University of Dayton Law Review

Volume 9 | Number 2 Article 9

1983

Constitutional Law: Sleep as Expression

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CONSTITUTIONAL LAW: "SLEEP" AS "EXPRESSION" — *Community For Creative Non-Violence v. Watt*, 703 F.2d 586 (D.C. Cir. 1983), *cert. granted*, 52 U.S.L.W. 3229 (U.S. Oct. 3, 1983) (No. 82-1998).

I. INTRODUCTION

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[1]

The first amendment to the United States Constitution embodies many important rights. One of these is freedom of speech. Freedom of speech has been thought worthy of protection because it allows for the free exchange of ideas—a necessity for the survival of democracy. Over the years, speech protected under the first amendment has been interpreted to include not only the spoken or written word, but some forms of conduct as well.[2] Conduct which falls within the context of speech has been referred to as symbolic speech or speech-plus.[3] Not all conduct claimed to be speech is protected, however.[4] For conduct to be protected under the first amendment, it must fit within the guidelines provided by the Supreme Court in *United States v. O'Brien*[5] and *Spence v. Washington*.[6]

Using these guidelines, the Court of Appeals for the District of

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1. U.S. CONST. amend. I.

2. *See, e.g.*, Spence v. Washington, 418 U.S. 405 (1974) (peace sign affixed to American flag); Tinker v. Des Moines School Dist., 393 U.S. 503 (1969) (wearing armbands); Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969) (marching); *see also* Nimmer, *The Meaning of Symbolic Speech under the First Amendment*, 21 UCLA L. REV. 29 (1973); Note, *Symbolic Speech*, 43 FORDHAM L. REV. 590 (1975).

3. *See* Nimmer, *supra* note 2, at 31 & n.13; Note, *Symbolic Speech*, 9 IND. L. REV. 1009, 1014 (1976).

4. *See* California v. LaRue, 409 U.S. 109 (1972) (some forms of nude entertainment); United States v. O'Brien, 391 U.S. 367 (1968) (draft card burning); United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968) (mutilation of government documents), *aff'd*, 417 F.2d 1009 (4th Cir.), *cert. denied*, 397 U.S. 909 (1969); *see also* Note, *supra* note 3.

5. 391 U.S. 367 (1968). The Court in *O'Brien* stated that even if conduct is speech,

> a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. at 377.

6. 418 U.S. 405 (1974). The Court in *Spence* held that conduct is speech if "an intent to convey a particularized message [is] present, and in the surrounding circumstances the likelihood [is] great that the message [will] be understood by those who view it." *Id.* at 410–11.

Columbia in *Community For Creative Non-Violence v. Watt (CCNV II)*[7] had to decide two questions: first, whether sleeping in a public park as part of a demonstration was "speech" within the scope of the first amendment, and secondly, whether a National Park Service regulation proscribing sleeping in a park served a sufficiently important governmental interest to warrant its being upheld even if "speech" was involved.

This casenote explores the court's reasoning in *CCNV II* with reference to its application of the pertinent Supreme Court precedent, and also discusses the practical effect of this case.

II. FACTS AND HOLDING

In the fall of 1982, the National Park Service (Park Service) granted the Community for Creative Non-Violence (CCNV) a permit to demonstrate in Lafayette Park and on the Mall in Washington, D.C.[8] The permit approved a seven-day round-the-clock protest to begin on the first day of winter.[9] "The declared purpose of the demonstration was to impress upon the Reagan Administration, the Congress, and the public the plight of the poor and homeless."[10]

In accordance with the permit, the Park Service allowed CCNV to set up symbolic tents.[11] However, the Park Service denied CCNV permission to sleep within the symbolic tents because a Park Service regulation forbade such activity.[12] Pursuant to that denial, CCNV sought a court order invalidating the Park Service's prohibition of sleep.[13] The organization claimed that the regulation was an unconstitutional re-

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7. 703 F.2d 586 (D.C. Cir. 1983), *cert. granted*, 52 U.S.L.W. 3229 (U.S. Oct. 3, 1983) (No. 82-1998).

8. *Id.* at 587.

9. *Id.*

10. *Id.*

11. 36 C.F.R. § 50.19 (1982). Section 50.19(e)(8) reads, in part, as follows: "In connection with permitted demonstrations or special events, temporary structures, may be erected for the purpose of symbolizing a message or meeting logistical needs such as first aid facilities, lost children areas or the provision of shelter for electrical and other sensitive equipment or displays."

