Cleveland State Law Review

Volume 19
Issue 2 *Non-Profit Organizations' Impact on U.S. Society*

Article 39

1970

Free Speech on Private Property

Daniel A. Silver

Free Speech on Private Property

*Daniel A. Silver**

IN OUR SYSTEM of constitutional law the First Amendment right of freedom of speech has always maintained a preferred position. The Supreme Court of the United States, on numerous occasions, has proclaimed freedom of speech to be one of our most fundamental rights.[1] An evolving problem in the area of free speech is the question of what constitutes a proper *forum* for the expression of First Amendment rights. This paper examines the use of *private property* as a forum for expression.

The Public Forum

It has been firmly established that an individual may use the public streets and parks for the purpose of a forum, subject to regulation to prevent disruptive behavior. This concept of the free use of public streets and parks was recognized in 1939 in *Hague v. Committee for Industrial Organization.*[2] For all practical purposes *Hague* overruled the famous case of *Davis v. Massachusetts.*[3] In *Davis* the United States Supreme Court upheld a Boston ordinance which prohibited any type of public address on public property without the consent of the Mayor. The Court held that the property in question belonged to the city, and that Davis had no right to use it against the wishes of the public authorities. It was the opinion of the Court that the city could prohibit speaking in a public street or park as an owner of a private home can eject trespassers.[4]

Following the *Davis* case, the scope of the public forum was very much limited until 1939, at which time the United States Supreme Court, in the *Hague* case, upheld an injunction against the Mayor of Newark, New Jersey.

The Court stated:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens and discussing public questions. Such

---

* B.A., Marietta College; Third-year student at Cleveland State University, Cleveland-Marshall College of Law; Law Intern, Legal Aid Society of Cleveland.

1 Lovell v. City of Griffin, 303 U.S. 444, 450 (1938); De Jonge v. Oregon, 299 U.S. 353 (1936); Gitlow v. New York, 268 U.S. 652, 666 (1924); Near v. Minnesota, 283 U.S. 697, 707 (1930).

2 307 U.S. 496 (1939).

3 167 U.S. 43 (1897).

4 *Id.*, 47.

> use of the streets and public places has from ancient times been a part of the privileges, immunities, rights and liberties of citizens.[5]

Shortly after *Hague* the Court reaffirmed its decision[6] and has since gone on to expand the idea of the public forum.[7] However, even though the proposed forum is publicly owned, its use can be limited when the property is not freely accessible to the public. In *Adderley v. Florida*[8] the Court held that a state could forbid a demonstration on public property which was used as a jail. It said that the state could, as any private owner, retain control of its land for the specific use to which it was originally designated. In this case the demonstrators had entered jailhouse grounds which were closed to the public.[9] The Court distinguished this public property from a public street or park.[10]

The Forum on Private Property

Difficulties arise when the forum of the speech is private property rather than public. One of the major problems that the courts have faced in this area has been our long tradition of absolute property rights. Concerning this tradition, Mr. Justice Cardozo has stated that:

> Today there is a growing tendency in political and juristic thought to probe the principle more deeply and formulate it more broadly. Men are saying today that property like every other social institution has a social function to fulfill.[11]

Recently the question as to whether the freedom of expression can be restricted solely because an individual's choice of forum happens to be on private property rather than on a public street, has been posed several times. But first some history.

One of the first cases to deal with this problem was *Marsh v. Alabama*.[12] The petitioner, who was a Jehovah's Witness, was arrested for distributing religious literature on the streets of Chickasaw, Alabama. The special significance of this case is that the town was completely owned by a private corporation. The entire downtown area, including the buildings, streets and sidewalks were all privately owned. At each end of the downtown district were state highways, from which members

---

5 Hague v. Committee for Industrial Organization, *supra* n. 2, at 515.

6 Schneider v. State of New Jersey, 308 U.S. 14 (1939).

7 Niemotko v. Maryland, 240 U.S. 268 (1951); Cox v. Louisiana, 379 U.S. 559 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963); Thornhill v. Alabama, 310 U.S. 88 (1939).

8 Adderley v. Florida, 385 U.S. 39 (1967).

9 *Id.*, 47.

