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ARTICLES

A CAUTIONARY TALE ABOUT POLICING PEACEFUL PROTESTS: FIRST AMENDMENT RIGHTS STILL REIGN SUPREME

KIA H. VERNON*

I. INTRODUCTION

“Forward together, not one step back! Forward together, not one step back!” the crowd of thousands yelled as they marched from the Capitol Lawn toward the North Carolina Legislative Building in Raleigh, North Carolina.¹ The multitude of men and women, representing various races, socioeconomic backgrounds, and ideological views,² converged on the Capitol Mall to participate in a “Moral Monday”³ demonstration, to protest numerous legislations enacted by the North Carolina General Assembly relating to voter identification, unemployment benefits, Medicaid expansion,

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1. NC Forward Together Moral Movement Channel, *June 3rd Moral Monday Mass Rally Promo – Forward Together Movement*, YOUTUBE (May 30, 2013), <http://www.youtube.com/watch?v=U5Hi3bXMVnc>.

2. See NC Civitas Institute, *The Moral Monday Protestors*, <http://www.nccivitas.org/moralmonday/> (last visited Mar. 10, 2015) (Although there is no statistical information available regarding protestor diversity, proportional representations by age, sex, political affiliations, reported cities and counties and available salaries of arrestees can be found on this site).

3. See Ari Berman, *North Carolina's Moral Mondays*, NATION (July 17, 2013), <http://www.thenation.com/article/175328/north-carolinas-moral-mondays#>. (Weekly protests, organized by the North Carolina Chapter of the National Association for the Advancement of Colored People (NC NAACP), began on Apr. 29, 2013. The demonstrations, called “Moral Monday” protests, were held on Mondays, the beginning of the legislative work week, to encourage lawmakers to reverse some of the laws and policies they enacted “that attack North Carolina’s poorest and most vulnerable residents.”).

abortion rights, teacher pay, changes in tax legislation, and other issues affecting poor and disadvantaged citizens in the State.⁴

While many in the crowd remained on the Capitol Lawn, others filed into the North Carolina Legislative Building to continue their protest.⁵ Protestors entering the public building filed in through the front doors, passing reporters and police officers from various agencies.⁶ Some protestors continued to sing and chant, while others bowed their heads in silent prayer or simply stood in solidarity.⁷ After several minutes of singing and chanting, the group was addressed by Jeff Weaver, Chief of the North Carolina General Assembly Police, who announced that the group was engaged in an unlawful assembly; the individuals would be arrested unless they dispersed.⁸

What happened next presents a cautionary tale for those who are tasked with the responsibility of writing, enacting, and ultimately policing the laws that restrict an individual's freedom of speech, freedom to peaceably assemble, and right to petition the government for a redress of the individual's grievances. After the police issued three warnings, protestors on the first level of the building⁹ were arrested and charged with Failure to Disperse,¹⁰ Violation of Building Rules,¹¹ and Second Degree Trespass.¹² Protestors were not informed of the nature of their "unlawful acts," nor were they asked to be quiet or provided instructions on how they could be in compliance with the building rules and thus avoid arrest.¹³ Instead, immediately after the third warning, protestors were asked one-by-one to turn around with their hands behind their backs so zip ties could be placed around their wrists, as they were informed that they were being placed under arrest.¹⁴ The protestors were then led to a prison bus and driven past the thousands of onlookers who cheered in their support as they were trans-

4. Interview with Irving Joyner, Professor of Law at N.C. Cent. Univ. Sch. of Law and Chair of the N.C. NAACP Legal Redress Team, in Durham, N.C. (Feb. 6, 2015) (Professor Joyner was also Defense Team Coordinator for the North Carolina Moral Monday Movement, leading a group of over 100 volunteer attorneys who assisted in the representation of the over 900 Moral Monday arrestees).

5. Order Granting Dismissal of Charges, Sept. 14, 2014.

6. *Id.* Police officers from the North Carolina General Assembly, Raleigh Police Department and Capitol Police Department were present.

7. Berman, *supra* note 3.

8. *Id.*

9. Protestors on the second level were allowed to remain and continue with their protest and were not threatened with arrest.

10. N.C. GEN. STAT. § 14-288.5 (2013).

11. N.C. GEN. STAT. § 120-32.1(b) (2013). Protestors were charged with violating building rules for displaying signs in violation of posted building rules. All protestors were charged for violating building rules, regardless of whether the protestors were displaying a sign.

12. N.C. GEN. STAT. § 14-159.13 (2013).

13. Interview with Irving Joyner, *supra* note 4.

14. *Id.*

ferred to the nearby Wake County Justice Center so they could be processed.¹⁵

Over the course of the 2013 legislative session, thirteen Moral Monday protests took place, bringing more than 35,000 concerned citizens together to voice their concerns about the new direction of the North Carolina Legislature.¹⁶ At the end of the session, nearly 950 protestors were arrested for what the protestors and rally organizers deemed to be an exercise of the protestors' First Amendment rights.¹⁷ Despite efforts by attorneys for the Moral Monday Movement to negotiate for the dismissal of all charges prior to trial,¹⁸ the Wake County District Attorney¹⁹ chose instead to proceed with prosecuting each case, presenting arrested protestors with only two options: 1) accept a deferred prosecution agreement, requiring each defendant to perform twenty-five hours of community service at an approved organization, pay court costs in the amount of \$180, and agree not to commit any criminal offense other than waivable traffic violations, in exchange for a voluntary dismissal of all charges;²⁰ or 2) proceed with a trial.²¹

Although some protestors accepted the deferral agreement, the majority of those arrested decided to challenge the constitutionality of the charges,²² asserting that they "were engaging in 'peaceful political speech' protected under the U.S. Constitution."²³ To accommodate the over 900 cases, the North Carolina Administrative Office of the Courts appointed a special judge who was scheduled to oversee all of the Moral Monday Cases during the two monthly court dates allocated for the trials.²⁴

15. Berman, *supra* note 3.

16. REV. DR. WILLIAM J. BARBER II (with BARBARA ZELTER), FORWARD TOGETHER, A MORAL MESSAGE FOR THE NATION 4 (2015). Moral Monday Protests were also held in cities across North Carolina. It is estimated that more than thirty thousand protestors attended those statewide events. *Id.*

17. Berman, *supra* note 3.

18. Interview with Irving Joyner, *supra* note 4.

19. See Kelly Gardner, *Governor Appoints Wake judge as interim DA*, <http://www.wral.com/governor-appoints-district-court-judge-as-interim-wake-da/13518670/> (last visited Mar. 12, 2015) (The Wake County District Attorney at the time of the Moral Monday arrests was Colon Willoughby. Ned Mangum was appointed as interim Wake County District attorney in March 2014.).

20. Sloane Heffernan, et. al., *DA: Do community service to discharge 'Moral Monday' arrests*, <http://www.wral.com/wake-da-offers-deal-to-moral-monday-arrestees/12765874/> (last visited Mar. 12, 2015).

21. *Id.*

22. Of the nearly 1,000 arrests, only approximately two dozen accepted plea agreements. Anne Blythe, *Moral Monday Case Verdicts Vary*, NEWS & OBSERVER (Raleigh), Nov. 8, 2013, at 1A.

23. Anne Blythe, 2 'Moral Monday' Cases Dismissed, NEWS & OBSERVER (Raleigh), Oct. 12, 2013, at 1B. (quoting Scott Holmes, one of the lead attorneys for the Moral Monday cases).

