perma.cc/H7KE-ZBGT>].

11. Barbara Ehrenreich, *Occupy Wall Street Brings Homelessness into the Open*, GUARDIAN (Oct. 24, 2011, 12:45 PM), <https://www.theguardian.com/commentisfree/cifamerica/2011/oct/24/occupy-wall-street-homelessness-us> [<https://perma.cc/G9S8-8Q37>] ("[T]ent cities are the domestic progenitors of the American occupation movement.").

12. *Id.*

13. *Id.*

14. See Jen Schradie, *Why Tents (Still) Matter for the Occupy Movement*, COMMON DREAMS (Nov. 24, 2011), <https://www.commondreams.org/views/2011/11/24/why-tents-still-matter-occupy-movement> [<https://perma.cc/C5UB-A7XK>] (discussing the symbolic and political significance of visible tents to Occupy's cause).

15. See, e.g., Eyder Peralta, *The Occupy Movement and the First Amendment: 'A Classic Collision'*, NPR (Nov. 15, 2011, 1:25 PM), <https://www.npr.org/sections/thetwo-way/2011/11/15/142348726/the-occupy-movement-and-the-first-amendment-a-classic-collision> [<https://perma.cc/GR6S-TDKY>].

16. See *infra* notes 227–235 and accompanying text.

17. See *infra* Section I.B.

This Comment argues that the use of content-neutral and content-based analysis for expressive conduct facilitates the systematic exclusion of expression by and about houseless people. Part I explains the development of anti-sleeping ordinances and jurisprudence on expressive conduct. Part II assesses the Occupy First Amendment challenges. Part III contends that when courts afford less scrutiny for content-neutral restrictions on expressive conduct, they also condone removing the appearance of houselessness from public spaces. Ultimately, the Occupy cases illustrate a more pervasive issue: courts have undermined the accessibility of expressive conduct in the public forum for all Americans.

### I. THE ANTI-SLEEPING ORDINANCE AND EXPRESSIVE CONDUCT

Criminal laws prohibiting sleeping in public and First Amendment jurisprudence on expressive activity converge in the public parks of American cities. Section I.A highlights criminal anti-sleeping laws. Section I.B explores First Amendment jurisprudence on sleeping as an expressive activity.

#### A. *The Criminal Prohibition on Sleeping*

Policing public space in a city to force houseless people elsewhere is a common way to make unsheltered people another city's problem.<sup>18</sup> Many ordinances criminalize sleeping in public,<sup>19</sup> even though most houseless people cannot find shelter indoors.<sup>20</sup> Therefore, compliance with anti-sleeping laws is effectively impossible for most houseless people.<sup>21</sup>

Discriminatory enforcement is well documented.<sup>22</sup> Police cannot find and remove everyone who sleeps in public, so seeking out people who look houseless is an easier,<sup>23</sup> more enforceable approach.<sup>24</sup> Moreover, policing

18. Marc L. Roark, *Homelessness at the Cathedral*, 80 MO. L. REV. 53, 76 nn.121–22, 110 (2015).

19. *Id.* at 81 (“Cities regularly enact ordinances aimed at preventing homeless persons from sleeping in public spaces.”); Bryce Covert, *When Trying to Survive While Homeless Is Made Illegal*, THINKPROGRESS (Nov. 17, 2016, 1:01 PM), <https://thinkprogress.org/criminalization-homelessness-908918d0a46/> [<https://perma.cc/UNET7-D2TT>] (“Today, a third of the country’s cities ban camping in public, nearly one in five ban sleeping in public . . .”); see NAT’L COAL. FOR THE HOMELESS & NAT’L LAW CTR. ON HOMELESSNESS & POVERTY, A DREAM DENIED: THE CRIMINALIZATION OF HOMELESSNESS IN U.S. CITIES 16–17, 24–78 (2006), <https://www.nationalhomeless.org/publications/crimreport/report.pdf> [<https://perma.cc/MMD5-9WZ8>] (providing narratives of cities with measures that criminalize homelessness, many including sleeping bans).

20. Sara K. Rankin, *The Influence of Exile*, 76 MD. L. REV. 4, 43 (2016) (“[T]he majority of homeless people are forced to live in public.”).

21. See Randall Amster, *Patterns of Exclusion: Sanitizing Space, Criminalizing Homelessness*, 30 SOC. JUST., no. 1, 2003, at 195.

22. See *id.* at 208; see also Alafair Burke, *Policing, Protestors, and Discretion*, 40 FORDHAM URB. L.J. 999, 1002–05 (2013).

23. See Jessica Gerrard & David Farrugia, *The ‘Lamentable Sight’ of Homelessness and the Society of the Spectacle*, 52 URB. STUD. 2219, 2223–24 (2015); David M. Smith, Note, *A The-*

appearance is an overt goal in many cities.<sup>25</sup> Broken windows policies promote “the idea that eliminating visible signs of disorder deters more serious crime.”<sup>26</sup> They stigmatize houseless people as a visible sign of danger.<sup>27</sup> But the threat is only “one of perception.”<sup>28</sup> An increased houseless population does not necessarily correspond to a rise in crime.<sup>29</sup> More importantly, the policies dehumanize people by viewing them as problems.<sup>30</sup>

### B. *Expressive Conduct Jurisprudence*

The First Amendment protects forms of expression beyond written and spoken words.<sup>31</sup> Conduct, including sleeping, can be communicative.<sup>32</sup> Sleeping is a particularly difficult form of expression to adjudicate, because it is “a nonexpressive everyday function, yet it may also be performed for communicative reasons.”<sup>33</sup>

The threshold question is whether conduct is sufficiently expressive for First Amendment protection.<sup>34</sup> The Supreme Court created a two-prong test for the inquiry. First, was the conduct “intended to be communicative”?<sup>35</sup> Second, would the conduct “in context . . . be understood by the viewer to be

*oretical and Legal Challenge to Homeless Criminalization as Public Policy*, 12 YALE L. & POL’Y REV. 487, 496–97 (1994).

24. See Amster, *supra* note 21, at 197, 208–09 & 216 n.10.

25. *Id.* at 201 (“[S]ome cities state expressly that their intention is to . . . remove homeless people from particular places, such as parks, streets or downtown areas. . . . Some target the ‘visible’ homeless with the goal of making them ‘invisible.’” (quoting Maria Foscarinis, *Downward Spiral: Homelessness and Its Criminalization*, 14 YALE L. & POL’Y REV., no. 1, 1996, at 1, 22–23)).

26. Roark, *supra* note 18, at 73–74 (“[P]roponents of the broken window hypothesis often point to homelessness as a precursor to greater criminal tendencies for an area.”).

27. See *id.* at 81. See generally Gerrard & Farrugia, *supra* note 23, at 2221 (analyzing how onlookers visually interpret images of homeless people).

28. Amster, *supra* note 21, at 196 (emphasis omitted).

29. See *id.* at 209; Roark, *supra* note 18, at 80–82; Smith, *supra* note 23, at 496.

30. See Amster, *supra* note 21, at 207–09; Roark, *supra* note 18, at 80–82.

31. *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc.*, 515 U.S. 557, 569 (1995).

32. See *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1327–28 (M.D. Fla. 2011) (recognizing sleeping in public as protected under the First Amendment in the context of Occupy Fort Myers); see also *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Brown v. Louisiana*, 383 U.S. 131 (1966); *Stromberg v. California*, 283 U.S. 359 (1931).

33. Laurie Magid, Note, *First Amendment Protection of Ambiguous Conduct*, 84 COLUM. L. REV. 467, 467 (1984).

34. *Spence v. Washington*, 418 U.S. 405, 409 (1974); see also *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294 (1984).

35. *Clark*, 468 U.S. at 294.

communicative”?<sup>36</sup> If a plaintiff cannot meet the two-prong test, there is no claim.<sup>37</sup> If the plaintiff meets both prongs, the Constitution limits the government’s ability to restrict the expression. The Court uses a balancing test to assess whether the governmental restriction is valid.<sup>38</sup>

There are a few iterations of the balancing test that may apply depending on the nature of the government’s restriction.<sup>39</sup> The first time the Court articulated a balancing test in the context of expressive conduct was in 1968, in *United States v. O’Brien*.<sup>40</sup> The case involved a Vietnam War dissenter who was convicted for intentionally burning his draft card before a large crowd.<sup>41</sup> But the relevant statute targeted his conduct, not his message.<sup>42</sup> Further, the government interest—the administrative ease of raising armed forces—was “unrelated to the suppression of free expression.”<sup>43</sup> The Court propounded a test that applies when a restriction on speech is incidental, rather than intended to suppress speech.<sup>44</sup> The restriction is permissible “if it furthers an important or substantial governmental interest . . . and if the incidental restriction . . . is no greater than is essential<sup>45</sup> to the furtherance of that interest.”<sup>46</sup> In effect, the Court created a balancing test in which an important governmental interest may outweigh incidental restrictions on speech.<sup>47</sup>

Over a decade after *O’Brien*, the Court articulated a second balancing test. The time, place, or manner (TPM) test also covers expressive conduct in some instances when the regulation is content neutral.<sup>48</sup> This test applies when a content-neutral regulation limits the time, the place, or the man-

36. *Id.* An early iteration of the test also required a particularized message, but the Court abandoned that criterion, allowing greater flexibility. Compare *Spence*, 418 U.S. at 409–11, with *Clark*, 468 U.S. at 294.

37. See *Clark*, 468 U.S. at 294.

38. See, e.g., *Texas v. Johnson*, 491 U.S. 397 (1989); *Clark*, 468 U.S. 288; *United States v. O’Brien*, 391 U.S. 367 (1968).

39. See *Johnson*, 491 U.S. at 412; *Clark*, 468 U.S. at 294; *O’Brien*, 391 U.S. at 376–77.

40. See 391 U.S. at 376–77; Claire Howard, *A New First Amendment Battleground: Challenges Facing Local Governments by the Occupy Movement and Proactive Responses to Future Movements*, 45 *URB. LAW.* 473, 480 (2013).

41. *O’Brien*, 391 U.S. at 369.

42. *Id.* at 375.

43. *Id.* at 377.

44. *Id.* at 376.