10 Compare with Edwards v. South Carolina, *supra* n. 8.

11 Cardozo, The Nature of Judicial Process, 87-88 (1932).

12 Marsh v. Alabama, 326 U.S. 501 (1946).

of the public could enter the shopping area. There were no restrictions attached as to who could use the facilities in the town. The petitioner was advised by the owners that he was on private property and that he would have to leave. When the petitioner refused to do so, the police were called and he was arrested under the state trespass statute. The Court found that even though the property was private, the town functioned in a manner similar to any other town. Therefore, the owners could not deprive anyone who entered the town of their constitutional rights merely because of where the title stood. The Court based its decision on the public function theory that has been applied to the regulation of privately owned public utilities.[13] It stated that:

> Ownership does not always mean absolute dominion. The more an owner for his own advantage, opens up his property for use by the public in general, the more do his rights become circumscribed by the statutory and constitutional rights of those who use it.[14]

The *Marsh* decision was of great importance in the development of the theory of private property as an available forum for expression. It was a great step forward when one realizes that the *Davis* case was the law up until 1937. However, except for issues coming under the National Labor Relations Act very little expansion of the *Marsh* doctrine occurred until the last few years.[15]

Most of the modern cases in this area are concerned with anti-war demonstrations on private property that is used by great numbers of people. In the case of *In Re Hoffman*[16] the petitioners were arrested in a private railroad terminal, while distributing anti-war literature. They were convicted of violating a loitering statute, and in this case brought a writ of *habeas corpus* for their release from prison. The terminal was owned by three railroad companies. It contained not only transportation facilities but shops and restaurants which were all freely accessible to the public.[17] Unlike in *Marsh* the terminal in *Hoffman* did not perform a community function.

The sole issue was whether or not owners had the right to prohibit the petitioners from exercising their freedom of expression. The Court stated that an individual's right to freedom of expression cannot be refused merely because the property is not primarily a forum for dissent. This does not mean that the owners cannot prohibit any activity that

---

[13] *Id.*, 506-8.

[14] *Id.*, 506.

[15] See Powe v. Miles, 407 F. 2d 73, 80 (2d Cir. 1968), where the court states that a college football field did not meet the "public function" test in the *Marsh* case; Grossner v. Trustees of Columbia University, 287 F. Supp. 535, 549 (S.D.N.Y. 1968), where the court said that the Columbia University campus also did not meet the "public function" test in *Marsh*.

[16] 434 P. 2d 353 (1967).

[17] *Id.*, 354.

would interrupt the use for which the property was built. As the Court noted there was no claim by either the owners or the city of any violation of any legitimate interests.[18] If this had been the case the petitioners could probably have been denied access under the *Adderley* rule.[19]

In another terminal case in 1968 the Second Circuit Court of Appeals came to the same conclusion as in the *Hoffman* case, but went a little further and established some interesting further guidelines.[20] The factual situation in this case was similar to *Hoffman* except that the terminal was created under the authority of a state statute. However, in light of *Hoffman* the same principles should apply if the terminal was completely private.

One of the crucial questions that the Court faced was whether or not the character of the terminal was such to make it an appropriate place to express one's First Amendment rights. It was shown that even though the terminal was not a traditional place for dissent, its character did make it an appropriate location. The area is utilized by thousands of people who use the terminal for many reasons other than just taking a bus. The very purpose of its existence is connected with noise and other commotion. It was shown that glee clubs had performed concerts and the terminal had housed merchandise exhibitions. This had all been done without interference to the other functions of the terminal.[21]

There are two aspects of this decision which may prove to be important in future cases in this area. The first, that ideas generated from the demonstrations need not relate to the function of the terminal. The particular place used for the expression of First Amendment rights may be chosen solely because it is where the relevant audience is situated. In this case the petitioner was attempting to reach not just the general public but the servicemen coming into New York from Fort Dix as well.[22] The second, the determination that the mere presence of a roof over the terminal would not make it an inappropriate location to express one's opinions. The Court said, "Indeed the public forum is surely as traditionally a covered meeting hall as a sunlit arena." [23]

From a careful examination of the *Hoffman* and *Port Authority* cases certain basic concepts can be derived. Merely because the forum is on private property rather than public property does not mean an owner can automatically prevent an individual from expressing his First Amendment rights. However, this must be qualified by saying that the property must conform to certain characteristic standards. All litigation

---

[18] *Id.*, 356.

