April 14, 2020

ARTICLES

A Bloody Problem: Free Speech and Private Property Rights Collide in California

A recent case upends the legal landscape for shopping centers seeking to keep their properties free of gruesome images. This resulting conflict in First Amendment and private property rights calls for new legal strategies.

By Nancy J. Newman

Share this:

A shopping center in California has every legal right to ban the use of vulgar or obscene expression on its private property premises. But what about grisly or gruesome imagery? Can a shopping center prohibit the display of dismembered bodies? According to a recent California Court of Appeal decision, the answer is no. The resulting jurisprudence creates a serious problem for owners and managers of shopping centers in California who wish to protect their rights to provide a peaceful shopping experience.

In *Center for Bio-Ethical Reform, Inc. v. Irvine Co., LLC*, 37 Cal.App.5th 97 (2019), California's Fourth District Court of Appeal struck down a shopping center's rule banning "grisly or gruesome displays," finding the rule unconstitutional under a "strict scrutiny" test. By applying the strict scrutiny test, the court held the landlord to the same constitutional standards as a government actor. Finding that the shopping center had no "compelling government interest" to support its ban on grisly imagery, the court struck down the regulation as infringing on free speech rights under California's constitution. Facing the prospect of newly empowered activists converging on shopping centers, inflicting gruesome imagery on all patrons as a means of amplifying their message, shopping center owners need new legal strategies, and California needs a new test.

Irvine Presents a Tangle of Federal and State Constitutional Free Speech Issues

The *Irvine* court recognized that some free speech rights exist on private shopping center property, subject to a landlord's right to reasonably regulate time, place, and manner, under *Robins v. Pruneyard Shopping Center*, 23 Cal.3d 899, 910 (1979). The court first examined whether gruesome and grisly imagery fell within the narrowly limited classes of speech that do not enjoy

constitutional protection, such as "obscenity, fighting words, defamation, and speech intended, and likely, to incite imminent lawless action." After concluding that gruesome imagery did not fall within a class of unprotected speech, the court found the regulation was "content-based" and thus presumptively invalid and subject to strict scrutiny. *Irvine,* 37 Cal.App.5th at 105.

In reaching this conclusion, the *Irvine* court disagreed with dicta in *H-CHH Associates v. Citizens for Representative Government,* which had indicated that grisly or gruesome displays had no constitutional protection. 193 Cal.App.3d 1193 (1987) (overruled on other grounds in *Fashion Valley Mall, LLC v. Nat'l Labor Relations Bd,* 42 Cal.4th 850, 868-869 (2007). Instead, the *Irvine* court relied on more recent federal constitutional authority of *U.S. v. Stevens*, 559 U.S. 460, 468-469 (2010) and *Brown v. Entertainment Merchants Assn.,* 564 U.S. 786 (2011), for the proposition that the classes of speech that have no constitutional protection are narrow and not easily expanded. *Stevens* rejected a statute that criminalized the creation, sale, or depiction of animal cruelty, and *Brown* rejected a law that banned the sale or rental of violent video games. Both involved *government action* to which the federal constitutional standards plainly apply. By relying on federal First Amendment analysis, however, the *Irvine* court lost sight of a key distinction between public and private regulations.

In fact, the federal constitution provides *no protection* for the conduct that the *Irvine* landlord sought to ban. Rights to free speech access on private property under *Pruneyard Shopping Ctr. v. Robins* derive only from the California Constitution; no such rights exist under the federal constitution. 447 U.S. 74, 76 (1980). Indeed, the Ninth Circuit recently reiterated that the federal First Amendment does not apply to private actors. See *Prager University v. Google LLC, et al.* 2020 WL 913661 (February 26, 2020, USCA 9th Cir.). So the real question is, what is the best analysis of this issue under California law?

California's Analysis of Free Speech Rights on Private Property May Be Changing

In the 2007 *Fashion Valley* case, the California Supreme Court found that a landlord's ban on advocating a boycott was a content-based restriction, subject to strict scrutiny—thus holding the mall to the same standard as a governmental actor. But it is unclear whether the California Supreme Court would apply a strict scrutiny test to a ban on gruesome imagery today. *Fashion Valley* was a 4–3 decision, with a vigorous dissent by Justice Chin, who noted the fallacy of requiring an owner of private property to show a compelling *government interest* for its rules:

> Good reason exists for this lack of authority. Because most of the country, including the United States Supreme Court, rejects the very notion of free speech rights on private property, *the issue never arises.* Only in California is the issue relevant. The only *tradition* that is relevant to this case is the tradition, followed in most of the country, of finding no free speech rights on private property. The majority is trampling on tradition, not following it.