45. “[N]o greater than is essential” was later interpreted as a balancing test only. *United States v. Albertini*, 472 U.S. 675, 688–89 (1985) (quoting *O’Brien*, 391 U.S. at 377).

46. *O’Brien*, 391 U.S. at 377.

47. Christine Verbitsky, *The Occupy Wall Street Movement and the Constitution: Protesters Preoccupied with the First Amendment*, 29 *TOURO L. REV.* 1003, 1008–10 (2013).

48. *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 294–95 (1984); *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 808 (1984). Content neutral means that the regulation did not target the content of speech. See *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015) (reinterpreting content neutral from the more traditional route followed in *Taxpayers for Vincent*, 466 U.S. at 817).

ner—when, where, or how—the message is communicated.<sup>49</sup> TPM restrictions are only valid if “they are narrowly tailored to serve a significant governmental interest, and . . . they leave open ample alternative channels for communication of the information.”<sup>50</sup> If a TPM restriction is content based, however, the test will require strict scrutiny in order for the restriction to remain valid.<sup>51</sup>

The relationship between the *O’Brien* and TPM tests is important. The two tests sometimes overlap. And in many circumstances, both apply.<sup>52</sup> This is because TPM regulations often impose only incidental restrictions on speech. The two tests are also substantially similar in their treatment of content-neutral regulations. *O’Brien* uses “important or substantial” governmental interest, and the TPM test uses “significant” governmental interest.<sup>53</sup> The Court has explained that there is “little, if any,” difference between these standards.<sup>54</sup>

The Court applies more scrutiny to content-based restrictions. For example, in *Texas v. Johnson*, the Court adjudicated a content-based restriction that targeted a particular message.<sup>55</sup> There, the respondent burned a U.S. flag and chanted, “America, the red, white, and blue, we spit on you,” at the 1984 Republican National Convention.<sup>56</sup> The content-based regulation prohibited disrespectful flag burning, but it permitted respectful burning as a method to dispose of a flag.<sup>57</sup> The Court characterized this distinction as a content-based restriction on speech.<sup>58</sup> It required that “[a] law directed at *the communicative nature* of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First Amendment re-

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49. *Frisby v. Schultz*, 487 U.S. 474, 481 (1988) (citing *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45 (1983)); *Clark*, 468 U.S. at 293 (collecting cases).

50. *Clark*, 468 U.S. at 293 (describing the requirements of the TPM test). The Court has articulated the final prong of the test in different ways. Compare *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 132 (1981) (setting the standard as “leaves open adequate alternative channels for communication”), with *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (setting the standard as “do[es] not unreasonably limit alternative avenues of communication”).

51. *Reed*, 135 S. Ct. at 2227.

52. See, e.g., *Ward v. Rock Against Racism*, 491 U.S. 781, 797–99 (1989); *Clark*, 468 U.S. at 298 & n.8.

53. *United States v. O’Brien*, 391 U.S. 367, 377 (1968); *Clark*, 468 U.S. at 293.

54. *Clark*, 468 U.S. at 298 (declining to apply *O’Brien* due to the substantial similarity to TPM).

55. 491 U.S. 397, 410–11 (1989).

56. *Johnson*, 491 U.S. at 399.

57. See *id.* at 416–17.

58. *Id.*

quires.”<sup>59</sup> Similarly, as previously mentioned, where TPM applies, a content-based restriction will receive strict scrutiny.<sup>60</sup>

In sum, whether a restriction targets content is an important consideration for all forms of expressive speech. Once a court determines that conduct is expressive, it must determine whether it is content neutral. This finding determines the applicable level of scrutiny for the regulation. If the restriction is content neutral, it will receive the more deferential *O’Brien* and TPM standards. If the restriction is content based and the TPM test applies, that test dictates application of strict scrutiny.<sup>61</sup> Under *Johnson*, a content-based restriction will also receive an increased form of scrutiny.<sup>62</sup>

The Supreme Court has contemplated sleeping as an expressive activity only once, in *Clark v. Community for Creative Non-Violence*.<sup>63</sup> The case involved a Department of the Interior ordinance that prohibited camping on National Park Service lands not specifically designated for camping.<sup>64</sup> Protesters were interested in sleeping in a tent encampment on the National Mall to demonstrate the difficulties of houselessness.<sup>65</sup> The issue was whether the restriction, as applied to the protesters, violated the First Amendment.<sup>66</sup> Ultimately, the Court declined to determine whether sleeping was expressive conduct.<sup>67</sup> It concluded that even if the activity was protected, the government regulation was a valid TPM restriction and met the *O’Brien* test.<sup>68</sup> The restriction was content neutral because it applied to protesters and nonprotesters alike.<sup>69</sup> The regulation “narrowly focuse[d] on the Government’s substantial interest in maintaining the parks.”<sup>70</sup> Additionally, there were ample alternative channels for communication, because the National Park Service permitted the protest group to leave its tent encampment in place, maintaining the group’s visual message.<sup>71</sup> Accordingly, the Court held that there was no First Amendment violation.<sup>72</sup> Importantly, the maintenance of the aesthetic value of public parks as a significant governmental interest was essential to that holding.<sup>73</sup>

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59. *Id.* at 406 (emphasis altered) (quoting *Cmty. for Creative Non-Violence v. Watt*, 703 F.2d 586, 622 (D.C. Cir. 1983) (Scalia, J., dissenting), *rev’d sub nom. Clark*, 468 U.S. 288).

60. *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2227 (2015).

61. *See id.*

62. *See Johnson*, 491 U.S. at 406.

63. 468 U.S. 288, 293 (1984).

64. *Clark*, 468 U.S. at 289–90.

65. *Id.* at 291–92.

66. *Id.* at 289.

67. *Id.* at 293.

68. *Id.* at 295, 298.

69. *Id.* at 295.

70. *Id.* at 296.

71. *Id.* at 295.

72. *Id.*

73. *Id.* at 296.

*Clark* serves as the primary guide for restrictions on public sleeping. Its framework was later applied to an injunction merits analysis in *Metropolitan Council, Inc. v. Safir*, an important lower court case that occurred pre-Occupy.<sup>74</sup> The protesters in *Metropolitan Council* planned to sleep on New York City sidewalks, taking up half the walking area, as a vigil for housing issues.<sup>75</sup> Aware that the New York City Police Department strictly prohibited sleeping on public walkways, the protesters filed for an injunction on First Amendment grounds.<sup>76</sup> The Court applied the TPM test to its merits analysis and awarded injunctive relief.<sup>77</sup>

The First Amendment cases that resulted from the Occupy movement created a burst of new decisions on the issue of sleeping as an expressive activity. These cases were not resolved until as late as 2017,<sup>78</sup> and their impact on First Amendment jurisprudence and social movements remains unassessed. This Comment reviews the pattern of First Amendment enforcement, a task only possible in retrospect. Although Occupiers removed their encampments from public parks eight years ago, the continued relevance is twofold. First, social and political movements—including the Standing Rock protests and the Black Lives Matter movement—continue to use similar tactics.<sup>79</sup> Second, the Occupy context provides broadly applicable insights into conduct-based First Amendment claims and the accessibility of speech, which affects all Americans.

## II. CONTENT-DRIVEN JUDICIAL ENFORCEMENT

The Occupy cases relevant to this inquiry began when Occupy protesters, facing anti-sleeping laws, asked courts to enjoin law enforcement from removing the Occupiers.<sup>80</sup> Courts declined to protect the protesters' interest

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74. 99 F. Supp. 2d 438, 444 (S.D.N.Y. 2000).

75. *Metropolitan Council*, 99 F. Supp. 2d at 440.

76. *Id.* at 439.

77. *Id.* at 443–48.

78. See, e.g., *Krinks v. Haslam*, No. 3:12-cv-01095, 2017 WL 1857352 (M.D. Tenn. May 9, 2017), report and recommendation accepted sub nom. *Custer v. Haslam*, No. 3:12-cv-01095, 2017 WL 2591831 (M.D. Tenn. June 15, 2017).

79. For example, Standing Rock and Black Lives Matter used encampments as a tactic. At Standing Rock, this reclaiming of space challenged colonialism. Similarly, some activists for the Black Lives Matter movement set out to “Decolonize LA City Hall”—physically occupying the space in an effort to pressure Mayor Eric Garcetti to meet with them publicly. Elsewhere, Black Lives Matter advocates built encampments as safe, police-free environments. Much like Occupy, the unifying principle was creating and living in their respective desired communities. See Sarah Jaffe, *Occupy Is Everywhere*, NEW REPUBLIC (Oct. 6, 2016), <https://newrepublic.com/article/137512/occupy-everywhere> [<https://perma.cc/6AXS-GCYC>]; Zach Stafford, *Chicago Protesters Occupy Homan Square for Eighth Day to Demand Closure*, GUARDIAN (Jul. 29, 2016, 12:05 PM), <https://www.theguardian.com/us-news/2016/jul/29/chicago-protestors-occupy-homan-square-police-black-lives-matter> [<https://perma.cc/36JV-7A2Y>].

80. See, e.g., *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1113, 1119 (E.D. Cal. 2012).

in sleeping as an expressive activity, but they did so for different reasons and at various stages in the proceedings.<sup>81</sup>

From the outset of the Occupy cases, courts across the country recognized that sleeping was an expressive activity protected by the First Amendment.<sup>82</sup> After agreeing on this threshold question, the cases diverged considerably. They fall into three categories: (1) cases in which early success on sleeping claims at the temporary restraining order (TRO) stage flipped at the preliminary injunction stage, (2) cases that vindicated traditional First Amendment rights—but not sleeping claims—with preliminary injunctions,<sup>83</sup> and (3) cases that were not granted any form of relief. These categories are arranged in temporal order according to the length of time protests had been on the ground at the time the cases were heard. For example, although the cases in category three ended at the earliest procedural stage, the cases generally commenced after the protests had been on the ground the longest.<sup>84</sup> This temporal accounting is significant because the amount of time the encampments were standing is inversely related to the success of the First Amendment challenges. Importantly, the factual inquiries that the courts purportedly based their decisions upon—like the injunctive relief standard and indicia suggesting content-based regulations—do not predict or adequately explain the disparity in the outcomes of the cases.

