OREGON

CIVIL RIGHTS

NEWSLETTER

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The Blurry Line Between Protesting and Occupying: What the Difference Means to Your Civil Rights

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One of the distinguishing freedoms in our American society is that we are allowed to gather, in a group, for the purpose of peaceful protest against any perceived harm. But the recent "Occupy" protests have provoked some emotional debate from both sides—even when everyone was seeking to preserve (and perhaps enhance) the civil rights of the protesters and the community at large. Major questions involve the differences between lawful protest and civil disobedience, and how the Constitution's protections differ for each, as well as the government's right to restrict speech, conduct, and assembly while preserving individuals' First Amendment rights.

Protests Are Protected (But Some Restrictions Apply)

The First Amendment to the United States Constitution guarantees the right to assemble and engage in peaceful protest in what have become known as "traditional public forums," such as streets, sidewalks, and parks. The Supreme Court has upheld certain restrictions on the "time, place, and manner" of the speech; the restrictions must be reasonable, not based on content, and narrowly tailored to protect permissible public interests (such as safety). *See Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37 (1983). By imposing acceptable restrictions, a city, county, or municipality has the power to balance the civil rights of its general populace with the individual rights of the protesters.

For example, people conducting large, organized marches down city streets that will likely disrupt or stop traffic may be required to first obtain a permit, a restriction that has been upheld by courts as long as it is uniformly required of all large marches regardless of their purpose. In contrast, a small group that stays on public sidewalks and obeys all traffic signals is usually allowed to march without a permit, because such a group does not raise serious safety concerns or interfere with or threaten the general public's right to use the roads.

Similarly, if a group intends to use public facilities or amplified sound, courts will likely uphold a permit requirement, but protesters may use the "call and repeat" method to vocally protest without a permit. Protestors generally have the right to distribute literature, hold signs, drum, dance, sing, chant, and collect petition signatures and donations while on sidewalks or in front of government buildings as long as they are not disrupting traffic, harassing or forcing passersby to accept leaflets, or otherwise blocking public thoroughfares.

The First Amendment does not protect speech combined with conduct that violates established laws, such as trespassing or disobeying or interfering with a police officer's lawful order. A speaker can be arrested if he or she advocates imminent violence or panic, *Schenck v. United States,* 249 U.S. 47 (1919) (illegal to yell fire in a crowded theatre); specifically provokes people to commit unlawful actions, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) ("fighting words" not protected); makes malicious statements about public officials, *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); is obscene or lewd (in speech or conduct), *Miller v. California*, 413 U.S. 15 (1973); or uses speech constituting "hate speech," that is, vitriolic speech related to a protected characteristic, *R.A.V. v. St. Paul*, 505 U.S. 377 (1992).

Furthermore, an individual generally does not enjoy greater protection to engage in free speech activity than a private property owner is protected in exercising his or her property rights. Protestors do not have the right to protest on private property without the consent of the property owner, because constitutional protections apply only to situations involving "state action." *Hudgens v. NLRB*, 424 U.S. 507 (1976).

Basically, the civil rights of protestors must be balanced against the rights of other community members

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Supreme Court Update

Elizabeth Bonucci
Fisher & Phillips LLP

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Certiorari Granted

***Elgin v. Department of the Treasury*, No. 11-45 (Oct. 17, 2011)**

In this case out of the First Circuit Court of Appeals, the United States Supreme Court will determine whether the Civil Service Reform Act (CSRA) prevents the federal district court from having jurisdiction over constitutional challenges to employment dismissals under the Military Selective Services Act (MSSA).

The MSSA bars employment in the executive branch of male citizens who failed to register for the draft. The petitioners, who were discharged (or allegedly constructively discharged) from their jobs for failing to register for the draft, challenged the constitutionality of the MSSA by filing an action in district court. The district court ruled against the petitioners' constitutional claims.

The First Circuit vacated the district court's judgment and held that the district court lacked subject matter jurisdiction because the exclusive remedy for the petitioners' dismissals is provided by the CSRA: a federal employee may first file an appeal to the Merit Systems Protection Board, and then appeal to the Federal Circuit Court of Appeals, whose decisions are reviewable by the Supreme Court.

