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Whose Rights?

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"BLACK POWER MEANS the destruction of everything Western Civilization stands for!" shouts a Negro militant. The Southern redneck has long predicted the same dire consequence. It is as saddening as it is ironic that the leaders of both SNCC and the KKK at last agree on the aims of the civil rights movement.

And it is as alarming as it is saddening that hate and violence spiral toward open racial war. In Watts, Negro fanatics fire and loot, and the cry—"Burn, baby, burn"—echoes across the country. In Chicago, white goons harass Negro marchers, and the epithets, "nigger" and "baboon," are once again heard. In this bitter hour it is perhaps futile to counsel moderation—to remind both black and white that each has his civil rights and that neither has the right to trample under the other.

To begin with, the Negro has the right to seek legislation that he believes will promote his self-interest. One may question the wisdom of (and he certainly has the right to oppose) the social welfare measures that the Negro seeks, but that is not to deny his right to seek them.

But what means may the Negro use to achieve his legislative goals; specifically, may he sit-in and march, thereby pressuring legislators into acquiescence? The Negro insists that he may. "When I sit-in at the library or march on the school board," he says, "I am exercising my right of free speech guaranteed by the First Amendment." Three Justices of the Supreme Court have recently agreed that a sit-in is speech.

In *Brown v. Louisiana*,¹ decided 5-4 in the 1965-66 term, Justice Fortas, writing the opinion of the Court and joined by Chief Justice Warren and Justice Douglas, reversed sit-in convictions on the specific ground that the protestors were exercising First Amendment rights:²

... [T]hese [First Amendment rights] are not confined to verbal expression. They embrace appropriate types of actions which certainly include *the right in a peaceable and orderly*

Definition and Transition

FIRST, THE STATUTE must apply equally to all groups. If labor unions may march up and down the streets, Negroes may also parade.²² If whites may loiter in a public library, Negroes cannot be booted out for doing likewise.²³ Second, the statute must state precisely and clearly what is prohibited, where and when. The Court has shown little patience with the use of general trespass, public nuisance, and breach of peace statutes to prevent demonstrators from marching, picketing, parading, and meeting. General statutes do not warn the would-be protestor that he will violate the law.²⁴ Moreover, when confronted with a broad or vague statute, a careful individual may forego exercising his First Amendment rights; consequently, lawful expression is inhibited or "chilled."²⁵ The broader the statutory language, the greater the area of administrative discretion, the less likely the Court to approve.²⁶ Finally, where First Amendment rights hang in the balance, the legislature alone should tip the scales in favor of restriction.²⁷

Additional "rules of thumb" stick out of recent Court decisions. A state cannot prohibit a demonstration that does not in fact interfere with traffic or disrupt transaction of business.²⁸ The Court will, of course, uphold "traffic regulations" designed to facilitate the transaction of business in public buildings—Justice Fortas referred to library rules in *Brown v. Louisiana*, for instance. Justice Black has made clear his belief that a statute prohibiting obstruction of entrances is valid.²⁹ In the most recent sit-in case the Court for the first time affirmed convictions under a general trespass statute, stressing the fact that the sit-inners interfered with the operation of the county jail.³⁰

The Court probably would allow greater restriction of sit-ins than marches. A sit-in at the high school, for example, thrusts its message on those who would teach and learn. A street parade or march, though it too presses upon onlookers, occurs where one expects some hustle and bustle; even the most naive does not expect the atmosphere of Walden Pond to pervade mid-Manhattan. In the *Brown* case Justice Black exclaimed:³¹

... [I]t is incomprehensible to me that a state must measure

but resurrected of late to justify application of the Fourteenth Amendment to nongovernmental action. Considering what has recently been demanded in the name of public interest, what stands naked? In an era of esthetic zoning, even the style of one's garbage can is a matter of public interest.

The second suggested standard is possession of a license from the state. In the first place, the state's licensing A to run a restaurant because he mops the floor every night implies no state policy that A must therefore let B lie down on the mopped floor. Besides, most property owners must have some kind of license from the state. Building permits, for example, are required in most communities for the construction of private homes—not to mention fire codes, zoning laws, and housing ordinances. As petitioners in *Bell v. Maryland* admitted:⁴

... [E]xtension of constitutional guarantees of the Fourteenth Amendment to authentically private choices of man is wholly unacceptable, and any constitutional theory leading to that result would have reduced itself to absurdity.

