A NOTE ABOUT OWS AND PRE-TRIAL DIVERSION IN LOS ANGELES

I have seen a lot of garment rending on Twitter and in discussion forums I participate in about the Los Angeles Times report that a pre-trial diversion option is being offered to some Occupy Wall Street-Los Angeles protesters:

> Many Occupy L.A. protesters arrested during demonstrations in recent months are being offered a unique chance to avoid court trials: pay $355 to a private company for a lesson in free speech.
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> Los Angeles Chief Deputy City Atty. William Carter said the city won't press charges against protesters who complete the educational program offered by American Justice Associates.
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> He said the program, which may include lectures by attorneys and retired judges, is being offered to people with no other criminal history and who were arrested on low-level misdemeanor offenses, such as failure to disperse.

"Tin eared!" "Propaganda!" "Re-Education!" "Stupid!" "Tone-deaf!" "By a private corporation??" "Seriously, LA, this is the worst ever!" "Unbelievable!"

Those are a smattering of the responses I saw, and all are from people I know and respect greatly. And they are all wrong to take such umbrage at this report. Here is why.

Pre-trial diversion of criminal misdemeanor charges is an extremely common tool in municipal and other misdemeanor courts (and in some felon courts on the lowest grade offenses such as

marijuana possession). It is, from a policy perspective, considered a win-win for both sides; the state and taxpayers avoid the cost of processing the defendant through the court system, and the defendant avoids having a conviction on their record (often avoid even having a formal charge lodged). But whether or not to offer pre-trial diversion lies entirely within the prosecutorial discretion of the state's attorney. It is an option that can be offered, but certainly is not mandatory.

Just as pre-trial diversion is a voluntary option that does not have to be offered in the first place, the decision on whether to accept the offer is entirely up to the individual facing the charge. There is no punishment whatsoever for declining – none – they will stand in the EXACT same position vis a vis the state as if they had not been offered pre-trial diversion at all, i.e. there will be a municipal offense that has either been charged, or is pending charge, with a one year statute of limitation running.

There has been a hue and cry that – gasp! – the program will be administered by – gasp! – a private company. Well, they always are. I have never seen a diversion program with an educational component that was not farmed out to a private or non-profit outside entity. That is simply how it is done; cities and individual courts are not structured and funded to have classrooms, instructors and curriculum for these matters. And, being as it is a discretionary option to resolve outside of the criminal process (most are contractual, not court compelled) it just does not make fiscal or judicial sense to have it run by the court or state.

As to the content suggested for this particular diversion program offer, it is precisely what you would expect to be offered under the circumstances. Pre-trial diversion at the misdemeanor level almost always involves a perfunctory remedial/instructive class in the

subject of the offense. This is the case with defensive driving class to get out of a ticket, it is the case with anger management for assault and domestic violence, it is the case for shoplifting and solicitation programs as well. For the OccupyLA cases, it is hard to imagine a more appropriate subject than a free speech centered program, as that lies at the heart of why the individuals face the prospect of criminal process in the first place.

So, in sum, the offer of pre-trial diversion is but an extra option offered people that are facing the criminal justice system. It did not have to be offered, that it is should be considered positive not negative if the individuals are going to be facing the criminal system anyway. Whether or not one feels these individuals should be charged in the first place is a different discussion; since they do face the system, having an extra option should be cheered not jeered.

Lastly, a word about the “Free Speech” rights that are at issue here. The long and short of it is free speech has never been completely free nor absolute. Living in the west, and being still a little bit of a night person, I have seen a lot of the television reports and internet live stream coverage of the raids on various OWS camps including, notably, the infamous ones in Oakland and Los Angeles. I constantly saw protesters screaming about their First Amendment rights being trampled on. I have also seen a lot of very bright people I know repeating this mantra on Twitter, in discussion forums and in published articles. At least as to the actions that have been about the OWS tent encampments on public property, they have been wrong.

