STATE OF DELAWARE
THE COURTS OF THE JUSTICES OF THE PEACE
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WILMINGTON, DELAWARE 19801

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LEGAL MEMORANDUM 81-72

TO: ALL JUSTICES OF THE PEACE
STATE OF DELAWARE

FROM: NORMAN A. BARRON
CHIEF MAGISTRATE

DATE: NOVEMBER 13, 1981

RE: AND THE FIFTH SHALL BE FIRST (SOMETIMES):
THE FIRST AMENDMENT, THE FIFTH AMENDMENT AND THE CRIME OF CRIMINAL TRESPASS

The issue raised in this Legal Memorandum is one of no small constitutional dimension. Said issue arose before the Courts of the Justices of the Peace in the following context:

While certain Jehovah's Witnesses were peaceably attempting to distribute religious literature to apartments located within the Salem Village II Apartment complex, the management of said complex, which has a no solicitation policy, ordered said witnesses to leave the apartment property. Upon their refusal to do so, they were arrested by officers of the New Castle County Police Department on the charge of Criminal trespass in the third degree in violation of 11 Del.C., §821, which states, in pertinent part as follows:

> "A person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully upon real property."

The issue is whether the State of Delaware may prosecute a person on said charge under the facts as above-stated. I conclude that the State may do so.[1]

In the case of Tucker v. Texas, 326 U.S. 517, 66 S.Ct. 274, 90 L.Ed. 274 (1946), the United States Supreme Court held that to the extent that a Texas statute was held to authorize a person's punishment for refusing to refrain from religious activities in a federally owned village, it was an invalid abridgment of the freedom of the press and religion. To the same effect with regard to a company-owned town, see Marsh v. Alabama, 326 U.S. 501, 66 S.Ct. 276, 90 L.Ed. 265 (1946). In the earlier case of Martin v. City of Struthers, 319 U.S. 141, 63 S.Ct. 862, 87 L.Ed. 1313 (1943), the United States Supreme Court was faced with the issue of whether a governmental entity, consistent with the federal Constitution's guarantee of free speech and press,[2] has the power to decide for all of its inhabitants whether said inhabitants shall be visited in their private homes by persons wishing to express political or religious views. The Court concluded that a governmental entity has no such right. Justice Black expressed the view of the majority in the following language:

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[1]My thanks are extended to Deputy Chief Magistrate Morris Levenberg for his valuable contributions in preparing this Legal Memorandum.

[2]The First Amendment forbids all laws "prohibiting the free exercise" of religion. The strictures of the First Amendment are applicable to the States by virtue of the Fourteenth Amendment. Cantwell v. Connecticut, 310 U.S. 296, 60 S.Ct. 900, 84 L.Ed. 1213 (1940).

"For centuries it has been a common practice in this and other countries for persons not specifically invited to go from home to home and knock on doors or ring doorbells to communicate ideas to the occupants or to invite them to political, religious, or other kinds of public meetings. Whether such visiting shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community. In the instant case, the City of Struthers, Ohio, has attempted to make this decision for all its inhabitants. The question to be decided is whether the City, consistently with the federal Constitution's guarantee of free speech and press, possesses this power.

The appellant, espousing a religious cause in which she was interested -- that of the Jehovah's Witnesses -- went to the homes of strangers, knocking on doors and ringing doorbells in order to distribute to the inmates of the homes leaflets advertising a religious meeting. In doing so, she proceeded in a conventional and orderly fashion. For delivering a leaflet to the inmate of a home she was convicted in the Mayor's Court and was fined $10.00 on a charge of violating the following City ordinance:

> 'It is unlawful for any person distributing handbills, circulars or other advertisements to ring the doorbell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door for the purpose of receiving such handbills, circulars or other advertisements they or any person with them may be distributing.'

The appellant admitted knocking at the door for the purpose of delivering the invitation, but seasonably urged in the lower Ohio state court that the ordinance as construed and applied was beyond the power of the State because in violation of the right of freedom of press and religion as guaranteed by the First and Fourteenth Amendments.

The right of freedom of speech and press has broad scope. The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, Lovell v. Griffin, 303 U.S. 444, 452, 82 L.Ed. 949, 954, 58 S.Ct. 666, and necessarily protects the right to receive it. The privilege may not be withdrawn even if it creates the minor nuisance for a community of cleaning litter from its streets. Schneider v. Irvington, 308 U.S. 147, 162, 84 L.Ed. 155, 165, 60 S.Ct. 146. Yet the peace, good order, and comfort of the community may imperatively require regulation of the time, place and manner of distribution. Cantwell v. Connecticut, 310 U.S. 296, 304, 84 L.Ed. 1213, 1218, 60 S.Ct. 900, 128 ALR 1352. No one supposes, for example, that a city need permit a man with a communicable disease to distribute leaflets on the street or to homes, or that the First Amendment prohibits a state from preventing the distribution of leaflets in a church against the will of the church authorities.