[19] Adderley v. Florida, *supra* n. 9.

[20] Wolin v. Port Authority of New York, 392 F. 2d 83 (2d Cir. 1968).

[21] *Id.*, 89-90.

[22] *Id.*, 90.

[23] *Ibid.*

in this area has stated the property must be freely accessible with no restrictions as to entry. In dealing with a railroad or bus terminal there is little trouble in determining the high degree of accessibility. In both *Hoffman* and *Port Authority* it was established that thousands of people used the facilities daily.

An earlier case dealing with this theory involved a demonstration within the grounds of the 1964 World's Fair in New York.[24] Similar to *Hoffman* and *Port Authority* there were large numbers of people and no alleged problem of interference. However, accessibility was limited due to the fences surrounding the grounds. The same Court which heard the *Port Authority* case in this opinion upheld the position of the Fair management. It said that the differentiating factors were the fences and ticket windows which surrounded the area. It was felt by the Court that the grounds were not so completely open as to bring this case under the *Marsh* rule.[25] The fact that the demonstrators had agreed to pay the price of admission did not change the status of the forum.

Another area where private property owners have attempted to limit freedom of speech has been in shopping centers. In most instances the conflict developed from attempts by labor unions to picket. The Supreme Court of the United States has handed down a decision, *Amalgamated Food Employees v. Logan Valley Plaza, Inc.*, which should definitively settle many of the questions in this area.[26] In that case an employer obtained an injunction in state court prohibiting the union from peaceful picketing of a supermarket within a shopping center. The property in question was on a large area containing two stores, a large parking lot and sidewalks for pedestrians. At each end of the parking lot were state owned highways, which the public used to enter the area. There was no controversy over the fact that the shopping center was freely accessible with no restrictions on entry. The sole issue was whether or not the state trespass laws could be used to limit First Amendment rights. The Court came to the conclusion that the area in question was quite similar to the downtown area in the *Marsh* case. Therefore, there was no reason to distinguish between the two cases.[27] Here the union was protesting the hiring practices of the employer. The Court limited its decision by stating that:

> The state may not delegate the power, through the use of its trespass laws, wholly to exclude those members of the public wishing to exercise their First Amendment rights on the premises in a manner and for a purpose generally consonant with the use to which the property is actually put.[28]

---

[24] Farmer v. Moses, 232 F. Supp. 154 (S.D.N.Y. 1964).

[25] *Id.*, 161.

[26] 391 U.S. 308 (1968).

[27] *Id.*, 319.

[28] *Id.*, 319-20.

The Court left open the subject of whether or not First Amendment rights could be limited if the ideas generated had no bearing on the function of the property, a serious problem in light of the protest movements today, e.g., the anti-war movement and the California grape boycott. It is interesting to note, however, that the *Port Authority* case[29] provided a possible answer. The Court of Appeals, in deciding that the Port Authority Terminal was a proper location for the expression of First Amendment rights, stated that a proper forum may be ". . . where the relevant audience may be found." [30] Furthermore, a Federal District Court has recently held that the distribution of anti-war leaflets in a shopping center constituted a valid extension of the *Logan Valley* decision.[30a]

A few states have reached conclusions similar to that reached in *Logan Valley*.[31] In one case the California Supreme Court decided that a union did have the right to picket within a shopping center.[32] In that case the employer sought an injunction to prevent the union from picketing his place of business. The employer, however, was merely a lessee within the shopping center. The court held that the plaintiff did not have exclusive possession of the parking lot and the sidewalks since he was only a tenant. Therefore, he was not in a position to prohibit the union from exercising its First Amendment rights.[33]

In another recent decision the California Supreme Court expanded their doctrine to include an individual grocery store that was not a part of a larger shopping center.[34] The area in question was a private sidewalk which was adjacent to the store. After discussing both *Marsh* and *Logan Valley* the Court concluded that there was no distinction between those cases and the area in question.[35]

All of the cases found in this area have dealt with the public areas around outdoor shopping centers. Today, much construction is concentrated on the indoor-mall type of shopping centers. These malls are usually fully heated in the winter and air conditioned during the summer months. Although they serve the same purpose as their outdoor counterparts, the question still remains as to whether or not the *Logan Valley* and *Port Authority* concepts would apply. The Circuit Court of

---

[29] Wolin v. Port Authority of New York, *supra* n. 24.