12. 36 C.F.R. § 50.27 (1982). Section 50.27(a) prohibits camping in all but designated areas, and defines camping as follows:

> Camping is defined as the use of park land for living accommodation purposes such as sleeping activities, or making preparation to sleep (including the laying down of bedding for the purpose of sleeping), or storing personal belongings, or making any fire, or using any tents or shelter or other structure or vehicle for sleeping . . . . The above-listed activities constitute camping when it reasonably appears, in light of all circumstances, that the participants, in conducting these activities, are in fact using the area as a living accommodation regardless of the intent of the participants or the nature of any other activities in which they might also be engaging.

13. Community for Creative Non-Violence v. Watt, No. 82-02501 (D.D.C. Dec. 3, 1982).

striction on their freedom of expression.[14] The prohibition struck at the message they were trying to convey—"that homeless people have no permanent place to sleep."[15]

United States District Court Judge John H. Pratt first heard the case. He ruled that "National Park Service regulations allowing tents, but forbidding people to sleep in them, did not 'breach protected constitutional rights.' "[16] On expedited appeal, the case proceeded to the Court of Appeals for the District of Columbia.[17] The court of appeals reversed the district court, holding that sleep within this context was speech under the first amendment.[18] Moreover, since the government had failed to establish that the prohibition of sleep furthered any significant governmental interest, the court held that permission to sleep had been unconstitutionally denied.[19]

III. ANALYSIS

A. Background

Whether governmental regulations proscribing sleep as part of a demonstration are an unconstitutional violation of freedom of speech has been an issue debated since the early 1970's. The Supreme Court had an opportunity to pass on the issue in 1971 in *Morton v. Quaker Action Group*[20] but the Court issued its decision without an opinion.[21] The Supreme Court merely gave "full force and effect" to the district court injunction preventing camping.[22]

The issue again arose three years later in *Vietnam Veterans Against the War v. Morton (VVAW)*.[23] The court of appeals in *VVAW* followed what appeared to be the thrust of *Quaker* and held that camping (sleeping overnight) was categorically not within first amendment protection.[24] Notwithstanding *Quaker* and *VVAW*, the same court[25] in

14. *CCNV II*, 703 F.2d at 587.
15. *Id.*
16. Community for Creative Non-Violence v. Watt, N.Y. Times, Dec. 4, 1982, at 34, col. 3 (D.D.C. Dec. 3, 1982).
17. *CCNV II*, 703 F.2d at 587.
18. *Id.* at 593–94.
19. *Id.* at 599.
20. No. 71-1276 (D.C. Cir. Apr. 19, 1971), *vacated mem.*, 402 U.S. 926 (1971).
21. In the absence of any reasoning, *Quaker* cannot be cited as precedent but merely as nonbinding dicta. *See* United States v. Abney, 534 F.2d 984 (D.C. Cir. 1976) (per curiam); *see also CCNV II*, 703 F.2d at 590 & n.5.
22. *Quaker*, 402 U.S. at 926.
23. 506 F.2d 53 (D.C. Cir. 1974) (per curiam).
24. *Id.* at 57–58.
25. Although *VVAW* and *Abney* were heard before the Court of Appeals for the District of Columbia, different judges presided over the cases.

1976 in *United States v. Abney*[26] held that sleep as part of a protest was "sufficiently expressive in nature to implicate First Amendment scrutiny."[27] In that instance, Abney took up a round-the-clock vigil in Lafayette Park to protest his treatment at the hands of the Veterans Administration.[28] "[T]his necessitated sleeping in the park."[29] The antisleeping regulation in *Abney* did not survive constitutional challenge because it was held overbroad.[30]

The view espoused in *Abney* was reiterated in *Community For Creative Non-Violence v. Watt (CCNV I)*[31] in 1982. The court of appeals in *CCNV I* held that CCNV members could sleep in symbolic tents erected as a part of a protest because sleeping could express a message and symbolic campsites were reasonably related to the first amendment statement being made.[32] The court reached its conclusion in the light of principles of statutory construction, looking to the Park Service's Policy Statement for the anticamping regulation. The court in *CCNV I* thereby avoided passing on the constitutionality of the Park Service regulation.[33]

Only one year later, under facts almost identical to those in *CCNV I, CCNV II* arose. In both cases, CCNV demonstrated in Lafayette Park and on the Mall using symbolic tents; in both instances the organization was denied permission to sleep in the tents. The only difference between the cases was that *CCNV I* could be resolved on the basis of a Park Service Policy Statement, whereas *CCNV II* had to be grounded in constitutional law because of an interim change in the Park Service's Policy Statement.[34]

The court's decision in *CCNV II*, the subject of this casenote, which held the anticamping regulation unconstitutional, was based in part on the sleeping–first amendment relationship previously espoused in *Abney* and *CCNV I*.