#### A. Cases that Flipped<sup>85</sup>

There were several cases in which the Occupiers won on the sleeping issue at the TRO stage, but in all of these cases the courts did not grant relief at

81. Compare *Watters v. Otter*, 26 F. Supp. 3d 1014, 1019 (D. Idaho 2014) (granting a permanent injunction protecting tents), and *Occupy Bos. v. City of Boston*, No. SUCV201104152G, 2011 WL 7460294, at \*4 (Mass. Super. Ct. Nov. 17, 2011) (granting a TRO protecting sleeping in the tents), with *Occupy Sacramento*, 878 F. Supp. 2d at 1124 (dismissing activists' request for a permanent injunction for failure to state a claim), and *Occupy Bos. v. City of Boston*, No. 11-4152-G, at 24 (Mass. Super. Ct. Dec. 7, 2011), <https://cbsboston.files.wordpress.com/2011/12/untitled.pdf> [<https://perma.cc/6MYE-P3M4>] (order denying preliminary injunction).

82. See *Occupy Nashville v. Haslam*, 949 F. Supp. 2d 777, 798–99 (M.D. Tenn. 2013), *rev'd*, 769 F.3d 434 (6th Cir. 2014); *Occupy Columbia v. Haley*, 866 F. Supp. 2d 545, 557 (D.S.C. 2011); *Occupy Fresno v. County of Fresno*, 835 F. Supp. 2d 849, 857 (E.D. Cal. 2011); *Freeman v. Morris*, No. 11-cv-00452-NT, 2011 WL 6139216, at \*5 (D. Me. Dec. 9, 2011), *amended* Dec. 12, 2011; *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 1069 (D. Minn. 2011); *Occupy Bos.*, 2011 WL 7460294, at \*2; *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011). In 2011, the Middle District of Florida was the first to make this determination. *Occupy Fort Myers*, 882 F. Supp. 2d at 1328.

83. Although overlap between the first two categories is ostensibly possible, no case fell into both.

84. See *infra* Section II.C.

85. “Cases that Flipped” refers to when injunctive relief was granted at the TRO stage but was not granted at the preliminary injunction stage. The title rests on the idea that the change in a merits assessment, implicit in the decisions due to the standard for injunctive relief and special features of First Amendment claims for such relief, constitutes a flip.

the preliminary injunction stage, and the Occupiers lost their previously granted injunctions. The tendency to flip from granting the relief to not granting the relief indicates that courts were more inclined to grant TROs than preliminary injunctions. For example, in cases in five different cities, the courts initially granted TROs and later rescinded the injunctions at the preliminary injunction hearings.<sup>86</sup> The cases suggest a pattern: on a nearly identical issue, it is easier to win on a TRO than it is to win on a preliminary injunction. Significantly, in the context of the cases that vindicated traditional First Amendment rights and the cases without relief granted, the pattern holds true. Including all the cases, there are five in which TROs were granted<sup>87</sup> and five in which TROs were denied.<sup>88</sup> By contrast, there is one case in which a preliminary injunction was granted,<sup>89</sup> and there are nine in which preliminary injunctions were denied.<sup>90</sup>

The legal standards for TROs and preliminary injunctions are identical for First Amendment purposes. The standards consider (1) the likelihood of success on the merits, (2) whether irreparable harm will result without the injunctive relief, (3) whether the balance of equities tips in the favor of injunctive relief, and (4) whether an injunction is in the public interest.<sup>91</sup> The distinctions between TROs and preliminary injunctions are procedural. Unlike a preliminary injunction, a TRO—which has a shorter duration than a

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86. In *Occupy Boston v. City of Boston*, a TRO was granted but relief was revoked a month later at the preliminary injunction hearing. No. 11-4152-G, at 2–3. In *Isbell v. City of Oklahoma City* and *Mitchell v. City of New Haven*, relief granted on TROs in 2011 ended when the Occupiers were denied preliminary injunctions. See *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 241, 254 (D. Conn. 2012); *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 WL 6152852, at \*1, \*10 (W.D. Okla. Dec. 12, 2011). Similarly, in *Occupy Columbia v. Haley* and *Occupy Nashville v. Haslam*, the courts granted TROs and preliminary injunctions but later reversed previously granted preliminary injunctions. See *Occupy Nashville v. Haslam*, 769 F.3d 434, 440 (6th Cir. 2014); *Occupy Columbia v. Haley*, 738 F.3d 107 (4th Cir. 2013); *Occupy Columbia v. Haley*, No. 3:11-cv-03253-CMC, 2011 WL 6698990, at \*7 (D.S.C. Dec. 22, 2011).

87. See *supra* sources cited note 86 (listing five cases granting a TRO).

88. See *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1114 (E.D. Cal. 2012); *Occupy Tucson v. City of Tucson*, No. CV-11-699-TUC-CKJ, 2011 WL 6747860 (D. Ariz. Dec. 22, 2011); *Occupy Fresno v. County of Fresno*, 835 F. Supp. 2d 849, 853 (E.D. Cal. 2011); *Davidovich v. City of San Diego*, No. 11cv2675 WQH-NLS, 2011 WL 6013010, at \*7 (S.D. Cal. Dec. 1 2011); *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 1069, 1071–72 (D. Minn. 2011).

89. *Occupy Columbia v. Haley*, 866 F. Supp. 2d 545, 563 (D.S.C. 2011). *Occupy Nashville* is the only other case to enter a Preliminary Injunction on a sleeping issue, but it was by agreement of the parties. *Occupy Nashville*, 769 F.3d at 440.

90. See *Mitchell*, 854 F. Supp. 2d at 254; *Watters v. Otter*, 854 F. Supp. 2d 823, 825–26 (D. Idaho 2012); *Occupy Columbia*, 2011 WL 6698990, at \*6; *Occupy Tucson*, 2011 WL 6747860 at \*8; *Occupy Fresno*, 835 F. Supp. 2d at 865–66; *Isbell*, 2011 WL 6152852, at \*10; *Freeman v. Morris*, No. 11-cv-00452-NT, 2011 WL 6139216, at \*12 (D. Me. Dec. 9, 2011), *amended* Dec. 12, 2011; *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1338–39 (M.D. Fla. 2011); *Occupy Bos.*, No. 11-4152-G, at 24.

91. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008); *Free Country Ltd. v. Drennen*, 235 F. Supp. 3d 559, 565 (S.D.N.Y. 2016).

preliminary injunction—is often heard *ex parte* and is often granted in advance of significant discovery.<sup>92</sup> Ostensibly, a preliminary injunction is more difficult to win primarily because of the increased attention to the claims that comes with the longer amount of time it would be in place, but this distinction is diminished in the First Amendment context.

The test for the two types of injunction is more likely to reach the same conclusion when there is a valid First Amendment claim. When a First Amendment right is at stake, “irreparable harm is ‘inseparably linked’ to the likelihood of success on the merits.”<sup>93</sup> This is because the denial of a constitutional right is automatically considered an irreparable harm.<sup>94</sup> The public interest factor also turns on the likelihood of success on the merits, “because it is always in the public interest to protect constitutional rights.”<sup>95</sup> Thus, in these cases, a determination on the likelihood of success on the merits should drive the choice to grant a TRO and a preliminary injunction alike.

Given that courts apply the same standard, the difference in outcomes between TROs and preliminary injunctions is difficult to reconcile. In reversing earlier TROs at the preliminary injunction stage,<sup>96</sup> courts did not report shifts in the merits of the First Amendment claim.<sup>97</sup> For example, in *Mitchell v. City of New Haven* (Occupy New Haven), the court denied the Occupiers’ motion for preliminary injunction on the merits.<sup>98</sup> The court acknowledged that the protesters were engaged in protected speech but found that the city’s rules were “constitutionally acceptable, content-neutral restrictions.”<sup>99</sup> The court did not indicate changes to the factual situation or

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92. *Free Country Ltd.*, 235 F. Supp. 3d. at 565; see FED. R. CIV. P. 65(a)–(b).

93. *Occupy Columbia*, 866 F. Supp. at 553 (quoting *WV Ass’n of Club Owners & Fraternal Servs. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009)); see also *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion) (“The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.”); *Mitchell*, 854 F. Supp. 2d at 245 (quoting *Elrod*, 427 U.S. at 373); *Isbell*, 2011 WL 6152852 at \*9 (quoting *Elrod*, 427 U.S. at 373); *Occupy Bos. v. City of Boston*, No. SUCV201104152G, 2011 WL 7460294, at \*3 (Mass. Super. Ct. Nov. 17, 2011) (quoting *Elrod*, 427 U.S. at 373).

94. *Phelps-Roper v. Nixon*, 545 F.3d 685, 690 (8th Cir. 2008).

95. *Id.*; *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 1067 (D. Minn. 2011); see M Devon Moore, Note, *The Preliminary Injunction Standard: Understanding the Public Interest Factor*, 117 MICH. L. REV. 939, 957 (“Unconstitutional government actions are an affront to the public interest and provide an imperative *in favor* of granting a preliminary injunction. This . . . is driven by the interrelatedness of the merits and public interest factors.” (footnote omitted)).

96. See *Mitchell*, 854 F. Supp. 2d at 241; *Isbell*, 2011 WL 6152852, at \*10; *Occupy Bos. v. City of Boston*, No. 11-4152-G, at 2–3 (Mass. Super. Ct. Dec. 7, 2011), <https://cbsboston.files.wordpress.com/2011/12/untitled.pdf> [<https://perma.cc/6MYE-P3M4>] (order denying preliminary injunction).

97. *Mitchell*, 854 F. Supp. 2d at 241; *Isbell*, 2011 WL 6152852, at \*7–9. *Occupy Boston* is an exception: in reversing, the court found that the protest no longer met the threshold for First Amendment protection. *Occupy Bos.*, No. 11-4152-G, at 13.

98. 854 F. Supp. 2d at 254.