24. Jess Thomas, *Moral Monday Protestor from N.C. State Faces Trial*, TECHNICIAN ONLINE (Oct. 27, 2013, 11:55 PM), http://www.technicianonline.com/news/article_b896ff30-3f84-11e3-8335-0019bb30f31a.html.

108 NORTH CAROLINA CENTRAL LAW REVIEW [Vol. 37:105]

As the cases began to trickle through the court system, many began to question the arrests and subsequent prosecutions of the protestors.²⁵ How could protestors be arrested for exercising their constitutionally protected rights? Were the protestors arrested in order to thwart future attempts by individuals interested in exercising their right to peacefully assemble and petition their representatives? Was the criminal justice system being used to deter freedom of speech? What is the “cost” of attempts to legislate protest?

This Article will examine the issues relating to recent attempts by the North Carolina General Assembly to regulate speech and limit an individual’s First Amendment right to protest. Part II of this Article will examine the protections afforded to individuals exercising their rights to protest and peaceably assemble under the First Amendment, as extended to the states by the Fourteenth Amendment, and discuss the limitations on freedom of speech and the right to assemble, including a discussion of time, place, or manner restrictions and the limitation of speech in places designated as public forums. Part III of this Article will discuss leading cases involving freedom of speech. Part IV of this Article will discuss the Moral Monday Movement in North Carolina and attempts by the North Carolina General Assembly to limit protest and regulate freedom of speech by enacting and enforcing statutes that criminalize protest. Part V will discuss the costs associated with attempts to limit and criminalize protest, and Part VI will provide recommendations for individuals or entities charged with monitoring freedom of speech to avoid infringing upon an individual’s constitutionally protected rights.

II. FIRST AMENDMENT PROTECTIONS

The First Amendment to the United States Constitution provides that “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*.”²⁶ Although the First Amendment applies to interference from the federal government, these prohibitions are extended to the states through the Fourteenth Amendment.²⁷

While the language in the First Amendment appears to imply that these fundamental rights were only bestowed upon individuals by the Amend-

25. Because court cases were only scheduled for two days per month — with the first trial lasting more than two days — moving the cases through the system was an extremely slow process. As prosecutor Barbara Zelter opined, “with her schedule, it’s going to take many years to complete all of the trials involving the [Moral Monday] defendants.” *Id.*

26. U.S. CONST. amend. I (emphasis added).

27. See *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

ment's enactment, it was well established — long before even the Constitution itself was written — that the ability “to meet peaceably for consultation in respect to public affairs and to petition for a redress of grievances” was an inherent birthright of every citizen of the United States.²⁸ As United States Supreme Court Chief Justice Morrison Waite acknowledged in *United States v. Cruikshank*,²⁹ “[t]he right of the people peaceably to assemble for lawful purposes, with the obligation on the part of the States to afford it protection, existed long before the adoption of the Constitution.”³⁰ At the very core of the creation of this democracy was the desire of the people of the United States to develop a national government that would “‘establish justice, insure domestic tranquility . . . promote the general welfare, and secure the blessings of liberty’ to themselves and their posterity”³¹

Even though it is well-known that the inalienable rights of freedom of speech and peaceful assembly are liberties afforded to everyone, it is likewise recognized that these liberties are not absolute.³² All speech is not protected and even protected speech can be limited. As the Court held in *Schenck v. United States*,³³ “[t]he character of every act depends upon the circumstances in which it was done.”³⁴ Accordingly, in determining what and when speech is protected and where an individual is legally allowed to peacefully protest numerous factors will be considered.

Because there are so many cases involving attempts to prohibit speech, formulating one general rule that applies to all speech is simply not possible. “[S]peech interacts with too many other values in too many complicated ways to expect that a single formula will prove productive.”³⁵ Thus, whether a particular speech is protected will depend on the facts and circumstances surrounding each case.³⁶ As a result, limitations on speech have been the subject of great debate, and therefore heavily litigated.³⁷

28. *Id.* at 552. *See also* *De Jonge v. Oregon*, 299 U.S. 353, 364–65 (1937) (“The greater the importance of safeguarding the community from incitements to the overthrow of our institutions by force and violence, the more imperative is the need to preserve inviolate the constitutional rights of free speech, free press and free assembly in order to maintain the opportunity for free political discussion, to the end that government may be responsive to the will of the people and that changes, if desired, may be obtained by peaceful means. Therein lies the security of the Republic, the very foundation of constitutional government.”).

29. 92 U.S. 542 (1875).

30. *United States v. Cruikshank*, 92 U.S. 542 (1875).

31. *Id.* at 549–50 (quoting U.S. CONST. pmbl.).

32. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

33. 249 U.S. 47(1919).

34. *Id.* at 52.

35. JESSE H. CHOPER ET AL., *LEADING CASES IN CONSTITUTIONAL LAW* 314 (West ed., 2010).

36. *Id.*

37. *Id.*

The United States Supreme Court has provided guidance to lower courts when analyzing whether certain types of speech are protected. In examining freedom of speech limitations, the Court has held that certain categories of speech do not fall under the protection of the First Amendment. In *Chaplinsky v. New Hampshire*,³⁸ the Court held that “[t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.”³⁹ Among the types of speech that are not afforded constitutional protection are “the lewd and obscene, the profane, the libelous, and the insulting or ‘fighting’ words — those which by their very utterance inflict injury or tend to incite an immediate breach of the peace.”⁴⁰

When examining the constitutionality of laws that regulate free speech, the Court balances the importance of the rights with the interests that the policies are seeking to serve. Accordingly, to analyze the regulations, it is necessary to distinguish between content regulations and regulations of conduct related to speech.⁴¹ Content restrictions refer to policies that are enacted to prohibit or limit the speaker’s message.⁴² These restrictions include content-based regulations, when the government undertakes to regulate speech based on the subject matter or specific views expressed in the message, and content-neutral regulations, when the government seeks to regulate all speech for some other purpose.⁴³

In order to justify content-based restrictions, the government must meet the highest level of scrutiny and demonstrate that the regulation is necessary to serve a compelling state interest and that the regulation is narrowly tailored to serve that interest.⁴⁴ However, in justifying content-neutral restrictions, an intermediate level of scrutiny applies and the government needs only to show that the regulation is necessary to advance important interests unrelated to the suppression of speech, and that it does not burden

38. 315 U.S. 568 (1942).

39. *Id.* at 571–72.

40. *Id.* at 572. See also *Masses Publishing Co. v. Patten*, 244 Fed. 535, 540 (S.D.N.Y. 1917) (“The defendant’s position, therefore, in so far as it involves the suppression of the free utterance of abuse and criticism of the existing law, or the policies of the war, is not, in my judgment supported by the language of the statute. Yet there has always been a recognized limit to such expressions, incident indeed to the existence of any compulsive power of the state itself.”).