[30] *Id.*, 90.

[30a] Tanner v. Lloyd Corp., 38 U.S.L.W. 2427 (USDC Ore. 1-15-70).

[31] Schwartz-Torrance Investment Co. v. Bakery Workers Local 31, 40 Cal. Rep. 233, 394 P. 2d 921 (1962); Amalgamated Clothing Workers v. Wonderland Shopping Center, 370 Mich. 547, 122 N.W. 2d 785 (1963).

[32] Nachas v. Local 905 Retail Clerks International, 144 Cal. 2d 808, 301 P. 2d 932 (1956).

[33] *Id.*, 940.

[34] In Re Lane, 74 Cal. Rep. 721, 457 P. 2d 561 (1969).

[35] *Id.*, 724, 564.

Appeals in the *Port Authority* case said, "Indeed the public forum is surely as traditionally a covered meeting hall as a sunlit arena." [36] The *Port Authority* case can be distinguished from the indoor mall situation in that the terminal's main function was transportation, which is a regulated public utility rather than a purely private enterprise. This distinction should not be carried too far, as in both the terminal and the indoor mall, the owners had opened the area for public use. They had attempted to attract all segments of the public without any restriction as to accessibility. Furthermore, the owners of the shops and restaurants within the Port Authority serve the same function as their counterparts in the indoor mall shopping center.

Another area where there has been litigation is in connection with private apartment buildings. This is an interesting area as some careful distinctions have been made. In *Watchtower Bible and Tract Society v. Metropolitan Life Insurance Co.*[37] a Jehovah's Witness attempted to distribute handbills in an apartment complex owned by the defendant. The complex was an entire residential community, as it was situated on 129 acres of land and housed 35,000 people. There was a company restriction on door-to-door solicitation. The Court, in distinguishing this situation from the *Marsh* case, stated that a hallway in an upper part of an apartment building is hardly the same as the streets in the company town in *Marsh.*[38] But, in *Commonwealth v. Richardson*[39] a Massachusetts court reversed a trespass conviction brought against a Jehovah's Witness for soliciting in an apartment building after being told to leave by the owners. The unique factual situation here should be noted. In the building there was an outer vestibule that could be entered by an open door. Between the vestibule and the hallway was a locked security door. A visitor would ring a bell and the tenant could release the lock on the door while still in his apartment. The Court stated:

> But apart from this we think that by supplying the means of seeking access to the tenants by way of the bells which could ring in the vestibule an implied license was granted to the defendants and all others engaged in lawful pursuits to make use of them for the purpose of seeking an interview with the tenants.[40]

In effect, the Jehovah's Witness had at least an implied license to enter the hallway and speak to the tenant who had released the security door.

A California court was able to distinguish the *Richardson* case when applied to a boarding house.[41] It said that the guests were not tenants

---

[36] *Supra* n. 24, 90.

[37] 297 N.Y. 339, 79 N.E. 2d 433 (1948).

[38] *Id.*, 342, 436.

[39] 48 N.E. 2d 678 (1943).

[40] *Id.*, 682.

[41] People v. Vaughan, 150 P. 2d 964 (1944).

and that the owner had complete control over the entrance to the lobby and the halls. Under these circumstances he could prohibit solicitors from obtaining interviews with the occupants.