42 Cal.4th at 881 (original emphasis). But none of the justices in the *Fashion Valley* majority sits on the court today. Two of the three dissenters (Justice Chin and Justice Corrigan) remain on the California Supreme Court, but Justice Chin has announced his retirement as of August 31, 2020.

Indeed, five years after *Fashion Valley* was decided, the California Supreme Court showed a willingness to limit the application of *Pruneyard*. In *Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8*, 55 Cal.4th 1083 (2012), the court held there is no general constitutional protection for free speech on the private property of a shopping center property, except for areas "designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation." *Id.* at 1093. This holding thus confirmed that no protection exists at access points or at the apron of the store. While all justices on the court agreed with this limitation, their divergent views on the right to reasonably regulate the manner of allowed activity suggest a new test is needed. For example, in a concurring opinion, Chief Justice Cantil-Sakauye observed that even labor speech, expressly protected by statute, could reasonably be limited on the basis of business considerations:

> [i]f the size of its signs or the volume of its speech thereby repel patrons from the business. At the point at which the signs and sound levels interfere with the business for reasons other than their persuasive message, the communication is no longer lawful.

Id. at 1130. Justices Baxter and Corrigan, both of whom dissented in *Fashion Valley*, joined the chief's opinion. Justice Liu, joined by Justice Werdegar, concurred in the result, but noted the analytical challenges posed by making such judgments:

> [i]f reasonableness is the test, then we must ask reasonable as to whom? Business owners are likely to argue that any labor activity that drives customers away is unreasonable. . . . At what point does a court say that the communicative value of a marginally more effective form of protest is outweighed by the incremental potential for interference with the business? Answering this question becomes particularly difficult when a case

> involves nontraditional forms of protest, designed to have an emotional impact on the intended audience.

Id. at 1139–1140. The evident tensions in these concurring opinions provide an opportunity for California to adopt a "limited public forum" analysis for free speech activity on private property. Such a test would be consistent with the views of all justices, and would permit owners to validly ban gruesome imagery at their centers.

A Shopping Center Should Be Considered a Limited Public Forum

The concept of a "limited public forum" is well grounded under federal and state constitutional principles. As the Ninth Circuit recently explained, even public property may be considered a limited public forum if it is used "primarily as part of a commercial enterprise," and free speech activities permitted "are only incidental to that use." *Seattle Mideast Awareness Campaign v. King Cty.,* 781 F.3d 489, 497 (9th Cir. 2015) (*SeaMac*). Finding that a program allowing advertising on city busses met the definition of a limited public forum, the *SeaMac* court found the transit agency's regulation was constitutional as long as it was *reasonable* and *viewpoint neutral.*

While a California court has not yet applied a limited public forum analysis to free speech issues at a California shopping center, limited public forum analysis has been recognized in California. For instance, in *Clark v. Burleigh,* 4 Cal.4th 474 (1992), the California Supreme Court unanimously agreed that an election code statute limiting the content of candidate statements was constitutional, finding that the legislature intended only to create only a limited forum and that the regulation was both reasonable and viewpoint neutral. 4 Cal.4th at 493–494. Similarly, the California Supreme Court applied a limited public forum analysis to a school district's regulation of the content of its internal school mailboxes, citing the district's legitimate interest in limiting the use of such mailboxes. *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.,* 46 Cal.4th 822, 844 (2009).

In light of the *Irvine* decision, it may be time for California courts to apply a limited public forum analysis to shopping centers. Certainly, when a shopping center includes any areas that are "designed and furnished in a way that induces shoppers to congregate," those areas are incidental to the primary, commercial purposes of the shopping center. Likewise, banning grisly and gruesome imagery on shopping center property is a reasonable regulation, in light of the commercial purpose of the center, and is viewpoint neutral. As a matter of public policy, and sound constitutional principle, there should be no right to inflict grisly and gruesome imagery on

customers, owners, and tenants of a shopping center in violation of their rights to enjoy and provide a peaceful shopping experience.

Conclusion

The *Irvine* decision is now precedent for invalidating bans on gruesome imagery under a strict scrutiny test, but limited public forum analysis was not addressed in the opinion. For this reason, if California shopping center owners wish to provide a subsequent court with the opportunity to consider applying a limited public forum analysis, they should modify their existing time, place, and manner regulations to invoke the reasons for this analysis. This issue is also ripe for legislative reform. If people do not wish to be forced to see grisly images when they shop, they should ask their elected representatives to ensure that reasonable limitations on any private property forum are respected.

Nancy J. Newman is a partner at Hanson Bridgett LLP in San Francisco, California.

Note: This article originally appeared in similar form in Law360 on December 20, 2019.
