Calif. Should Allow Grisly Image Bans On Private Property

By Nancy Newman (December 20, 2019)

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On July 2, the California Court of Appeal's Fifth Appellate District struck down a shopping center's rule banning grisly or gruesome displays, creating a host of new problems for an industry seeking to provide a peaceful and pleasant shopping experience.

In Center for Bio-Ethical Reform Inc. v. Irvine Co. LLC,[1] the court applied a strict scrutiny test to hold the landlord to the same constitutional standards as a government actor, and found no compelling government interest to support the regulation.

Faced with the prospect of newly empowered activists converging on shopping centers with graphic posters of severed limbs and similar disturbing imagery, owners need new legal strategies, and California needs a new test.

Irvine rejected the center's ban on gruesome imagery.

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 the 1979 California Supreme Court case of Robins v. Pruneyard Shopping Center.[2]

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,"[3] citing U.S. v. Stevens.[4]

After concluding that gruesome imagery did not fall within a class of unprotected speech, the court found that the regulation was content-based and thus presumptively invalid and subject to strict scrutiny,[5] citing Fashion Valley Mall LLC v. National Labor Relations Board.[6]

In reaching this conclusion, the Irvine court disagreed with dicta in H-CHH Associates v. Citizens for Representative Government,[7] which had indicated that grisly or gruesome displays had no constitutional protection. Instead, the Irvine court relied on more recent federal constitutional authority of Stevens and Brown v. Entertainment Merchants Association,[8] 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. In 1980, the U.S. Supreme Court confirmed that rights to free speech access on private property under Pruneyard derive only from the California Constitution; no such rights exist under the federal constitution.[9] So the real question is, what is the best analysis of this issue under California law?

California needs a better test for regulating free speech rights on private property.

In 2007, the California Supreme Court in Fashion Valley found that a landlord's ban on advocating a boycott was a content-based restriction subject to strict scrutiny, and thus held the landlord to the same standard as a governmental actor. But it is not clear that the California Supreme Court would apply a strict scrutiny test to a ban on gruesome imagery today. Fashion Valley was a 4-3 decision, including a vigorous dissent by Justice Ming Chin, who noted the fallacy of requiring a private property owner to show a compelling government interest to support 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.[10]

Notably, none of the justices in the Fashion Valley majority sits on the California Supreme Court today, while two of the three dissenters, Justices Chin and Carol Corrigan) remain.

Since Fashion Valley, the California Supreme Court has shown a willingness to limit the application of Pruneyard. In Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8,[11] the court held that there is no general constitutional protection for free speech on private shopping center property, except for areas "designed and furnished in a way that induces shoppers to congregate for purposes of entertainment, relaxation, or conversation," thus confirming that no protection exists at access points or at the apron of the store.[12]

While all the justices 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 Tani Gorre Cantil-Sakauye noted that even labor speech, expressly protected by statute, could reasonably be limited based on business considerations:

> If 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.[13]

Justices Marvin Baxter and Corrigan, both of whom dissented in Fashion Valley, joined this opinion. Justice Goodwin Liu, joined by Justice Kathryn Werdegar, concurred in the result, but highlighted the challenges of making such judgments:

> If 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.[14]

The tensions evident in these concurring opinions provide an opportunity for California to adopt 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 exclude gruesome imagery from their centers.

A shopping center forum is a limited public forum.

Limited public forum analysis is well grounded under federal and state constitutional principles. As recently explained by the U.S. Court of Appeals for the Ninth Circuit in Seattle Mideast Awareness Campaign v. King County,[15] even public property may be consider a limited public forum if it is used primarily as part of a commercial enterprise, and the expressive activities permitted "are only incidental to that use."[16]

Finding that an advertising program on public transit met the definition of a limited public forum, the SeaMac court found the transit agency's regulation constitutional as long as it was reasonable and viewpoint neutral.

Applying the same test, if a public forum under Pruneyard exists in a shopping center at all, it squarely meets the definition of a limited public forum, because any such locations are furnished primarily as part of a commercial enterprise, and allowing expressive activity is only incidental to the commercial purpose for which a shopping center exists.