99. *Mitchell*, 854 F. Supp. 2d at 246, 254.

how its assessment shifted, and there was no opinion accompanying the TRO.<sup>100</sup>

The flip between the TRO and preliminary injunction is similarly difficult to reconcile in *Isbell v. City of Oklahoma City*.<sup>101</sup> The logic of the *Isbell* (Occupy Oklahoma City) opinion is muddled.<sup>102</sup> The court acknowledged that a protected First Amendment right was at stake.<sup>103</sup> It remarked that “[i]t is well-settled that ‘loss of First Amendment freedoms for even minimal periods of time, unquestionably constitutes irreparable injury.’”<sup>104</sup> Yet, it concluded that “[p]laintiffs have failed to make a sufficient showing of irreparable injury.”<sup>105</sup>

In *Occupy Columbia v. Haley*, the court flipped its ruling on a preliminary injunction after the city formally implemented new regulations.<sup>106</sup> In the two temporary injunction hearings, the court considered regulations that were created in direct response to the Occupy movement. At the TRO stage and the first preliminary injunction hearing, the court deemed the regulations content based as a result of that origin.<sup>107</sup> But the formally implemented regulations considered at the second preliminary injunction hearing were valid as TPM restrictions that served an important government interest.<sup>108</sup> In other words, the court implicitly found that the formal regulations were content neutral, straying from its earlier determination.<sup>109</sup>

Similarly, the court in *Occupy Nashville v. Haslam* granted injunctive relief at the TRO stage and later found the new regulations valid.<sup>110</sup> There, new regulations did not exist until after the TRO was granted.<sup>111</sup> Although Occupiers did not contest the new regulations, the court retrospectively discussed the First Amendment claims, making the case instructive. To the court, the city had viable options to prevent the Occupiers from sleeping in the encampment overnight after the TRO was granted and before it enacted the

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100. *Id.*

101. 2011 WL 6152852.

102. *Isbell*, 2011 WL 6152852, at \*9.

103. *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 WL 6016906, at \*2 (W.D. Okla. Dec. 2, 2011) (“Plaintiffs have raised substantial questions about whether a violation of First Amendment rights can be shown.”).

104. *Id.* (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)).

105. *Isbell*, 2011 WL 6152852, at \*9.

106. *See* No. 3:11-cv-03253-CMC, 2011 WL 6698990, at \*7 (D.S.C. Dec. 22, 2011) (refusing to extend the preliminary injunction to the new regulations).

107. *See* *Occupy Columbia v. Haley*, 866 F. Supp. 2d 545, 561 (D.S.C. 2011).

108. *Occupy Columbia*, 2011 WL 6698990, at \*7.

109. *See id.* (providing the cursory explanation of a similarity to *Clark*).

110. *See* 949 F. Supp. 2d 777, 784–85, 790 (M.D. Tenn. 2013), *rev’d*, 769 F.3d 434 (6th Cir. 2014).

111. *Occupy Nashville*, 949 F. Supp. 2d at 784–85.

new rules.<sup>112</sup> Thus, *Occupy Nashville* exhibits the same shift as the other cases that flipped.<sup>113</sup>

### B. Cases that Vindicated Traditional First Amendment Rights

Many of the Occupy cases considered injunctive relief allowing sleeping—on a theory that it is protected as expressive conduct—alongside requests for relief for other First Amendment infringements.<sup>114</sup> Some courts vindicated more traditional First Amendment rights, including speech activities like parading<sup>115</sup> and handing out leaflets. For example, the court in *Occupy Minneapolis v. County of Hennepin* determined that a TRO was inappropriate to protect the tent city, the protesters' interest in sleeping at the encampment overnight, and the protesters' interest in writing with chalk on the plaza.<sup>116</sup> Instead, the court granted a TRO to protect protesters' interest in using signage.<sup>117</sup> In *Occupy Fort Myers*, the court declined to protect protesters' interest in sleeping, protesting for twenty-four hours, or maintaining their tent city;<sup>118</sup> however, the court enjoined enforcement of a permitting preference that favored "civil events."<sup>119</sup> The court in *Occupy Fresno v. County of Fresno* considered and denied preliminary injunctions for sleeping and staying in the park overnight but granted a preliminary injunction to protect the distribution of handbills.<sup>120</sup> In *Watters v. Otter* (Occupy Boise), protesters' interests in writing with chalk and sleeping at the park were not protected, yet the court eliminated a permitting provision that gave preference to state-sponsored events.<sup>121</sup>

112. *Id.* at 800.

113. See *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 241, 254 (D. Conn. 2012) (denying a preliminary injunction protecting the tent city after having granted a TRO); *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 WL 6152852, at \*1, \*10 (W.D. Okla. Dec. 12, 2011) (same); *Occupy Bos. v. City of Boston*, No. 11-4152-G, at 2-3 (Mass. Super. Ct. Dec. 7, 2011), <https://cbsboston.files.wordpress.com/2011/12/untitled.pdf> [<https://perma.cc/6MYE-P3M4>] (order denying preliminary injunction); *supra* text accompanying notes 106-109.

114. See *Watters v. Otter*, 854 F. Supp. 2d 823, 831 (D. Idaho 2012); *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 1069 (D. Minn. 2011); *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1328 (M.D. Fla. 2011).

115. Although the Supreme Court called parading the "most pristine and classical form" of First Amendment rights, the Court has also called it "mob law." Magid, *supra* note 33, at 475.

116. 866 F. Supp. 2d at 1070-71.

117. *Occupy Minneapolis*, 866 F. Supp. 2d at 1070, 1072.

118. *Occupy Fort Myers*, 882 F. Supp. 2d at 1331-32, 1334-36.

119. The court also enjoined parading, due to extraneous circumstances. *Id.* at 1332-36.

120. 835 F. Supp. 2d 849, 863-67, 870 (E.D. Cal. 2011).

121. *Watters v. Otter*, 26 F. Supp. 3d 1014, 1019 (D. Idaho 2014); *Watters v. Otter*, 986 F. Supp. 2d 1162, 1176 (D. Idaho 2013). *Watters* had the best outcome for protesters. The court entered a permanent injunction that protected the encampment and allowed protestors to remain there for twenty-four hours (but not to sleep in the encampment). *Watters*, 26 F. Supp. 3d at 1018-19.

This category of cases illustrates a huge variation in how courts determine whether a regulation is content based. The standards appear even more diverse across the Occupy movement.<sup>122</sup> Except for *Occupy Fresno*,<sup>123</sup> each court produced conclusions about whether the restriction on each *activity*, or sub-issue, was content based, rather than determining if the regulation overall was content based.<sup>124</sup> Injunctive relief turned on whether the regulation of a particular activity was content neutral. Relief was denied if the sub-issue regulation was content neutral; relief was granted if it was content based.<sup>125</sup> This was not true for the other categories of cases, where the content determination did not vary by speech activity sub-issues or procedural stages.<sup>126</sup>

In *Occupy Minneapolis*, the ban on signage was deemed content based because it only allowed display of state-endorsed signs, implying preferential treatment for endorsed content.<sup>127</sup> The court's standard looked only to the terms of the ordinance.<sup>128</sup> Since a government official administering the regulation "must 'examine the content of . . . signs to determine whether the

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122. In some cases, the court did not ask if the regulation was content based or content neutral. See, e.g., *Occupy Nashville v. Haslam*, 949 F. Supp. 2d 777 (M.D. Tenn. 2013); *Occupy Bos. v. City of Boston*, No. SUCV201104152G, 2011 WL 7460294 (Mass. Super Ct. Nov. 17, 2011). In *Mitchell v. City of New Haven*, the court assessed enforcement of the regulation in practice to determine if it was content based. 854 F. Supp. 2d 238, 251 (D. Conn. 2012). In *Occupy Eugene v. United States General Services Administration*, the court found the regulation content neutral, despite the fact that the regulation overtly stated its purpose was to enable removal of Occupiers. 43 F. Supp. 3d 1143, 1150 (D. Or. 2014).

123. See *Occupy Fresno*, 835 F. Supp. 2d at 857–58.

124. *Watters*, 986 F. Supp. 2d at 1177; *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 1071 (D. Minn. 2011); *Occupy Fort Myers*, 882 F. Supp. 2d at 1335.

125. See *Watters v. Otter*, 854 F. Supp. 2d 823 (D. Idaho 2012) (finding Boise's anti-sleeping ban content neutral but its anti-tent and protester removal policies content based); *Occupy Minneapolis*, 866 F. Supp. 2d at 1070–71 (finding regulations that ban signs content based but anti-camping rules and anti-chalking rules content neutral); *Occupy Fort Myers*, 882 F. Supp. 2d at 1335 (finding the permitting regulations content based).

126. No other set of cases varies in its determinations about content targeting according to the type of activity regulated (sub-issue). No other cases vary in between, for example, the TRO and preliminary injunction hearings (procedural stage). See *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1118 (E.D. Cal. 2012) (finding regulations as a whole content neutral); *Mitchell*, 854 F. Supp. 2d at 245; *Occupy Tucson v. City of Tucson*, No. CV-11-699-TUC-CKJ, 2011 WL 6747860, at \*7–8 (D. Ariz. Dec. 22, 2011) (finding the permit provision content-neutral); *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 WL 6152852, at \*8 (W.D. Okla. Dec. 12, 2011) (finding curfew enforcement and the camping ban content-neutral); *Davidovich v. City of San Diego*, No. 11cv2675 WQH-NLS, 2011 WL 6013010, (S.D. Cal. Dec. 1, 2011) (providing a broad treatment of the regulations as a whole). But see *Occupy Columbia v. Haley*, 922 F. Supp. 2d 524, 528–30 (D.S.C. 2013) (discussing the change in views on content neutrality between the first and second preliminary injunction orders).

127. *Occupy Minneapolis*, 866 F. Supp. 2d at 1071.