We are faced in the instant case with the necessity of weighing the conflicting interests of the appellant in the civil rights she claims, as well as the right of the individual householder to determine whether he is willing to receive her message, against the interest of the community which by this ordinance offers to protect the interests of all of its citizens, whether particular citizens want that protection or not. The ordinance does not control anything but the distribution of literature, and in that respect it substitutes the judgment of the community for the judgment of the individual householder. It submits the distributor to criminal punishment for annoying the person on whom he calls, even though the recipient of the literature distributed is in fact glad to receive it. In considering legislation which thus limits the dissemination of knowledge, we must 'be astute to examine the effect of the challenged legislation' and must 'weigh the

circumstances and . . . appraise the substantiality of the reasons advanced in support of the regulation.' Schneider v. Irvington, supra (308 U.S. 161, 84 L.Ed. 154, 60 S.Ct. 146).

Ordinances of the sort now before us may be aimed at the protection of the householders from annoyance, including intrusion upon the hours of rest, and at the prevention of crime. Constant callers, whether selling pots or distributing leaflets, may lessen the peaceful enjoyment of a home as much as a neighborhood glue factory or railroad yard which zoning ordinances may prohibit. In the instant case, for example, it is clear from the record that the householder to whom the appellant gave the leaflet which led to her arrest was more irritated than pleased with her visitor. The City, which is an industrial community most of whose residents are engaged in the iron and steel industry, has vigorously argued that its inhabitants frequently work on swing shifts, working nights and sleeping days so that casual bell pushers might seriously interfere with the hours of sleep although they call at high noon. In addition, burglars frequently pose as canvassers, either in order that they may have a pretence to discover whether a house is empty and hence ripe for burglary, or for the purpose of spying out the premises in order that they may return later. Crime prevention may thus be the purpose of regulatory ordinances.

While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion. The widespread use of this method of communication by many groups espousing various causes attests its major importance. 'Pamphlets have proved most effective instruments in the dissemination of opinion. And perhaps the most effective way of bringing them to the notice of individuals is their distribution at the homes of the people.' Schneider v. Irvington, supra (308 U.S. 164, 84 L.Ed. 166, 60 S.Ct. 146). Many of our most widely esta-

blished religious organizations have used this method of disseminating their doctrines, and laboring groups have used it in recruiting their members. . . . Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people.

Freedom to distribute information to every citizen wherever he desires to receive it is so clearly vital to the preservation of a free society that, putting aside reasonable police and health regulations of time and manner of distribution, it must be fully preserved. The dangers of distribution can so easily be controlled by traditional legal methods, leaving to each householder the full right to decide whether he will receive strangers as visitors, that stringent prohibition can serve no purpose but that forbidden by the Constitution, the naked restriction of the dissemination of ideas.

Traditionally the American law punishes persons who enter onto the property of another after having been warned by the owner to keep off. . . . We know of no state which, as does the Struthers ordinance in effect, makes a person a criminal trespasser if he enters the property of another for an innocent purpose without an explicit command from the owners to stay away. The National Institute of Municipal Law Officers has proposed a form of regulation to its member cities which would make it an offense for any person to ring the bell of a householder who has appropriately indicated that he is unwilling to be disturbed. This or any similar regulation leaves the decision as to whether distributors of literature may lawfully call at a home where it belongs -- with the homeowner himself. A city can punish those who call at a home in defiance of the previously expressed will of the occupant and, in addition, can by identification devices control the abuse of the privilege by criminals

> posing as canvassers. In any case, the problem must be worked out by each community for itself with due respect for the constitutional rights of those desiring to distribute literature and those desiring to receive it, as well as those who choose to exclude such distributors from the home.
>
> The Struthers ordinance does not safeguard these constitutional rights. For this reason, . . . we conclude that the ordinance is invalid because in conflict with the freedom of speech and press." (Emphasis added.)