So much for the absurd.

Two other possible standards merit closer scrutiny. Unlike the first two, neither would blanket all private property. The first is that the property is "open" to the public. Who opens the property to the public and who decides for what public purposes it remains open? The answer is clear: the owner. Neither the law nor his fellows can force a man to open a restaurant or hotel.⁵ While one may perhaps imply that a restaurateur or hotel keeper invites all the public to eat or sleep at his establishment, he has not impliedly or otherwise invited them to demonstrate there as well. Surely an owner does not lose all power to the public to determine the use of his property in every area because he opens it to public use in one area. What Justice Black said about public property in the *Brown* case applies with special force to private property: to allow sit-ins or parades at will would exalt the power of non-owners over the owner, to determine what use shall be made of private property. The Justice blanched at the consequences of so novel a theory:⁶

to win the listener's attention. But the inaccuracy of describing a direct protest as necessary to win the community's attention is apparent so long as dodgers and advertisements are still available. Moreover, a sound truck not only wins but rivets attention. The citizen cannot choose to listen; he must. As Justice Frankfurter lamented in the first sound truck case, *Saia v. New York*:¹⁷

If uncontrolled, the result is intrusion into cherished privacy. The refreshment of mere silence, or meditation or quiet conversation, may be disturbed or precluded by noise beyond one's personal control.

There may be a right to win attention. There is no right to capture it.

If that distinction produced a different result, the question becomes whether the direct protest is closer to the pamphlet case or the sound truck case. The frustrating answer is that it is in the middle, wavering now toward leaflet and then toward sound depending on the character and place of the protest.

Even assuming the mass protest is more properly analogized to the sound truck cases, the city may not absolutely prohibit it. The *Kovacs* majority made clear—if the *Saia* decision had not—that the use of sound trucks could not be banned. In the *Saia* case Justice Douglas, admitting that noise could be reduced by regulating decibels, worried that annoyance at ideas might be cloaked in annoyance at sound. In his *Kovacs* opinion Justice Frankfurter asserted that the equal protection clause would prevent any discrimination based on content. Though true enough of a well-drawn statute regulating use of sound trucks, an absolute prohibition might prefer one idea over another. Justice Black, dissenting in *Kovacs*, emphasized that sanctioning laws which “. . . hamper the free use of some instruments of communication thereby favor competing channels. . . . [L]aws . . . can give an over-powering influence to views of owners of legally favored instruments of communication.”¹⁸ The direct protest is the Negroes' one effective channel of communication, and Professor Harry Kalven has observed that this is not the time to create a new epigram about the majesty of the law denying both rich and poor the right to march. *But neither should the law permit both rich and poor to seize the other's property.*

porate owners in these cases—the stockholders—are unidentified members of the public at large, who probably never saw these petitioners, who may never have frequented these restaurants. . . . Corporate motives have no tinge of an individual's choice to associate only with one class of customer, to keep members of one race from his “property,” to erect a wall of privacy around a business in the manner that one is erected around the home.

Thus he concludes:

. . . [T]he separation of the atom of property into one unit of “management” and into another of “absentee ownership” has . . . basically changed the relationship of that “property” to the public.

The crucial point is not that “public” private property is “clothed with the public interest,” though it may be; nor licensed by the state, though it may be. Rather, it is that its owner's interests in freedom of association and privacy are not infringed by the protestor's speech. In short, the owner is not captured because he is nowhere to be found.