I support the intent and message OWS set out to propel into the public consciousness completely and with every fiber of my being. There is no more critical message right now than the burgeoning income inequality, financial suffering and human loss being caused by the

rapacious elements in the global financial sector epitomized by Wall Street. That said, the simple fact of the matter is that there are, and long have been, time place and manner restrictions on free speech and that is what is at play here.

So, let's look for a moment about what the real state of the law is regarding the tent encampments that OWS keeps screaming are protected by the First Amendment, because the simple truth is they most certainly are not if there are appropriate local laws and/or regulations prohibiting overnight sleeping and camping, as there have been in most all of these cases. These are called "time, place and manner restrictions" (TPM), and they are long engrained into the very heart of American First Amendment law.

The complete history of TPM restrictions is to long too go into in a blog post, but perhaps the key case for modern general TPM law is *Cox v. New Hampshire,* 312 U.S. 561 (1941) where the court stated:

> Civil liberties, as guaranteed by the Constitution, imply the existence of an organized society maintaining public order without which liberty itself would be lost in the excesses of unrestrained abuses. The authority of a municipality to impose regulations in order to assure the safety and convenience of the people in the use of public highways has never been regarded as inconsistent with civil liberties but rather as one of the means of safeguarding the good order upon which they ultimately depend. The control of travel on the streets of cities is the most familiar illustration of this recognition of social need. Where a restriction of the use of highways in that relation is designed to promote the public convenience in the interest of all, it cannot be disregarded by the attempted exercise of

> some civil right which in other circumstances would be entitled to protection. One would not be justified in ignoring the familiar red traffic light because he thought it his religious duty to disobey the municipal command or sought by that means to direct public attention to an announcement of his opinions. As regulation of the use of the streets for parades and processions is a traditional exercise of control by local government, the question in a particular case is whether that control is exerted so as not to deny or unwarrantedly abridge the right of assembly and the opportunities for the communication of thought and the discussion of public questions immemorially associated with resort to public places.
> ….
> If a municipality has authority to control the use of its public streets for parades or processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed by the state court contravened any constitutional right.(citations omitted)

Time, place and manner restrictions thus having been ratified by the Supreme Court into modern law in *Cox*, the issue then becomes how this applies to the issue of tents in the OWS encampment paradigm. Well, it turns out the Supreme Court has an app for that too. SCOTUS, in the directly on point case of *Clark v. Community for Creative Nonviolence*, 468 U.S. 288 (1984), addressed the free speech issues surrounding tent encampments on public property:

> We need not differ with the view of the Court of Appeals that overnight sleeping in connection with the demonstration is expressive conduct protected to some extent by the First Amendment. We assume for present purposes, but do not decide, that such is the case, cf. United States v. O'Brien, 391 U.S. 367, 376 (1968), but this assumption only begins the inquiry. Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place, or manner restrictions.
> ….
> 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. United States v. O'Brien, supra.
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> Petitioners submit, as they did in the Court of Appeals, that the regulation forbidding sleeping is defensible either as a time, place, or manner restriction or as a regulation of symbolic conduct. We agree with that assessment.
> ….
> The requirement that the regulation be content-neutral is clearly satisfied. The courts below accepted that view, and it is not disputed here that the prohibition on camping, and on sleeping specifically, is content-neutral, and is not being applied because of disagreement with the message presented

There is a lot of discussion in *Clark* that is spot on point with the OWS situation. Suffice it to say, it has proven to be decisive in nearly every state and federal court challenge brought by OWS, and so long as there is some statutory or regulatory basis for camping and/or sleeping

prohibition at a given locale, it will continue to so be decisive against the tent encampments of OWS. And, as demonstrated by, among others, Federal Judge Cameron Currie in South Carolina yesterday, this logic will stand even for regulations and laws passed *after* the encampments started, so long as the proscriptions are content neutral.

In conclusion, the OWS protesters, well meaning as they may be, are flat wrong when they scream that their First Amendment rights are being trampled upon when cities and governments no longer tolerate the long term residence on public property. Similarly, there is nothing wrong whatsoever about a jurisdiction offering an appropriate pre-trial diversion program to folks that have been arrested in these dismantling raids.