***Hosanna-Tabor Evangelical Lutheran Church v. EEOC*, No. 10-553 (March 28, 2011; Oral Argument Oct. 5, 2011)**

In this case out of the Sixth Circuit Court of Appeals, the Supreme Court will decide whether the "ministerial exception," a First Amendment doctrine that bars most employment-related lawsuits brought against religious organizations by employees performing religious functions, applies to a teacher at a religious school.

The EEOC sued the petitioner, asserting a retaliation claim under the Americans with Disabilities Act on behalf of a teacher who taught a full secular curriculum, but also taught daily religious classes and was a commissioned minister who regularly led students in prayer and worship. While the employee was on disability leave, the petitioner terminated her. The district court dismissed the EEOC's suit for lack of subject matter jurisdiction, finding that the ministerial exception applied to the employee.

The Sixth Circuit reversed, applying a "primary duties test" and determining that the time the employee devoted per day to religious activity was nominal, and thus the ministerial exception did not apply.

***Rehberg v. Paulk*, No. 10-778 (March 21, 2011; Oral Argument Nov. 1, 2011)**

The Court recently heard this case out of the Eleventh Circuit Court of Appeals regarding whether a government official who acts as a complaining witness by presenting perjured testimony against an innocent citizen is entitled to absolute immunity from a 42 U.S.C. § 1983 claim for civil damages. The petitioner filed a federal complaint alleging that the respondent, an investigator for the district attorney's office, had knowingly provided false testimony against him in multiple grand jury proceedings, which led to three indictments, all of which were subsequently dismissed.

The district court held that because the respondent had acted as a complaining witness, he was not entitled to absolute immunity. The Eleventh Circuit reversed and held that grand jury testimony, like trial testimony, is subject to absolute immunity.

***United States v. Alvarez*, No. 11-210 (Oct. 17, 2011)**

The Court will hear this case out of the Ninth Circuit Court of Appeals regarding whether the Stolen Valor Act is facially invalid under the free

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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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Assessing a Disparate Impact Claim After *Ricci v. DeStefano*

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Two and a half years ago, at the conclusion of its 2008–2009 term, the United States Supreme Court released its decision in *Ricci v. DeStefano*, No. 07-1428, __ U.S. __, 129 S. Ct. 2658 (2009). *Ricci* announced a new (and, in the eyes of many critics, entirely unprecedented) perspective on hiring and promotion decisions made pursuant to standardized testing, not to mention other employment practices that often result in disparate impact litigation under Title VII.

Under *Ricci*, an employer can be liable on a disparate treatment (i.e., intentional discrimination) theory when it rejects the outcome of a neutral employment policy on the grounds that adopting the results will expose the employer to disparate impact liability, unless the employer shows that it had a "strong basis in evidence" for concluding that such liability would follow.

I had the pleasure of writing about the *Ricci* decision for this newsletter in its August 2009 edition. In the time since, several lower court decisions have applied *Ricci*, in greater or lesser depth. This article examines one in particular, *Briscoe v. City of New Haven*, 654 F.3d 200 (2nd Cir. 2011), a case that offers some perspective on where this area of the law is headed and how employers (particularly municipal governments that rely on standardized examinations for hiring and promotion decisions) can address their potentially competing obligations in the new era of disparate-impact/disparate-treatment litigation.

Title VII Disparate Impact Litigation and *Ricci v. DeStefano*: A Not-So-Brief Refresher

Discussion of the *Ricci* case and its progeny requires some familiarity with the disparate impact doctrine under Title VII of the Civil Rights Act of 1964. Title VII, in addition to prohibiting intentional employment discrimination on the basis of race, color, sex, religion, or national origin, prohibits neutral employment policies that have a "disparate impact" on a particular protected classification. Disparate impact is not an "intent theory" of discrimination. In effect, the drafters of Title VII decided that it wasn't good enough for employers to operate with neutral (let alone nondiscriminatory) motives: for purposes of disparate impact, it's the destination, not the journey that matters.

Legally, a disparate impact case requires proof that (1) a particular employment practice (2) caused a legally significant adverse impact on the protected classification in question, based on a statistical analysis. If the plaintiff establishes a prima facie case, the burden of persuasion shifts to the employer either to attack the validity of the plaintiff's statistical analysis or to assert the "business necessity defense," which requires proof that the neutral employment policy at issue was job-related and consistent with business necessity. However, even if the employer successfully asserts the business necessity defense, a plaintiff may still prevail if she can show that a less discriminatory alternative would satisfy the employer's business needs.