41. CHOPER, *supra* note 35, at 414.

42. *Id.*

43. *Id.*

44. *Id.* See also *Turner Broadcasting System, Inc. v. F.C.C.*, 512 U.S. 622, 680 (1994) (“Content-based speech restrictions are generally unconstitutional unless they are narrowly tailored to a compelling state interest.” (citing *Boos v. Barry*, 485 U.S. 312, 321 (1988))).

substantially more speech than is necessary or are narrowly tailored to further those interests.⁴⁵

Regulations that seek to prohibit speech must also be reasonable. A regulation will not be upheld if it is overbroad, prohibits substantially more speech than is necessary to serve its interest, it is vague, or it fails to provide reasonable notice of the type of speech that is prohibited or permitted.⁴⁶ Additionally, there must be defined standards for how the law is to be applied.⁴⁷ A public official cannot be afforded unfettered discretion in the enforcement of the law.⁴⁸

In regulating the conduct pertaining to free speech, the Court has allowed even more governmental latitude, permitting the government to adopt time, place, and manner regulations.⁴⁹ When speech is made on property that is a public forum (government property that the government is constitutionally required to make available for speech),⁵⁰ or a designated public forum (government property that the government could close to speech, but instead chooses to open the property to speech for a specific use or period of time),⁵¹ the government may use time, place, and manner restrictions to regulate speech.⁵² However, the regulation must be content-neutral, or it must meet the highest level of scrutiny and be necessary to serve a compel-

45. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) ("The appropriate inquiry in this case, then, is whether the Renton ordinance is designed to serve a substantial governmental interest and allows for reasonable alternative avenues of communication."). See also *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); *Heffron v. Int'l Soc'y for Krishna Consciousness*, 452 U.S. 640, 647-48 (1980). It is clear that the ordinance meets such a standard. As a majority of the Court recognized in *American Mini Theatres*, a city's 'interest in attempting to preserve the quality of urban life is one that must be accorded high respect.' *Young v. Am. Mini Theatres*, 427 U.S. 50, 71 (1976) (plurality opinion); see *id.* at 80 (Powell, J., concurring) ("Nor is there doubt that the interests furthered by this ordinance are both important and substantial."). Exactly the same vital governmental interests are at stake here.

46. *Interstate Circuit, Inc. v. City of Dallas*, 390 U.S. 676, 685 (1968).

47. *Id.* at 677.

48. *Cox v. Louisiana*, 379 U.S. 536, 558 (1965) ("It is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute."). See *Saia v. New York*, 334 U.S. 558, 560-61 (1938).

49. *Clark*, 468 U.S. 288, 293-94 (1984) ("Expression, whether oral or written or symbolized by conduct, is subject to reasonable time, place or manner restrictions. 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); see also *City Council of LA v. Taxpayers for Vincent*, 466 U.S. 789, 815 (1984); *U.S. v. Gracc*, 461 U.S. 171, 177 (1983); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983); *Heffron*, 452 U.S. at 647; *Va. Pharmacy Board v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976); *Consol. Edison Co. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 530, 535 (1980).

50. *Perry*, 460 U.S. 37, 45-46 (1983).

51. *Widmar v. Vincent*, 454 U.S. 263, 267-68 (1981).

52. *Id.* at 276; See also *Perry*, 460 U.S. at 45.

ling state interest, and narrowly tailored to serve that interest.⁵³ If the regulation is content-neutral it must be a time, place, and manner restriction that is narrowly tailored to serve an important governmental interest and leaves open alternative channels for communication.⁵⁴

When a property is a limited public forum (a government property that the government opens to some speakers or some topics), the government can regulate speech as long as the regulation is reasonable and viewpoint-neutral.⁵⁵ Likewise, if a property is designated as a non-public forum, a government property that the government can — and does — close to speech, the government can regulate speech as long as the regulation is reasonable and viewpoint neutral.⁵⁶

III. CASES ADDRESSING FIRST AMENDMENT PROTECTIONS

Despite the guidelines provided by the United States Supreme Court, governmental regulations and other attempts to prohibit, limit, or penalize speech are pervasive.⁵⁷ However, despite continued attempts to limit these fundamental rights, the Court has consistently affirmed that governmental agencies cannot infringe upon an individual's right to exercise those rights.⁵⁸ When the speech is constitutionally protected speech that takes place in a public forum or designated public forum, the Court has generally held that, although the speech may be protected, the government is allowed to establish appropriate limitations to protect its governmental interest.⁵⁹

In *Edwards v. South Carolina*,⁶⁰ the United States Supreme Court examined the restriction of speech in a public forum.⁶¹ In *Edwards*, 187 high school and college students gathered at the South Carolina State House grounds to protest racially discriminatory practices.⁶² As they approached the State House grounds, they encountered thirty law enforcement officers,

53. *Perry*, 460 U.S. at 45 (“In places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the State to limit expressive activity are sharply circumscribed . . . In these quintessential public forums, the government may not prohibit all communicative activity. For the State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.”) (citing *Carey v. Brown*, 447 U.S. 455, 461 (1980)).

54. *Id.*

55. *USPS v. Council of Greenburgh*, 453 U.S. 114, 132 (1981).

56. *Id.* at 132–33.

57. *See, e.g., id.* at 116–17.

58. *See Young v. Am. Mini Theatres*, 427 U.S. 50, 59–60 (1976).

59. As the focus of this article is the North Carolina Moral Monday Movement, for the purposes of this article, the cases and subsequent discussion will be limited to content-neutral speech in public forums.

60. 372 U.S. 229 (1963).

61. *Id.*

62. *Id.* at 229.

who had received notice that the students had planned to engage in protest.⁶³ The students were advised that they could go through the State House Grounds, but were required to do so peacefully, which they did.⁶⁴ Nonetheless, after hundreds of onlookers began to crowd around, the students were warned that if they did not disperse within fifteen minutes, they would be arrested.⁶⁵ Instead of complying with the order to disperse, the students began to sing and chant, and were arrested and consequently convicted of violating a South Carolina breach of the peace statute.⁶⁶ The South Carolina Supreme Court affirmed the convictions.⁶⁷ The United States Supreme Court, in reversing the convictions, held the students' peaceful assembly at the site of state government, without the protestors themselves being violent, or threatening violence or harm, was an infringement of the constitutionally protected rights of free speech, free assembly, and freedom to petition the government for redress of their grievances.⁶⁸ The Court further provided that "[a] statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment"⁶⁹

In 1965, two years after *Edwards*, the United States Supreme Court addressed the regulation of protected speech on state grounds in *Cox v. Louisiana*.⁷⁰ In *Cox*, the defendant, B. Elten Cox, an ordained minister who led a group of students to protest against segregation and discrimination in a march from the Louisiana State Capitol Building to the courthouse, was arrested and convicted under a disturbing the peace statute and violating a state statute for obstructing public passages.⁷¹ At the end of the assembly that consisted of singing, chanting, and praying, Mr. Cox encouraged the demonstrators to protest racial discrimination by walking into stores that served lunch and request to be served.⁷² If the demonstrators were not served, they were instructed to sit for an hour.⁷³ Thereafter, the demonstrators were approached by the sheriff, who informed them that Mr. Cox's appeal for them to engage in acts of civil disobedience in stores resulted in the assembly being unlawful, and a direct violation of the law, and all de-

63. *Id.* at 230.

64. *Id.* at 230–31.

65. *Id.* at 233.

66. *Id.*

67. *Id.* at 234.

68. *Id.* at 237–38.

69. *Id.* at 238 (citing *Stromberg v. California*, 283 U.S. 359, 369 (1931)).

70. 379 U.S. 536 (1965).

71. *Id.*

72. *Id.* at 542–43.

73. *Id.* at 543.

