

## FREE SPEECH RIGHTS IN COURTHOUSES

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There may be times when a court has to deal with demonstrators or with spectators or parties or even lawyers who wish to express a political view, either through speaking or expressive conduct. First Amendment free speech issues arise whenever the government, including a court, attempts to place restrictions on expression. The degree of protection depends on the place where the expression is attempted. Courtrooms and courthouses generally are places where free speech may be restricted.

1. **Expressive conduct as a form of speech** — Free speech protection applies not only to spoken or written words but also to expressive conduct. Wearing an armband, for example, may be a symbolic act protected by the First Amendment. *Tinker v. Des Moines Independent Community School Dist.*, 393 US 503 (1969). Artistic expression can be protected expressive conduct, the same as conduct expressing political, social or religious messages. *Nat'l Endowment for the Arts v. Finley*, 524 US 569 (1998). Soliciting funds, too, can be a form of protected speech. *Village of Schaumburg v. Citizens for a Better Environment*, 444 US 620 (1980).

Most conduct, particularly commercial activity, is not expressive conduct protected by the First Amendment. The question is whether the conduct is intended to express a message. As explained in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 US 557 (1995), a parade is entitled to free speech protection because the marchers are making a collective point to bystanders, but the First Amendment would not apply to a group of people who are just walking from here to there.

2. **Protection given to speech depends on location** — The First Amendment does not give citizens the right to exercise free speech rights on any government property at any time. “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.” *Adderley v. State of Florida*, 385 US 39, 47 (1967). “[T]he First Amendment does not guarantee access to property simply because it is owned or controlled by the government.” *United States Postal Service v. Greenburgh Civic Association*, 453 US 114, 129 (1981).

The courts have adopted a forum analysis to determine when the government’s interest in limiting the use of its property outweighs the interest of those wishing to use the property for free expression. Thus, the extent to which the government can restrict expression depends on the nature of the forum. Strict scrutiny applies to any attempt to limit public expression at a traditional public forum or a designated public forum, but a policy limiting expression at a limited public forum or a nonpublic forum need only be reasonable.

- a. Traditional public forum — Some government-owned property is a public forum by its nature and must be open to First Amendment expression, subject to reasonable time, place and manner restrictions.

“[S]treets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely. . . .” *Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc.*, 391 US 308, 315 (1967).

“In such places, the government’s ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place and manner regulations as long as the restrictions are ‘content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.’” *United States v. Grace*, 461 US 171, 177 (1983), quoting *Perry Education Assn. v. Perry Local Educator’s Assn.*, 460 US 37, 45 (1983).

- i. *Courthouse is not a public forum* — As summarized in the discussion below under “Nonpublic forum,” courtrooms and courthouses are not considered traditional public forums.
- ii. *The courthouse sidewalk as a public forum* — Areas around courthouses may be public forums, however. In *United States v. Grace, supra*, the Supreme Court held that the public sidewalks forming the perimeter of the Supreme Court grounds are traditional public forums, just like other public sidewalks, and that a federal statute prohibiting parading, picketing and similar activity on those sidewalks was unconstitutional.
- iii. *Authority to limit demonstrations near court* — The Supreme Court, on the other hand, has upheld a state statute prohibiting picketing or parading “in or near a building housing a court” when the demonstration is intended to interfere with or impede justice or to influence a judge, juror or court officer. *Cox v. Louisiana*, 379 US 559 (1965). “There can be no question that a State has a legitimate interest in protecting its judicial system from the pressures which picketing near a courthouse might create.” At 562.

North Carolina has a statute similar to the one upheld in *Cox v. Louisiana*. General Statutes § 14-225.1 prohibits picketing, parading or using a sound truck or like device within 300 feet of a courthouse or the residence of a judge, juror, witness or prosecutor, with the intent to interfere with the administration of justice or influence the judge, juror, etc.