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26. 534 F.2d 984 (D.C. Cir. 1976) (per curiam).

27. *Id.* at 985.

28. *Id.*

29. *Id.*

30. *Id.* at 986.

31. 670 F.2d 1213 (D.C. Cir. 1982) (per curiam).

32. *Id.* at 1216–17.

33. *Id.* By analyzing the Park Service's Policy Statement on § 50.19(e)(8), the court of appeals concluded that sleeping in symbolic tents was permissible as long as it was reasonably related to first amendment activities and not primarily for living accommodations. By this approach, the court avoided the constitutional issue involved. However, the court in *CCNV II* was precluded from using this approach because the Park Service had in the interim published a new Policy Statement that explicitly foreclosed any living accommodation–first amendment distiction. Therefore, the constitutional issue had to be addressed. *CCNV II*, 703 F.2d at 591.

34. *CCNV II*, 703 F.2d at 589–91.

B. *Is Sleep Symbolic Speech?*

The first step, in assessing CCNV's constitutional rights assertion, is to resolve whether freedom of speech is implicated at all in CCNV's proposed sleeping activities. As is evident from the preceding case law, two conflicting views have surfaced in this area. One view holds that there is no connection between freedom of speech and sleeping;[35] the other holds that there is a sufficient nexus between the two.[36]

In determining whether CCNV's proposed sleeping was symbolic speech of the type protected by the first amendment, the court of appeals applied the Supreme Court guidelines provided in *Spence v. Washington*.[37] Under the *Spence* test, the court views the activity "combined with the factual context and environment in which it was undertaken . . . ."[38] In essence, if there is an intent to convey a particularized message and, given the surrounding circumstances, the likelihood is great that the message will be understood by those who view it, the activity warrants protection.[39]

Using the *Spence* standard, the court of appeals was arguably correct in holding that sleeping was symbolic speech under the first amendment.[40] CCNV intended to convey the message that homeless people had nowhere else to go.[41] Also, given the surrounding circumstances—the activity was conducted in an area frequently used to convey messages[42] and was, in fact, part of an organized protest using symbolic tents—the casual passerby most likely would have been aware of the message and would have understood its meaning. It would have been difficult for passersby to "miss the drift" of CCNV's point.[43]

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35. *See id.* at 622 (Scalia, J., dissenting); Vietnam Veterans Against the War v. Morton (VVAW), 506 F.2d 53, 58 (D.C. Cir. 1974) (per curiam). "I write separately to express my willingness to grasp the nettle which the principal dissent leaves untouched, and which the opinions supporting the court's disposition consider untouchable—that is, flatly to deny that sleeping is or can ever be speech for First Amendment purposes." *CCNV II*, 703 F.2d at 622 (Scalia, J., dissenting).

36. *See CCNV II*, 703 F.2d at 593; Community for Creative Non-Violence v. Watt (CCNV I), 670 F.2d 1213, 1216 (D.C. Cir. 1982) (per curiam); United States v. Abney, 534 F.2d 984, 985 (D.C. Cir. 1976) (per curiam). "The first amendment is not so rarefied that it cannot accommodate within its scope the conduct of these demonstrators who use their bodies to express the poignancy of their plight." *CCNV II*, 703 F.2d at 593.

37. 418 U.S. 405 (1974). For a discussion of the *Spence* standard, see *supra* note 6.

38. *Spence*, 418 U.S. at 409–10.

39. *Id.* at 410–11.

40. One must remember, though, that an unlimited variety of conduct cannot be labeled speech "whenever the person engaging in the conduct intends thereby to express an idea." United States v. O'Brien, 391 U.S. 367, 376 (1968).

41. *CCNV II*, 703 F.2d at 592.

42. The demonstration took place in Lafayette Park and on the Mall in Washington, D.C.—places often used as sites for protests because of their proximity to the White House.

43. *See Spence*, 418 U.S. at 410.

C. *Can the Regulation Survive* O'Brien?

The fact that conduct is symbolic speech does not conclude the inquiry or preclude any regulation. Such speech is still subject to reasonable time, place, and manner restrictions.[44] Therefore, the next step is to determine if the Park Service regulation is "reasonable."