128. *Id.*

[Resolution] applies,' ” it is content based.<sup>129</sup> Here, the terms of the ordinance included consideration for the implied terms that administering the rule as written involved.<sup>130</sup>

Similarly, in *Occupy Fort Myers*, the preference provided to civic events on the plaza was deemed content based because it “require[d] the recreation manager to examine the nature of the activity in making a decision to extend park hours.”<sup>131</sup> The court applied an “on the terms of the regulation” standard.<sup>132</sup> Much like in *Occupy Minneapolis*,<sup>133</sup> the court applied the standard loosely.<sup>134</sup> The same standard used elsewhere can mean a textual approach that requires the statute to directly limit the advancement of specific ideas to find content targeting.<sup>135</sup>

In *Watters v. Otter* (*Occupy Boise*), the court found that the anti-camping ordinance was content based.<sup>136</sup> The ordinance was not formally enacted, and it was unenforced before *Occupy*.<sup>137</sup> The court inferred selective enforcement, finding that the informal rule was only ever enforced against *Occupy*.<sup>138</sup> The city implemented formal rules after the TRO hearing and before the preliminary injunction hearing.<sup>139</sup> The same court assessed the unwritten rules and later the formal rule. Yet after rules were formally implemented in response to the court’s TRO decision, the court found the formal rules content neutral.<sup>140</sup> On review, the district court articulated criteria different from those in its TRO decision. It deemed regulation content based if it described speech content on its face, distinguished favored speech from disfavored, or required law enforcement to examine the content of the message.<sup>141</sup> This rationale abandoned the key criterion that drove the prior

129. *Id.* (quoting *Desert Outdoor Advert., Inc. v. City of Moreno Valley*, 103 F.3d 814 (9th Cir. 1996)).

130. *Id.* The case has another inconsistency. For the anti-sleeping ordinance, since “[t]he Court [could not] perceive a reason not to apply *Clark*,” it concluded the regulation was valid, implying a finding of content neutrality without assessing the terms of the anti-sleeping statute. *Id.*

131. *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1335 (M.D. Fla. 2011).

132. *Id.*

133. *See supra* notes 127–130 and accompanying text.

134. *Compare* *Occupy Eugene v. U.S. Gen. Servs. Admin.*, 43 F. Supp. 3d 1143, 1149 (D. Or. 2014) (considering *overt* appearance of *political* ideas only), *with* *Occupy Fort Myers*, 882 F. Supp. 2d at 1335 (considering implications of the facial text).

135. *See, e.g., Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 251 (D. Conn. 2012).

136. 854 F. Supp. 2d 823, 825 (D. Idaho 2012).

137. *Watters*, 854 F. Supp. 2d at 826.

138. *Id.* at 829.

139. *Watters v. Otter*, 986 F. Supp. 2d 1162, 1170 (D. Idaho 2013).

140. *Watters v. Otter*, 955 F. Supp. 2d 1178, 1187 (D. Idaho 2013).

141. *See id.*

decision: it no longer recognized explicit targeting of the Occupy movement as a sufficient reason to find the regulations content based.<sup>142</sup>

The cases that vindicated other First Amendment rights reflect uneven adjudication of whether or not the regulation was content based. The courts applied standards inconsistently, which is made evident not only by comparing the different standards but also by contrasting the internal logic of the same court at different procedural stages. This demonstrates that the test for content targeting may be vulnerable to unintentional manipulation, altering the level of scrutiny required for governmental regulations.

### C. Cases Without Relief Granted

In the Occupy cases without relief granted, no form of relief was granted whatsoever at any stage of the proceedings. This category of cases similarly displays the previously discussed trends—but in these cases the courts quickly dismissed the First Amendment claim. The courts all either applied a content-neutral frame<sup>143</sup> or did not make any content-targeting determination.<sup>144</sup>

In some cases, courts articulated a circular rationale. Injunctive relief was not justified because injunctions should only maintain the status quo, and the ordinance enforcement established the status quo. Thus, the courts dismissed the cases based on either the plaintiffs' failure to plead the status quo or the fact that the ordinance was enforced prior to Occupy.<sup>145</sup> The quick dismissal of claims is most evident in *Occupy Sacramento v. Sacramento* and *Occupy Pensacola v. City of Pensacola*.<sup>146</sup> In both, the cities won on motions to dismiss for failure to state a claim.<sup>147</sup>

All of the cases in this category took place in cities with relatively high populations of houseless people, anti-sleeping laws, and regular enforcement of those laws before Occupy started.<sup>148</sup> Thus, courts upheld these ordinances without hesitation because formal regulations excluding houseless people were already a frequently enforced part of the criminal law, despite conflict with recognized First Amendment interests. Furthermore, on average, these cases commenced long after the cases in the other categories, often after they

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142. See *id.* at 1186–87.

143. See, e.g., *Davidovich v. City of San Diego*, No. 11cv2675 WQH-NLS, 2011 WL 6013010, at \*4 (S.D. Cal. Dec. 1, 2011).

144. See, e.g., *Occupy Tucson v. City of Tucson*, No. CV-11-699-TUC-CKJ, 2011 WL 6747860, at \*7–8 (D. Ariz. Dec. 22, 2011).

145. See, e.g., *id.* at \*7.

146. *Occupy Pensacola v. City of Pensacola*, 569 F. App'x 745, 752 (11th Cir. 2014); *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110 (E.D. Cal. 2012).

147. *Occupy Pensacola*, 569 F. App'x at 753; *Occupy Sacramento*, 878 F.2d 1110.

148. See U.S. DEPT. OF HOUS. & URBAN DEV., 2011 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS 8–9, 16 (2012).

had TRO and preliminary injunction hearings.<sup>149</sup> These cases are in stark contrast to the sleeping claims in the cases that flipped, where the TRO hearings took place when the encampments were newly set up.<sup>150</sup> Accordingly, the cases illustrate a negative correlation between success gaining injunctive relief and the amount of time the protests were on the ground.

The Occupy cases demonstrate odd trends in judicial enforcement. The cases that flipped reveal a preference for TRO claims over preliminary injunctions and suggest the eroding willingness of courts to find likelihood of success on the merits over time. In addition, the cases that validated traditional First Amendment protesters' claims illustrate judicial disapproval of expressive sleeping activity. As this Comment illustrates in Part III, the presence of visual signs of houselessness at the protests may better explain these trends.

### III. EXCLUDING ACCESSIBLE SPEECH

Judicial interest in policing the aesthetics of public space is a viable explanation for the pattern of enforcement identified in Part II. Section III.A reexamines the Occupy decisions and suggests that policing the appearance of houselessness is an alternative explanation for the pattern of judicial enforcement. Section III.B explains the harm involved in policing aesthetics where speech content is also implicated.

#### A. *Judicial Enforcement and Aesthetic Policing*

The blending of broken windows laws and the First Amendment provides a compelling explanation for what may have animated the pattern of judicial enforcement. This has sinister implications: it suggests the further rollback of rights for people without resources, this time in the arena of expression. Courts did not adequately explain why some cases flipped, winning TROs but not preliminary injunctions.<sup>151</sup> Government policing of aesthetics provides a persuasive alternative explanation for the change in outcomes. In each case, the visual disorder in the encampments increased between the TRO and preliminary injunction stages. Such visual disorder is commonly associated with houselessness.<sup>152</sup>

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149. Compare *Occupy Pensacola*, 569 F. App'x at 746–47, with *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1323 (M.D. Fla. 2011).

150. Compare *Occupy Pensacola*, 569 F. App'x at 747, with *Occupy Fort Myers*, 882 F. Supp. 2d at 1324–25.

151. See *supra* Section II.A.

152. Compare *Occupy Nashville v. Haslam*, 949 F. Supp. 2d 777, 786–87, 800 (M.D. Tenn. 2013) (describing “urinating and defecating” around the encampment and interactions between houseless persons and protesters), and *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 WL 6152852, at \*6 (W.D. Okla. Dec. 12, 2011) (describing “deteriorating conditions and a stench” in the protest space), with *Tobe v. City of Santa Ana*, 892 P.2d 1145, 1151–52 (Cal. 1995) (detailing actions by the city to remove a tent city of houseless persons).

In *Occupy Boston v. City of Boston* and *Occupy Columbia*, the protests grew larger over time.<sup>153</sup> Interestingly, there was also a change in tone when the judges discussed the situations at the respective camps. In granting each TRO, the judges noted mitigating factors, describing protesters and their camps as well kept.<sup>154</sup> For example, the *Occupy Boston* court noted that “participants [had] worked with the Boston Fire Marshal to ensure that the structure of the occupation [met] fire regulations.”<sup>155</sup> Similarly, in *Occupy Columbia*, the court noted that protesters “work[ed] with the horticulturist who maintain[ed] the grounds to minimize [the protest’s] impact on the lawn.”<sup>156</sup> In contrast, the decisions denying the preliminary injunctions painted a picture of disorderly camps. The *Occupy Boston* court began by emphasizing that occupation is not speech as a matter of law.<sup>157</sup> The protest had always included the claim that its message “can only be effectively communicated through the ‘literal occupation of Boston.’”<sup>158</sup> The court described the visual appearance of the encampment at length, in disapproving terms: “[T]ents are set cheek-to-jowl with stakes, guy ropes, and space only for three walkways.”<sup>159</sup> It also proclaimed that “[t]he density of people occupying one-quarter acre of land is extraordinary.”<sup>160</sup>

In *Occupy Columbia*, the governor became involved because she was concerned about the aesthetic damage of the protest group appearing alongside her holiday tree-lighting ceremony.<sup>161</sup> Although the court did not view the tree-lighting ceremony as a valid reason to remove the group,<sup>162</sup> it did allow the state to justify removing protesters because of worries about “crime” and public health.<sup>163</sup>

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153. See *Occupy Bos. v. City of Boston*, No. 11-4152-G, at 4 (Mass. Super. Ct. Dec. 7, 2011), <https://cbsboston.files.wordpress.com/2011/12/untitled.pdf> [<https://perma.cc/6MYE-P3M4>] (“More tents and protesters have joined the group.”); Brian McConchie, *Occupy Demonstrators Arrested at State House*, WACH FOX57 (Nov. 16, 2011, 8:41 PM), <https://wach.com/news/local/occupy-demonstrators-arrested-at-state-house> [<https://perma.cc/QS6M-PK4V>] (“The group has been rallying at the State House since October 15, usually in crowds of several dozen.”).

154. *Occupy Columbia v. Haley*, 866 F. Supp. 2d 545, 549 (D.S.C. 2011); *Occupy Bos. v. City of Boston*, No. SUCV201104152G, 2011 WL 7460294, at \*4 (Mass. Super. Ct. Nov. 17, 2011).