- iv. *Communicating restrictions on use of a public forum* — Restrictions on the time, place and manner of First Amendment activity at a public forum may be communicated in any manner that reasonably informs the user of the restriction. The restrictions may be incorporated in published regulations, for example. *Clark v. Community for Creative Non-Violence*, 468 US 288 (1984). The restrictions may be posted on a sign. *Leiss v. United States*, 364 A2d 803 (DC Ct App 1976). The restrictions may be communicated by a guard (*Leiss*), by an administrative assistant in charge of the property (*Hemmati v. United States*, 564 A2d 739 (DC Ct App 1989)), by the officer on duty in charge of the property at the time (*State v. Occhino*, 572

NW2d 316 (Minn Ct App 1998)), or by some other person with authority over the property.

b. Designated public forum — A location which is not a traditional public forum may become one when the government designates it as a place for public expression. If so, any restrictions on expression are subject to the same strict scrutiny as would apply to a traditional public forum.

i. Designated public forum not created inadvertently — A designated public forum cannot be created inadvertently, it must be done intentionally. “The government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse.” *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 US 788, 802 (1985). “In cases where the principal function of the property would be disrupted by expressive activity, the Court is particularly reluctant to hold that the government intended to designate a public forum.” *Id.*, at 804.

ii. A portion of a courthouse may become a designated public forum — Although courthouses generally are nonpublic forums (see below), a portion of a courthouse might become a designated public forum (or a limited public forum as discussed below).

In *United States v. Gilbert*, 920 F2d 878 (11<sup>th</sup> Cir 1991), the Eleventh Circuit considered whether a portion of a federal building (which housed a federal court and other offices) had become a designated public forum. The area in question was a covered portico area that was used occasionally for demonstrations. Because there was an unwritten policy of excluding demonstrators from that area, the court decided the area had not become a designated public forum despite the occasional demonstration. The adjoining unenclosed plaza, however, had become a designated public forum because it was opened by the government as a place for public expression, with demonstrations occurring there frequently. *Id.*

A New Jersey county courthouse was considered a designated public forum for purposes of filming a movie because court officials had allowed it to be used regularly for filming movies and television shows and had never before denied permission. *Amato v. Wilentz*, 753 F Supp 543 (DC NJ 1990), *rev'd on other grounds*, 952 F2d 742 (3<sup>rd</sup> Cir 1991). Today this case would be considered an example of a limited public forum as discussed immediately below. By opening the courthouse to other movies and TV shows, officials created a limited public forum and could not exclude the movie in question on the grounds that they did not approve the theme. But creating a limited public forum for the filming of movies and TV shows would not open the courthouse to other forms of expression such as anti-war demonstrators.

c. Limited public forum — In a limited public forum the government creates an outlet for a specific or limited type of expression at a location in which such expression was not previously allowed. Thus, for example, a university may open facilities to use by student

groups but not others, a public school may distribute flyers for community education arts groups but not for all nonprofit organizations, or a city council may allow public comment on a proposed annexation but not on other topics. Or, as discussed immediately above in connection with *Amato v. Wilentz*, court officials could allow use of the courthouse for filming movies and TV shows while excluding other forms of expression. In older cases, limitations of this sort often were discussed as a form of designated public forum, but more recently the courts have recognized limited public forum as a separate category. See *Christian Legal Soc’y v. Martinez*, 130 S Ct 2971 (2010).

“When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified ‘in reserving [its forum] for certain groups or for the discussion of certain topics.’” *Good News Club v. Milford Central School*, 533 US 98, 106 (2001), quoting *Rosenberger v. Rector and Vistors of Univ. of Va.*, 515 US 819, 829 (1995). “The restriction must not discriminate against speech on the basis of viewpoint [citing *Rosenberger*] and the restriction must be ‘reasonable in light of the purpose served by the forum.’” *Id.*, at 106-107, quoting *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 US 788, 806 (1985).