To determine the reasonableness of the anticamping regulation, the interests involved must be examined.[45] The Supreme Court in *United States v. O'Brien*[46] established a test for examining and balancing governmental versus individual interests[47]—specifically, the government's legitimate interest in protecting society against the individual's interest in the free exercise of first amendment rights.[48] *O'Brien* holds that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[49] Using the *O'Brien* test, the court of appeals in *CCNV II* held that there was not a sufficiently important governmental interest served to warrant the denial of a sleep permit to CCNV.[50]

In reaching this conclusion, the court gauged the government's interest by looking solely at the interest served by prohibiting CCNV and all similarly situated groups from sleeping in the park.[51] Using this narrow view, Judge Mikva, writing for the court, found:

> Because such groups are already allowed to erect tents and maintain an all-night presence during which time they may sit, stand, or even lie down in the tents, there are no incremental savings of park resources, sanitation facilities, or law enforcement personnel to be gained by proscribing only sleep.[52]

Despite the seeming logic of the court's approach, closer examination might reveal that a sufficiently important governmental interest is involved. As a preliminary matter, though, one must first consider how the government's interest is to be measured.

According to *Heffron v. International Society for Krishna Con-*

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44. *See, e.g.*, Grayned v. Rockford, 408 U.S. 104 (1972); Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968).
45. *See* Note, *supra* note 2, at 594.
46. 391 U.S. 367 (1968).
47. For a discussion of the *O'Brien* test, see *supra* note 5.
48. *See CCNV II*, 703 F.2d at 595; Vietnam Veterans Against the War v. Morton, 379 F. Supp. 9, 14 (D.D.C.), *rev'd per curiam on other grounds*, 506 F.2d 53 (D.C. Cir. 1974).
49. *O'Brien*, 391 U.S. at 376.
50. *CCNV II*, 703 F.2d at 599.
51. *Id.* at 596.
52. *Id.*

sciousness,[53] the government's interest in the enforcement of regulations for the general welfare is measured by looking at more than the harm or disorder that would result from granting an exemption from such regulations to one particular group.[54] Therefore, in *CCNV II*, the governmental interest cannot be measured by looking solely to the *harm* that might be caused by allowing CCNV to sleep in the park.[55] Rather, it is necessary to look at the interest supporting the law generally.[56] To do otherwise is to "nickel and dime" every regulation to death.[57] This approach was embraced by Judge Wilkey in the principal dissent.

As the dissent points out, once this broader approach is applied, the governmental interest becomes clear. The parks are simply unsuited for camping.[58] "Were camping permitted in this area, other park visitors, including demonstrating park visitors, would be deprived of use of this nationally significant space. Camping could cause significant damage to park resources, create serious sanitation problems, and seriously tax law enforcement resources."[59] Given the possible serious consequences were camping allowed, it is obvious that the governmental interest is substantial.

Balanced against this substantial governmental interest is a merely incidental first amendment infringement. CCNV was not prevented from expressing its message: the regulation only prevented the demonstrators from "camping."[60] CCNV could still maintain a twenty-four-hour presence, erect symbolic tents, place cots or blankets inside the tents, and even lie inside the tents.[61] Therefore, CCNV's ability to express its message was not unduly hampered. The government is not compelled by the first amendment to permit the *most effective* means of expression chosen by a citizen.[62]

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53. 452 U.S. 640 (1981).

54. *Id.* at 652.

55. *CCNV II*, 703 F.2d at 616 (Wilkey, J., dissenting).

56. *Id.* at 615.

57. *Id.*

58. *Id.* at 617. This governmental interest is also acknowledged by Judge Edwards in his concurring opinion. *Id.* at 604 (Edwards, J., concurring).

59. 47 Fed. Reg. 24,305 (1982).

60. *See CCNV II*, 703 F.2d at 587; *see also* Community for Creative Non-Violence v. Watt (CCNV I), 670 F.2d 1213, 1216 (D.C. Cir. 1982) (per curiam); Vietnam Veterans Against the War v. Morton, 506 F.2d 53, 57 (D.C. Cir. 1974) (per curiam). CCNV was not prevented from maintaining a continuous presence in and around the symbolic tents now standing in the park, or from placing cots or blankets inside them. They simply could not fall asleep. *CCNV I*, 670 F.2d at 1215–16.

61. *See CCNV II*, 703 F.2d at 587; *see also CCNV I*, 670 F.2d at 1216.

62. *See, e.g.*, Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640 (1981); Lloyd Corp. v. Tanner, 407 U.S. 551 (1972); Adderley v. Florida, 385 U.S. 39 (1966). This view was not challenged by either the majority or dissenting opinions in *CCNV II*.

As there is a sufficiently important governmental interest served and only an incidental first amendment infringement, the regulation passes the *O'Brien* test.