The *Ricci* case involved the city of New Haven, Connecticut,'s methodology for selecting rank-and-file firefighters for promotion to captain or lieutenant. Acting under state law and various collective bargaining agreements, the city used a two-part standardized exam to select the candidates. When the results of the exam showed that African American and Hispanic applicants had passed at a much lower rate than white applicants, the city abandoned the results out of fear that it would be exposed to disparate impact claims from unsuccessful African American and Hispanic applicants.

The applicants who passed the exam but did not receive promotions sued the city under Title VII for disparate treatment. The plaintiffs alleged that the city committed intentional discrimination when it set aside the exam results based on the race of the successful candidates. The city responded that because it had a good-faith belief that adopting the results would have violated Title VII's disparate impact rules, it could not be liable for violating Title VII's disparate treatment rules. The U.S. District Court for the District of Connecticut granted summary judgment for the city, which the Second Circuit affirmed.

The U.S. Supreme Court reversed and remanded with instructions to enter summary judgment for the plaintiffs. The Court held that Title VII requires "a strong basis in evidence" that adopting the results of an employment policy will create disparate impact liability before an employer may rely on a protected classification to disregard the results because of the impact on a particular protected class. Furthermore, the Court held that an employer cannot meet the new standard by determining that potential plaintiffs could state a prima facie disparate impact case. Rather, an employer must also determine whether it could meet its burden of persuasion on the business necessity defense and whether the plaintiffs could prove that there was no equally valid, less discriminatory alternative.

Applying the new standard, the Supreme Court held that the city did not have a strong basis in evidence to conclude that certifying the exam results would create disparate impact liability. Although there was no dispute that the African American and Hispanic applicants could establish a prima facie case of disparate impact, the Court held that the city (as a matter of law) could have prevailed on the grounds of business necessity or because there was no equally valid, less discriminatory alternative.

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Briscoe v. City of New Haven: The Opposite Side of the *Ricci* Coin

Ricci held that an employer was liable for disparate treatment under Title VII if it disregarded the results of a neutral employment policy without a "strong basis in the evidence" to believe that their adoption would lead to disparate impact liability. But is the opposite true? Can an employer defeat a disparate impact claim if it has a strong basis in evidence to believe that adopting the test results would have led to disparate treatment liability?

The Second Circuit answered "no" to this question in *Briscoe v. City of New Haven*, 654 F.3d 200 (2nd Cir. 2011), a case that is (for all intents and purposes) chapter 2 to *Ricci v. DeStefano*. This case involved an African American firefighter who contended that the city's weighting of the written and oral sections of the standardized examination (the same 2003 examination that led to *Ricci)* disparately impacted African American applicants. Briscoe sued to enjoin the city from using the exam going forward and to be retroactively promoted to lieutenant with back pay and benefits.

The city successfully moved to dismiss Briscoe's disparate impact suit at the district court level under preclusion principles. On appeal, the Second Circuit addressed two issues: (1) whether Briscoe was entitled, as a matter of ordinary preclusion principles, to litigate his claims; and (2) whether the substantive outcome of *Ricci* (what the city called "a two-way reading" of *Ricci*) foreclosed Briscoe's disparate impact claims in its disposition.

First, the panel held that the district court's conclusion that *Ricci* precluded Briscoe's claims did not withstand a traditional nonparty preclusion analysis under the Supreme Court's decision in *Taylor v. Sturgell*, 553 U.S. 880, 893 (2008). *Taylor* recognizes six exceptions to the general rule that "one is not bound by a judgment *in personam* in a litigation in which . . . he has not been made a party by service of process," all six of which reflect some degree of control of or interest in the stranger litigation. According to the court:

> First, Briscoe did not agree to be bound by the determination of the issues in *Ricci*. Second, no preexisting "substantive legal relationship" existed between the city and Briscoe that is akin to a "bailee and bailor" or "assignee and assignor." Third, Briscoe was not adequately represented by the city in *Ricci*, because their interests are widely divergent. Fourth, Briscoe did not "assume[] control" over the *Ricci* litigation, or have the "opportunity to present proofs and argument." Fifth, Briscoe is not avoiding preclusive force by relitigating through a proxy. Sixth, no special statutory scheme such as bankruptcy or probate is present.