I could find no subsequent United States Supreme Court case which in any way diminishes the holding of the Martin v. City of Struthers case, at least with regard to state action.[3] In fact, the principles espoused in Martin have been cited with approval in recent United States Supreme Court cases. See e.g., Organization for a Better Austin v. Keefe, 402 U.S. 415, 91 S.Ct. 1575, 29 L.Ed. 2d. 1 (1971); McDaniel v. Paty, 435 U.S. 618, 98 S.Ct. 1322, 55 L.Ed.2d 593 (1978).

Based upon the above, one might conclude that the management of the Salem Village II Apartments stood in the shoes of the City of

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[3]There is, of course, no absolute right under the federal Constitution to enter on the private premises of another and knock on a door for any purpose, and the police power permits reasonable regulation for public safety. Hynes v. Mayor and Council of the Borough of Oradell, 425 U.S. 610, 96 S.Ct. 1755, 48 L.Ed.2d 243 (1976). But an ordinance or statute regulating such conduct must meet the test that in the First Amendment area "government may regulate . . . only with narrow specificity." NAACP v. Button, 371 U.S. 415, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963). Whatever occasion would restrain orderly discussion and persuasion, at appropriate time and place, must have clear support in public danger, actual or impending. Thomas v. Collins, 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945). That public debate of religious ideas, like any other, may arouse emotion, may incite, may foment religious divisiveness and strife does not rob it of constitutional protection. Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949).

Struthers: The management chose to decide for all of the apartment tenants whether the said tenants should be visited in their own apartments, of which they hold recognized property interests, by persons wishing to express religious views.[4] Thus, the argument might be made that renters are no less protected by the Federal Constitution than are homeowners. Both homeowner and tenant fall within the penumbra of the First and Fourteenth Amendments. A renter of an apartment is, as regards said apartment, the individual master of that household, and whether such visiting, as by a Jehovah's witness, "shall be permitted has in general been deemed to depend upon the will of the individual master of each household, and not upon the determination of the community." Martin v. City of Struthers, supra. If ever vigorous enlightenment is to triumph over slothful ignorance, then the right of the tenant to receive literature must be as scrupulously protected as were the rights of the homeowners in Martin v. City of Struthers, supra. Afterall, the renter of an apartment located within an apartment complex cannot

[4]The proponents of such a position would point out that this is not a case where all tenants authorized the apartment complex owner or manager to act as their agent in refusing admission to their apartments of uninvited distributors of political or religious literature. Nor is this a case where an individual tenant told an uninvited distributor of literature to leave his or her apartment which was followed by a refusal to do so on the part of the distributor. Nor is this a case where a distributor becomes disorderly or unruly on the apartment premises. Nor is this a case where a distributor wishes to distribute at an unreasonable time of day, such as two in the morning. Nor is this a case involving an apartment with a security device at its public entrance. The proponents of the position stated above would admit that such cases might well have drawn a different conclusion than that which is advanced by them.

determine if he or she is willing to receive such literature when the apartment complex owner or manager stands in the way of such distribution.

Yet, for the reasons which follow, I conclude that the analogy drawn above, which places the management of the apartment complex in the shoes of the City of Struthers, is constitutionally flawed and therefore invalid. While the cases cited above demonstrate, beyond question, a seemingly preferred status given to First Amendment considerations, care must be taken to balance same, when appropriate, with Fifth Amendment rights.[5]

A case which balances the rights provided by the First and Fifth Amendments is that of Lloyd Corporation, Ltd. v. Tanner, 407 U.S. 551, 92 S.Ct. 2219, 33 L.Ed.2d 131 (1972). There, draft and war protesters were barred by a privately owned shopping center's security guards from handbilling in the interior area of the shopping center. The protesters secured an injunction in the United States District Court for the District of Oregon against interference with their noncommercial handbilling in a peaceful and orderly manner in the shopping center's public areas which were open to general public access. After the Ninth Circuit Court of Appeals affirmed the District Court's decision, the shopping center took the case to the United States Supreme Court which, by a 5 to 4 decision, reversed

[5]The Due Process Clauses of the Fifth and Fourteenth Amendments provide that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." The Fifth Amendment also proscribes against the taking of "private property . . . for public use, without just compensation."

with directions to vacate the injunction. In an opinion by Associate Justice Powell, which expressed the views of the majority, it was held that while generally open to the public, the shopping center was not so dedicated to public use as to require the shopping center owner to permit handbilling therein unrelated to the shopping center's operations. Portions of Justice Powell's opinion follow:

> "This case presents the question reserved by the Court in Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 20 L.Ed.2d 603, 88 S.Ct. 1601 (1968), as to the right of a privately owned shopping center to prohibit the distribution of handbills on its property when the handbilling is unrelated to the shopping center's operations. Relying primarily on Marsh v. Alabama, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946), and Logan Valley, the United States District Court for the District of Oregon sustained an asserted First Amendment right to distribute handbills in petitioner's shopping center, and issued a permanent injunction restraining petitioner from interfering with such right. . . . The Court of Appeals for the Ninth Circuit affirmed, . . . We granted certiorari to consider petitioner's contention that the decision below violates rights of private property protected by the Fifth and Fourteenth Amendments . . .
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> Lloyd Corporation, Ltd. (Lloyd), owns a large, modern retail shopping center in Portland, Oregon. Lloyd Center embraces altogether about 50 acres including some 20 acres of open and covered parking facilities which accommodate more than 1,000 automobiles. It has a perimeter of almost one and one-half miles, bounded by four public streets. It is crossed in varying degrees by several other public streets, all of which have adjacent public sidewalks. Lloyd owns all land and buildings within the Center, except these public streets and sidewalks. There are some 60 commercial tenants, including small shops and several major department stores.

The Center had been in operation for some eight years when this litigation commenced. Throughout this period it had a policy, strictly enforced, against the distribution of handbills within the building complex and its malls. No exceptions were made with respect to handbilling, which was considered likely to annoy customers, to create litter, potentially to create disorders, and generally to be incompatible with the purpose of the Center and the atmosphere sought to be preserved.

On November 14, 1968, the respondents in this case distributed within the Center handbill invitations to a meeting of the 'Resistance Community' to protest the draft and Vietnam war. The distribution, made in several different places on the mall walkways by five young people, was quiet and orderly, and there was no littering. There was a complaint from one customer. Security guards informed the respondents that they were trespassing and would be arrested unless they stopped distributing the handbills within the Center. The guards suggested that respondents distribute their literature on the public streets and sidewalks adjacent to but outside of the Center complex. Respondents left the premises as requested 'to avoid arrest' and continued the handbilling outside. Subsequently this suit was instituted in the District Court, seeking declaratory and injunctive relief.

I

The District Court, emphasizing that the Center 'is open to the general public,' found that it is 'the functional equivalent of a public business district.' . . . That court then held that Lloyd's 'rule prohibiting the distribution of handbills within the Mall violates . . . First Amendment rights.' . . . In a per curiam opinion, the Court of Appeals held that it was bound by the 'factual determination' as to the character of the Center, and concluded that the decisions of this Court in Marsh v. Alabama, 326 U.S. 501, 90 L.Ed. 265, 66 S.Ct. 276 (1946), and Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308, 20 L.Ed.2d 603, 88 S.Ct. 1601 (1968), compelled affirmance.

. . . Some of the stores open directly on the outside public sidewalks, but most open on the interior privately owned malls. Some stores open on both. There are no public streets or public sidewalks within the building complex, which is enclosed and entirely covered except for the landscaped portions of some of the interior malls.

The distribution of the handbills occurred in the malls . . .

. . . Lloyd employs 12 security guards, who are commissioned as such by the city of Portland. The guards have police authority within the Center, wear uniforms similar to those worn by city police, and are licensed to carry handguns. They are employed by and subject to the control of Lloyd. Their duties are the customary ones, including shoplifting surveillance and general security.

At a few places within the Center, small signs are embedded in the sidewalk which state:

> 'NOTICE -- Areas In Lloyd Center Used By The Public Are Not Public Ways But Are For The Use Of Lloyd Center Tenants And The Public Transacting Business With Them. Permission To Use Said Areas May Be Revoked At Any Time. Lloyd Corporation, Ltd.'

The Center is open generally to the public, with a considerable effort being made to attract shoppers and prospective shoppers, and to create 'customer motivation' as well as customer goodwill in the community. . . . Groups and organizations are permitted, by invitation and advance arrangement, to use the auditorium and other facilities. . . . The Center also allows limited use of the malls by the American Legion to sell poppies for disabled veterans, and by the Salvation Army and Volunteers of America to solicit Christmas contributions. It has denied similar use to other civic and charitable organizations. Political use is also forbidden, except that presidential candidates of both parties have been allowed to speak in the auditorium.