114 NORTH CAROLINA CENTRAL LAW REVIEW [Vol. 37:105]

monstrators were required to leave at once.⁷⁴ The demonstrators did not immediately leave which prompted the police to explode a tear gas shell at the group.⁷⁵ This caused most of the protestors to quickly disperse, but the defendant, as the organizer of the event, was one of the last individuals to disperse.⁷⁶ The defendant was charged and convicted of violating the Louisiana State Statute which provided that

“[w]hoever with intent to provoke a breach of the peace . . . crowds or congregates with others . . . in or upon . . . a public street or public highway, or upon a public sidewalk, or any other public place or building . . . and who fails or refuses to disperse and move on . . . when ordered so to do by any law enforcement officer . . . or any other authorized person . . . shall be guilty of disturbing the peace.”⁷⁷

The Louisiana Supreme Court affirmed Cox’s conviction, and Mr. Cox appealed.⁷⁸

In reversing the defendant’s conviction for breach of peace, the United States Supreme Court held that the State could not constitutionally punish the defendant for “engaging in the type of conduct which [the] record reveals”⁷⁹ The Court asserted that the demonstrators were engaged in a peaceful demonstration, which was protected by the Constitution.⁸⁰ The Court further held that the statute was unconstitutionally broad in scope as it “sweeps within its broad scope activities that are constitutionally protected free speech and assembly.”⁸¹ The Court added that “[m]aintenance of the opportunity for free political discussion is a basic tenet of our constitutional democracy.”⁸² Quoting Chief Justice Hughes in *Stromberg v. California*,⁸³ the Court reiterated that “[a] statute which upon its face, and as authoritatively construed, is so vague and indefinite as to permit the punishment of the fair use of this opportunity is repugnant to the guaranty of liberty contained in the Fourteenth Amendment.”⁸⁴

The Court also reversed the defendant’s conviction for obstructing passages as the statute provides unfettered discretion to the public official.⁸⁵ The Court held,

74. *Id.*

75. *Id.* at 544.

76. *Id.*

77. *Id.*

78. *Id.* at 536.

79. *Id.* at 545.

80. *Id.* at 549–51.

81. *Id.* at 552.

82. *Id.*

83. *Stromberg v. California*, 283 U.S. 359, 369 (1931).

84. *Cox*, 379 U.S. at 552.

85. *Id.* at 557–58.

“[i]t is clearly unconstitutional to enable a public official to determine which expressions of view will be permitted and which will not or to engage in invidious discrimination among persons or groups either by use of a statute providing a system of broad discretionary licensing power or, as in this case, the equivalent of such a system by selective enforcement of an extremely broad prohibitory statute.”⁸⁶

In *Occupy Columbia v. Haley*,⁸⁷ the Fourth Circuit also addressed impermissible regulation in public forums. In *Occupy Columbia*, the defendants engaged in a twenty-four hour per day protest on the grounds of the South Carolina General Assembly.⁸⁸ After thirty-one days of continuous occupation, South Carolina Governor, Nikki Haley, issued a letter to the Director of the Department of Public Safety and to the Chief of Police of the Bureau of Protective Services, advising them to arrest any individual who remained on the state grounds after 6:00 p.m. without written authorization from the Budget and Control Board.⁸⁹ In her letter authorizing the arrest, Governor Haley referred to a “Condition for Use of South Carolina State House Grounds” provision that stated that, “no activities would be scheduled after 5:00 p.m. in the State House and on the state grounds after 6:00 p.m. without written authorization from the Board.”⁹⁰ Later that day, Governor Haley held a press conference announcing the policy. At 6:00 p.m. that evening nineteen protestors, who referred to themselves as Occupy Columbia, remained on the state grounds. Police arrested the protestors and released them the following morning.⁹¹

Although the state dismissed charges against the nineteen individuals, two weeks later the individuals filed suit to enjoin Governor Haley, and other governmental actors, from interfering with their twenty-four hour access to the state grounds.⁹² The court granted a preliminary injunction in favor of the occupiers and after several amended complaints and cross-complaints, which included a claim for damages by the occupiers and a qualified immunity argument by the defendants, the South Carolina District Court concluded that the defendants were entitled to occupy the state grounds.⁹³ The court held the rules that existed at the time of the arrest did not include valid time, place, and manner restrictions that would preclude

86. *Id.*

87. 738 F. 3d 107 (4th Cir. 2013).

88. *Id.* at 112.

89. *Id.*

90. *Id.* at 112–13.

91. *Id.*

92. *Id.*

93. *Id.*

116 NORTH CAROLINA CENTRAL LAW REVIEW [Vol. 37:105]

the plaintiffs' occupation.⁹⁴ The court also rejected the qualified immunity arguments by Governor Haley and other defendants.⁹⁵

In affirming the district court's ruling that the defendants violated the plaintiffs' First Amendment Rights, the court reaffirmed its holding from *Tobey v. Jones*,⁹⁶ that "[a] bedrock First Amendment principle is that citizens have a right to voice dissent from government policies . . . [and] speech regarding 'matters of public concern . . . is at the heart of the First Amendment's protection.'"⁹⁷ However, the court recognized that even protected speech was not permissible in all places and at all times, and that governments may enforce appropriate time, place, and manner restrictions that are content-neutral and that are narrowly tailored to serve an important governmental interest, and leave open alternative channels for communication.⁹⁸ Nonetheless, at the time the arrests were made, there were no time, place, and manner restrictions prohibiting the occupiers' overnight presence on the state grounds, and thus the plaintiffs were entitled to be present on the grounds, and the denial of that right was unconstitutional.⁹⁹

Most recently, the United States Supreme Court examined time, place, and manner restrictions in *McCullen v. Coakley*,¹⁰⁰ ruling that

the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant public interest, and that they leave open ample alternative channels for communication of the information.¹⁰¹

In *McCullen*, the plaintiffs questioned the constitutionality of a statute that made it a crime to "knowingly stand on a public way or sidewalk within thirty-five feet of an entrance or driveway to any place, other than a hospital, where abortions are performed."¹⁰² The defendants alleged that the law was necessary because the previous statute establishing an "18-foot radius around the entrances and driveways of [abortion clinics]" was inadequate.¹⁰³ Plaintiffs challenged the statute, alleging that it infringed upon their First Amendment Rights.¹⁰⁴ In ruling that the statute was unconstitu-

94. *Id.* at 114–115.

95. *Id.* at 115.

96. 706 F.3d 379 (4th Cir. 2013).

97. *Occupy Columbia v. Halcy*, 738 F. 3d 107, 122 (4th Cir. 2013) (*quoted in* *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 477 U.S. 749, 758–59 (1985)).

98. *See id.* at 122.

99. *Id.* at 125.

100. 134 S. Ct. 2518 (2014).

101. *Id.* at 2529.

102. *Id.* at 2525.

103. *Id.*

104. *Id.* at 2528.

tional, the Court concluded that in order for a content-neutral time, place, or manner restriction to be narrowly tailored, “it must not burden substantially more speech than is necessary to further the government’s legitimate interests.”¹⁰⁵ In order to prevent the exclusion of areas open for speech and debate, the content-neutral “restriction of speech need not be the least restrictive or least intrusive means of serving the government’s interest.”¹⁰⁶ However, the government still “may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals.”¹⁰⁷

These cases reflect that in spite of the numerous challenges testing the constitutionality of regulations restricting speech in public forums, the law and the United States Supreme Court’s position remains the same: an individual’s right to access in a public forum is vital and deserves the utmost protection.¹⁰⁸

IV. A CLOSER EXAMINATION OF THE NORTH CAROLINA MORAL MONDAY MOVEMENT

Similar to the other First Amendment cases, the Moral Monday protests were not organized and effectuated to challenge the constitutionality of existing regulations that attempted to thwart free speech. The protestors that gathered did so to engage in what they understood, and the Court provided in *Edwards*, to be constitutionally protected rights.¹⁰⁹ In defending his right to protest, N.C. National Association for the Advancement of Colored People (NAACP) President, Reverend William Barber, one of the first protestors to be arrested at the North Carolina General Assembly, declared that the General Assembly was the “People’s House.”¹¹⁰ Protestors “went in to challenge what we believed then, and believe now, are constitutionally inconsistent, morally indefensible and economically insane extremist policies” such as requiring individuals to show a form of identification in order

105. *Id.* at 2535 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989)).