Briscoe, 654 F.3d at 203–204, citing *Taylor*, 553 U.S. at 893–895.

The Second Circuit also addressed the city's "two-way reading of *Ricci*" argument, summarizing the argument as follows:

> *Ricci* held that "before an employer can engage in intentional discrimination . . . [it] must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action." 129 S. Ct. at 2677.
>
> The city's argument is thus that an employer can engage in conduct yielding a disparate impact if it has a strong basis in evidence to believe it will be subject to disparate-treatment liability if it acts otherwise.

Briscoe, 654 F.3d at 203, n. 3.

The court thoroughly rejected the city's argument. Initially, it identified the "dicta" from the *Ricci* opinion upon which the city rested its argument:

> If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability.

Id. at 205, citing *Ricci*, 129 S. Ct. at 2681. The court then identified six different reasons why the city's argument failed.

First, the panel pointed to several other portions of the *Ricci* decision that (in its view) showed the limited nature of the Court's holding. *See id*. at 206, citing *Ricci*, 129 S. Ct. at 2677 ("We hold only that, under Title VII, before an employer can engage in intentional discrimination for the asserted purpose of avoiding or remedying an unintentional disparate impact, the employer must have a strong basis in evidence to believe it will be subject to disparate-impact liability if it fails to take the race-conscious, discriminatory action.")

Second, the Second Circuit held that the purported problem the city looked to solve with its "two-way reading of *Ricci*" was already resolved by an ordinary disparate impact analysis. *Ricci* supplied the answer to the question of "when an act that would otherwise trigger disparate-treatment liability is excusable due to concern over disparate impact." *Id*. at 207. The Second Circuit concluded, however, that Congress addressed the opposite scenario (i.e., "when an employment practice that would otherwise trigger disparate-impact liability is excusable due to concern over disparate treatment") when it drafted the business necessity defense, which allows such a practice as long as it is "job related" and "consistent with business necessity." *Id*. To put it another way, the city's "two-way reading of *Ricci*" was a solution in search of a problem.

Third, and by the same token, the court reasoned that because "the[]

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disparate-impact parameters are statutory, unlike the contours of a disparate-treatment claim, which are predominantly supplied by case law," the Supreme Court's statement in *Ricci* was not definitive enough to signal a new wrinkle in disparate impact litigation.

Fourth, the court (with an eye toward future cases that lack clear-cut evidence that the employer would be subject to disparate treatment suits) noted the inherently poor fit between the "strong basis in evidence" standard and disparate treatment claims. *See id*. at 208 ("[T]he 'strong basis in evidence' standard that the majority opinion in *Ricci* explicitly establishes to evaluate whether an employer can engage in *disparate treatment* employs the quantitative metrics of *disparate-impact* law. Unlike disparate-treatment liability, in which intent is a core consideration and for which consistent standards are simply impractical, disparate-impact liability involves quantitative metrics that resonate with an objective 'strong basis in evidence' standard.") (emphasis retained).

Fifth, the court traced the "strong basis in evidence" standard to the Supreme Court's equal protection clause jurisprudence, an area of law wholly inimical to a disparate impact theory, which is not available under an equal protection claim. *Briscoe*, 654 F.2d at 208. Finally (in what was more-or-less a repeat of its second and third arguments), the court concluded that *Ricci*'s express holding and the plain terms of the business necessity defense offered employers sufficient solace. *Id*.

The New Normal Under *Ricci*: The Second Circuit's Perspective

Interestingly (although perhaps ruefully, from the city's perspective), the Second Circuit offered a way forward for future employers caught between *Ricci* and a disparate-impact hard place. According to the Second Circuit, there were two ways the city might have avoided facing competing obligations to the different firefighters in piecemeal litigation. First, the court noted that if the city had joined all the potential interested parties (in effect, every applicant for a firefighter promotion, successful or otherwise) under Federal Rule of Civil Procedure 19, then Briscoe would have been a party to the *Ricci* litigation and therefore precluded from bringing suit under ordinary preclusion rules.