Clever though the Justice's theory is, it is not without flaws. First, management and ownership are not separated in all corporations, particularly not in the “close” corporation. “Mom” and “Dad,” who incorporated their family root beer stand for tax reasons, must retain the same property interests as if they had continued to operate the stand as a partnership or a proprietorship. The law has always recognized differences between public corporations and close corporations, and adopting the Douglas thesis would not, of course, preclude the Court's drawing a distinction here, too. The point is, however, that even “corporateness” cannot serve as a touchstone. The Court must inquire and determine in each case whether the owner's rights to association and privacy have been infringed; and if the Court must make the inquiry in each corporate-owner case, can it reasonably forego a similar inquiry in traditional, private-owner cases? Although the owner may hold title in noncorporate form, his rights will not always be infringed either. He may not take any interest in the business, for example, allowing his son to run it instead. He is as much an absentee owner as is a shareholder in Howard Johnson's. How intimately must the

may speak, but the Ku Kluxer need not listen; and Negro militants can no more force the redneck to lend them his ears than the redneck can gag the Muslims.

The Claims of Privacy

THERE ARE TWO, perhaps three, constitutional pegs upon which the captive audience may hang its plea for protection. Of the two traditional grounds the most frequently asserted is the right to privacy—the right to be let alone. A more subtle approach reads the freedom not to listen into the First Amendment as an implied corollary of the freedom of speech. Professor Charles Black comments:¹⁴

... [T]he claim to freedom from unwanted speech rests on the grounds of high policy and convictions of human dignity closely similar to if not identical with those classically brought forward in support of freedom of speech in the usual sense.

A third and more radical alternative premises the claim to insulation on associational grounds. Nowhere does the Constitution explicitly recognize the freedom of association, and the Court has never clearly indicated whether it is implied in the First Amendment or is part of due process guaranteed in the Fifth and Fourteenth Amendments or is among those Ninth Amendment rights "retained by the people." Regardless of doubts about its constitutional paternity, the Court has treated it as one among preferred freedom equals. Because the full contours of the freedom have not yet been marked off, a few observations may be required or at least suffered. Basic to any association is a voluntary agreement. The right not to associate must be an implied element of association, for a coerced relationship violates the essence of association. Sociologically, the concept of a speaker and his audience as an association rings true: a group comes together to meet. Consequently, if a citizen has drawn a circle excluding himself from the dialogue, the protestor has no right to draw a circle taking him in. This approach would emphasize the civility of a society that prizes voluntarism.

Some scholars reject the captive audience's plea on the ground that exposure to novel ideas is good for them; others, because insu-

Public Property

WHEN ONE TURNS to public property and asks whether the protestor may appropriate it for a platform, an answer is not easily reached because the owner is not always identifiable; nor, if he is, are his wishes always determinative of how the property will be used.

It is not helpful to think of government as the owner of public property in the same sense that John Doe owns his home or car. Justice Oliver Wendell Holmes gave the traditional doctrine its classic statement:⁹

... For the legislature absolutely or conditionally to forbid public speaking in a highway or public park is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house.

Justice Black in the latest sit-in case said much the same thing:¹⁰

... The state, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated.

With all due respect to these gentlemen, who stand among the dozen or so preeminent jurists in the history of the American bench, they are wrong.

The question, "Who owns public property?" has received astonishingly little scholarly attention, but the better theory is that public property is owned in common by the citizens of the governmental unit in whose hands its management has been entrusted. Any other theory mocks democracy as mythology. At the most, then, a governmental agency is a trustee; it can exercise discretion over the use of public property only to the extent that citizens *can* and *have* given it discretionary authority. When some citizens want to stage a street rally and others want to drive down the street, two co-owners are squabbling over how to use their property. The protestor who demands use of the streets for a demonstration is thus not only speaking, but attempting to exercise his property rights in those streets and parks. At the same time, the businessman driving home after a long day at the office is attempting to exercise his property rights in those same streets.

If co-owners of private property cannot agree on how to use

their properties, a court of law grants them a partition. It need hardly be pointed out that a highway cannot be split down the middle, one half to the ralliers and the other half to the drivers. There is no apparent way to identify the citizen's share in commonly held public property. Professor Leopold Kohr alludes to the problem tongue-in-cheek:¹¹

... I bed myself down under God's infinite star-spangled roof in a public park, of which I fancy myself a part owner, only to be kicked by a policeman and be told: "This property is neither God's nor yours. It belongs to the Public which wants no part of individuals. Beat it." And when I protest that I am the Public, he asks me to produce my incorporation certificate establishing that, like Louis XIV, I am the state. Which, of course, I cannot do. So he arrests me for trespassing.