155. *Occupy Bos.*, 2011 WL 7460294, at \*4.

156. *Occupy Columbia*, 866 F. Supp. 2d at 549.

157. *Occupy Bos.*, No. 11-4152-G, at 2.

158. *Id.* at 11.

159. *Id.* at 5.

160. *Id.* at 6.

161. See *Occupy Columbia v. Haley*, 922 F. Supp. 2d 524, 527–28 (D.S.C. 2013). The governor took action only after receiving a letter from a state senator noting that the protest would make the tree lighting less “pleasant.” That same day, the governor ordered the protesters removed. In an open letter, she noted damage to the statehouse property. *Id.*

162. *Id.* at 535.

163. *Occupy Columbia v. Haley*, No. 3:11-cv-03253-CMC, 2011 WL 6698990, at \*5–6 (D.S.C. Dec. 22, 2011).

In *Isbell* (Occupy Oklahoma City) and *Occupy Nashville*, the increase in houseless participation is essential to understanding why the courts did not grant preliminary injunctions.<sup>164</sup> Unlike the situations in Boston and Columbia, in Oklahoma City,<sup>165</sup> the number of protesters decreased over time.<sup>166</sup> At the preliminary injunction stage,<sup>167</sup> unoccupied tents were described as “an open invitation for homeless persons unaffiliated with the group.”<sup>168</sup> The court described the people remaining as “mainly transients or others who were causing disturbances and safety issues.”<sup>169</sup> This highlights a key assumption: that houselessness and protesting were mutually exclusive. The city bluntly worried that the camp had become “aesthetically damaging,” and the court validated that view.<sup>170</sup> Professor Marc L. Roark contends that the visual representation of Occupy Oklahoma City’s message was “condoned and accepted so long as they were not actually representative of poor and homeless people, but rather were merely symbolic.”<sup>171</sup> That is, the speech was only legitimate when it was done *on behalf of* houseless people, and it lost legitimacy once the houseless people themselves participated.

As in Oklahoma City, the judge in *Occupy Nashville* was uncomfortable with the number of houseless people in the plaza.<sup>172</sup> The judge attributed negative features of the protest to the houseless people alone, quoting extensively in the opinion to the plaza’s Facilities Administrator, who stated that “protesters have lost control of the situation with the homeless and the environment has become unsanitary and unsafe.”<sup>173</sup> Under this view, the presence of the houseless people delegitimized the expressive activity and transformed the entire group into a public nuisance.<sup>174</sup> After houseless people began to utilize the camp as a living space, the encampment was removed.<sup>175</sup>

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164. See *Occupy Nashville v. Haslam*, 949 F. Supp. 2d 777, 786 (M.D. Tenn. 2013); *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 WL 6152852, at \*6 (W.D. Okla. Dec. 12, 2011); Roark, *supra* note 18, at 61–63.

165. See also *supra* note 153 and accompanying text.

166. *Isbell*, 2011 WL 6152852, at \*6 (“[T]he number of protestors dwindled . . .”).

167. The same judge issued the divergent rulings at the TRO and preliminary injunction stages. See *Isbell*, 2011 WL 6152852, at \*1; *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 WL 6016906, at \*1 (W.D. Okla. Dec. 2, 2011).

168. *Isbell*, 2011 WL 6152852, at \*6.

169. The court attributes this view to the protester who previously held the protest permit. *Id.*

170. *Id.* at \*6, \*8.

171. Roark, *supra* note 18, at 62.

172. *Occupy Nashville v. Haslam*, 949 F. Supp. 2d 777, 786–87 (M.D. Tenn. 2013), *rev’d*, 769 F.3d 434 (6th Cir. 2014).

173. *Id.* at 787.

174. See Roark, *supra* note 18, at 62.

175. See Tim Ghianni, *Police Arrest 29 Occupy Nashville Protesters at Capitol Plaza*, REUTERS (Oct. 28, 2011, 12:31 PM), <https://www.reuters.com/article/us-tennessee-occupy->

More information about the context of *Occupy Nashville* demonstrates a connection between the use of anti-sleeping ordinances to remove houseless people and the removal of Occupy protesters.<sup>176</sup> One year before the start of Occupy, the governor urged the Department of Government Services to create a regulation to diminish the number of houseless people sleeping at the plaza overnight.<sup>177</sup> By the time the protest started, the anti-sleeping rules were not yet enacted. Therefore, the regulations that made it impossible for Occupy to continue were designed to target houseless people from the start. In the *Occupy Nashville* opinion, the court stated that “[s]omething needed to be done to preserve the physical integrity of the Plaza, to reduce or eliminate crime taking place there.”<sup>178</sup> The court’s reasoning bears an uncanny resemblance to broken windows theory.<sup>179</sup> The Nashville judge viewed the appearance of the protest as a blemish on an otherwise orderly space and thought the disorder created a potential site for criminal activity.<sup>180</sup>

Commenting on Occupy Nashville, Professor Roark explained an irony: “[T]he identity of the occupy group shifted from protester to public nuisance. Thus, the occupants of the Plaza were aligned with the negative features of vandalism, public urination, indecent exposure, and the like through the import of a new rule and a broader collective judgment on the space.”<sup>181</sup> He suggests that it was not just the existence of the houseless people, who were there all along, but that fact combined with the promulgation of new anti-camping rules that drove the change.<sup>182</sup> The new rules codified that it is criminal to sleep in the park. In so doing, they affirmed that the people sleeping in the park were not stakeholders engaged in valid park use but were the criminal “other.”<sup>183</sup> Thus, the new rules created a legal hook for many, including the judge who adjudicated the case, to vindicate the existing goal of diminishing the appearance of houselessness in public.<sup>184</sup>

*Mitchell* (Occupy New Haven) is difficult to assess because the TRO did not have an associated opinion.<sup>185</sup> The opinion denying the preliminary injunction voiced a crucial concern.<sup>186</sup> The court lamented, “[t]here is some-

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arrests/police-arrest-29-occupy-nashville-protesters-at-capitol-plaza-idUSTRE79R4FU20111028 [https://perma.cc/X6V7-WTY8].

176. *Occupy Nashville*, 949 F. Supp. 2d at 786–88.

177. *Id.* at 786.

178. *Id.* at 800.

179. *See supra* Section I.A.

180. *Compare Occupy Nashville*, 949 F. Supp. 2d at 800, with Amster, *supra* note 21, at 200 (“For at least six centuries, homelessness has been associated with ‘disorder’ and ‘criminality’ . . .”).

181. Roark, *supra* note 18, at 62.

182. *Id.* at 62, 74.

183. *See id.*

184. *See id.* at 61–62, 66, 73–80.

185. *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238 (D. Conn. 2012).

186. *Id.* at 253.

thing unsatisfying about telling a movement that aims to make visible an often unseen, ignored population that it should content itself with forms of communication that are only seen when someone seeks them out.”<sup>187</sup> It touched on the central oddity in all cases that flipped. The courts previously acknowledged the expressive value of sleeping but later removed protection, unanimously citing interest in maintaining the aesthetics of the parks as an important governmental interest.<sup>188</sup> Thus, they saw the speech’s value but were uncomfortable with the conduct’s visual impact.<sup>189</sup>

The decisions in the cases that flipped replicated the underlying policy goals of the criminal exclusion of houseless people in the First Amendment context. In the Occupy cases, dehumanizing houseless people also denied several rights not ordinarily at stake with anti-sleeping laws.<sup>190</sup> Houseless people were participating in recognized First Amendment protected speech, and the injunction hearings turned on the likelihood of success on the merits of the First Amendment claim. The determination that the restriction on speech was valid—despite treading on individual free speech rights—was based on aesthetic interests. Accordingly, the choice not to protect protesters embedded a value judgment based on what the protesters and their space looked like. The same population that was targeted for exclusion from using public space was silenced. This is a high price to pay to protect a governmental interest in uninterrupted lawn care.<sup>191</sup>

The second category of cases, cases that vindicated traditional First Amendment rights, also featured an odd pattern. Those cases may be explained by courts’ discomfort with expression perceived to have a lasting disorderly impact and courts’ comfort in vindicating nonvisual, evanescent forms of communication. Unsuccessful claims correlate with the content-neutral determinations assigned to activities that left a lasting visual impact on the space. In contrast, successful claims correlate almost exclusively with content-based determinations awarded to activities that did not leave a lasting visual impact on the space.<sup>192</sup> The pattern likely served to reinforce the validity of the exclusion of houseless people from public spaces.

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187. *Id.*

188. See *Occupy Columbia v. Haley*, 738 F.3d 107, 114 n.4 (4th Cir. 2013); *Occupy Nashville v. Haslam*, 949 F. Supp. 2d 777, 800 (M.D. Tenn. 2013); *Mitchell*, 854 F. Supp. 2d at 250; *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 WL 6152852, at \*6 (W.D. Okla. Dec. 12, 2011); *Occupy Bos. v. City of Boston*, No. 11-4152-G, at 5, 18–19 (Mass. Super. Ct. Dec. 7, 2011), <https://cbsboston.files.wordpress.com/2011/12/untitled.pdf> [<https://perma.cc/6MYE-P3M4>] (order denying preliminary injunction).

189. See, e.g., *Occupy Bos.*, No. 11-4152-G, at 5, 18–19.

190. See, e.g., *supra* text accompanying notes 176–178.

191. See, e.g., *Watters v. Otter*, 986 F. Supp. 2d 1162, 1175 (D. Idaho 2013) (validating the state’s justification of lawn care for removing the Occupy Boise encampment); see also Timothy Zick, *Space, Place, and Speech: The Expressive Topography*, 74 GEO. WASH. L. REV. 439, 475 (2006) (detailing New York City’s attempt to prohibit protests in Central Park due to lawn preservation).