While the concept of a limited public forum has not yet been applied to shopping centers in California, limited public forum analysis has been recognized in California. For instance, in 1992, the California Supreme Court unanimously agreed that an Election Code statute limiting the content of candidate statements was constitutional, finding that the legislature's intent was to create only a limited forum, and that the regulation was both reasonable and viewpoint neutral.[17]

Also, in 2009, the California Supreme Court applied a limited public forum analysis to a school district's regulation of the content of its internal school mailboxes, based on the district's legitimate interest in limiting the use of such mailboxes.[18]

The Irvine decision underscores the need to apply limited public forum analysis to shopping centers. Certainly, to the extent that a center includes areas "designed and furnished in a way that induces shoppers to congregate,"[19] such areas are incidental to the primary, commercial purposes of the shopping center.

Likewise, a shopping center's ban on grisly and gruesome imagery is reasonable in light of the commercial purpose of the center, and it is viewpoint neutral. There should be no constitutional 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. It is time California law made this clear.

Conclusion

While Irvine is precedent for invalidating bans on grisly or gruesome imagery under a strict scrutiny test, limited public forum analysis was not addressed in the opinion. To provide a subsequent court with the opportunity to consider applying a limited public forum analysis, shopping center owners should modify their time, place and manner regulations to invoke the reasons for this analysis at their centers.

This issue is also ripe for legislative reform, as people who do not wish to be forced to view gruesome imagery when they shop should ask their elected representatives to ensure that reasonable limitations on any private property forum are respected.

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[1] Center for Bio-Ethical Reform, Inc. v. Irvine Co., LLC (2019) 37 Cal.App.5th 97 ("Irvine") (third party's request for depublication denied on October 16, 2019).

[2] Robins v. Pruneyard Shopping Center (1979) 23 Cal.3d 899, 910 ("Pruneyard").

[3] Irvine, supra, 37 Cal.App.5th at pp. 104-105, citing U.S. v. Stevens (2010) 559 U.S. 460, 468-469 ("Stevens").

[4] Stevens, supra, 559 U.S. at pp. 468-469.

[5] Irvine, supra, 37 Cal.App.5th at p. 105.

[6] Fashion Valley Mall, LLC v. Nat'l Labor Relations Bd. (2007) 42 Cal.4th 850 ("Fashion Valley").

[7] H-CHH Associates v. Citizens for Representative Government (1987) 193 Cal.App.3d 1193, overruled on other grounds in Fashion Valley, 42 Cal.4th at pp. 868-869.

[8] Brown v. Entertainment Merchants Assn. (2011) 564 U.S. 786.

[9] Pruneyard Shopping Ctr. v. Robins (1980) 447 U.S. 74, 76.

[10] Fashion Valley, supra, 42 Cal.4th at p. 881, original emphasis.

[11] Ralphs Grocery Co. v. United Food & Commercial Workers Union Local 8 (2012) 55 Cal.4th 1083 ("Ralphs").

[12] Ralphs, supra, 55 Cal.4th at p. 1093.

[13] Ralphs, supra, 55 Cal.4th at p. 1130.

[14] Ralphs, supra, 55 Cal.4th at p. 1139-1140.

[15] Seattle Mideast Awareness Campaign v. King Cty. (9th Cir. 2015) 781 F.3d 489 ("SeaMac").

[16] SeaMac, supra, 781 F.3d at p. 497, citing Int'l Soc. for Krishna Consciousness, Inc. v. Lee (1992) 505 U.S. 672, 682 ("As commercial enterprises, airports must provide services attractive to the marketplace. In light of this, it cannot fairly be said that an airport terminal has as a principal purpose promoting 'the free exchange of ideas.'")

[17] Clark v. Burleigh (1992) 4 Cal.4th 474, 493-494.

[18] San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist. (2009) 46 Cal.4th 822, 844.

[19] Ralphs, supra, 55 Cal.4th at p. 1093.