Marsh involved Chickasaw, Alabama, a company town wholly owned by the Gulf Shipbuilding Corp. The opinion of the Court, by Mr. Justice Black, described Chickasaw as follows:

> 'Except for [ownership by a private corporation] it has all the characteristics of any other American town. The property consists of residential buildings, streets, a system of sewers, a sewage disposal plant and a 'business block' on which business places are situated. A deputy of the Mobil County Sheriff, paid by the company, serves as the town's policeman. Merchants and service establishments have rented the stores and business places on the business block and the United States uses one of the places as a post office from which six carriers deliver mail to the people of Chickasaw and the adjacent area. . . . In short the town and its shopping district are accessible to and freely used by the public in general and there is nothing to distinguish them from any other town and shopping center except the fact that the title to the property belongs to a private corporation.' . . .

A Jehovah's Witness undertook to distribute religious literature on the sidewalk near the post office and was arrested on a trespassing charge. In holding that First and Fourteenth Amendment rights were infringed, the Court emphasized that the business district was within a company-owned town, an anachronism long prevalent in some southern States and now rarely found.

In Logan Valley, the Court extended the rationale of Marsh to peaceful picketing of a store located in a large shopping center, known as Logan Valley Mall, near Altoona, Pennsylvania. Weis Markets, Inc. (Weis), an original tenant,

had opened a supermarket in one of the larger stores and was employing a wholly nonunion staff. Within 10 days after Weis opened, members of Amalgamated Food Employees Union Local 590 (Union) began picketing Weis, carrying signs stating that it was a nonunion market and that its employees were not receiving union wages or other union benefits. The picketing, conducted by nonemployees, was carried out almost entirely in the parcel pickup area immediately adjacent to the store and on portions of the adjoining parking lot. The picketing was peaceful, with the number of pickets varying from four to 13.

Weis and Logan Valley Plaza, Inc., sought and obtained an injunction against this picketing. The injunction required that all picketing be confined to public areas outside the shopping center. On appeal the Pennsylvania Supreme Court affirmed the issuance of the injunction, and this Court granted certiorari. In framing the question, this Court stated:

> 'The case squarely presents . . . the question whether Pennsylvania's generally valid rules against trespass to private property can be applied in these circumstances to bar petitioners from the Weis and Logan premises.' . . .

The Court noted that the answer would be clear 'if the shopping center premises were not privately owned but instead constituted the business area of a municipality.' Ibid. In the latter situation, it has often been held that publicly owned streets, sidewalks, and parks are so historically associated with the exercise of First Amendment rights that access to them for purposes of exercising such rights cannot be denied absolutely. Lovell v. Griffin, 303 U.S. 444, 82 L.Ed. 949, 58 S.Ct. 666 (1938); Hague v. CIO, 307 U.S. 496, 83 L.Ed. 1423, 59 S.Ct. 954 (1939); Schneider v. State, 308 U.S. 147, 84 L.Ed. 155, 60 S.Ct. 146 (1939); Jamison v. Texas, 318 U.S. 413, 87 L.Ed. 869, 63 S.Ct. 669 (1943).

The Court then considered Marsh v. Alabama, supra, and concluded that:

> 'The shopping center here is clearly the functional equivalent of the business district of Chickasaw involved in Marsh.' . . .

But the Court was careful not to go further and say that for all purposes and uses the privately owned streets, sidewalks, and other areas of a shopping center are analogous to publicly owned facilities:

> 'All we decide here is that because the shopping center serves as the community business block 'and is freely accessible and open to the people in the area and those passing through,' Marsh v. Alabama, 326 U.S. at 508, [90 L.Ed. at 269, 66 S.Ct. 276], 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.' . . .

The Court noted that the scope of its holding was limited, and expressly reserved judgment on the type of issue presented in this case:

> 'The picketing carried on by petitioners was directed specifically at patrons of the Weis Market located within the shopping center and the message sought to be conveyed to the public concerned the manner in which that particular market was being operated. We are, therefore, not called upon to consider whether respondents' property rights could, consistently with the First Amendment, justify a bar on picketing which was not thus directly related in its purpose to the use to which the shopping center property was being put.' . . .

The . . . facts in this case are significantly different.

II

The courts below considered the critical inquiry to be whether Lloyd Center was 'the functional equivalent of a public business district.' This phrase was first used in Logan Valley, but its genesis was in Marsh. It is well to consider what Marsh actually decided. As noted above, it involved an economic anomaly of the past, 'the company town.' One must have seen such towns to understand that 'functionally' they were no different from municipalities of comparable size. They developed primarily in the Deep South to meet economic conditions, especially those which existed following the Civil War. Impoverished States, and especially backward areas thereof, needed an influx of industry and capital. Corporations attracted to the area by natural resources and abundant labor were willing to assume the role of local government. Quite literally, towns were built and operated by private capital with all of the customary services and utilities normally afforded by a municipal or state government: there were streets, sidewalks, sewers, public lighting, police and fire protection, business and residential areas, churches, postal facilities, and sometimes schools. In short, as Mr. Justice Black said, Chickasaw, Alabama, had 'all the characteristics of any other American town.' . . . Indeed, as title to the entire town was held privately, there were no publicly owned streets, sidewalks, or parks where such rights could be exercised.