192. See discussion *supra* Section II.B.

In *Watters* (Occupy Boise), *Occupy Fort Myers*, *Occupy Minneapolis*, and *Occupy Fresno*, the courts only protected speech with low visual impact. They protected displaying handheld signs, distributing handbills, and parading.<sup>193</sup> Unlike sleeping in tent encampments, which necessitated an ongoing and visible presence, the protected activities did not change the park's appearance.<sup>194</sup> The courts overtly discussed aesthetic interests. For example, the *Fresno* court credited the government's argument that the laws already in place "maintained[ed] Courthouse Park in aesthetically pleasing and sanitary conditions for the benefit of all park users."<sup>195</sup> The *Fresno* court likely drew a parallel between the format of the protest and the already infamous tent encampments,<sup>196</sup> commonly erected by houseless residents for survival and a familiar sight in Fresno long before Occupy began.<sup>197</sup> Crucially, classic forms of First Amendment speech interests—for example, a published writing, a speech, or a parade—leave only a subtle or fleeting visual.

Oddly, *Watters* (Occupy Boise) and *Occupy Minneapolis* both rejected protesters' interests in writing in chalk as a form of expression.<sup>198</sup> Chalk is not permanent; nonetheless, courts made clear that they viewed it as an activity with a high visual impact. *Watters* is paradigmatic of how the camps were associated with blight, due to the visual impact of speech. In *Watters*, the court explained that anti-chalking rules are valid TPM restrictions, because the government has a substantial interest in "controlling the aesthetic appearance" of its facilities.<sup>199</sup> It noted that aesthetic interest is also a legitimate reason to proscribe "unpleasant formats for expression."<sup>200</sup> Furthermore, it said that "the substantive evil—visual blight—is not merely a possible byproduct" but an inherent result of use of "the medium"—chalk.<sup>201</sup> The opinion makes a false equivalence between chalk and painted graffiti.

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193. *Watters*, 986 F. Supp. 2d at 1172; *Occupy Fresno v. County of Fresno*, 835 F. Supp. 2d 849, 869 (E.D. Cal. 2011); *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 1072 (D. Minn. 2011); *Occupy Fort Myers v. City of Fort Myers*, 882 F. Supp. 2d 1320, 1333–34 (M.D. Fla. 2011); see *supra* Section II.B.

194. See *Occupy Fresno*, 835 F. Supp. 2d at 864; see *supra* Section II.B.

195. *Occupy Fresno*, 835 F. Supp. 2d at 871.

196. See, e.g., Diana Marcum, *Occupy Fresno: More than 20 People Arrested over the Weekend*, L.A. TIMES: L.A. NOW (Nov. 7, 2011, 12:58 PM), <https://latimesblogs.latimes.com/lanow/2011/11/occupy-fresno-more-than-20-arrested.html> [<https://perma.cc/S8HS-WSTA>].

197. See *Occupy Fresno Stalls Clearing of Homeless Camp*, ASSOCIATED PRESS (Oct. 28, 2011, 12:17 AM), <http://www.mercurynews.com/2011/10/28/occupy-fresno-stalls-clearing-of-homeless-camp/> [<https://perma.cc/Z838-JXPT>].

198. *Watters*, 986 F. Supp. 2d at 1169; *Occupy Minneapolis*, 866 F. Supp. 2d at 1070. This was, of course, in addition to the rejection of sleeping interests. *Watters v. Otter*, 854 F. Supp. 2d 823, 831 (D. Idaho 2012); *Occupy Minneapolis*, 866 F. Supp. 2d at 1071.

199. *Watters*, 986 F. Supp. 2d at 1173.

200. *Id.* at 1174 (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)).

201. *Id.* (quoting *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984)).

Vilification of graffiti is common to broken windows policing,<sup>202</sup> which imagines vandalism as a symptom of untended property, threatening a breakdown of control.<sup>203</sup> The court stated that “even temporary blight” may be removed; accordingly, it made no difference that chalk washes away in the rain.<sup>204</sup> This presents an exaggerated account of the state’s aesthetic interests.

Professor Timothy Zick explains that leaving a mark on physical space, such as drawing in chalk, is communicative under a rubric of legal geography.<sup>205</sup> He uses the term “inscription” for the act of conveying an idea or experience by writing on the physical space, noting that restrictions on inscription “are often justified as necessary to prevent visual blight.”<sup>206</sup> Zick argues that it is essential to realize that restrictions on inscription “eliminate cheap and efficient methods of *writing* in spaces frequented by the public.”<sup>207</sup> Moreover, he alleges that restrictions on inscriptions “define not only norms of community aesthetics, but proper communicative methods as well.”<sup>208</sup>

The law is open to considerable discretion in deciding what is content neutral.<sup>209</sup> Alarming, governmental aesthetic controls in the guise of content-neutral restrictions engender less scrutiny.<sup>210</sup> The label obscures the cost to houseless persons’ speech. Thus, there is a high risk that courts’ unconscious manipulation of the content-targeting test replicates preexisting power relationships. By prioritizing an orderly aesthetic for public parks, courts pushed houseless, unsheltered people out of view, excluding them from expressive conduct protected by the First Amendment.

The final category of cases, those that were not granted any form of relief, also featured visually based considerations. These cases featured the same justification: the need to clear the protest from the space to make way for other uses.<sup>211</sup> For example, in *Davidovich v. City of San Diego* the court

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202. Jenny E. Carroll, *Graffiti, Speech, and Crime*, 103 MINN. L. REV. 1285, 1306 (2019). Much like public sleeping, “[g]raffiti is calculated in terms of the damage it causes and not in terms of the speech value it may contain.” *Cf. id.* at 1288. “Criminal law regulates graffiti as a property or nuisance offense. . . . [I]t signals a subdermal lawlessness that will lead to greater harm if left unchecked.” *Id.* at 1286.

203. See Amster, *supra* note 21, at 207.

204. *Watters*, 986 F. Supp. 2d at 1174.

205. See Zick, *supra* note 191, at 473–74. .

206. *Id.*

207. *Id.* at 474.

208. *Id.* at 475.

209. See, e.g., *Occupy Eugene v. U.S. Gen. Servs. Admin.*, 43 F. Supp. 3d 1143, 1150 (D. Or. 2014) (finding the regulation content neutral despite its stated purpose to remove the Occupy protesters).

210. See *supra* Section I.B.

211. *Occupy Sacramento v. City of Sacramento*, 878 F. Supp. 2d 1110, 1119–20 (E.D. Cal. 2012); *Occupy Tucson v. City of Tucson*, No. CV-11-699-TUC-CKJ, 2011 WL 6747860, at \*8 (D. Ariz. Dec. 22, 2011); *Freeman v. Morris*, No. 11-cv-00452-NT, 2011 WL 6139216, at \*12 (D. Me. Dec. 9, 2011), *amended* Dec. 22, 2011; *Davidovich v. City of San Diego*, No. 11cv2675 WQH-NLS, 2011 WL 6013010, at \*4 (S.D. Cal. Dec. 1, 2011).

explained that the municipal code that banned sleeping in the park “serve[d] significant government interests in . . . ensuring that the public space is free of obstructions and is available for the use and enjoyment of members of the public.”<sup>212</sup> This frequently provided justification is not unique to the cases without any relief granted.<sup>213</sup>

The court in *Freeman v. Morris* (Occupy Augusta) took the logic of making way for other uses one step further. The court explained that the protest could not remain because it would suppress the free speech of hypothetical future protests that would ostensibly be vying for the same space and unable to coexist.<sup>214</sup> This is problematic; it automatically placed the interests of hypothetical future groups over ongoing speech based only on the format the speech took.

The court in *Freeman* acted as though the movement was only performative and its form coincidental, parallel to the empty words used in filibustering.<sup>215</sup> The explicit purpose of a filibuster is the exclusion of other speech to force a particular conversation.<sup>216</sup> Occupy did aspire to transform the discussion around politics; however, its expression did not come at the cost of excluding other speech. More importantly, the conduct itself engaged in a political conversation. The form itself was full of meaning, unlike speech in a filibuster. The confusion was made possible by the content-neutral frame, used in all the cases without relief.<sup>217</sup> The threshold test that determines if the First Amendment applies “only helps determine whether the act is indeed expressive rather than merely functional.”<sup>218</sup> The next step in adjudication is a check for content targeting, which treats expressive conduct no differently from spoken or written words.<sup>219</sup> When the act, like sleeping, can be merely functional, it is likely that regulations of general application aimed at the act will also appear content neutral.<sup>220</sup>

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212. *Davidovich*, 2011 WL 6013010, at \*4.

213. See, e.g., *Occupy Fresno v. County of Fresno*, 835 F. Supp. 2d 849, 859 (E.D. Cal. 2011) (noting that the city has a substantial government interest in “regulating competing uses” of the public space at issue).

214. *Freeman*, 2011 WL 6139216, at \*12.

215. Compare *id.* at \*10, with Dana Milbank, *Ted Cruz’s Phony Obamacare Filibuster Was Really About . . . Ted Cruz*, WASH. POST (Sept. 25, 2013), [https://www.washingtonpost.com/opinions/ted-cruzs-phony-obamacare-filibuster-was-really-about--ted-cruz/2013/09/25/b8f273a8-2632-11e3-b3e9-d97fb087acd6\\_story.html](https://www.washingtonpost.com/opinions/ted-cruzs-phony-obamacare-filibuster-was-really-about--ted-cruz/2013/09/25/b8f273a8-2632-11e3-b3e9-d97fb087acd6_story.html) [https://perma.cc/9KYU-LY65].

216. *Filibuster and Cloture*, U.S. SENATE, [https://www.senate.gov/artandhistory/history/common/briefing/Filibuster\\_Clature.htm](https://www.senate.gov/artandhistory/history/common/briefing/Filibuster_Clature.htm) [https://perma.cc/SWX2-2B47] (“The term filibuster—from a Dutch word meaning ‘pirate’—became popular in the 1850s, when it was applied to efforts to hold the Senate floor in order to prevent a vote on a bill.”).

217. See *supra* notes 143–144 and accompanying text.

218. Magid, *supra* note 33, at 501.

219. *Id.* at 477, 501.