D. *Implications of CCNV II*

To sustain the regulation, one final step is necessary: it must also be found that the anticamping regulation was the least restrictive means of protecting the government's previously stated interests.[63]

Judge Mikva, writing for the court, and Judge Edwards, in his concurring opinion, believed that the regulation was not the least restrictive means available. In their opinions, they suggested a number of "less restrictive alternatives" including exceptions for first amendment demonstrators,[64] permit revocation procedures,[65] as well as other reasonable time, place, and manner restrictions.[66] Although these alternatives appear reasonable, they are actually unfeasible and problematic.

The first suggestion—that an exception be made for first amendment demonstrators—was the alternative adopted by the court which allowed CCNV to sleep in the symbolic tents.[67] The difficulty with this alternative and the underlying problem of this decision is that one cannot accurately differentiate between true first amendment demonstrators and others. As the dissent explained, anyone could offer a first amendment pretext in order to camp.[68] The Park Service would then have to issue the permit because the agency could not screen or draw distinctions between permit applicants based on the supposed substantiality of their message.[69] This means effectively that "[a]nyone and everyone who is willing to apply for a permit and recite [a] First Amendment purpose must be allowed to camp, subject only to a first come-first served limitation."[70] If this situation is allowed to exist, it will hamper the efficient management of the parks and make a mockery of the first amendment.

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63. *See* United States v. O'Brien, 391 U.S. 367, 377 (1968) (although *O'Brien* is, in essence, a balancing test, part four of the test does state that the restriction on first amendment freedoms can be no greater than is essential to the furtherance of the governmental interests).

64. *CCNV II*, 703 F.2d at 597.

65. *Id.* at 597, 604.

66. *Id.* at 604 (Edwards, J., concurring).

67. *See id.* at 594. CCNV's success was short-lived, however, because on March 17, 1983, Chief Justice Burger issued an order that, in effect, banned the demonstrators from sleeping in the tents that they had pitched. *See CCNV II*, N.Y. Times, Mar. 19, 1983, at 8, col. 6 (U.S. Mar. 17, 1983). That order is still in effect. *See CCNV II*, 51 U.S.L.W. 3684 (U.S. Mar. 21, 1983) (No. A-771).

68. *CCNV II*, 703 F.2d at 620 (Wilkey, J., dissenting).

69. *Id.* at 620–21. *See also* Consolidated Edison Co. v. Public Serv. Comm'n, 447 U.S. 530 (1980); L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-2, at 580 (1978).

70. *CCNV II*, 703 F.2d at 621.

The other alternatives suggested must likewise fall. Revocation of a demonstrator's permit is but a modification or extension of the first alternative. Other reasonable time, place, and manner restrictions are also merely extensions of the first alternative. They are, therefore, likewise unfeasible.

Judge Wilkey's dissent is on point when it states that "there is no possibility of a constitutionally acceptable less restrictive alternative."[71] Therefore, the Park Service anticamping regulation should have been upheld.[72]

IV. CONCLUSION

CCNV II has been granted certiorari by the United States Supreme Court.[73] Supreme Court review of the court of appeals' ruling is indeed warranted because of the far-reaching and significant ramifications of this decision. *CCNV II* upheld the expansion of symbolic speech into an area never before decided by the Supreme Court. It held unconstitutional a Park Service regulation prohibiting camping that furthered a substantial government interest. And the court of appeals' decision may also lead to detrimental effects on our nation's parks.

As the Supreme Court reviews *CCNV II*, it should be remembered that "regulations banning the use of parks for living accommodations are designed not to stifle First Amendment expression, but to protect undesignated parks from activities for which they are not suited and the impacts of which they cannot sustain."[74] In pursuing these objectives, some first amendment infringement may occur, but, as has already been shown, such infringement is merely incidental. In weighing the government's interest, the individual's interest, and the implications of this case, the conclusion the Court should reach seems clear—the Park Service's anticamping regulation should be upheld.

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71. *Id.* at 619 (emphasis deleted).

72. An issue not raised in *CCNV II* deserves mention at this time. The court never addressed the issue of enforceability of the Park Service regulation, although as a practical consideration, the judges may well have looked at this potential problem. However, any issue of enforceability should play no role in the determination of the case. The constitutionality of a law or regulation should not depend on to what degree it is enforceable. *Cf.* Nixon v. Sirica, 487 F.2d 700, 711–12 (D.C. Cir. 1973) (per curiam).

73. *CCNV II*, 52 U.S.L.W. 3229 (U.S. Oct. 3, 1983) (No. 82-1998).

74. 47 Fed. Reg. 24,304 (1982).