Logan Valley extended Marsh to a shopping center situation in a different context from the company town setting, but it did so only in a context where the First Amendment activity was related to the shopping center's operations. . . .

The holding in Logan Valley was not dependent upon the suggestion that the privately owned streets and sidewalks of

a business district or a shopping center are the equivalent, for First Amendment purposes, of municipally owned streets and sidewalks. No such expansive reading of the opinion of the Court is necessary or appropriate. The opinion was carefully phrased to limit its holding to the picketing involved, where the picketing was 'directly related in its purpose to the use to which the shopping center property was being put.' . . . and where the store was located in the center of a large private enclave with the consequence that no other reasonable opportunities for the pickets to convey their message to their intended audience were available.

Neither of these elements is present in the case now before the Court.

A

The handbilling by respondents in the malls of Lloyd Center had no relation to any purpose for which the center was built and being used. . . .

. . . There is no open-ended invitation to the public to use the Center for any and all purposes, however incompatible with the interests of both the stores and the shoppers whom they serve. . . .

B

A further fact, distinguishing the present case from Logan Valley, is that the Union pickets in that case would have been deprived of all reasonable opportunity to convey their message to patrons of the Weis store had they been denied access to the shopping center. The situation at Lloyd Center was notably different. The central building complex was surrounded by public sidewalks, totaling 66 linear blocks. All persons who enter or leave the private areas within the complex must cross public streets and sidewalks, either on foot or in automobiles. When moving to and from the privately owned parking lots, automobiles are required by law to come to a complete stop. Handbills may be distributed conveniently to pedestrians, and also to occupants of automobiles, from these public sidewalks and streets.

Indeed, respondents moved to these public areas and continued distribution of their handbills after being requested to leave the interior malls. It would be an unwarranted infringement of property rights to require them to yield to the exercise of First Amendment rights under circumstances where adequate alternative avenues of communication exist. Such an accommodation would diminish property rights without significantly enhancing the asserted right of free speech. In ordering this accommodation the courts below erred in their interpretation of this Court's decisions in Marsh and Logan Valley.

III

The basic issue in this case is whether respondents, in the exercise of asserted First Amendment rights, may distribute handbills on Lloyd's private property contrary to its wishes and contrary to a policy enforced against all handbilling. In addressing this issue, it must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only. The Due Process Clauses of the Fifth and Fourteenth Amendments are also relevant to this case. They provide that '[n]o person shall . . . be deprived of life, liberty, or property, without due process of law.' There is the further proscription in the Fifth Amendment against the taking of 'private property . . . for public use, without just compensation.'

Although accommodations between the values protected by these three Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only. Even where public property is involved, the Court

has recognized that it is not necessarily available for speech, pickets, or other communicative activities. . . .

Respondents contend, . . . that the property of a large shopping center is 'open to the public,' serves the same purposes as a 'business district' of a municipality, and therefore has been dedicated to certain types of public use. The argument is that such a center has sidewalks, streets, and parking areas which are functionally similar to facilities customarily provided by municipalities. It is then asserted that all members of the public, whether invited as customers or not, have the same right of free speech as they would have on the similar public facilities in the streets of a city or town.

The argument reaches too far. The Constitution by no means requires such an attenuated doctrine of dedication of private property to public use. The closest decision in theory, Marsh v. Alabama, supra, involved the assumption by a private enterprise of all of the attributes of a state-created municipality and the exercise by that enterprise of semi-official municipal functions as a delegate of the State. In effect, the owner of the company town was performing the full spectrum of municipal powers and stood in the shoes of the State. In the instant case there is no comparable assumption or exercise of municipal functions or power.

. . . [T]he Fifth and Fourteenth Amendment rights of private property owners, as well as the First Amendment rights of all citizens, must be respected and protected. The Framers of the Constitution certainly did not think these fundamental rights of a free society are incompatible with each other. There may be situations where accommodations between them, and the drawing of lines to assure due protection of both, are not easy. But on the facts presented in this case, the answer is clear.