Of necessity citizens grant governmental units broad authority to decide how to use public property; but, since the dissatisfied owner cannot secure a partition, it follows that not even a majority of citizens can grant the governmental agency the right to exercise its discretion arbitrarily; that is, to favor invariably and absolutely the wishes of some owners over those of others. The Fourteenth Amendment—no state may deny persons the equal protection of the laws—forbids such discrimination. The constitutional prohibition against deprivation of property without due process also bars arbitrary municipal action. Consequently, legislators and courts are saddled with the perplexing task of adjusting fairly and equitably conflicting demands on public property.

On what terms and under what conditions must government make public property available to protestors?

First, what public property may the protestor claim? Only the streets and parks, or any public building or land? Commentators generally speak only of parks and streets. Rarely, however, do they analyze whether those are the only places the protestor may claim or what distinguishes them from other kinds of public property like libraries and swimming pools.

One valid distinction may be a historical one; streets and parks have traditionally been used for demonstrations; libraries and swimming pools have not. Aside from the somewhat embarrassing

facts that there were no swimming pools and no public libraries when the First Amendment was adopted, there remains the inconclusiveness of most appeals to history and the probability that it is a rationalization for a decision reached on other grounds.

Where complex and often conflicting interests must be reconciled, a rigid standard or test will serve neither Court nor country well. A formula, however, can be devised which will identify the interests which must be weighed: *the utility of the forum discounted by the probability that its use will infringe other's rights.* Availability, size, and ease of access are the major components of a forum's utility. While the streets and parks will usually satisfy the utility requirements better than other public property, the formula would not invariably dictate their use or preclude use of other public property. ✓

Some analysts would add a fourth utility component: proximity to the desired audience. In the last sit-in case the Court explicitly rejected the argument that the "appropriateness" of the place of protest immunized demonstrators from trespass convictions, saying:¹²

Such an argument has as its major inarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.

Since the protestor needs an audience if his message is to be heard, some argue that he may force his fellows to listen by, for example, lying in front of their cars. Society has done enough when it has guaranteed the speaker's right to be heard; it should not and probably cannot insure that his fellows will listen. Indeed, aside from the obvious functional interests like movement of traffic, the interest the speaker is most likely to infringe from a public forum is his fellow citizen's right not to listen.

Justice Douglas has argued that a citizen has a constitutional right not to listen. While the Court did not embrace the Douglas position in the only case that presented the issue squarely,¹³ it has recognized that the community may insulate its citizens from unwanted speech. Ideally, the freedom to speak should end where the other fellow's ears begin. In other words, the Black Muslims

owner be involved in the day-to-day management of the business before the Constitution protects him? The Court's attempting to answer that question would open a Pandora's box. Justice Black foresaw the difficulties and could not remain silent:⁸

Furthermore, legislative bodies may draw lines like this, but if the Constitution itself fixes its own lines, as is argued, legislative bodies are powerless to change them, and homeowners, churches, private clubs, and other property owners would have to await case-by-case determination by this Court before they knew who had a constitutional right to trespass on their property.

The question, how private must private property be before the protestor loses his right to appropriate it for a platform, is not the kind of question the Court should try to answer.

Second, the corporate manager has rights to association and privacy, too; rights which, though not inhering in ownership of the land seized, are presumably still constitutionally protected. To focus on the technicalities of ownership and conclude that the owner has suffered no infringement, ignores the infringement his manager may have suffered. "It" may not turn Negroes aside because of "its" feelings of antipathy to black-skinned people; but John Doe, the manager, may turn Negroes aside because of his feelings of antipathy to black-skinned people.

Third, trespass laws were not designed exclusively to insure the owner's associational and privacy rights. They were designed to protect the institution of private property itself. One of its primary functions is to reduce societal conflict by removing from majoritarian decision a whole range of questions, giving to the owner or his delegate instead the sole power of decision. If the decisions which owners make inflame society, it may feel justified in demanding that individuals give up their decision power to the majority; but no circumstance can justify "surrendering" the decision power to a mob. Yet, should the Court tell protestors that they may occupy private property to edify its owner, no matter how noble their position and no matter how ignoble his action, it will have done just that.