Second, the panel pointed to a somewhat obscure provision of Title VII, 42 U.S.C. § 2000e-2(n), which states that a Title VII plaintiff may not challenge an employment practice (e.g., hiring decisions made pursuant to a standardized test, as in this case) that "implements and is within the scope of a [Title VII] litigated consent judgment or order," as long as the plaintiff had actual notice of the judgment or order *and* a "reasonable opportunity" to present objections to the judgment. The court noted that the city could have moved "for compliance with the notice and opportunity-to-object requirements of § 2000e–2-(n), which would have permitted the litigated judgment to have preclusive effect even over nonparties."

According to the Second Circuit, there were two ways the city might have avoided facing competing obligations to the different firefighters in piecemeal litigation.

Although the Second Circuit's decision is obviously not binding in this district, *Briscoe* is nonetheless important to local practitioners for at least two reasons. First, the decision is well reasoned and thoroughly researched and will likely prove to be highly persuasive to any court faced with the "two-way reading of *Ricci*" argument in the future. Second, it sets out a practical path for employers to use in preventing piecemeal litigation (and the risk of inconsistent obligations to competing groups of employees) when making the difficult decision whether to adopt the results of a neutral employment practice in the face of disparate impact claims. ✦

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Newsletter Articles Needed

Have you recently done some research or written a memo that you could easily transform into an article for this newsletter?

Do you need an incentive to brush up on a recent development in the law?

We need articles for upcoming issues of this newsletter.

If you or someone in your office would like to contribute an article in the next few months, please contact our editor at elise.gautier@comcast.net.

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and the welfare of the community at large. Thus, protest activities that endanger others or infringe on private rights or overly interfere with other public rights (including blocking traffic, interfering with businesses, harassing or intimidating others, and creating a dangerous environment) can be legally curtailed.

But They're Not Protesting! They're Occupying!

Countries around the world with freedom of speech and assembly provisions, including the United States and Canada, are struggling with the distinction between "protesting" and "occupying," and whether the protections granted to traditional protesting extend to an indefinite "occupation" of public land and resources in support of a broader "protest" (protected) movement.

Is encampment a form of symbolic speech that should enjoy protection? (*See Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) (right to wear armbands in school protesting war); *United States v. O'Brien*, 391 U.S. 367 (1968) (right to burn draft cards as form of symbolic speech).) Or is it a form of civil disobedience—a peaceful but unlawful activity that is used as a form of protest but is not protected under the First Amendment?

The law has historically made a distinction between lawful, nonviolent, constitutionally protected protest and civil disobedience. Civil disobedience has been defined as one's "deliberate refus[al] to comply with laws he or his group considers to be unjust," and is separate and distinct from a lawful protest demonstration. *See* J. L. LeGrande, "Nonviolent Civil Disobedience and Police Enforcement Policy," *The Journal of Criminal Law, Criminology, and Police Science* (Sept. 1967). The Ninth Circuit notes that "'civil disobedience' is the wilful violation of a law, undertaken for the purpose of social or political protest. *Cf. Webster's Third New International Dictionary* 413 (unabridged, 1976) ('refusal to obey the demands or commands of the government' to force government concessions)." *U.S. v. Schoon*, 971 F.2d 193, 195–196 (9th Cir. 1991). This is, obviously, almost a phantom distinction, given that the "symbolic speech" protected by many of the landmark Supreme Court cases upholding expressive conduct as First Amendment–protected speech (including *Tinker, supra*) involve conduct that does violate the law but the Court has determined to be protected nonetheless.

There is also a distinction between indirect civil disobedience and direct civil disobedience. The former "involves violating a law which is not, itself, the object of protest, whereas direct civil disobedience involves protesting the existence of a particular law by breaking that law." *U.S. v. Schoon, supra*, 971 F.2d at 196.

In many past protests/demonstrations of civil disobedience that made statements about the oppressive unfairness of the laws and the government itself, protesters who broke the law—such as Rosa Parks—were arrested. In fact, the arrests of the participants drew attention to the laws that were unjust and energized people to overturn them. Thus direct civil disobedience resulted in changes to the very laws being broken. Conversely, indirect civil disobedience involves conduct that violates a law (e.g., trespassing on land privately owned by a shop) in order to protest something not directly related to the actual violation itself (e.g., the business owner's unfair hiring practices).