> We hold that there has been no such dedication of Lloyd's privately owned and operated shopping center to public use as to entitle respondents to exercise therein the asserted First Amendment rights. Accordingly, we reverse the judgment and remand the case to the Court of Appeals with directions to vacate the injunction." (Emphasis added.)

I conclude that the characteristics of a privately owned apartment complex more closely approximates those of an interior area of a private shopping mall then those of a public area regulated by a governmental entity. If handbilling may be prohibited from the interior of a private shopping mall which is open to the public, then surely handbilling may be prohibited from a private apartment complex which is not open to the public. Clearly, an apartment complex is not "the functional equivalent of a public business district." Amalgamated Food Employees Union v. Logan Valley Plaza, supra. Also clear is the fact that the distribution of religious literature to tenants of a privately owned apartment complex has no direct relationship with the purpose to which apartment complex property is put. Amalgamated Food Employees Union v. Logan Valley Plaza, supra. The handbilling by Jehovah's Witnesses at the Salem Village II Apartment complex had no relation to any purpose for which the complex was built and was being used. There was no open-ended invitation to the public to use the apartment complex for any and all purposes, however incompatible with the

interests of the tenants. In fact, quite the opposite would appear to be true.[6] The owner and management of the apartment complex have a duty to their tenants to ensure that security safeguards are maintained and that the peace and quiet of the apartment community are promoted.

As Mr. Justice Jackson opined in a concurring opinion in the case of Douglas v. City of Jeannette, 319 U.S. 157, 63 S.Ct. 877, 87 L.Ed. 1324 (1943):

> "Our difference of opinion cannot fairly be given the color of a disagreement as to whether the constitutional rights of Jehovah's Witnesses should be protected in so far as they are rights. These Witnesses, in common with all others, have extensive rights to proselyte and propagandize. These of course include the right to oppose and critize the Roman Catholic Church or any other denomination. These rights are, and should be held to be, as extensive as any orderly soceity can tolerate in religious disputation. The real question is where their rights end and the rights of others begin. The real task of determining the extent of their rights on balance with the rights of others is not met by pronouncement of general propositions with which there is no disagreement.
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>
> A common-sense test as to whether the Court has struck a proper balance of these rights is to ask what the effect would be if the right given to these Witensses should be exercised by all sects and denominations. If each competing sect in the United States went after the householder by the same methods, I should think it intolerable. If a minority can put on this kind

[6] There is no showing that the Salem Village II Apartment complex allows some handbilling by certain groups and causes but prohibits handbilling by others. The ban on solicitation within the complex appears to be all inclusive.

of drive in a community, what can a majority resorting to the same tactics do to individuals and minorities? Can we give to one sect a privilege that we could not give to all, merely in the hope that most of them will not resort to it? Religious freedom in the long run does not come from this kind of license to each sect to fix its own limits, but comes of hard-headed fixing of those limits by neutral authority with an eye to the widest freedom to proselyte compatible with the freedom of those subject to proselyting pressures." (Emphasis added.)

In light of the above, it is not surprising that the Virginia Supreme Court of Appeals, in the case of Hall v. Commonwealth, Va. Supr.App., 49 S.E.2d 369 (1948), concluded as follows:

> "Not one of those cases has held that Jehovah's Witnesses, or others having similar pursuits, have a Constitutional right to enter within an apartment house or multiple dwelling house, against the wishes of its owner or occupants. Thoses cases, it is true, have upheld their right to go upon the streets and to go from house to house and knock upon the doors abutting on the streets, in order to enable them to distribute their literature and to deliver their evangelical messages. It was even held that they had the right so to do in cases where the streets as well as the abutting houses were all privately owned by a corporation (Marsh v. Alabama, supra); and where they were owned by an agency of the United States Government (Tucker v. Texas, supra). But that august court has yet to rule that they have any Constitutional right to go beyond the streets (whether publicly or privately owned) and into the abutting houses against the wishes of the owners or occupants. I do not think its adjudications thus far have destroyed the time-honored maxim that a man's home is his castle, nor any of its cherished implications.

> The inner hallways of apartment houses are not to be regarded in the same light as public roads, streets or highways, even when the naked fee of the latter is privately owned. As was said in Hague v. C.I.O., 307 U.S. 496, 515, 59 S.Ct. 954, 964, 83 L.Ed. 1423: 'Wherever the title to 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 use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights and liberties of citizens.'
>
> Does the foregoing mean that the inner hallways of apartment houses, merely because they must be traversed from the street in order to reach the actual apartments wherein the tenants reside likewise are burdened with the rights which the public has in streets? Do such inner hallways constitute places of public assembly, or for communicating thoughts one to another, or for the discussion of public questions? In the opinion of this court, the answer to those questions is clearly 'No'". (Emphasis added.)