- i. *Distinction between a designated public forum and a limited public forum* — The difference between a designated public forum and a limited public forum is that the designated forum is open to all speakers while a limited forum is open only to a particular category of speakers or only speakers on a particular topic. Restrictions on speech at a designated public forum are subject to the same strict scrutiny as restrictions on speech at a traditional public forum, but restrictions at a limited public forum need only be reasonable and viewpoint neutral.
  - ii. *The reasonableness of the limitation* — Limited public forum cases often present difficult questions of whether the government has been reasonable and consistent in defining which groups may use facilities, particularly when public schools and universities try to accommodate some organizations but not others. See, for example, *Christian Legal Soc’y v. Martinez*, *supra*; *Good News Club v. Milford Central School*, *supra*; *Child Evangelism Fellowship of Md., Inc., v. Montgomery Cnty. Pub. Sch.*, 457 F3d 376 (4<sup>th</sup> Cir 2006). The same difficulties will arise when court or county officials desire to open the courthouse lobby or hallways or bulletin boards to use by some kinds of organizations but not others. Opening a space to all “charitable organizations,” for example, might create a much larger limited public forum than intended, but limiting the space to the more narrowly defined “nonprofit organizations providing court-related services” may create its own problems in determining who qualifies.
- d. *Nonpublic forum* — When government property is not a traditional public forum, and has not been designated by the government as a public forum or a limited public forum, it is a nonpublic forum. Government restrictions on expression at a nonpublic forum will be upheld so long as they are reasonable and are not based on the speaker’s viewpoint. “The Government’s decision to restrict access to a nonpublic forum need only be *reasonable*; it

need not be the most reasonable or the only reasonable limitation.” *Cornelius, supra*, 473 US at 808.

- i. *Courtrooms and the courthouse lobbies are nonpublic forums* — “A courthouse — and, especially, a courtroom — is a nonpublic forum.” *Berner v. Delahanty*, 129 F3d 20, 26 (1<sup>st</sup> Cir 1997). “The lobby of the courthouse is not a traditional public forum or a designated forum, not a place open to the public for presentation of views.” *Sefick v. Gardner*, 164 F3d 370, 372 (7<sup>th</sup> Cir 1998). “The courtroom is a nonpublic forum, *Berner*, 129 F.3d at 26, where the First Amendment rights of everyone (attorneys included) are at their constitutional nadir.” *Mezibov v. Allen*, 411 F3d 712, 718 (6<sup>th</sup> Cir 2005). “The building housing the Rutland District Court is a nonpublic forum.” *Huminski v. Corsones*, 396 F3d 53, 90 (2<sup>nd</sup> Cir 2005). Nor is a courthouse parking lot adjacent to the courthouse a public forum. *Id.*
- ii. *Limiting expression in courtrooms and lobbies* — In *Berner v. Delahanty, supra*, it was considered reasonable for the judge to ban the wearing of political buttons in the courtroom. In *Sefrick v. Gardner, supra*, it was reasonable for the court to restrict the lobby to “sedate and decorous exhibits” and reject comic, caustic, sardonic artwork. In *Mead v. Gordon*, 583 F Supp2d 1231 (USDC OR), it was reasonable to exclude an individual from the courthouse for a year (unless the visit was specifically approved and escorted) for disruptive conduct. Given the court’s inherent authority to maintain order and protect the fairness, dignity and integrity of the judicial process, it was held reasonable for the judge to bar a defendant from wearing a T-shirt with a political message. *People v. Aleem*, 149 P3d 765 (Colo 2007). The ban served to protect the right to a fair trial.
- iii. *When time, place or manner restrictions become unreasonable* — Time, place and manner restrictions can be unreasonable when they are too broad or leave too much discretion with supervising officials. In *People v. Tisbert*, 14 Cal Rptr2d 128 (LA Sup App 1992), for example, a ban on all forms of solicitation on all county property, including court buildings, was held to be too broad. The ordinance also was defective in allowing officials to permit solicitations for charitable programs they “deemed meritorious,” without further guidance as to what was allowed and what not. In *Sammartano v. First Judicial District Court*, 303 F3d 959 (9<sup>th</sup> Cir 2002), a ban on wearing any clothing with symbols of motorcycle organizations in a government building which included courts was held too broad in the absence of any evidence that such clothing had been or was likely to be disruptive or intimidating and because of the failure to distinguish between courtrooms and other offices.