One stated reason for using indirect civil disobedience against a government entity to protest conduct by a private organization is that it defies the authority of a system that continues to allow the unjust private activity to occur. *See* Kimberley Brownlee, "The Communicative Aspects of Civil Disobedience and Lawful Punishment," *Criminal Law and Philosophy* (Nov. 9, 2006). Thus the violations by the Occupy movement of local government authority can be viewed as a protest against the government's support for or failure to remedy the current social and economic conditions.

Does the conduct of "occupying"—establishing semi-permanent residences in public spaces—constitute protected free speech?

The Occupy movement seeks to combine lawful, First Amendment–protected political speech with indirect civil disobedience, disregarding laws for the purpose of social and political protest. Thus, the question becomes: does arresting the Occupiers (or threatening arrest if they do not leave public lands protected by anti-camping ordinances) violate their constitutional rights to free speech and protest? That is, does the conduct of "occupying"—establishing semi-permanent residences in public spaces—constitute protected free speech?

The Supreme Court has previously said "no." In *Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984), the Supreme Court considered whether application of the regulations against camping in a national park so as to prevent sleeping in tents infringed demonstrators' First Amendment right of free expression during an "occupy"-like protest designed to call awareness to the plight of the homeless. The Court found that "sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment." It emphasized, however, that "[e]xpression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions."

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The court explained:

> We have often noted that restrictions of this kind are valid, provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information. . . .
>
> . . . Symbolic expression of this kind may be forbidden or regulated if the conduct itself may constitutionally be regulated, if the regulation is narrowly drawn to further a substantial governmental interest, and if the interest is unrelated to the suppression of free speech. . . .
>
> . . . That sleeping, like the symbolic tents themselves, may be expressive and part of the message delivered by the demonstration does not make the ban any less a limitation on the manner of demonstrating, for reasonable time, place, or manner regulations normally have the purpose and direct effect of limiting expression but are nevertheless valid.

Id. at 293–294.

Balancing the Needs of the Many with the Rights of the Relatively Few

Starting in early November 2011, city governments began dispersing the Occupiers from public spaces based on the fact that neutral, preexisting laws that constituted allowable time, place, and manner restrictions were being violated.

On Sunday, November 13, police in Portland resumed enforcing the preexisting municipal laws against being in a park after midnight (Portland City Code § 20.12.210) and erecting structures in a park (Portland City Code § 20.12.080). By further authority of the Portland City Code, the city closed Lownsdale and Chapman Squares "for repair and to remediate any remaining safety, health and crime problems." Statement from Portland Mayor Sam Adams on November 10, 2011, available at http://www.portlandonline.com/mayor/index.cfm?c=52750&a=373519 (accessed December 6, 2011).

On November 16, New York State Supreme Court Justice Michael Stallman upheld the eviction of protesters from Zuccotti Park in Lower Manhattan, New York City, ruling that the protesters did not have a First Amendment right to remain in the park along with their tents, structures, generators, and other installations. The judge ruled that the owner of the park (a privately owned space designated as "public land" under New York zoning regulations) has the "right to adopt reasonable rules that permit it to maintain a clean, safe, publicly accessible space," and noted that "even protected speech isn't equally permissible in all places and at all times." *In the Matter of the Application of Jennifer Waller v. City of New York*, 11112957, New York State Supreme Court, New York County (Manhattan).

Mayor Michael Bloomberg, in a public statement, explained:

> [T]he City had two principal goals: guaranteeing public health and safety, and guaranteeing the protestors' First Amendment rights.
>
> But when those two goals clash, the health and safety of the public and our first responders must be the priority.
>
> . . . .
>
> No right is absolute and with every right comes responsibilities. The First Amendment gives every New Yorker the right to speak out—but it does not give anyone the right to sleep in a park or otherwise take it over to the exclusion of others—nor does it permit anyone in our society to live outside the law. There is no ambiguity in the law here—the First Amendment protects speech—it does not protect the use of tents and sleeping bags to take over a public space.

Let's appreciate those freedoms, whatever our individual position is on the Occupy movement.