106. *Id.*

107. *Id.*

108. *Id.* at 2540.

109. *Edwards v. South Carolina*, 372 U.S. at 235 (“The circumstances in this case reflect an exercise of these basic constitutional rights in their most pristine and classic form. The petitioners felt aggrieved by laws of South Carolina, which allegedly ‘prohibited Negro privileges in this State.’ They peaceably assembled at the site of the State Government and there peaceably expressed their grievances ‘to the citizens of South Carolina, along with the Legislative Bodies of South Carolina.’”). See also Anne Blythe, *Wake DA agrees to dismiss all but about 50 ‘Moral Monday’ cases from 2013*, News and Observer (Sept. 19, 2014), available at <http://www.newsobserver.com/news/politics-government/state-politics/article10065071.html> (a discussion of the reasons the protestors decided to engage in protest and why they asserted their actions were constitutional).

110. Interview with Irving Joyner, *supra* note 4.

to vote, decreasing unemployment benefits and restricting abortion rights.¹¹¹

The leaders in the N.C. NAACP, having an established history of engaging in protest to further the advancement of its causes, were no strangers to the minutiae of protest and free speech protections, and laws that apply to them.¹¹² Given this experience, NAACP leaders properly counseled individuals prior to engaging in the Moral Monday demonstrations.¹¹³ These meetings were a valuable component of the Moral Monday Movement, as they successfully prevented the escalation of protests and ensured that the message, not the method, was the focus of the movement.¹¹⁴ In the meetings held prior to the Moral Monday protests, organizers informed protestors of the types of speech and conduct that were protected by the First Amendment.¹¹⁵ Protestors were cautioned that the group intended to engage in only nonviolent protest, thus the organizers strongly discouraged protestors from participating in behavior that would run afoul of the Constitution and the organization's ultimate goal.¹¹⁶ As a precautionary measure — even though the group solely intended to engage in activities that it believed were constitutionally protected — protestors were advised of the possibility of arrest and provided instruction on how to respond in the event that they were arrested.¹¹⁷ Protestors who could not adhere to the rules were asked not to participate.¹¹⁸

Upon entering the North Carolina Legislative Building, protestors filed in singing and chanting, while others carried signs in support of their various causes.¹¹⁹ Despite adhering to the parameters provided by the N.C. NAACP to avoid engaging in speech and conduct not protected under the Constitution, Chief Weaver informed protestors that their assembly was unlawful, and after advising them to leave three times, instructed the other officers to secure the area and begin the process for arrest.¹²⁰

111. *Id.*

112. *Id.*

113. *Id.* (noting that similar meetings, described as training programs, were held during the Civil Rights Movement, where organizers held sit-in simulations were conducted to prepare protestors that intended to engage in acts of civil disobedience).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* (noting that similar meetings, described as training programs, were held during the Civil Rights Movement, where organizers held sit-in simulations were conducted to prepare protestors that intended to engage in acts of civil disobedience).

118. *Id.*

119. Ari Berman, *North Carolina's Moral Mondays*, NATION (July 17, 2013), <http://www.thenation.com/article/175328/north-carolinas-moral-mondays#>.

120. *Id.*

Protestors were subsequently arrested and charged with violating building rules and crimes associated with their failure to disperse after the determination was made that the assembly violated building rules.¹²¹ However, there were several fatal flaws with the building rules.¹²² First, Chief Weaver based his declaration that the group's assembly was an unconstitutional violation because it was creating a disturbance.¹²³ He relied on the North Carolina General Assembly Legislative Building Rules (Legislative Building Rules) to order the protestors to leave. These rules provided that with limited exceptions,¹²⁴ visitors on the second floor "may move freely about the Legislative Complex, so long as they do not *disturb* the General Assembly, one of its houses, or its committees, members, or staff in the performance of their duties."¹²⁵ However, Chief Weaver was unable to articulate an objective standard for how that determination was made.¹²⁶ At trial, Chief Weaver testified that the crowd was a disturbance, even though there were no established standards to determine what would amount to a disturbance, and he could not recount specific instances of being informed by individual legislators or staff that the group actually disturbed anyone in the General Assembly in the performance of their duties.¹²⁷

121. Order Granting Dismissal of Charges, *supra* note 5 (The author notes that the charges of Second Degree Trespass and Failure to Disperse both arise from the assertion that the Chief Weaver's basis for determining that the assembly was unlawful was proper. Accordingly, this portion of the article will focus specifically on why the protestor's activities were constitutionally protected, and thus the pronouncement was inaccurate, which would result in the subsequent charges being declared invalid).

122. N.C. GEN. ASSEMB., RESTATED RULES OF STATE LEGISLATIVE BUILDING (May 15, 2014) (The Legislative Building Rules in effect at the time of the Moral Monday protests were amended in 1987. In light of the Moral Monday Protests and subsequent rulings, these rules were amended on January 13, 2015.). See Additional Time, Place, and Manner Restrictions for use of 2nd Floor Rotunda of Legislative Building, available at <http://www.ncleg.net/ncgainfo/rotundaMemo.pdf>. See Rules of State Legislative Building and Legislative Office Building Adopted by the Legislative Services Commission, available at <http://www.ncga.state.nc.us/ncgainfo/BuildingRules5-15-2014.pdf> (The Legislative Rules are promulgated by the Legislative Services Commission which is composed of House and Senate members appointed by the President Pro Tem of the Senate, and the Speaker of the House.). The author notes that during the Moral Monday cases, defense attorneys questioned the constitutionality of the method by which the Commission promulgates the rules and the authority of the Commission to enact rules that can result in criminal charges. However, the constitutionality of the structure of the commission and the manner in which it promulgates rules is beyond the scope of this article.

123. Order Granting Dismissal of Charges, *supra* note 5, at 5.

124. *Id.* (The author notes during the first Moral Monday trials, Judge Hamilton ruled that the portion of the Legislative Building Rules that limited access to the second floor of the Legislative Complex based on the sole discretion of the members or staff was arbitrary and unconstitutional. Additionally, even after the North Carolina General Assembly Police were on notice that the protestors intended to engage in weekly protests and were aware that future Moral Monday protestors would engage in the same activities, the protestors were allowed to come in to the Legislative complex, with the full knowledge of their intent to engage in peaceful protest. This provides further evidence that the protestors were in a public forum and protected under the Constitution.).

125. *Id.* at 6.