The Private University

Most of the cases dealing with the problem of free speech on university property have attempted to establish the concept of state action, which is beyond the scope of this paper. Probably the prevailing attitude among the courts today concerning discipline in private universities appeared in an opinion by the United States District Court for the District of Columbia. That court said in *Green v. Howard University*:[42]

> It would be a sad blow to the institutions of higher learning and to the development of independent thought and culture, if the court were to step in and control and direct the administration of discipline.[43]

In the case of *Evers v. Birdsong* a Federal District Court ruled that school campuses are not public in the same sense as streets, courthouses, and public parks for the expression of First Amendment rights.[44] In another university case a group of students from Columbia University sought an injunction to restrain school officials from taking disciplinary action against them. The students had occupied a group of university buildings on campus.[45] They argued that the university performed a "public function" similar to the "company town" in the *Marsh* case. The court distinguished this problem from *Marsh* by stating that *Marsh* and the other cases indicated only the extent to which private property necessarily used by the public may be subject to constitutional limitations.[46]

The courts have said that, if there is lacking a general invitation to enter the property, protection may not be available. The college campus is not fully accessible to the general public, the restriction being admission to the university. However, it seems the courts have failed to consider the function of the university to the students who are enrolled and live on campus. To this group the university does have a public function similar to that in *Marsh*. This is especially true in the case of our large universities which are really cities within themselves. On many of our large campuses there are stores, restaurants, places of entertainment, and everything else that is found in a community. Therefore, it may be very difficult to find a difference between a "company town" and the university community.

---

[42] 271 F. Supp. 609 (Dist. Col. 1967).

[43] *Id.*, 615.

[44] 287 F. Supp. 900 (S.D. Miss. 1968).

[45] Grossner v. Trustees of Columbia University, 287 F. Supp. 535 (S.D.N.Y. 1968).

[46] *Id.*, 549.

New Approaches

When dealing with new and expanding areas such as the use of private property as a public forum, it is interesting to speculate what new arguments may emerge in the years ahead. The most fertile area for new case law in this field has been a series of cases under the National Labor Relations Act. These cases deal with the right of employers to limit the free speech of employees on company owned property.

In *Republic Aviation Corp. v. N. L. R. B.*[47] an employer had a "no soliciting" policy for employees. One employee was fired after being warned about soliciting for union membership. Other employees were released for the mere wearing of union buttons. In a companion case (*Le Tourneau v. N. L. R. B.*) decided at the same time, an employee was fired for distributing union literature in the company parking lot during his lunch hour.[48] The United States Supreme Court, in both cases, upheld the N. L. R. B. in stating that the company policy was a restriction on speech within the National Labor Relations Act.[49] When the *Le Tourneau* case was before the N. L. R. B., the Board said:

> Upon all the above considerations we are convinced and find that the respondent in applying its no distributing rule to the distribution of union literature by its employees on its parking lots has placed an unreasonable impediment on the freedom of communication essential to the exercise of its employees to self organization. . . .[50]

This doctrine was later limited in *N. L. R. B. v. Babcock and Wilcox Co.*[51] This case concerned the right of non-employees to distribute union literature in company parking lots. The United States Supreme Court here reversed the N. L. R. B., stating that there is an important distinction between employees and non-employees.[52] An employer could limit the expression of non-employees on the employer's property. However, the Court said an exception would exist where there was no other effective means of communication to establish contact with the employees.[53]

Perhaps the most helpful case in this area in future argument will be *Marshall Field Co. v. N. L. R. B.*,[54] which dealt with a major department store rather than a factory. The case was concerned with the right of non-employees to solicit union membership within the store. Following the *Babcock and Wilcox*[55] precedent the court ruled that the owners

---

47 324 U.S. 793 (1944).

48 324 U.S. 793 (1944).

49 *Id.*, 802.

50 In the matter of Le Tourneau Co., 92 N.L.R.B. 1253 (1943).

51 351 U.S. 105 (1955).

52 *Id.*, 113.

53 *Id.*, 112.

54 200 F. 2d 375 (7th Cir. 1953).

55 N.L.R.B. v. Babcock and Wilcox, *supra* n. 51.

could prohibit the action within the main part of the store. However, the court felt that the *Babcock and Wilcox* rule did not apply to a street that led into the store, and which was owned by the company. The court felt that this was a public thoroughfare, and therefore the owners could not limit the expression of non-employees on that public thoroughfare.

Conclusion

In review, it can be said that there has been a great expansion in the concept of the use of private property as a forum for expression. The old theories of absolute property rights have taken on a new look. No longer can it be assumed that expression can be limited solely because the forum is on private property. It is now apparent that the constitutional right to freedom of speech has reached an even more preferred status within our law. How far this will continue, only time will tell.