Statement from New York City Mayor Michael Bloomberg on November 15, 2011, available at http://blogs.wsj.com/metropolis/2011/11/15/statement-from-mayor-bloomberg-on-clearing-zuccotti-park/ (accessed December 6, 2011).

It should also be noted that thus far the governments dealing with the Occupiers have at least ostensibly tried to grant consideration to the movement's message, allowing them to stay in some parks for months. Additionally, unlike some of the violent skirmishes at civil rights protests in past years, with only a few exceptions the conduct of both the active protests and the evictions have been relatively harmless on both sides, although reports of excessive force have been made and violence has occurred.

A challenge for the Occupy movement going forward will be to determine whether its message can be effectively communicated through lawful, protected protest (complying with time, place, and manner restrictions, e.g., conducting protests during open park hours or relocating to private lands and complying with permit requirements) or whether it will need to embrace unlawful civil disobedience as a catalyst for change.

Perhaps most notable, however, is that at this moment we are contemplating our freedoms and rights as citizens of a country that allows dissent and open protest of regimes, governments, and ideologies. Let's appreciate those freedoms, whatever our individual position is on the Occupy movement. ✦

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Civil Rights Section Co-Hosts CLE

Sally Carter

With a focus on exploring cutting-edge topics in the field of civil rights, the Civil Rights Section presented its annual CLE, co-sponsored by the Oregon State Bar, on November 4, 2011. The day began with a look at marriage inequality. Tiffany Harris of Pacific Northwest Law traced the societal and legal changes that have occurred since the 1996 passage of the federal Defense of Marriage Act, and Professor John Parry of Lewis & Clark Law School discussed the constitutional challenges that plaintiffs have brought against the act. Mark Johnson Roberts of Gevurtz Menashe rounded off the panel with a primer on the current legal mechanisms of family creation and dissolution for non-heterosexual couples.

Next, Judges Richard Baldwin, Marco Hernandez, and Robert Selander spoke about specialized mental health courts. In addition to outlining the history and functions of those courts, they engaged in a spirited and engaging debate about the courts' pros and cons.

In an acknowledgement of the increase in the last decade of Americans in military service, the CLE included two segments on issues relating to veterans and servicemembers. In one panel, Major Bryan Libel of the Oregon Army National Guard and Theodore Sumner of Sumner Law took the audience through basic issue-spotting on civil and criminal law issues relevant to veterans and servicemembers. In the second panel, Adrian Brown of the U.S. Attorney's Office and Diane Schwartz Sykes of the Oregon Department of Justice took an in-depth look at the workings of the Uniformed Services Employment and Reemployment Rights Act, the Americans with Disabilities Act as applied to veterans, and the Oregon statutory equivalents.

Another panel addressed the potential for combating human trafficking using criminal and civil statutes. Kemp Strickland of the U.S. Attorney's Office spoke about his work prosecuting offenders under the federal sex-trafficking laws. Diane Schwartz Sykes substituted for Detective Keith Bickford of the Multnomah County Sheriff's Office, who combats labor trafficking, and adumbrated the immigration and social-service help available to foreign-born victims of such trafficking. Sherilyn Holcombe Waxler of Waxler Immigration Law discussed in depth the visas potentially available to trafficking victims. Wrapping up the panel, Michael Rose of Creighton & Rose used examples from his practice to suggest how to use civil litigation to obtain redress for trafficking victims.

Finally, the day included a lively ethics hour: Peter Jarvis and Judy Parker of Hinshaw & Culbertson spoke on the ethical aspects of social networking. They discussed the opportunities and dangers created by the intersection of new technology and long-standing ethical rules, and they illustrated their talk with accounts of attorneys and clients who have been insufficiently careful in using social media.

Sally Carter served as the Civil Rights Section's chair in 2011.

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speech clause of the First Amendment. The Stolen Valor Act makes it a crime to lie about receiving military medals or honors. After being convicted under the act, the respondent appealed to the Ninth Circuit. The Ninth Circuit reversed the conviction, holding that the act is facially invalid under the free speech clause. The court found that the speech did not fit into a previously defined category of unprotected false speech, and it struck down the law because it was not narrowly tailored to achieve a compelling governmental interest. ✦

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