126. *Id.*

127. Order Granting Dismissal of Charges, *supra* note 5, at 8 (The author notes that she was present during numerous Moral Monday trials challenging the constitutionality of Chief Weaver's determination

120 NORTH CAROLINA CENTRAL LAW REVIEW [Vol. 37:105]

As the United States Supreme Court held in *Cox*, such unbridled discretion in a public official is “clearly unconstitutional.”¹²⁸ As the Court further stated, “appropriate, limited discretion, under properly drawn statutes or ordinances . . . may be vested in administrative officials, provided that such limitation is exercised with uniformity of method of treatment . . . [and with] a systematic, consistent and just order of treatment”¹²⁹ In the Moral Monday cases, no such method was employed, or even considered that would allow Chief Weaver to consistently determine what conduct was sufficient to be classified as a disturbance and to do so in a “systematic, consistent and just order of treatment” as required by the Court in *Cox*.¹³⁰ Further, the rule prohibiting “disturbances” in the Legislative Complex was vague and overly broad as it provided no guidance for when and what speech would violate it.¹³¹ As such, Chief Weaver’s declaration that the assembly was unlawful because it caused a disturbance was unconstitutional.¹³²

Another fatal flaw in the building rules was the failure to provide appropriate time, place, or manner restrictions. The protestors were engaged in constitutionally protected speech in a public forum. As the United States Supreme Court has acknowledged, even though speech may be protected, it is not protected unconditionally.¹³³ Governmental agencies have the power to create appropriate time, place, or manner restrictions.¹³⁴ However, the North Carolina Legislative Commission neglected to do so.¹³⁵ The Legislative Building Rules in effect at the time of the Moral Monday protests simply provided that the Legislative Complex was open to the public without appropriate restrictions.¹³⁶ As such, the protestors were engaging in activities that were consistent with the protections afforded to them under the Constitution.¹³⁷ Analogous to the circumstances in *Occupy Columbia*, at the time of the initial Moral Monday protests, there were no time, place, or manner restrictions pertaining to the protest in the Legislative Complex.

that the assembly was unlawful. Further, during several Moral Monday protests, the North Carolina General Assembly was not in session, yet the protestors were still arrested based on Chief Weaver’s determination that they were causing a disturbance.).

128. *Cox v. Louisiana*, 379 U.S. 536, 557. *See also* *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 89 (1969) (holding unconstitutional an ordinance which makes peaceful enjoyment of freedoms guaranteed by the Constitution contingent upon uncontrolled will of an official).

129. *Cox*, 379 U.S. at 557.

130. *Id.*

131. Order Granting Dismissal of Charges, *supra* note 5, at 6.

132. *Id.* at 9.

133. *See* *Widmar v. Vincent*, 454 U.S. 263 (1981).

134. *Id.*

135. *See generally* Order Granting Dismissal of Charges, *supra* note 5; *State v. Beeghley*, app. A (2013).

136. *Id.*

137. *Id.*

The Legislative Building Rules were subsequently amended to include time, place, and manner restrictions.¹³⁸ The new rules cannot retroactively apply to conduct that occurred prior to the amendment.¹³⁹ Therefore, as the Fourth Circuit held in *Haley*, “the right of the protesters to assemble and speak out against the government on the State House grounds in the absence of valid time, place, and manner restrictions” was consistent and clearly established in its prior rulings.¹⁴⁰

Even if appropriate time, place, or manner restrictions were in effect at the time of the protests, the subsequent arrests of the protestors would still have been invalid. Time, place, and manner restrictions imposed by the government “must be narrowly tailored to serve a significant public interest, and must leave open ample alternative channels for communication of the information.”¹⁴¹ During the Moral Monday protests, the protestors were only informed that they had to disburse.¹⁴² They were not advised on what specific activity made the assembly unlawful or asked to reduce their noise level.¹⁴³ The recent *McCullen* decision, which eventually resulted in the dismissal of most of the Moral Monday cases, requires the government to use its available resources to employ less restrictive methods to accomplish its goals.¹⁴⁴ This requirement is to be satisfied without prohibiting individuals from engaging in speech in areas open to them to do so.¹⁴⁵ Furthermore, the conduct of each individual, and not the group as a whole, should be considered.¹⁴⁶ In Moral Monday cases, all protestors were charged with violating the same conduct, even though all protestors were not engaged in that conduct.¹⁴⁷ As attorney Scott Holmes argued while defending Moral Monday protestors, “you can’t use a bulldozer and clear everybody out of a public forum when only a few people are causing a disturbance.”¹⁴⁸ Ironi-

138. N.C. GEN. ASSEMBLY, RESTATED RULES OF STATE LEGISLATIVE BUILDING (May 15, 2014).

139. *Id.*

140. *Occupy Columbia v. Halcy*, 738 F. 3d 107, 125 (4th Cir. 2013). *See generally* *Edwards v. South Carolina*, 372 U.S. 229 (1963).

141. *McCullen v. Coakley*, 134 S.Ct. 2518, 2531 (2014); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989); *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 295 (1984); *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 806 (1984).

142. *See* Interview with Irving Joyner, *supra* note 4.

143. *Id.*

144. *McCullen*, 134 S. Ct. at 2549, 2552.

145. *Id.* at 2531.

146. *Id.* at 2547.

147. *See* Order Granting Dismissal of Charges, *supra* note 5. (For example, protestors charged with violating building rules for carrying signs and engaging in unlawful conduct by singing and chanting, although videos clearly showed the clients were not displaying signs, singing or chanting).

148. Anne Blythe, *Judge’s Ruling to Dismiss “Moral Monday” Cases Could Have Sweeping Effect*, NEWS & OBSERVER, Aug. 3, 2014, <http://www.charlotteobserver.com/news/politics-government/article9146807.html>.

122 NORTH CAROLINA CENTRAL LAW REVIEW [Vol. 37:105]

cally, Chief Weaver issued a memorandum on May 13, 2013 — two weeks after the initial protests, but well before *McCullen* was decided — which advised individuals that persons engaged in activity deemed to violate the building rules would be informed of the rules they were violating, and asked to cease those behaviors, before facing arrest.¹⁴⁹ Under *McCullen*, the guidelines specified in Chief Weaver's memorandum would have properly advised and informed the protestors how to comply with the order and the precise actions that could be taken in order to prevent arrest.¹⁵⁰ However, these procedures were never followed.¹⁵¹

Ultimately, and perhaps, most importantly, the greatest flaw with the building rules was that they sought to prevent the communication that is essential in a democratic system. Promulgating rules to discourage individuals from petitioning the government and seeking their representatives is not only unconstitutional, but it fails to produce the outcome it attempts to achieve, to prohibit the protest. After the arrest and treatment of the initial protestors, news media from around the state and nation generated massive publicity for the Moral Monday Movement.¹⁵² Instead of discouraging protest, the arrests encouraged more protest and increased the number of protest supporters.¹⁵³ Moreover, the North Carolina General Assembly's reactionary measures served as a catalyst that motivated others to join the protestors; some joined to protest the policies of the North Carolina General Assembly, while others became involved simply to protest the violation of the protestors' constitutional rights.¹⁵⁴ Regardless of why they came, the effort to stifle the protest produced the converse result.¹⁵⁵ As Professor Irving Joyner, professor of law at North Carolina Central University School of Law and Chair of the N.C. NAACP Legal Redress Team, stated, "[a]ttempts to deter protest will invariably result in people resisting those attempts, which ultimately produces a more vigorous response."¹⁵⁶

In contrast, when protestors were afforded a meaningful opportunity to speak to representatives about their concerns, a peaceful exchange resulted

149. See Order Granting Dismissal of Charges, *supra* note 5.

150. *Id.*; see generally *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

151. See Order Granting Dismissal of Charges, *supra* note 5.

152. Kelly Gardner & Bridget Whelan, *Moral Monday Crowd Rallies for Women's Rights; 101 Arrested*, Jul. 14, 2013, <http://www.wral.com/-moral-mondaycrowd-rallies-for-women-s-rights-/12661852/>. See also Andy Kotch, North Carolina Moral Monday Movement, PROGRESIVO, <https://progresivoblog.wordpress.com/north-carolinas-moral-monday-movement/>.