So noble a goal as civil rights cannot justify the commission of civil wrongs in its pursuit.

lation is inconsistent with an open society. Every good does not, however, justify the exercise of force in its accomplishment; nor is a closed-minded man more repugnant than a speaker who would pry open his "listeners'" heads and drill in his message. Should an "open society" protect the man so moved by his concern for his brothers' welfare that he willingly and forcibly substitutes his judgment for theirs? An open society can insure neither open nor closed minds among its citizens; and the observer who trots out the possibility of closed-mindedness as a bogymen neither understands the basis of the open society nor believes that his fellows should decide for themselves what and when they shall hear.

The sound truck and leaflet cases¹⁵ illustrate how the Court may look upon attempts to protect citizens from vocal trespass. The leaflet cases may only stand for the proposition that where a statute aimed at an evil which the community may prohibit—litter—indirectly infringes a First Amendment right—the distribution of handbills—and another statute could erase the evil—for example, a statute making littering a misdemeanor—without infringing First Amendment rights, the Court will strike down the statute. The "least means" doctrine is a familiar one, but by what least means can a community prevent direct protests from invading citizens' privacy?

The leaflet cases may have a larger significance, particularly if read in light of the second sound truck case, *Kovacs v. Cooper*. The majority opinion sympathized with the citizen bombarded by sonic messages:¹⁶

The right of free speech is guaranteed every citizen that he may reach the mind of willing citizens. . . . [W]e think the need for reasonable protection in the homes or businesses from the distracting noises of vehicles equipped with such sound amplifying devices justifies the ordinances [regulating sound trucks].

A person may or may not take a leaflet—the choice is his. The offer of the leaflet itself does not invade his privacy or quietude; rather, it is an attempt to win his attention. The Court has always held that the free speech guarantees subsume the right to win the listener's attention; indeed, the *Kovacs* majority pointedly reminded the communities that the right to speak includes the right

. . . The experience of ages points to the inexorable fact that people are frequently stirred to violence when property which the law recognizes as theirs is forcibly invaded or occupied by others. Trespass laws are born of this experience. They have been, and doubtless still are, important features of any government dedicated, as this country is, to a rule of law. Whatever power it may allow the states or grant to the Congress to regulate the use of private property, the Constitution does not confer upon any group the right to substitute rule by force for rule by law. Force leads to violence, violence to mob conflicts, and these to rule by the strongest groups with control of the most deadly weapons. Our Constitution, noble work of wise men, was designed—all of it—to chart a quite different course: to “establish Justice, and insure domestic tranquility . . . and secure the Blessing of Liberty to ourselves and our Posterity.” At times the rule of law seems too slow to some for the settlement of their grievances. But it is the plan our Nation has chosen to preserve both “Liberty” and equality for all. On that plan we have put our trust and staked our future. This constitutional rule of law has served us well. Maryland’s trespass law does not depart from it. Nor shall we.

Governments may have the power to condition operation of a business on owner consent to its use for demonstrations, but the United States Constitution does not impose any such affirmative obligation.

4
The second serious test is corporate ownership. “Corporateness,” of course, distinguishes private corporate property from private noncorporate property; and if one seeks only to part sheep and goats, “corporateness” is the most efficacious of the proffered tests. More importantly, it reflects most accurately the “felt” differences between “private” private property and “public” private property. Justice Douglas, who has been the most energetic and creative judicial proponent of the view that the Fourteenth Amendment reaches some kinds of private action, first urged the corporate ownership idea in *Bell v. Maryland* and bared the real interests at stake:⁷

It is said that ownership of property carries the right to use it in association with such people as the owner chooses. The cor-

An absolute prohibition would also interfere in the national free market of ideas. Because out-of-state citizens are not represented within the state, not even a majority therein should be able to cut off their access to ideas.

Hyde Parks would be the ideal solution. Built specifically for meetings, the parks would guarantee every man and group their public platform but deny to no one the use of public property primarily dedicated to other purposes. Professor Alexander Meiklejohn has even proposed:¹⁹

In every village, in every district of every town or city, there should be established at public expense cultural centers inviting all citizens, as they may choose, to meet together for the consideration of public policy. . . .