It would be an unwarranted infringement of the property rights of the tenants to require them to yield to the exercise of First Amendment rights of others under circumstances where adequate alternative avenues of communication exist, as they do here. To accommodate the rights of the Jehovah's Witnesses "would diminish property rights without significantly enhancing the asserted rights of free speech." Lloyd Corporation, Ltd. v. Tanner, supra. The Jehovah's Witnesses cannot be prohibited from distributing their religious literature on public property at the entrance to the apartment

complex, for example.[7] Here, however, we are concerned with private property. As was stated in Lloyd Corporation Ltd. v. Tanner, supra:

> ". . . [I]t must be remembered that the First and Fourteenth Amendments safeguard the rights of free speech and assembly by limitations on state action, not on action by the owner of private property used nondiscriminatorily for private purposes only . . .
>
> Although accommodations between the values protected by [the First, Fifth and Fourteenth] Amendments are sometimes necessary, and the courts properly have shown a special solicitude for the guarantees of the First Amendment, this Court has never held that a trespasser or an uninvited guest may exercise general rights of free speech on property privately owned and used nondiscriminatorily for private purposes only . . ."[8] (Emphasis added.)

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[7] Nor, if a tenant expressly invites members of the Jehovah's Witnesses to the tenant's apartment for the purpose of receiving religious literature, may Jehovah's Witnesses be prohibited from calling upon such a tenant in his or her individual apartment. See: Commonwealth v. Richardson, Mass.Supr.Jud.Ct., 48 N.E.2d 678 (1943). The right to restrict solicitation has been recognized with regard to private owners of housing developments and apartment houses, where the tenant may still admit the solicitors if he so desires. See: Constitutional Validity Of Regulations Controlling Noncommercial Door-To-Door Canvassing and Solicitation, Vol. 46, Mo.L.R., Winter 1981, No. 1, page 121.

[8] Professor Chafee would respectfully take exception to the Court's preferential treatment of First Amendment guarantees as far as door-to-door canvassing is concerned:
"[O]f all the methods of spreading unpopular ideas, . . . [house-to-house canvassing] seems the least entitled to extensive protection. The possibilites of persuasion are slight compared with the certainties of annoyance. Great as is the value of exposing citizens to novel views, home is one place where a man ought to be able to shut himself up in his own ideas if he desires . . . Freedom of the home is as important as freedom of speech. I cannot help wondering whether the Justices of the Supreme Court are quite aware of the effect of organized front-door intrusion upon people who are not sheltered from zealots and imposters by a staff of servants or the locked entrance of an apartment house." Z. Chafee, Free Speech In The United States, pp. 406, 407.

When the Jehovah's Witnesses involved in the case giving rise to this Legal Memorandum refused to leave the apartment complex after having been told to remove themselves by the management of said complex, they subjected themselves to prosecution for violating 11 Del.C., §821.[9]

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[9]The language of the statute is clear and unambiguous. Its provisions may be invoked only when a person has unlawfully entered or has unlawfully remained upon the premises of another.
"The statute does not restrain the accused in any of his activities in the exercise of his religious beliefs; he may go from house to house distributing his pamphlets on the streets, sidewalks, or any other public place without violating any provisions of the statute. The only purpose of this law is to protect the rights of the owners or those in lawful control of private property." Hall v. Commonwealth Va.Supr.App., 49 S.E.2d 369 (1948).
Although prosecution is permissible, I make no inference as to whether it be desirable under the facts of this case where the Jehovah's Witnesses appeared to have acted under a good faith belief that their presence upon the property of the apartment complex was constitutionally permitted even after being told by the management thereof to remove themselves from said premises.

NAB:pn

cc: The Honorable Daniel L. Herrmann
The Honorable William Marvel
The Honorable Albert J. Stiftel
The Honorable Robert H. Wahl
The Honorable Robert D. Thompson
The Honorable Alfred Fraczkowski
The Honorable Richard S. Gebelein
The Honorable Lawrence N. Sullivan
The Honorable William J. O'Rourke
The Honorable Richard J. McMahon, State Prosecutor
Bruce M. Stargatt, Esquire, Pres., Delaware State Bar Assoc.
Professor William J. Conner, Delaware Law School
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