153. *Id.*

154. *Id.*

155. *Id.*

156. Interview with Irving Joyner, *supra* note 4.

without any arrests.¹⁵⁷ When Moral Monday protestors requested — and were granted — an opportunity to speak with Senate President Pro Tem, Phil Berger, it provided for the exact exchange that the Constitution intended to encourage and safeguard.¹⁵⁸ The protestors, who had initially planned to stage a sit-in, instead left feeling that their concerns were at least heard.¹⁵⁹ One has to question why the North Carolina General Assembly continued to employ the same tactics during subsequent Moral Monday protests, instead of working with Moral Monday leaders to provide a forum for them to appropriately address their concerns. The failure to appropriately respond and provide the access should be a valuable lesson to heed.

V. THE PRICE OF LIMITING AND CRIMINALIZING PROTEST

The Moral Monday Movement illustrates the substantial monetary costs associated with attempts to regulate protest and then subsequently arrest, charge and prosecute individuals for violating those regulations. Although only fifty protestors participated in the first Moral Monday inside the North Carolina Legislative Building, the arrest of the seventeen protestors garnered local and national media exposure.¹⁶⁰ As a result, the number of protestors and arrestees increased the following week and continued to grow each week the protests were held.¹⁶¹ As the number of individuals protesting inside the Legislative Building grew, the number of supporters and opponents that converged on the Capitol Mall greatly multiplied as well.¹⁶² Anticipating the large crowds, the North Carolina General Assembly Police, in addition to utilizing all of its officers, enlisted other local agencies to provide additional police presence and support, causing unnecessary, additional expenses and an inefficient use of state resources.¹⁶³

The volume of protestor arrests also placed a tremendous strain on the City-County Bureau of Investigation (CCBI) and the Wake County Magis-

157. Mark Binkcr & Laura Lcslic, *Berger Talks Education with 'Moral Monday' Protesters*, Article to @NCCapitol, WRAL.COM (updated June 11, 2014), <http://www.wral.com/berger-talks-education-with-moral-monday-protesters/13715714/>.

158. *Id.*

159. *Id.*

160. McClatchy News Scr., *NAACP President, 16 Other Protestors Arrested Outside N.C. Senate*, Article to *Region/State*, THETIMESNEWS.COM (April 30, 2013, 08:44 AM), <http://www.thetimesnews.com/news/region-state/naacp-president-16-other-protestors-arrested-outside-n-c-senate-1.135124?page=0>.

161. On May 6, 2013, more than 100 people filed into the North Carolina Legislative Building and more than 30 people were arrested. Lynn Bonner, *30 Arrested While Protesting Laws They Say Hurt Poor, Children*, NEWS AND OBSERVER (Raleigh), May 6, 2013. For a list of the number of arrests of each Moral Monday protest, see <https://progresivoblog.wordpress.com/north-carolinas-moral-monday-movement/>.

162. Interview with Irving Joyner, *supra* note 4.

163. *Id.*

124 NORTH CAROLINA CENTRAL LAW REVIEW [Vol. 37:105]

trate's Office.¹⁶⁴ As the number of arrestees increased, the costs associated with processing the arrestees required additional CCBI staff, officers, and magistrates, that became financially unsustainable.¹⁶⁵ As such, the entities were forced to modify their normal protocols for processing arrestees.¹⁶⁶ As Former Wake County District Attorney Colon Willoughby stated in response to criticism about the procedural changes, "We have limited court resources that we're trying to properly allocate and be good stewards, and (the Moral Monday arrests) are putting a severe burden on (the resources), and I'm trying to figure out how to deal with it."¹⁶⁷

In addition to the burdens placed on the government entities tasked with processing the arrestees, the process of trying more than 900 cases was costly and inefficient.¹⁶⁸ District Attorney Willoughby estimated that it would take a year for a District Court judge to hear and rule on the cases.¹⁶⁹ Despite protestors coming from across the state and other parts of the country, the Wake County Court System was forced to bear the costs of adjudicating all the cases.¹⁷⁰ In order to accommodate the additional load of cases, The North Carolina Administrative Office of the Courts (AOC) appointed two retired Wake County District Court Judges to hear the cases and rule on administrative matters.¹⁷¹ Even though the majority of cases were ultimately dismissed after only forty trial dates, the AOC paid more than \$17,000 for the judges alone.¹⁷² The actual costs far surpassed the amount the Wake County District Attorney's Office assigned special Assistant District Attorneys to prosecute the cases.¹⁷³ Further, the North Carolina General Assembly continued to incur additional costs as the Chief of Legislative Assembly Police, Jeff Weaver, and his Lieutenant, Martin Brock, were both required to be present during all court trials.¹⁷⁴ This resulted in countless hours spent

164. *Id.*

165. Amanda Lamb & Kelly Gardner, 'Moral Mondays' Forcing Changes in Wake Arrest Procedures, Article to @NCCapitol, WRAL.COM (June 25, 2013), <http://www.wral.com/-moral-mondays-forcing-changes-in-how-wake-proccsses-arrests/12594377/>.

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* (The estimate does not take into account the continued strain on the system as the appeals for those found guilty began to trickle through the appeals process.).

170. *Id.* ("It's a tremendous amount of resources when we're struggling to try to get drunken-driving cases and domestic violence cases and violent juveniles processed through the District Court," [Willoughby] said. "It's a tremendous imposition on them, and it's being felt only by Wake County. The other 99 counties don't bear this burden.").

171. Anne Blythe, *Moral Monday Case Verdicts Vary*, NEWS & OBSERVER (Raleigh), Nov. 8, 2013, at 1A, available at <http://www.newsobserver.com/news/politics-government/state-politics/article10065071.html>.

172. *Id.*

173. Interview with Irving Joyner, *supra* note 4.

174. *Id.*

sitting in court, requiring the North Carolina General Assembly Police to pay for additional officers to work in their absence.¹⁷⁵

Protestors also suffered considerably due to the Legislative Assembly's attempt to regulate, and subsequently criminalize, their attempts to exercise their constitutionally protected rights. In spite of the fact that most protestors were provided with legal representation free of charge,¹⁷⁶ individuals, nevertheless, incurred costs due to numerous days taken off work to appear for court dates, only to learn their cases were continued.¹⁷⁷ As many of the protestors did not live in Wake County, they incurred costly travel expenses because they were required to appear in court, even when it was obvious that their cases would not be heard.¹⁷⁸ Even those protestors, who opted to avoid the additional inconvenience of traveling to Raleigh for trial by accepting the deferred prosecution agreements, were forced to pay court costs and fines.¹⁷⁹ This resulted in not only a financial burden, but added incalculable nonmonetary penalties due to their arrest, including the inability to obtain employment due to their record of arrest and psychological consequences from being placed under arrest.

The costs outlined above are in no way exhaustive. Additional factors, including attorney's fees to counsel, the agencies enforcing the regulations, and the agencies opposing them also increased the costs of the protestors. The costs, however, do adequately demonstrate that the attempts to unreasonably regulate protest have financial and other pecuniary implications that affect all parties involved, as well as innocent parties who are obligated to expend time and efforts in furtherance of what the United States has deemed to be an invalid regulation. Perhaps the greatest of these negative ramifications is the chilling effect that these regulations, and the ensuing criminalization, have on deterring these individuals from engaging in future protests and discouraging others from protesting at all. What is glaringly obvious is that these costs are unnecessary and contrary to the principles

175. *Id.*

176. *Id.* (discussing how Jamie Phillips, Public Policy & Legal Redress Coordinator of the North Carolina State Conference of the NAACP, and Professor Irving Joyner assisted the NC NAACP's organization of over 100 volunteer attorneys in surrounding counties to represent Moral Monday arrestees. Although most of the Moral Monday defendants were represented by these attorneys, some elected to hire outside attorneys to represent them.)