220. See *id.* at 484–85.

The purported justification that exclusion of houseless persons is necessary to make way for other public uses is also often advanced in broken windows campaigns to justify anti-sleeping rules.<sup>221</sup> The idea is that the law applies equally to unsheltered and sheltered persons.<sup>222</sup> But the rules transform public spaces into liminal areas that merely reinforce neighboring public property rights at the expense of unsheltered persons whom the regulations disenfranchise.<sup>223</sup> And there are additional repercussions in the realm of the First Amendment. The perceived visual disorder likely delegitimized the twenty-four-hour protest as a form of speech. Mark Bray, one of the founders of Occupy New York, explained this disparity in speech rights. In discussing negative media portrayals of the movement, he contended that “elites can go through the front door, while the back door is ‘designed for the poorer actors and the entrance fee is often paid for in (what could be labeled) the “dues of disorder.”’”<sup>224</sup> The same laws that disenfranchise people also disenfranchise speech about their interests.<sup>225</sup> The *Freeman* decision exemplifies this; the court reasoned that any other kind of speech that might take place in the future is more valuable than Occupy’s current speech due solely to the movement’s twenty-four-hour protest format.<sup>226</sup>

### B. *Silencing Houseless Speech*

The selective protection of First Amendment rights based on aesthetics is far from benign. There is an essential connection between the Occupy movement’s message and the unprotected conduct. The movement’s inclusion of houseless populations and its efforts to speak to issues related to indigence fused content and expressive conduct. Declining to protect Occupiers’ use of sleeping as expressive conduct fortified the systematic exclusion of speech by and about houseless people in public spaces.

The Occupy movement’s political message is relevant to issues of houselessness. The movement, designed as a nonhierarchical, consensus-based or-

221. See *supra* Section III.A.

222. See Amster, *supra* note 21, at 200 (“[U]nder the guise of universal applicability that plainly affect only the target community: ‘The law in its majestic equality forbids the rich as well as the poor to sleep under the bridges.’” (quoting Jeremy Waldron, Essay, *Homelessness and the Issue of Freedom*, 39 UCLA L. Rev. 295, 313 n.30 (1991) (translating ANATOLE FRANCE, LE LYS ROUGE 87 (1910)))).

223. See *id.* at 204–06.

224. MARK BRAY, TRANSLATING ANARCHY: THE ANARCHISM OF OCCUPY WALL STREET 22 (2013) (quoting Gadi Wolfsfeld, *Media, Protest, and Political Violence: A Transactional Analysis*, 127 JOURNALISM MONOGRAPHS 1, 8 (1991)).

225. Zick, *supra* note 191, at 475 (“[B]attles over access [to public space] tend to pit political and social elites against less-powerful residents who wish to retain . . . access to them.”).

226. See *Freeman v. Morris*, No. 11-cv-00452-NT, 2011 WL 6139216, at \*12 (D. Me. Dec. 9, 2011) (denying a preliminary injunction because “all comers” should have access to the space), *amended* Dec. 12, 2011.

ganization,<sup>227</sup> is multi-vocal.<sup>228</sup> An all-local-movements articulation of Occupy's goals would have aspired to address the failure of our representative government and the problem of income inequality.<sup>229</sup> Protesters involved in the First Amendment cases believed that the symbolic content of sleeping in the tent encampments made the connection between Occupy and houselessness issues overt.<sup>230</sup> For example, in *Mitchell* (Occupy New Haven), protesters explained that the encampment served as "a tangible reminder of the reality of homelessness and the hardship of poverty, facts often swept out of sight . . . in urban areas."<sup>231</sup>

Above symbolism, the Occupy protest format was designed to include indigent people. As Mark Bray explained, "'we don't have demands; we *are* the demand.' In other words [Occupy Wall Street] was embodying the world it desired."<sup>232</sup> This idea permeated the local Occupy groups involved in the First Amendment cases. For example, in *Occupy Boston* an Occupy advocate explained that "more perfect democracy can only be effectively communicated through the 'literal occupation' . . . [T]he occupation is the message."<sup>233</sup> Similarly, nearly all the other local Occupy groups articulated the goal of embodying a more egalitarian world.<sup>234</sup> The inclusion of all interested persons was not just a feature of the movement but also a core tenet of the content of the speech. The overlap in the conduct the movement sought to

227. NYC GEN. ASSEMBLY, STRUCTURE AND PROCESS GUIDE TO OWS 5, 8–9, <https://macc.nyc/img/assemblies/OWSstructure.pdf> [<https://perma.cc/586E-HSL3>].

228. See Anthony L. Fisher, *Occupy, 6 Years Later*, WEEK (Sept. 15, 2017), <https://theweek.com/articles/724178/occupy-6-years-later> [<https://perma.cc/QC2T-LEZM>].

229. See Sarah Leberstein & Anastasia Christman, *Occupy Our Occupations: Why "We Are the 99%" Resonates with Working People and What We Can Do to Fix the American Workplace*, 39 FORDHAM URB. L.J. 1073, 1104–05 (2012).

230. *Occupy Eugene v. U.S. Gen. Servs. Admin.*, 43 F. Supp. 3d 1143, 1146 (D. Or. 2014) ("[T]he group set up a tent to be used as a prop that would draw attention to the issue that homeless people did not have a place to legally sleep during the night."); *Isbell v. City of Oklahoma City*, No. CIV-11-1423-D, 2011 WL 6152852, at \*4 (W.D. Okla. Dec. 12, 2011) ("[L]iving in tents signifies poor and homeless people in a battle with Wall Street and government as a result of economic events, such as mortgage foreclosures and the financial crisis."); *Occupy Minneapolis v. County of Hennepin*, 866 F. Supp. 2d 1062, 1066 (D. Minn. 2011) ("[A] '24/7' presence at the Plazas is necessary to effectively communicate their message, such as the fact 'that the foreclosure crisis and homelessness are problems affecting millions of Americans.'" (quoting Complaint ¶ 22, *Occupy Minneapolis*, 866 F. Supp. 2d 1062 (No. 0:11-cv-03412), ECF No. 1)).

231. *Mitchell v. City of New Haven*, 854 F. Supp. 2d 238, 242 (D. Conn. 2012) (quoting Second Amended Complaint at 4, *Mitchell*, 854 F. Supp. 2d 238 (D. Conn. 2012) (No. 3:120cv-00370)).

232. BRAY, *supra* note 224, at 103 (footnote omitted) (quoting Swedish anarchist, People's Kitchen organizer, and Rutgers PhD student Stina Soderling).

233. *Occupy Bos. v. City of Boston*, No. 11-4152-G, at 11 (Mass. Super. Ct. Dec. 7, 2011), <https://cbsboston.files.wordpress.com/2011/12/untitled.pdf> [<https://perma.cc/6MYE-P3M4>] (order denying preliminary injunction).

234. See, e.g., *Occupy Columbia v. Haley*, 738 F.3d 107, 112 (4th Cir. 2013); *Occupy Eugene*, 43 F. Supp. 3d at 1146; *Isbell*, 2011 WL 6152852, at \*4.

protect and the content of its speech was not a lucky accident but the intentional marriage of action and plan.<sup>235</sup>

Unfortunately, the inclusion of houseless people also subjected each local movement to courts' inability to consider the bond between conduct and content.<sup>236</sup> Occupy's inclusive agenda drove the conduct-based speech. The courts recognized the speech, but the content-driven scrutiny determination could not account for conduct as content.<sup>237</sup>

In order to be visible and inclusive, the protests had only one option: the traditional public forum. Although public fora enjoy the most First Amendment protection, the same spaces are regulated by criminal law, which often criminalizes houseless persons.<sup>238</sup> The convergence of these two problems produced the ultimate failure of all Occupy First Amendment challenges and, troublingly, the exclusion of houseless persons' speech from public fora. As houseless, unsheltered people are likely in a position where the public forum is the only venue ostensibly available, the issue is significant.<sup>239</sup> Moreover, as the Occupy cases demonstrate, current jurisprudence weighs heavily against groups interested in speaking about issues related to houselessness.<sup>240</sup> The result is systemic failure to appropriately protect speech by and about houseless people.

Policing the content of speech based on the income or the appearance of the speaker is categorically unacceptable. The judicial system must treat symbolic speech carefully. Expressive conduct "has been called 'the poor man's printing press' because for many people without the power, prestige, and financial resources . . . action is the only way to effectively convey their views to a wide group of people."<sup>241</sup> Ironically, the Supreme Court created the content-targeting assessment to avoid the danger of message- and speaker-based bias.

#### CONCLUSION

This Comment has argued that the adjudication of expressive conduct in cases that challenged anti-sleeping ordinances raises concerns about the accessibility of expression. The Occupy movement cases that initially granted injunctive relief removed protections after an increase in visual indicia of houselessness. Other cases illustrated a preference for classic First Amendment rights, which left no trace in the public park, over the accessible speech interests in camping and sleeping. And when rules criminalizing houseless-

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235. Howard, *supra* note 40, at 475, 482–83 (2013); Kaste, *supra* note 9; Komlik, *supra* note 9.

236. See *supra* Section III.A.

237. See Magid, *supra* note 33, at 502–03; *supra* Section III.A.

238. See *supra* Section III.A.

239. See Roark, *supra* note 18, at 110–13.

240. See *supra* notes 223–226 and accompanying text.

241. Magid, *supra* note 33, at 471 (footnote omitted) (quoting Harry Kalven, Jr., *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 30).

ness were already well enforced, courts were most willing to swiftly dismiss First Amendment challenges. Together, the Occupy cases illustrated the systematic exclusion of conduct-based expression by and about houseless people.

There is a deep tension in the concept of removing houseless people to keep public spaces aesthetically pleasing for public use. Advocates of beauty at the cost of excluding houseless persons are often motivated by promoting property rights:<sup>242</sup> people with property adjacent to public spaces are the beneficiaries of the strict rules that impose exclusion.<sup>243</sup> Moreover, the government's interest is often aligned with tighter control over public spaces.<sup>244</sup> Against this backdrop, houseless people in public spaces are not invaders, but they are the "canary in the coalmine—the immediate victims of its colonization."<sup>245</sup> The Occupy movement's speech interests were aligned with accessibility. Despite the movement's name, Occupy may have been not the colonizer but the canary.

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242. See Amster, *supra* note 21, at 206, 208.

243. *Id.* at 206.

244. See Kevin Francis O'Neill, *Privatizing Public Forums to Eliminate Dissent*, 5 FIRST AMEND. L. REV. 201, 202–13 (2007).

245. Amster, *supra* note 21, at 206.