Many, perhaps most, communities will not, however, build Hyde Parks. Theirs is the difficult task of deciding what property to set aside for protest and when and how it may be used. The Bill of Rights Committee of the American Bar Association counsels:²⁰

A statesmanlike and workable approach would be to regard the availability of streets and parks as but two parts of a single problem . . . reconciling the city’s function of providing for the exigencies of traffic in its streets and for the recreation of the public in its parks, with its other basic obligation in order to safeguard the guaranteed right of public assembly.

It is upon the sword of drafting such statutes that communities will most likely impale themselves. They may be understandably vexed that the Supreme Court has given little guidance. Justice Frankfurter confessed in one speech case:²¹

. . . [M]any a decision of this Court rests on some inarticulate major premise and is none the worse for it. A standard may be found inadequate without the necessity of explicit delineation of the standards that would be adequate, just as doggerel may be felt not to be poetry without the need of writing an essay on what poetry is.

Fortunately, not all the Justices belong to the I-know-it-when-I-see-it school of jurisprudence, and the Court has set out some standards.

manner to protest by silent and reproachful presence, in a place where the protestant has every right to be, the unconstitutional segregation of public facilities.

Whether silence may be equated with speech is a semantic point of some interest; but the Court has never interpreted the language of the First Amendment literally, and it is difficult to deny that a sit-in "expresses" or "communicates" an idea or attitude.

Characterizing a sit-in as speech does not answer our question, however. Mr. Justice Fortas carefully qualified his expansive reading of the First Amendment: the protestor must also be "in a place where [he] has every right to be." *Thus, the initial—indeed, the primary—question must always be a property one.* Mr. Justice Black, dissenting, crystallized the point:³

I have never believed that it [the First Amendment] gives any person or group of persons the constitutional right to go wherever they please, without regard to the rights of private or public property. . . .

Private Property

TRADITIONALLY, PRIVATE property marked off that area within which the owner exercised untrammelled discretion. Today, however, an owner enjoys no such discretion, subjected as it has been to the police power of the state. Does the owner's surviving discretion include the right to deny use of his property to a protestor wishing to make a speech thereon? Or must the owner submit on his own property to the speech of those with whom he violently disagrees?

To be sure, no one now suggests that a man must open the doors of his home to the protestor; to James Otis' declaration that a man's home is his castle, all still defer. But a home is not a business, and many have no qualms about forcing the owner to open the latter to the protestor.

The divining rod which distinguishes private property from "public" private property has yet to be found, however. Two suggested standards may be rejected outright, since both sweep all private property into the public bin. The first is that vague phrase, "clothed with the public interest," once anathema to the liberals

disturbance in its libraries and on the streets with identical standards.

The Court may also be expected to smile sympathetically upon a community's attempt to insulate its citizens from unwanted speech, at least in residential areas. Professor Zechariah Chafee, the leading First Amendment scholar in our history, advised:³²

Great as is the value of exposing citizens to novel ideas, home is the one place where a man ought to be able to shut himself up in his own ideas if he so desires.

Restrictions on demonstrations in residential areas might not be upheld if applied to a rally in the local park.

Justice Frankfurter listed a variety of considerations in his *Niemotko v. Maryland* concurrence:³³

Where does the speaking which is regulated take place? Not only the general classifications—streets, parks, private buildings—are relevant. The location and size of a park; its customary use for the recreational, esthetic and contemplative needs of a community; the facilities other than a park or street corner, readily available in a community for airing views, are all pertinent considerations in assessing the limitations the Fourteenth Amendment puts on state power in a particular situation.

How far the community may go in insuring normality in the context of an abnormal situation defies a hard and fast answer, however. Only time and more, many more, decisions will tell how far the Court will go.

Difficult though legislators may find the task of fairly and equitably resolving competing demands on public property, they have no choice but to try. Whatever their success, one may safely predict that some will think they have failed. Consequently, the disenchanted will challenge the statute or ignore it. And so long as we remain wedded to a system of public ownership, the courts must play the role of marriage counselors, settling these inevitable and often nasty family squabbles over use of common property. In the long run, we may conclude that divorce is the only answer.