177. As one of the volunteer attorneys for Moral Monday cases, the author was present during numerous court dates, only to have those cases continued. Several administrative days were assigned to simply continue the cases to another administrative date, resulting in countless hours spent in Wake County District Court without an actual trial. In some cases, the Assistant District Attorney required attorneys and their clients to remain in the courtroom while other cases were heard, even though it was apparent that their cases would be continued.

178. Interview with Irving Joyner, *supra* note 4.

179. *Id.*

upon which this country was founded and why the Constitution was amended to prevent them.

VI. CONCLUSION

Unreasonable governmental attempts to prohibit or limit speech in public forums, or designated public forums, are indubitably contrary to the Constitution. Individuals must be afforded a meaningful opportunity to speak to their representatives and voice their concerns. Preventing the exercise of these First Amendment rights is not only unconstitutional, but ineffective. As the Moral Monday Movement and similar movements in United States' history have demonstrated, attempts to prevent and regulate speech — regardless of the rationale for doing so — produce an adverse effect.

When governmental entities have attempted to regulate speech in an effort to further prevent the act of protesting, and not the message itself, it has merely rallied more individuals to come together to protest against the entities that seek to violate their fundamental rights.¹⁸⁰ When the governmental entities have attempted to regulate the content of the speech by preventing or limiting the propagation of the protestors' ideologies, it instead results in the opposite effect and generates more awareness and engages a broader and larger audience.¹⁸¹ Whatever the rationale for attempting to hinder free speech, the end result simply does not serve any legitimate governmental interest.

In addition to the futility of these intrusions upon free speech, the costs associated with the attempted regulations on speech are onerous and an inefficient use of taxpayer and personal funds. Entities tasked with enforcing these laws must expend valuable resources to provide the appropriate support and personnel to implement them. In the event that the entities decide to penalize individuals that refuse to adhere to the constitutionally invalid regulations, these costs multiply exponentially in order to process, arrest and try individuals, as well as defend its regulations. The additional costs cannot be justified, especially in light of the limited resources that are available to the agencies that are forced to bear the costs for enforcing them.¹⁸² Unfortunately, these costs are not borne by the entity alone; indi-

180. *Id.*

181. *Id.*

182. Amanda Lamb & Kelly Gardner, 'Moral Mondays' forcing changes in Wake arrest procedures, WRAL (Jun. 25, 2013), <http://www.wral.com/-moral-mondays-forcing-changes-in-how-wake-processes-arrests/12594377/#YzXhWUiEiUV0YW7k.99> (discussing the City-County Bureau of Identification (CCBI), which was an agency forced to change their protocol following the increase of Moral Monday arrests due to the costs associated with the arrests. According to Sam Pennica, the Director of CCBI, "with limited funding for overtime, he has to weigh how to best use that funding. 'It's a matter of dollars and cents and how much money I have to operate CCBI and whether I spend that money on

viduals must likewise drain valuable resources, and more importantly, waste precious time in order to protect the liberties so clearly afforded to them under this democracy and further mandated by the Constitution.

Instead of attempting to prohibit and discourage speech, governmental entities and elected individuals should welcome an active dialogue with their constituents. Protest should not be considered a personal affront to elected officials. As Abraham Lincoln so succinctly stated, this is a government “by the people, for the people.”¹⁸³ Integral to a democratic society is a process by which the citizenry can voice concerns to elected officials without fear of reprisal. The government and its elected officials should provide regular, meaningful access to individuals to hear their concerns and to use those forums to further enhance democracy.

Elected officials have a crucial responsibility and must, at a minimum, be well-versed on the protections the Constitution affords to individuals. Neither their title, nor their positions on issues, makes them immune from accountability to the people who elect them. Once elected, the democracy doesn’t revert to a dictatorship; the Court has issued a clear mandate: citizens are entitled to petition the government and their elected officials to seek redress of their grievances. Often times, elected officials believe that their successful election, as evidenced by them attaining the majority of votes, validates their positions, ideals and beliefs, to the exclusion of rights of the minority. This too, is contrary to the form of government that United States citizens enjoy and value. For example, during the Civil Rights Movement, the majority of voters in many southern states elected candidates who held specific views. However, once elected, the elected officials became a representative of all people, not just those that supported them. All citizens are thus entitled to equal access to petition their elected officials. When this access is provided, it reduces conflict, allows for a meaningful exchange and enables the valuable discourse that is necessary for the egalitarian society to thrive. The paradigm must shift back to the fundamental values upon which this nation was founded and the laws enacted to safeguard them.

Protest should be encouraged; however, policies are also vital to ensure that protests do not exceed what is allowable. Regulations should be appropriate to prevent abuse, but not excessively restrictive so as to stifle or prohibit speech. Current rules that unnecessarily prohibit or restrict the “free

fingerprinting and photographing someone who’s arrested for trespassing, or do I pay an investigator overtime to work a homicide? Those are the decisions we have to make.”).

183. President Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

128 NORTH CAROLINA CENTRAL LAW REVIEW [Vol. 37:105]

flow . . . of ideas”¹⁸⁴ should be abolished and replaced with rules that are consistent with time, place, and manner restrictions that are indifferent to the views expressed and that are reasonable to protect the safety of others and the efficiency of the governmental process. These new rules should be transparent, reasonable, fair, and equally applied, regardless of the message or the speaker. Similar to the organizers of the Moral Monday Movements, governmental entities should also anticipate protest and issues related to protest, and in addition to establishing rules, should provide guidance and training to its staff that will allow them to prepare and appropriately respond to protestors so that their actions do not run afoul of the Constitution.

Finally, peaceful protest should never be criminalized. The least restrictive penalties should be imposed against individuals that violate reasonable regulations established for protesting. In lieu of arrest, protestors should be issued warnings, tickets or fines. Protestors should be provided with proper guidance on what activity is permitted and when it is allowed. If protestors violate rules, they should be given instructions on what they can do to comply with the rules. If it is ever necessary to penalize individuals for violating appropriate regulations involving free speech, the entities should establish objective, articulate, measurable standards to determine when the rules have been violated.

Although enacted over two centuries ago,¹⁸⁵ repeated challenges to the First Amendment have continued to yield the same result: the First Amendment still reigns supreme. As Professor Joyner aptly stated, “[t]he Constitution has to prevail. Just as lobbyists are granted access to representatives, so too, should the people. Government and elected officials have an obligation to accommodate that.”¹⁸⁶ The government must acknowledge what the United States Supreme Court has consistently held; the fundamental rights of freedom of speech, to peaceably assemble and to petition the Government for a redress of grievances must be regarded as paramount and its continued protection revered with the greatest sanctity.¹⁸⁷

184. President Franklin D. Roosevelt, Radio Address to the New York “Herald Tribune” Forum (Oct. 24, 1940). (“The constant free flow of communication amount us-enabling the free interchange of ideas-forms the very bloodstream of our nation. It keeps the mind and body of our democracy eternally vital, eternally young.”).

185. U.S. CONST. amend. I (discussing the date of enactment on Dec. 17, 1791).

186. Interview with Irving Joyner, *supra* note 4.

187. See generally *Borough of Duryea, Pa. v. Guarnieri*, 131 S. Ct. 2488, 2495 (2011) (“It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances.”).